



Summer May 2024

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Method of State Constitutional Interpretation for Claims Under the  
New Mexico Civil Rights Act**

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**Recommended Citation**

Arne R. Leonard, *New Mexico True: Crafting a More Inclusive and Independent Method of State Constitutional Interpretation for Claims Under the New Mexico Civil Rights Act*, 54 N.M. L. Rev. 425 (2024).

Available at: <https://digitalrepository.unm.edu/nmlr/vol54/iss2/7>

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# NEW MEXICO TRUE: CRAFTING A MORE INCLUSIVE AND INDEPENDENT METHOD OF STATE CONSTITUTIONAL INTERPRETATION FOR CLAIMS UNDER THE NEW MEXICO CIVIL RIGHTS ACT

Arne R. Leonard\*

## I. INTRODUCTION

A few weeks after a violent mob of White Nationalists broke into the United States Capitol with the intent to stop Congress from certifying the results of the presidential election on January 6, 2021, the New Mexico Legislature began its regular legislative session at the Roundhouse in Santa Fe. On the agenda that session were the New Mexico Civil Rights Commission's recommendations to pass new civil rights legislation, which were formulated in the wake of protests over the recent killings of George Floyd, Breonna Taylor, and Ahmaud Arbery.<sup>1</sup> Legislators went to work on the Civil Rights Commission's recommendations under public-health restrictions stemming from the COVID-19 pandemic while the Roundhouse was surrounded by security fencing, National Guard soldiers, and State Police following the repercussions of the January 6 insurrection.<sup>2</sup> Despite these obstacles, the legislation made its way through the session and became a new law entitled the New Mexico Civil Rights Act (NMCRA).<sup>3</sup> As the NMCRA went into effect on June 30,

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1. The New Mexico Legislature created the Commission during a special session called by Governor Michelle Lujan-Grisham. See H.B. 5, 54th Leg., 1st Spec. Sess. (N.M. 2020). In her proclamation for that special session, the Governor specifically called for such legislation and stated that "the recent killings of George Floyd, Breonna Taylor, and Ahmaud Arbery have brought nationwide and statewide attention to ongoing issues of systemic and institutional racism, the necessity of discussing certain police reforms, and the urgent need for additional police and government accountability measures." 2020 Spec. Sess. Proclamation, 54th Leg., 1st Spec. Sess. (N.M. 2020), [https://nmlegis.gov/Publications/2020\\_Special\\_Session\\_Proclamation.pdf](https://nmlegis.gov/Publications/2020_Special_Session_Proclamation.pdf) [<https://perma.cc/4AQN-5YFF>]. For the Civil Rights Commission's report and the record of its proceedings, including the public comments of the author and many others, see N.M. C.R. COMM'N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT, (2020) <https://www.generalservices.state.nm.us/civil-rights-commission> [<https://perma.cc/5DR6-Z6VD>].

2. See Rachel Knapp, *State's Top Rep.: Credible Threats Made Toward Lawmakers; Roundhouse Increases Security*, KRQE NEWS (Jan. 14, 2021, 6:42 AM), <https://www.krqe.com/news/politics-government/legislature/states-top-rep-credible-threats-made-towards-lawmakers-roundhouse-increases-security> [<https://perma.cc/EJB9-P9BX>].

3. Ch. 119, 2021 N.M. Laws 1849 (codified as N.M. STAT. ANN. §§ 41-4A-1 to -13).

2021, New Mexicans emerged from the fallout of the pandemic and the January 6 insurrection into a new era of state constitutional interpretation.

Past articles in this publication have amply documented how the development of a sound body of state constitutional jurisprudence in New Mexico has been impeded by “the absence of a state legislative enactment establishing a civil action for damages to redress the deprivation of rights guaranteed by the state constitution,” as well as the limitations imposed by the interstitial method of analyzing state constitutional issues adopted by the New Mexico Supreme Court in *State v. Gomez*.<sup>4</sup> The NMCRA removes the first of these impediments, and the New Mexico Supreme Court recently “encourage[d] thoughtful and reasoned argument in the future addressing whether the interstitial approach is the proper method to ensure the people of New Mexico the protections promised by their constitution.”<sup>5</sup> The purpose of this article is to present such arguments in favor of removing the limitations imposed by the interstitial approach for all civil actions in which claims arise under the NMCRA.

Removing the obstacles that *Gomez* and its progeny may impose in civil litigation under the NMCRA does not necessarily require a wholesale abrogation of existing precedents adopting or applying the interstitial approach to state constitutional interpretation. The very factors which *Gomez* identified as justifications for departing from federal law under the interstitial approach should lead to its demise, as New Mexico precedents interpreting our state constitution differently than its federal counterpart start to reach a “critical mass” capable of operating as an independent body of law. Under the precedent already established in *Gomez*, a state court “may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal governments, or distinctive state characteristics.”<sup>6</sup> This article will examine each of these three reasons and explain why, in addition to justifying departure from federal law, they also lay the groundwork for developing a more inclusive and independent method of state constitutional interpretation for claims under the NMCRA.

A third impediment to overcoming *Gomez* may be described as a lack of creative vision about what principled method of state constitutional interpretation should supplement or supplant the interstitial method when federal law loses its privileged status. Accordingly, the final section of this article attempts to chart a path beyond the ready-made categories of state constitutional interpretation from which *Gomez* offered a false choice, using the NMCRA as an example of how courts can transition from the interstitial approach to a more inclusive and independent method of interpreting our state constitution that is “New Mexico True”<sup>7</sup> to its text, as well as the history, culture, values, and life experiences of the people who created it. As

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4. Linda M. Vanzi & Mark T. Baker, *Independent Analysis and Interpretation of the New Mexico Constitution: If Not Now, When?*, 53 N.M. L. REV. 1, 1 (2023); *State v. Gomez*, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1.

5. *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 19 n.7, 539 P.3d 272, 281 n.7.

6. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7.

7. “New Mexico True” is a “brand” offered by the “New Mexico True Certified program” of the New Mexico Tourism Department, which “brings national attention to the quality, care and craftsmanship behind products that are authentically New Mexican.” *New Mexico True Certified*, NEW MEXICO TRUE, <https://www.newmexico.org/industry/work-together/true-certified> [<https://perma.cc/VY3Q-43LE>].

part of that new approach, this article humbly acknowledges the extent to which Anglo American jurisprudence on this subject is caught in its own self-referential, ethnocentric sphere. The article ends with a respectful call for constructive feedback from other scholars, activists, and practitioners to help guide the way out of the confines of that sphere and further shape the methodological framework sketched out in rudimentary form below.

## II. THE REASONS FOR DEPARTURE FROM FEDERAL LAW UNDER THE INTERSTITIAL APPROACH TO STATE CONSTITUTIONAL INTERPRETATION SHOULD APPLY TO ALL CLAIMS UNDER THE NMCRA WITHOUT THE NEED TO ADJUDICATE SUCH DEPARTURES ON A CLAIM-BY-CLAIM BASIS

In *Gomez*, the New Mexico Supreme Court expressly adopted an interstitial approach to interpreting the Bill of Rights in article II of the New Mexico Constitution in the context of a criminal appeal from a state district court's ruling on a search-and-seizure issue.<sup>8</sup> The apparent source of the formulation of the interstitial approach adopted in *Gomez* was a note published in the Harvard Law Review in 1982.<sup>9</sup> "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" to determine whether there are sound reasons for diverging from federal precedent.<sup>10</sup> *Gomez* also imposed preservation requirements which appear to call for a separate application of the interstitial approach for interpreting each particular section and clause of article II in criminal proceedings and appeals.<sup>11</sup>

In the state-court criminal proceedings in which *Gomez* was decided, there were no jurisdictional barriers or disincentives which precluded the appellant from concurrently raising both federal and state constitutional claims, because a state-court defendant does not face removal to federal court for raising a federal question under 28 U.S.C. § 1331, nor would the State be eligible to raise Eleventh Amendment immunity, qualified immunity, federal pleading standards, or similar barriers to deciding constitutional questions in such a state-court proceeding. Conversely, civil litigants had little incentive to seek adjudication of state constitutional rights as a matter of course during the *Gomez* era, because there was no recognized cause of action for damages arising from the violation of such rights, and no provision for awarding attorney fees when a plaintiff prevailed in obtaining any form of relief on such a state constitutional claim.<sup>12</sup> During that era, the New Mexico Supreme Court expressed reluctance to provide such remedies under its own inherent or equitable

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8. *Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d at 7.

9. *Id.* ¶ 19, 932 P.2d at 7 (citing *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358 (1982) [hereinafter *The Interpretation of State Constitutional Rights*]).

10. *Id.*

11. *See id.* ¶¶ 22–23, 932 P.2d at 8.

12. *See N.M. Right to Choose/NARAL v. Johnson (Johnson II)*, 1999-NMSC-028, ¶¶ 26–31, 127 N.M. 654, 986 P.2d 450.

powers and awaited further legislative action on the issue.<sup>13</sup> Then came the enactment of the NMCRA during the 2021 legislative session.

Even if one still accepts *Gomez* as controlling precedent for deciding what factors warrant departure from federal law when interpreting the Bill of Rights in the New Mexico Constitution, this article will show how each of those factors are already satisfied with respect to all claims brought in civil actions under the NMCRA. The provisions of that state statute differ significantly from the federal common law jurisprudence that has developed for adjudicating federal civil rights claims under 42 U.S.C. § 1983 and are linked to several “distinctive state characteristics” which qualify for departure from that body of federal common law under the precedent articulated in *Gomez*.<sup>14</sup> Further analysis of the features which distinguish the NMCRA from its counterpart in federal law reveals underlying “structural differences between state and federal government” which also qualify NMCRA claims for departure from federal law.<sup>15</sup> It follows from those distinctive state characteristics and structural differences that federal common law analyzing federal civil rights claims under § 1983 would qualify as “flawed” under *Gomez* if it were applied to NMCRA claims.<sup>16</sup> Because these reasons for departure are not limited to a particular type of claim under the NMCRA but permeate the application of the entire statute, courts should apply a more independent approach to state constitutional interpretation to all claims brought under the NMCRA, without the need to give federal law a privileged position in the analysis or discuss departure from federal law as a threshold issue in each case.

More detailed analysis is needed, however, before the interstitial approach can be used as a springboard to such a wholesale departure from reliance on federal law for claims under the NMCRA. It may be self-defeating to offer “distinctive state characteristics,” “structural differences,” or “flawed federal analysis” as reasons for departure from federal law without workable and principled definitions of what each of those reasons mean or how they apply. Accordingly, the next sections of this article undertake that definitional task before applying each of these reasons for departure to claims under the NMCRA.

### **III. THE TEXT OF THE NEW MEXICO CONSTITUTION, AS WELL AS THE STATE’S HISTORY AND CULTURE, PROVIDE SEVERAL SIGNIFICANT AND DISTINCTIVE STATE CHARACTERISTICS WHICH LAY THE GROUNDWORK FOR A MORE INCLUSIVE AND INDEPENDENT METHOD OF STATE CONSTITUTIONAL INTERPRETATION IN NEW MEXICO**

#### **A. *Gomez* and its progeny do not provide a workable definition of “distinctive state characteristics.”**

Arguing “distinctive state characteristics” as a reason for departing from federal precedents often fails under the interstitial approach because there is no

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13. *See id.*

14. *Gomez*, 1997-NMSC-006, ¶¶ 19–21, 932 P.2d at 7.

15. *Id.* ¶ 19, 932 P.2d at 7.

16. *Id.*

accepted definition of what qualifies as a “distinctive state characteristic” in the first place. Many opinions interpreting the restrictions on searches and seizures in article II, section 10 of the New Mexico Constitution employ a conclusory, circular definition under which prior New Mexico case law interpreting that section is itself cited as a “distinctive state characteristic.”<sup>17</sup> Indeed, when *Gomez* first used that terminology in adopting the interstitial approach to interpreting the New Mexico Constitution, prior New Mexico case law interpreting article II, section 10 more broadly than its federal counterpart was cited as the rationale for departure.<sup>18</sup> Curiously, *Gomez* never examined the more inclusive factors for discerning “distinctive state characteristics” listed in the 1982 *Harvard Law Review* note which it cited in support of adopting the interstitial approach.<sup>19</sup>

Merely citing earlier New Mexico case law under the *Gomez* approach does not suffice to define a “distinctive state characteristic,” as it conflates the interstitial method of state constitutional interpretation with the more general principle of *stare decisis*, under which New Mexico courts follow and seek guidance from their own past precedents.<sup>20</sup> The grounds for departing from interpretations of federal law by federal courts are not the same as the grounds for departing from New Mexico precedents, because federal law can be merely persuasive authority, but not precedent, when interpreting the Bill of Rights in the New Mexico Constitution.<sup>21</sup>

*Gomez* also cited two prior New Mexico cases to illustrate what types of “distinctive state characteristics” may qualify as reasons for departure from federal law.<sup>22</sup> In the first of these cases, *State v. Cordova*, the New Mexico Supreme Court joined several other state courts in deciding to keep an existing test for determining whether an informant can provide probable cause to issue a warrant under article II, section 10 of the New Mexico Constitution after the Supreme Court of the United States abandoned that test in favor of a “totality of the circumstances” approach to the Fourth Amendment.<sup>23</sup> The second case that *Gomez* cited to, *State v. Sutton*, illustrates the “distinctive state characteristics” involved “noting in dicta that the federal ‘open fields’ doctrine might clash with privacy expectations in New Mexico where ‘lot sizes in rural areas are often large, and land is still plentiful.’”<sup>24</sup> Although

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17. See, e.g., *State v. Crane*, 2014-NMSC-026, ¶¶ 15–16, 329 P.3d 689, 693–94; *State v. Granville*, 2006-NMCA-098, ¶¶ 18–19, 140 N.M. 345, 142 P.3d 933; *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶¶ 15–16, 130 N.M. 386, 25 P.3d 225.

18. *Gomez*, 1997-NMSC-006, ¶¶ 20, 36, 39, 932 P.2d at 7, 11–12.

19. See *id.* ¶ 19, 932 P.2d at 7 (citing *The Interpretation of State Constitutional Rights*, *supra* note 9, at 1358). For a discussion of these factors, see text accompanying *infra* note 36.

20. See *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶¶ 33–34, 125 N.M. 721, 965 P.2d 305.

21. *Vanzi & Baker*, *supra* note 4, at 17–18 (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977)).

22. *Gomez*, 1997-NMSC-006, ¶ 20, 932 P.2d at 7 (citing *State v. Cordova*, 1989-NMSC-083, 109 N.M. 211, 784 P.2d 30, and *State v. Sutton*, 1991-NMCA-073, 112 N.M. 449, 816 P.2d 518).

23. 1989-NMSC-083, ¶ 17, 794 P.2d at 36 (“We conclude that our present court rules better effectuate the principles behind [a]rticle II, [s]ection 10 of our Constitution than does the ‘totality of the circumstances’ test set out in *Gates*.”).

24. 1991-NMCA-073, ¶ 24, 816 P.2d at 524 (“The protection available under the [F]ourth [A]mendment for ‘open fields’ depends on concepts that appear to have evolved in areas with very different customs and terrain,” which contrast with New Mexico’s large “lot sizes” and “plentiful” land in rural areas.).

not cited in *Gomez*, other portions of the Court of Appeals opinion in *Sutton* reference textual differences between our state and federal constitutions, namely the use of the word “home” instead of “house” in article II, section 10, and the “inherent rights” protected in article II, section 4 of the New Mexico Constitution.<sup>25</sup> But again, *Cordova* and *Sutton* are of limited utility in defining what constitutes a “distinctive state characteristic,” because neither of those opinions expressly adopted that terminology or the interstitial approach on which it is based. Additionally, the language from *Sutton* cited above was mere dicta, because the Court of Appeals held that the appellant failed to preserve the state constitutional issue.<sup>26</sup>

The author of the *Gomez* opinion, Justice Ransom, also authored an earlier opinion in *State v. Gutierrez*, in which he sought to examine the “framers’ intent” and the “milieu from which the . . . search and seizure provision [in the New Mexico Constitution] emerged” when searching for distinctive state characteristics.<sup>27</sup> But *Gutierrez* did not look very hard for New Mexico source material on these issues. Instead, the Court blindly accepted the hypothesis that “the framers simply adopted article II, section 10 after having given little new contemplation to its scope, meaning, or effect.”<sup>28</sup> *Gutierrez* did not cite any meaningful source other than the English-language record of the official proceedings of New Mexico’s Constitutional Convention of 1910, and the only support given for this hypothesis were vague platitudes about “the progress of our national history” and “the absence in early twentieth-century New Mexico of any evidence of the same abusive police and governmental practices that plagued American colonists.”<sup>29</sup>

This ethnocentric view of New Mexico history resurfaced in *Morris v. Brandenburg*, where the Court again claimed to “examine the historical ‘milieu’ from which [article II, section 4 of the New Mexico Constitution] emerged in an effort to shed light on how the framers of our state constitution may have viewed it.”<sup>30</sup> But rather than conducting a detailed historical analysis, the *Morris* opinion blindly accepted the hypothesis that “[a]rticle II, [s]ection 4 most likely originated from the natural rights provision in the 1776 Virginia Declaration of Rights” based on a citation to a then-recent law school graduate’s article in this publication.<sup>31</sup> That article, in turn, expressed a view that dismissed article II, section 4 as mere “boilerplate” which is “not meant to be a source of substantive rights.”<sup>32</sup>

These compounding errors in *Gomez*, *Gutierrez*, and *Morris* amount to perhaps the most significant methodological flaws in the New Mexico Supreme Court’s interpretations of the Bill of Rights in our state constitution. And while the result of the Court’s analysis in *Morris* was legislatively overruled with the passage of the Elizabeth Whitefield End-of-Life Options Act during the same legislative

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25. *Sutton*, 1991-NMCA-073, ¶¶ 22–23, 816 P.2d at 523–24.

26. *Id.* ¶ 20, 816 P.2d at 523.

27. 1993-NMSC-062, ¶¶ 33–35, 116 N.M. 431, 863 P.2d 1052.

28. *Id.* ¶ 34, 863 P.2d at 1062.

29. *Id.* ¶¶ 33–34, 863 P.2d at 1062.

30. 2016-NMSC-027, ¶ 40, 376 P.3d 836, 850–51.

31. *Id.* (citing Marshall J. Ray, *What Does the Natural Rights Clause Mean to New Mexico?*, 39 N.M. L. REV. 375, 395 (2009)).

32. Ray, *supra* note 31, at 388, 406.

session as the NMCRA,<sup>33</sup> its methodological errors in state constitutional interpretation can only be corrected by the Court itself. Fortunately, there is another New Mexico precedent which provides an important guidepost for doing so.

**B. *Johnson I* applied a workable but incomplete method of identifying distinctive state characteristics under the constraints imposed by the interstitial approach.**

Given the absence of a cogent and workable definition of “distinctive state characteristics” in most of the New Mexico case law discussed above, one must look to Justice Pamela Minzner’s opinion in *New Mexico Right to Choose/NARAL v. Johnson (Johnson I)* as the first New Mexico precedent to articulate a clear rationale for using “distinctive state characteristics” as grounds for departing from federal constitutional jurisprudence in the *Gomez* era.<sup>34</sup> Although the *Johnson I* opinion began its analysis with a brief review of case law from other jurisdictions, that review was inconclusive and again illustrated the principle that generalized references to past case law interpreting a state constitution—whether from New Mexico or other states—do not provide a workable definition of a “distinctive state characteristic.”<sup>35</sup> The rest of the *Johnson I* opinion, however, analyzed precisely the “kinds of state-specific factors” which “are likely to be significant” in defining “distinctive state characteristics” according to the 1982 *Harvard Law Review* note cited in *Gomez*:

(1) distinctive provisions of the state constitution that recognize rights not identified in the federal Constitution or that characterize particular rights in a significantly different way; (2) distinctive features of a state’s history, particularly circumstances surrounding the adoption of the relevant state constitutional provision that can be used to guide textual interpretation; (3) previously established bodies of state law, independent of federal law, that establish or suggest distinctive state constitutional rights; and (4) distinctive attitudes of a state’s citizenry.<sup>36</sup>

*Johnson I* first focused on an obvious textual difference between the New Mexico Constitution and its federal counterpart: in November 1972, New Mexico voters passed the Equal Rights Amendment, which was added to article II, section 18 of the New Mexico Constitution and implemented by numerous statutory changes in the following year.<sup>37</sup> But *Johnson I* did not rely on “a mere textual difference between the federal and state constitutions” as the basis for identifying “distinctive state characteristics” under the interstitial approach.<sup>38</sup> Instead, the *Johnson I* opinion carefully reviewed the history of an entire series of state constitutional amendments, as well as changes to New Mexico statutes which followed from those amendments,

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33. See Elizabeth Whitefield End-of-Life Options Act, ch. 132, 2021 N.M. Laws 1963 (codified at N.M. STAT. ANN. §§ 24-7C-1 to -8).

34. 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841.

35. See *id.* ¶ 26, 975 P.2d at 850; see also *Morris*, 2016-NMSC-027, ¶¶ 43–44, 376 P.3d at 852.

36. *The Interpretation of State Constitutional Rights*, *supra* note 9, at 1361 (footnotes omitted).

37. *Johnson I*, 1999-NMSC-005, ¶¶ 28–30, 975 P.2d at 851–52; N.M. CONST. art. II, § 18.

38. *Johnson I*, 1999-NMSC-005, ¶ 31, 975 P.2d at 852.



to identify the relevant state characteristics which distinguished the New Mexico law from its federal counterpart.<sup>39</sup>

The purpose of that review was not limited to the identification of textual differences and their origins. Instead, the analysis of historical texts provided evidence of an “evolving concept of gender equality in this state,” which was also embodied in concrete experiences regarding “the rights of women to vote and participate in public life,” “hold various public offices,” and gain admission “to practice law.”<sup>40</sup> Indeed, the author of the *Johnson I* opinion was herself a member of a generation of women lawyers who entered law school soon after the Federal Civil Rights Act of 1964 first prohibited discrimination in employment on the basis of sex.<sup>41</sup> Justice Minzner practiced law in New Mexico when voters passed the Equal Rights Amendment in 1972, became a law professor and was appointed to public office in New Mexico after the Equal Rights Amendment became law in this state, served as the first female Chief Judge of the New Mexico Court of Appeals, and later served as the first female Chief Justice of the New Mexico Supreme Court.<sup>42</sup>

These parallels between Justice Minzner’s own professional biography and the roles of earlier generations of women lawyers cited in *Johnson I* may lend themselves to an inference that her methodology is rooted in the “living constitution” approach to constitutional decision-making advocated by Justice William J. Brennan, Jr.<sup>43</sup> But the *Johnson I* opinion’s careful analysis of the text and origins of the Equal Rights Amendment and earlier state constitutional amendments concerning the roles of women could equally support the contention that it is grounded in textualist and originalist approaches to constitutional interpretation.

The better view is that *Johnson I* employs a more inclusive approach to identifying “distinctive state characteristics” that does not rely on a false dichotomy between a “living” constitution and a “dead” one, but instead harmonizes textual analysis with Justice Brennan’s arguments for a “living constitution.” The textual analysis in *Johnson I* is valuable because attempting to arrive at a shared meaning of the law by reducing it to writing and publishing it at the time of the law’s origin serves important functions consistent with the substantive principles articulated in the resulting constitutional text. A written text published at the time of the law’s adoption provides notice of its meaning as required under principles of due process, and tethering the law’s meaning to that text promotes consistent enforcement and application under principles of equal protection.<sup>44</sup> On the other hand, the “living constitution” approach also evinced in *Johnson I* accords with several provisions in the text of the New Mexico Constitution which suggest that its meaning is open to expansion and clarification through democratic processes which are themselves lawful and textually grounded, such as constitutional amendments,<sup>45</sup> implementing

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39. See *id.* ¶¶ 31–35, 975 P.2d at 852–53.

40. *Id.* ¶¶ 31–32, 975 P.2d at 852.

41. See Mary J. Mullarkey, *Two Harvard Women: 1965 to Today*, 27 HARV. WOMEN’S L.J. 367, 373–75 (2004).

42. *Id.*; Edward L. Chavez, *Pamela B. Minzner: From Professional Promise to New Mexico’s Iconic Leader in Professionalism*, 39 N.M. L. REV. 7, 9–13 (2009).

43. See Vanzi & Baker, *supra* note 4, at 17–18.

44. See N.M. CONST. art. II, § 18.

45. See *id.* art. XIX.

legislation,<sup>46</sup> and judicial application to individual cases and controversies.<sup>47</sup> These democratic processes, in turn, are carried out by real people influenced by their own life experiences and the shared experiences of those around them. That is as it should be, because in a democracy, “[a]ll political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.”<sup>48</sup>

While *Johnson I* provides a more inclusive analysis of “distinctive state characteristics” using the *Harvard Law Review* factors, that analysis is incomplete because it predates the enactment of the NMCRA and is limited to a specific controversy over reproductive health care. Unconstrained by those limitations, the next sections of this article explore the *Harvard Law Review* factors enumerated above in greater detail.

**C. Distinctive provisions of the New Mexico Constitution regarding the elective franchise, freedom of speech, and the right to public education should be bookmarked for further research and are likely to reveal characteristics which support a more inclusive and independent method of state constitutional interpretation.**

While aiming to be more inclusive than most of the existing New Mexico case law on the subject, the analysis provided in this article is not intended to provide a comprehensive catalog of all the distinctive state characteristics which merit attention when interpreting the New Mexico Constitution. In *City of Farmington v. Fawcett*, for example, the New Mexico Court of Appeals provided a detailed analysis of the right to freedom of speech and expression under article II, section 17 of the New Mexico Constitution that foreshadows both the adoption of the interstitial approach in *Gomez* and the application of distinctive state characteristics in *Johnson I*.<sup>49</sup> The very broad and worthy topic of state constitutional counterparts to First Amendment rights under the United States Constitution should be bookmarked for future research, but is beyond the scope of the present article.

The affirmative right to public education has been another source of distinctive characteristics in the New Mexico Constitution from its beginnings,<sup>50</sup> including provisions for teaching in both Spanish and English,<sup>51</sup> and educational equality for “children of Spanish descent.”<sup>52</sup> The district court’s decision and order in the consolidated cases of *Martinez v. State* and *Yazzie v. State* provide an important head start on the long path toward implementing that state constitutional guarantee

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46. *See id.* art. IV, § 1.

47. *See id.* art. VI, § 1.

48. *Id.* art. II, § 2.

49. *City of Farmington v. Fawcett*, 1992-NMCA-075, 114 N.M. 537, 843 P.2d 839.

50. *See* N.M. CONST. art. XII, § 1. Like many other provisions in the New Mexico Constitution, those regarding public education can be traced to the values instilled in the delegates to the 1910 Constitutional Convention by earlier generations of New Mexicans such as the first territorial governor, Donaciano Vigil, who is described as “among the best educated men in public life” and a forceful advocate for “the improvement of public education” until his death in 1877. DONACIANO VIGIL, ARMS, INDIANS, AND THE MISMANAGEMENT OF NEW MEXICO, at xvi, xviii (David J. Weber ed. & trans., 1986).

51. N.M. CONST. art. XII, § 8.

52. *Id.* art. XII, § 10.

and explaining its importance.<sup>53</sup> On the other hand, Section I of Justice Gorsuch's concurring opinion in *Haaland v. Brackeen* provides a cautionary tale about the impacts of allowing an affirmative right to public education and other benefits of state government to become a pretext for cruelly robbing indigenous peoples of their languages, families, and cultural identities.<sup>54</sup> Lacking the level of scholarship exhibited in either of those opinions, this article will not attempt to cover those important and relevant subjects here.

Additionally, many people in New Mexico—including women and “Indians not taxed”—were excluded from the elective franchise when New Mexico became a state in 1912.<sup>55</sup> Ironically, the language which made the provisions regarding the elective franchise in New Mexico's Constitution of 1912 so difficult to amend may have resulted from concerns of the Spanish-speaking minority that their voting rights would be taken away by the Anglo majority if those provisions were made easier to amend.<sup>56</sup> While *Johnson I* may provide a first chapter in the story of how the elective franchise was expanded in our state constitution, there are more chapters to be written on that subject which deserve greater attention than the limited scope of this article allows.<sup>57</sup>

That earlier provisions of our state and federal constitutions excluded significant members of the state's population from voting and public participation in government may help to explain why their voices are missing, distorted, or erased from the historical record as it now stands. At the time New Mexico's Constitutional Convention was convened in the Fall of 1910 to draft the version of the New Mexico Constitution which took effect when the State was admitted to the Union in January 1912, the delegates in the Republican Party held a clear majority, and statehood required the approval of President Taft, who was also a conservative Republican.<sup>58</sup>

53. *Martinez v. State*, No. D-101-CV-2014-00793, 2018 WL 9489378 (N.M. Dist. Ct. July 20, 2018).

54. 599 U.S. 255, 297–307 (2023) (Gorsuch, J., concurring).

55. N.M. CONST. art. VII, § 1 (amended 1967); see also H.R. Mem'l 45, 2020 Leg., Reg. Sess. (N.M. 2020), <https://www.nmlegis.gov/Sessions/20%20Regular/final/HM045.pdf> [<https://perma.cc/JW2Z-QTDE>] (acknowledging that “when enacted in 1912, the constitution of New Mexico denied Native American New Mexicans suffrage based on [a]rticle 7, [s]ection 1”). The “Indians not taxed” provision was struck down as violating the Fourteenth Amendment in 1948, but not repealed until the 1967 amendment to article VII, section 1. *Trujillo v. Garley*, No. 1353 (D.N.M. Aug. 11, 1948) (unpublished) (transcript available at Brief of Appellant app. C, at 47–56, *Allen v. Merrell*, No. 8589 (Utah 1956), [https://digitalcommons.law.byu.edu/uofu\\_sc1/2704](https://digitalcommons.law.byu.edu/uofu_sc1/2704) [<https://perma.cc/3QBT-V9DR>]); N.M. CONST. art. VII, § 1 (amended 1967). The 1967 amendment, in turn, was the subject of a writ of mandamus which also modified the process of amending the state constitution to accord with the principle of “one person, one vote”. See *State ex rel. Witt v. State Canvassing Bd.*, 1968-NMSC-017, ¶ 39, 78 N.M. 682, 437 P.2d 143.

56. See Reuben W. Heflin, *New Mexico Constitutional Convention*, 21 N.M. HIST. REV. 60, 62 (1946) (describing “that portion of the constitution covering the elective franchise” as taking “precedence over all else” for the Spanish-speaking delegates at the 1910 Constitutional Convention, who “had much to do with putting the franchise provisions . . . in the constitution”).

57. The determination that partisan gerrymandering claims “cannot be resolved under the interstitial analysis” is a recent development that warrants such attention. *Grisham v. Van Soelen*, 2023-NMSC-027, ¶ 20, 539 P.3d 272, 281.

58. See Thomas J. Mabry, *New Mexico's Constitution in the Making—Reminiscences of 1910*, 19 N.M. HIST. REV. 168, 169–70, 184 (1944); Thomas C. Donnelly, *The Making of the New Mexico Constitution: Part II*, 12 N.M. Q. 435, 448–449 (1942).

“The membership stood [at] 35 members of Spanish descent, and 65 members of the so[-]called Anglo American descent. Politically there were 71 republicans, 28 democrats and one socialist.”<sup>59</sup> Accordingly, much of the recorded debate at the 1910 Constitutional Convention concerned provisions which the members of the majority party thought necessary to gain the federal approval required for statehood.<sup>60</sup> Other hotly debated topics in the record of the proceedings concerned the majority party’s efforts to secure short-term economic and commercial gains for its members, such as “gerrymandering” the boundaries for legislative and judicial districts.<sup>61</sup>

Despite those efforts, the elective franchise was later expanded through the amendment process, implementing legislation, and court decisions.<sup>62</sup> These developments led to New Mexico becoming a “deep blue” state with members of the Democratic Party holding the Governor’s office, majorities in both legislative chambers, and almost all of the judgeships on the state’s appellate courts by the time the NMCRA was enacted in 2021. Ironically, the results of New Mexico’s recent statewide elections do not match the original intentions of the Republican majority at the time of the 1910 Constitutional Convention, at least with respect to influencing the content of the state constitution so that it would allow them to keep that majority on a long-term basis. It must also be remembered, however, that major political parties of today do not have the same platforms or membership as they did more than a hundred years ago, nor did all members of one party share the same views. Instead, it was the “35 Spanish speaking members, many of whom spoke English, [who] formed a comparatively solid block welded by a common interest” at the time of the 1910 convention.<sup>63</sup>

If one looks beyond the delegates’ petty partisan debates to the actual text upon which they agreed at the 1910 Constitutional Convention, it is easy to discern some shared principles and purposes that would have required no further debate.<sup>64</sup> That these shared principles and purposes evinced in the text of our state constitution itself were not the most controversial or hotly debated issues in the English-language record of the proceedings of that convention does not render them unimportant with respect to the future development of state constitutional law in New Mexico.

59. Heflin, *supra* note 56, at 61. Despite such differences, the compiler of these statistics described the 1910 convention as “many-sided and colorful, being as it was on the border line where two civilizations had met, fused and developed a society of its own composed of the Anglo American from the States and the Spanish American who had come up through Mexico.” *Id.*

60. See BRANDON MORGAN, THE HISTORY OF NEW MEXICO ch.12 (2015) (ebook), [https://mytext.cnm.edu/wp-content/uploads/2023/08/The-History-of-New-Mexico\\_PDF.pdf](https://mytext.cnm.edu/wp-content/uploads/2023/08/The-History-of-New-Mexico_PDF.pdf) [<https://perma.cc/Q3NV-NWRD>].

61. See Mabry, *supra* note 58, at 174–75.

62. See, e.g., N.M. Right to Choose/NARAL v. Johnson (*Johnson I*), 1999-NMSC-005, ¶¶ 33–34, 126 N.M. 788, 975 P.2d 841.

63. Heflin, *supra* note 56, at 61; see also Phillip B. Gonzales, *New Mexico Statehood and Political Inequality: The Case of Nuevomexicanos*, 90 N.M. HIST. REV. 31, 31–32 (2015) (“The success of the statehood proposition rested on [the support of Nuevomexicano spokesmen]. Nuevomexicanos constituted the majority of New Mexico’s population and statehood required that the population ratify the 1910 constitution. A great deal thus rode on Nuevomexicano leaders making the effort to convince their ethnic brethren that they needed statehood in particular.”).

64. See Mabry, *supra* note 58, at 183–84; Heflin, *supra* note 56, at 62 (noting that “[a]ll believed in the democratic processes of self government”).

“Legislative silence is at best a tenuous guide to determining legislative intent,”<sup>65</sup> especially when that silence appears in the legislative history of an otherwise loud-and-clear text.

**D. A more careful and inclusive analysis of New Mexico’s state constitutional history reveals distinctive state characteristics which lay the groundwork for an independent method of state constitutional interpretation.**

One need only read the first article of the New Mexico Constitution, which purported to set the State’s territorial boundaries, to start finding distinctive state characteristics which inform the meaning of the Bill of Rights in article II.<sup>66</sup> Unlike the original thirteen states which obtained their independence through revolutionary war with Britain, the territory of what is now the State of New Mexico became part of the United States through the federal government’s own military conquests and its purchase of additional land on which to build a southern route for a transcontinental railroad.<sup>67</sup>

The history of the first thirteen independent states that joined together to form a federal government differs significantly from the state constitutional history of New Mexico, which began under the rule of the federal territorial government for more than sixty years, during which multiple attempts were made to gain federal approval before becoming a state.<sup>68</sup> And while the history of the revolution conducted by the original thirteen states remains relevant to New Mexico’s quest for statehood, New Mexicans have their own tales of abuses and excesses committed by the imperial powers which occupied their territory before statehood.<sup>69</sup> Among these tales is the story of how the State was deprived of hundreds of thousands of acres of its own declared territory due to erroneous surveys of its borders with Colorado and Texas, which were later ratified by the federal government.<sup>70</sup>

The reference to rights protected by the Treaty of Guadalupe Hidalgo in article II, section 5 of the New Mexico Constitution provides another distinctive state characteristic relevant to the task of developing an independent method of state constitutional interpretation in this State.<sup>71</sup> That treaty resulted from and codified the United States’ military victory in its war with the Republic of Mexico.<sup>72</sup> The

65. Swink v. Fingado, 1993-NMSC-013, ¶ 29, 115 N.M. 275, 850 P.2d 978.

66. See N.M. CONST. art. I.

67. See Thomas C. Donnelly, *The Making of the New Mexico Constitution: Part I*, 11 N.M. Q. 452, 4 (1941); MORGAN, *supra* note 60, at ch. 9 (discussing the Gadsden Purchase of 1853).

68. See Mabry, *supra* note 58, at 168–70.

69. See, e.g., L. BRADFORD PRINCE, *NEW MEXICO’S STRUGGLE FOR STATEHOOD: SIXTY YEARS OF EFFORT TO OBTAIN SELF GOVERNMENT* 98–106 (1st ed. 1910); Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANA/O-LATINA/O L. REV. 9, 13–56 (2005); Mark J. Stegmaier, *An Imaginary Negro in an Impossible Place?: The Issue of New Mexico Statehood in the Secession Crisis, 1860-1861*, 84 N.M. HIST. REV. 263, 284 (2009).

70. See Mark Thompson, *The New Mexico Constitution Meets the “Facts on the Ground”*, 46 N.M. BAR BULL. 9, 9 (2007) (explaining the reasons why the State’s actual boundaries do not match the legal description stated in article I of the New Mexico Constitution).

71. N.M. CONST. art. II, § 5.

72. Treaty of Peace, Friendship, Limits, and Settlement With the United States of America and the Republic of Mexico, Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

aftermath of that war, as well as the Civil War which followed it, was marred by abuses and excesses of the military and territorial regimes imposed by the federal government during New Mexico's pre-statehood era.<sup>73</sup> The rights to popular sovereignty and self-government expressed in article II, sections 2 and 3 of the New Mexico Constitution also take on a distinctive significance when considered against the backdrop of New Mexico's lengthy quest for statehood while under territorial rule.

Before the United States' military conquest and purchase of railroad right-of-way across the territory which became the State of New Mexico, that territory had been claimed as part of the Mexican Republic, which had formally abolished slavery.<sup>74</sup> The controversy surrounding the abolition of slavery affected the futures of the Mexican Republic, the United States, and New Mexico. Abolition and "states' rights" regarding slavery in the Mexican Republic are often cited among the reasons why Anglo settlers in what became the Republic of Texas seceded from Mexico and eventually joined the United States as a "slave state," only to secede from the United States and join the Confederate States of America during the Civil War.<sup>75</sup>

But the New Mexicans who created the first drafts of what later became our state constitution took a very different course. While the federal military regime which occupied the New Mexico territory continued in *de facto* form after the Treaty of Guadalupe Hidalgo in 1848, an intrepid group of New Mexicans formed a committee to draft a petition to Congress seeking "the immediate establishment of a Territorial Government, entirely civil in its character, which then appeared the most feasible method of obtaining relief from military rule and some regular legal system."<sup>76</sup> In their petition of 1848, the committee stated: "We do not desire to have domestic slavery within our borders; and until the time shall arrive for admission into the Union of States, we desire to be protected by Congress against the introduction of slaves into the Territory."<sup>77</sup>

The same goals were presented again in the first state constitution proposed for New Mexico in 1850, which "contained a clause prohibiting slavery, in order to meet the views of the native New Mexicans, who were pronouncedly opposed to slavery in any form."<sup>78</sup> Approved by New Mexico voters by a margin of 8,731 to 39,

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73. See, e.g., Donnelly, *supra* note 67, at 453–59; MORGAN, *supra* note 60, at ch. 10.

74. Abolition under Mexican rule first occurred through the declaration of President Vicente Guerrero, and again in 1837, when Mexico's National Congress passed an emancipation bill. See *Decree Abolishing Slavery in Mexico in 1829*, SAM HOUSTON STATE UNIV., <https://digital.library.shsu.edu/digital/collection/p243coll3/id/2243> [https://perma.cc/D663-AECX] (providing a record of the original declaration from September 15, 1829); Dara Flinn, *Emancipation in Mexico*, RICE UNIV.: FONDREN LIBR. (July 7, 2022), <https://woodsononline.wordpress.com/2022/07/07/emancipation-in-mexico> [https://perma.cc/937J-JUGU] (providing a record of the original emancipation bill from April 5, 1837).

75. See, e.g., Sean Kelley, "Mexico in His Head": *Slavery and the Texas-Mexico Border, 1810-1860*, 37 J. Soc. HIST. 709, 710–23 (2004).

76. PRINCE, *supra* note 69, at 9.

77. *Id.* at 10.

78. Donnelly, *supra* note 67, at 455 n.6.; see also Stegmaier, *supra* note 69, at 284 ("Despite a Confederate invasion and occupation of New Mexico in early 1862, most New Mexicans supported the Union, and the first major action taken by the territorial legislature after the war began was to repeal the territory's slave code.").

article I, section 1 of the proposed New Mexico Constitution of 1850 provided as follows:

All men being born equally free and independent, and having certain natural, inherent and inalienable rights, amongst which are the enjoying and defending of life and liberty, the acquirement, possession and protection of property, and the pursuit of and attainment of happiness; therefore, no male person shall be held by law to serve any person as a servant, slave or apprentice, after he arrives at the age of twenty-one years; nor female in like manner, after she arrives at the age of eighteen years; unless they be bound by their own consent after they arrive at such age, or are bound by law for punishment of crime.<sup>79</sup>

Well aware of their own history, delegates at the 1910 Constitutional Convention took the pertinent language from the first clause of this section of the proposed 1850 constitution and placed it in what became article II, section 4 of the New Mexico Constitution of 1912, where it remains to this day.<sup>80</sup>

Far from being a meaningless appendage that was mindlessly copied from the verbiage of another state's constitution without any apparent purpose, the "born equally free" and "natural rights" language in what became article II, section 4 of the New Mexico Constitution was so important to its original drafters that they were willing to forego statehood for many years in order to keep it.<sup>81</sup> Former territorial governor L. Bradford Prince articulated this distinctive state characteristic more eloquently in his account of New Mexico's struggle for statehood:

It is an evidence of the courage and high principle of the convention which formulated the Constitution [proposed in 1850], that at that time, when the debate on slavery was raging in Congress, when they knew that the slave power was determined to have a new slave State to balance California, and that if they declared for slavery they would be admitted in a moment; they sacrificed their prospects of immediate admission to the higher duty of protecting their cherished land from the incubus and wrong of human bondage. It should never be forgotten that this first Constitutional Convention in New Mexico, in which native New Mexicans composed over ninety per cent of the membership, took this high ground and maintained it courageously, although by so

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79. S. Exec. Doc. 74, 31st Cong. (1st Sess. 1850); JACK D. RITTENHOUSE, CONSTITUTION OF THE STATE OF NEW MEXICO, 1850 14–15 (1965); PRINCE, *supra* note 69, at 20. The second sentence of this section of the 1850 constitution accords with the view that abducted children may have been excepted from the formal abolition of slavery during the Mexican and territorial eras. See Bill Piatt, Moises Gonzales & Katja Wolf, *Law Schools Harm Genizaros and Other Indigenous People by Misunderstanding ABA Policy*, 49 N.M. L. REV. 236, 248 (2019). Such practices continued in another form after statehood with the boarding-school regime for indigenous children. See *Haaland v. Brackeen*, 599 U.S. 255, 297–307 (2023) (Gorsuch, J., concurring).

80. N.M. CONST. art. II, § 4.

81. PRINCE, *supra* note 69, at 19.

doing they were placing in jeopardy their own right to self government.<sup>82</sup>

And so it was that for the course of the next sixty years and several more attempts at drafting a state constitution to gain the federal approval needed for statehood, New Mexico was held in servitude as a subordinate territory of the United States, without any elected representatives in Congress, and with a territorial governor appointed by the President in Washington.<sup>83</sup>

The lack of their own elected representatives to such important positions, as well as the influx of federal appointees from other states with no knowledge of, or commitment to, the territory or its people, were sources of frustration to the local population which motivated their persistent efforts to achieve statehood.<sup>84</sup> In this regard, José Francisco Chaves, the president of a state constitutional convention in 1889, delivered a “stirring address” pointing out that “New Mexico, as a territory, has furnished a place of forage for politicians who couldn’t be either supported or elected to any office in their own home states.”<sup>85</sup>

From 1850 through the Civil War era, New Mexico statehood was precluded by the “Compromise of 1850,” under which “California was admitted as a free state and Utah and New Mexico, covering all the remaining area acquired from Mexico, were made into territories with no mention of slavery.”<sup>86</sup> Following a failed effort by the Confederate States to split part of what is now New Mexico into a southern, Confederate territory during the Civil War,<sup>87</sup> New Mexicans made several more unsuccessful attempts at a state constitution before finally gaining statehood in 1912.<sup>88</sup> “No other territory ever fought so continuously for so long a time, or suffered so many discouraging defeats in its attempts to gain admission.”<sup>89</sup>

While the abolition of slavery proposed in the 1850 draft of the New Mexico Constitution was less of an obstacle to statehood after the United States ratified similar abolitionist language in the Thirteenth Amendment to the United States Constitution in 1865, that did not stop powerful officials in the federal government from continuing to express their discriminatory animus against Spanish-speaking and native populations as further reasons for denying statehood to New Mexico.<sup>90</sup> Among them was Senator Albert J. Beveridge of Indiana, who became chair of the Senate Committee on Territories.<sup>91</sup> Occupying that position from 1899 until he lost his Senate seat to a Democrat in the 1910 elections, Beveridge was an avowed White Nationalist who effectively blocked statehood for New Mexico based on his view

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82. *Id.*

83. Donnelly, *supra* note 67, at 459–61.

84. See Mabry, *supra* note 58, at 169; see also Gonzales, *supra* note 63, at 32 (noting the arrival of “a new breed of aggressive Euroamerican politicians . . . in the 1870s” and dramatic increases in the Euroamerican population “once the railroad crisscrossed New Mexico in the 1880s”).

85. Mabry, *supra* note 58, at 169.

86. Donnelly, *supra* note 67, at 455.

87. MORGAN, *supra* note 60, at ch. 10.

88. Donnelly, *supra* note 67, at 459 (“During the sixty-year period from 1850 to 1910 more than fifty bills proposing statehood for New Mexico were introduced into Congress without success.”).

89. *Id.*

90. PRINCE, *supra* note 69, at 98–101.

91. *Id.* at 95; MORGAN, *supra* note 60, at ch. 12.



that “[t]he great majority of the New Mexican population” are disqualified from full citizenship because they are “of Spanish and mixed Spanish and Indian descent, and of these all speak Spanish in the affairs of daily life and the majority speak nothing but Spanish.”<sup>92</sup> Senator Beveridge issued a report which took a particularly dim view of court proceedings conducted in Spanish,<sup>93</sup> as he viewed “‘refusal’ to speak English as treason.”<sup>94</sup> It was only after Senator Beveridge was voted out of office in his home state that New Mexico finally gained statehood in 1912.<sup>95</sup>

The distinctive historical characteristics of New Mexico’s quest for statehood and the numerous drafts of our state constitution which circulated during that period bring the meaning of its current text into clearer focus. A more inclusive view of the historical evidence suggests that the Bill of Rights in the New Mexico Constitution is the culmination of a lengthy and resilient struggle against a colonization process whereby an influx of Anglo settlers sought to depopulate a newly acquired federal territory of its existing inhabitants and then gain statehood for themselves alone under the banner of White Nationalism. While that colonization process may have reached its goal in other states, it was thwarted in New Mexico because of a Spanish-speaking population that “formed a comparatively solid block welded by a common interest” in “the preservation of their traditional way of life and the language of their fathers,”<sup>96</sup> even when reduced to a minority in government due to the Anglo influx.<sup>97</sup> This common interest included an “anti-slavery sentiment [which] likely reflected Mexico’s historic opposition to African slavery, as well as ongoing hostilities with Texas” during the early territorial era.<sup>98</sup> After achieving statehood, these sentiments were cemented into fundamental values through which the elective franchise was expanded and new protections, including those stated in the Equal Rights Amendment of 1972, were added to the New Mexico Constitution.<sup>99</sup> Reignited by the protests that followed in the wake of the killings of George Floyd, Breonna Taylor, and Ahmaud Arbery, these same fundamental values informed and motivated the passage of the NMCRA,<sup>100</sup> which should be interpreted in light of New Mexico’s distinctive history and resistance to colonization.

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92. PRINCE, *supra* note 69, at 99 (quoting from S. REP. NO. 57-2206, at 5 (1902)).

93. *Id.* (quoting from S. REP. NO. 57-2206, at 5–6).

94. MORGAN, *supra* note 60, at ch. 12.

95. See *Albert Jeremiah Beveridge, 1862–1927*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <https://bioguide.congress.gov/search/bio/b000429> [<https://perma.cc/9K2R-S3H6>] (noting that Senator Beveridge lost a campaign for reelection in 1910).

96. Heflin, *supra* note 56, at 61; see also Lysette P. Romero, Note, *Why English-Only Notice to Spanish-Only Speakers is Not Enough*, 41 N.M. L. REV. 603, 616–17 (2011) (listing reasons for the Spanish-speaking population of New Mexico to require a state constitution that would adequately protect their interests at the time of the 1910 Constitutional Convention).

97. See Gonzales, *supra* note 63, at 32–33.

98. Gómez, *supra* note 69, at 42.

99. See N.M. Right to Choose/NARAL v. Johnson (*Johnson I*), 1999-NMSC-005, ¶¶ 31–35, 126 N.M. 788, 975 P.2d 841.

100. See 2020 Spec. Sess. Proclamation, *supra* note 1.

**E. Article II, section 4 of the New Mexico Constitution evinces distinctive state characteristics which provide keys to unlocking a more inclusive and independent method of state constitutional interpretation for other provisions in our Bill of Rights.**

Returning to a detailed textual analysis further evinces how the “born equally free” and “natural rights” language in article II, section 4 of the New Mexico Constitution takes on a distinctive meaning in the context of the controversy over slavery and provides a foundation for understanding other provisions of our state constitution as well. The sixty-year milieu in which New Mexicans persistently and repeatedly engaged in the process of drafting their own state constitution suggests that they chose the specific wording eventually included in article II, section 4 to provide an enforceable mechanism that would forever prohibit slavery and attributes of involuntary servitude.<sup>101</sup>

That steadfast choice which prevented New Mexico’s first attempts at statehood circa 1850 likely has roots in Afro-Mexican President Guerrero’s formal abolition of slavery in 1829, while New Mexico was still considered part of the early Mexican Republic.<sup>102</sup> Although President Guerrero was taken into custody and executed by his political opponents within a few years after issuing his declaration,<sup>103</sup> it was followed by an emancipation bill enacted by Mexico’s National Congress in 1837, which “abolished without exception all slavery in all the [Mexican] Republic.”<sup>104</sup> Unlike federal law in the United States at the time, Mexico’s 1837 emancipation bill did not provide a mechanism for returning fugitive slaves to their alleged “owners” and even denied compensation to settlers in Texas whose former slaves escaped to Mexico.<sup>105</sup> These advantages of escaping to territory held by Mexico instead of the northern United States led to an important southern route for the “underground railroad” during that time period.<sup>106</sup> Thus, the origin of article II, section 4 of the New Mexico Constitution probably owes as much to the history of Mexican emancipation described above as it does to the first draft of the Virginia Declaration of Rights of 1776, upon which other states modeled the “inherent rights” clauses in their constitutions.<sup>107</sup> After all, New Mexicans had already lived under a

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101. See *Morris*, 2016-NMSC-027, ¶ 42, 376 P.3d 836, 851 (“[A]t least five states relied on the guarantee of their natural rights provisions that all men are born equally free to declare slavery unconstitutional.”).

102. See Ted Vincent, *The Blacks Who Freed Mexico*, 79 J. NEGRO HIST. 257, 258 (1994). This hypothesis warrants further research on the subject by historians of that era with better access to Spanish-language materials.

103. Theodore G. Vincent, *The Contributions of Mexico’s First Black Indian President, Vicente Guerrero*, 86 J. NEGRO HIST. 148, 153 (2001).

104. Flinn, *supra* note 74 (providing a record of the original emancipation bill from April 5, 1837).

105. See *id.*

106. See John Burnett, *A Chapter in U.S. History Often Ignored: The Flight of Runaway Slaves to Mexico*, NPR (Feb. 28, 2021), <https://www.npr.org/2021/02/28/971325620/a-chapter-in-u-s-history-often-ignored-the-flight-of-runaway-slaves-to-mexico> [<https://perma.cc/Y7X7-4WX7>].

107. Again, this hypothesis warrants further research by Spanish-language historians, but the circumstantial evidence indicates that the drafters of New Mexico’s first proposals for statehood included former officials of the Mexican republic who were likely to be familiar with Mexican law on the subject.

regime which twice outlawed slavery and provided an incentive for slaves to seek refuge there before becoming a territory of the United States. They did not need to rely exclusively on an eighteenth-century white slave plantation owner such as George Mason, drafter of the Virginia Declaration of Rights, to introduce them to that idea.

In any event, the declaration that Mason drafted for Virginia exists in more than one version.<sup>108</sup> Thus, it does not necessarily follow that all other states' "inherent rights" clauses were copied from the same version of the Virginia declaration or have the same meaning. On the contrary, more careful study of the historical record suggests that the drafters of each state's constitution modified the language in these clauses to signal their views on the slavery controversy.<sup>109</sup> Such modifications began with Virginia's Declaration of Rights itself.

George Mason's widely published first draft states:

That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing [sic] and obtaining Happiness and Safety.<sup>110</sup>

In contrast, the final draft adopted as part of Virginia's state constitution on June 12, 1776, was modified as follows in response to concerns about its potential effect on the legality of slavery as practiced in that State:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.<sup>111</sup>

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*See, e.g.*, PRINCE, *supra* note 69, at 9–10 (reporting that two former governors under Mexican rule, Francisco Sarracino and Donaciano Vigil, were involved in sending a petition to Congress in October 1838 opposing both slavery and the loss of any New Mexico territory to Texas). In addition to serving as territorial governor after the United States' military conquest of the territory, Vigil is described as a well-educated veteran with many years of prior service in Mexico's military. VIGIL, *supra* note 50, at xvi.

108. Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1315–16 (2015).

109. *Id.* at 1325–55; *see also* David R. Upham, *The Understanding of "Neither Slavery Nor Involuntary Servitude Shall Exist" Before the Thirteenth Amendment*, 15 GEO. J. L. & PUB. POL'Y 137, 141–46 (2017) (discussing the relationship between "inherent rights" clauses in state constitutions and precursors of the Thirteenth Amendment to the United States Constitution).

110. Calabresi & Vickery, *supra* note 108, at 1315 (quoting George Mason, First Draft of the Virginia Declaration of Rights (May 20–26, 1776), in 1 THE PAPERS OF GEORGE MASON, 1725–1792 276, 277 (Robert A. Rutland ed., 1970) [hereinafter PAPERS]).

111. *Id.* at 1316 (quoting Final Draft of the Virginia Declaration of Rights (June 12, 1776), in PAPERS, *supra* note 110, at 287, 287).

The latter version was subsequently interpreted by Virginia courts to allow for slavery on the grounds that it “was notoriously framed with a cautious eye to this subject.”<sup>112</sup>

But by 1780, Massachusetts had adopted a “natural rights” clause in its state constitution that more resembled George Mason’s unedited first draft of the Virginia Declaration of Rights.<sup>113</sup> The Massachusetts Supreme Judicial Court then issued a series of decisions which culminated in holding that the specific language included in that State’s “natural rights” clause rendered slavery unconstitutional in that State.<sup>114</sup> The operative words of the Massachusetts Constitution of 1780 which provided the textual basis for these rulings state that:

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.<sup>115</sup>

According to more detailed scholarship which analyzed twenty-four “inherent rights” provisions in state constitutions and the case law interpreting them between the federal government’s start date in 1787 and the adoption of the Fourteenth Amendment in 1868, the Massachusetts Supreme Judicial Court’s “foundational holding” in *Commonwealth v. Aves* “was cited by virtually every state court opinion following 1836 that dealt with the subject of slavery.”<sup>116</sup> Thus, by the time New Mexico became a territory of the federal government in 1848, drafters of state constitutions who had any significant legal education or background would have known that by including, omitting, or modifying certain language in their “inherent rights” clauses, they could send a clear signal about whether they intended to outlaw or permit slavery in their respective states.<sup>117</sup>

For example, California and Nevada were the first two former Mexican territories to gain statehood after the Treaty of Guadalupe Hidalgo in 1848, and both of their original state constitutions contain “natural rights” provisions similar to New Mexico’s, with obvious anti-slavery implications.<sup>118</sup> In contrast, Texas was the last former Mexican territory to gain statehood as a “slave state,” and the original Texas

112. *Id.* at 1350 (quoting *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134, 141 (1806)).

113. *Compare* First Draft of the Virginia Declaration of Rights, in *PAPERS*, *supra* note 110, at 277, with Calabresi & Vickery, *supra* note 108, app. A, at 1445 (quoting MASS. CONST. pt. 1, art. I (1780)).

114. Calabresi & Vickery, *supra* note 108, at 1330–36 (citing *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836)).

115. MASS. CONST. pt. 1, art. I (prior to the adoption of Massachusetts’ equal rights amendment in 1976).

116. Calabresi & Vickery, *supra* note 108, at 1334; *see also* Upham, *supra* note 109, at 142–46.

117. This hypothesis about the wording of state constitutions also raises questions about whether an underlying reason for not including a bill of rights in the United States Constitution when it was originally enacted was to avoid conflict and controversy over whether to include a “natural rights” clause in such a federal bill of rights. In any event, it is curious that a specific amendment with such “natural rights” language was never included in the first ten amendments to the United States Constitution in 1791. Perhaps that omission was another attempt to avoid controversy among the original thirteen states over the institution of slavery.

118. *See* CAL. CONST. art. I, § 1 (1849); NEV. CONST. art. I, § 1.

Constitution of 1845 lacks such “natural rights” language in its Bill of Rights.<sup>119</sup> Instead, the Bill of Rights in the Texas Constitution includes caveats similar to the final version of the Virginia Declaration for the purpose of making it compatible with slavery.<sup>120</sup> In particular, the first Texas constitutions limited “equal rights” to “freemen, when they form a social compact,”<sup>121</sup> with the clear implication that enslaved people were not “freemen” and were not among those who formed the necessary “social compact.”

Both New Mexico’s first proposed constitution of 1850 and the version of the state constitution which took effect at statehood in 1912 contain the operative language signaling opposition to slavery and agreement with an underlying philosophy of natural rights.<sup>122</sup> According to “natural rights” philosophies, individuals are naturally endowed with such rights before entering into civil society or forming a social compact in written form.<sup>123</sup> In accordance with these concepts, the drafters of the New Mexico Constitution chose to use the words “born equally free,” and they described the rights at issue as “natural” and “inalienable,” not merely “inherent.”<sup>124</sup> These choices in wording accord with George Mason’s first draft of the Virginia Declaration of Rights of 1776, as well as the operative language from the Massachusetts Constitution of 1780, which formed the basis for the Massachusetts Supreme Judicial Court’s influential ruling in *Commonwealth v. Aves*.<sup>125</sup>

The differences in word choice discussed above suggest that, in selecting a broader formulation of the “inherent rights” language from the bills of rights in other state constitutions, New Mexicans were making a conscious decision to firmly ally themselves with the “free states” which had used such language to create enforceable, substantive state constitutional rights in the pre-Fourteenth Amendment era—including the right to be free from enslavement and involuntary servitude. By doing so, they placed article II, section 4 of the New Mexico Constitution in line with other state constitutions which, before the territorial era when New Mexicans began their efforts at achieving statehood, had been interpreted to extend such “natural rights” protections to other minoritized groups regarded as living outside the “social compact” or in a “state of nature.”<sup>126</sup> For under “natural rights” philosophies such as those articulated by John Locke, individuals were “born” with such rights even when

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119. See TEX. CONST. art. I, § 2 (1845); see also REPUBLIC OF TEX. CONST., Declaration of Rights, § 1 (1836).

120. Compare Final Draft of the Virginia Declaration of Rights, in PAPERS, *supra* note 110, at 287, with TEX. CONST. art. I, § 2 (1845).

121. TEX. CONST. art. I, § 2 (1845).

122. Compare N.M. CONST. art. I, § 1 (1850), with N.M. CONST. art. II, § 4.

123. See Calabresi & Vickery, *supra* note 108, at 1322–25 (discussing opposing views of “natural rights” philosophy in the pre-Fourteenth Amendment era); Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281, 296–303 (2003) (discussing the distinctive synthesis of “natural rights” philosophies in nineteenth-century Latin America).

124. See N.M. CONST. art. II, § 4.

125. See *supra* notes 110–16 and accompanying text.

126. See, e.g., *Murch v. Tomer*, 21 Me. 535, 535–39 (1842) (concluding that as “human beings, born and residing within our borders,” an “Indian of the Penobscot tribe” had the inherent right to enter into valid contracts).

they were regarded as living in a “state of nature” or lacking a written “social compact” of their own.<sup>127</sup>

That drafters of the New Mexico Constitution were capable of making such finely nuanced, philosophical distinctions when choosing which words to include in that document is supported by the account of the composition of the Constitutional Convention of 1910 cited in *City of Farmington v. Fawcett*: “since almost one-third of the constitutional delegates were lawyers who received their legal training in other states, they may have brought some understanding on the subject from their states of origin.”<sup>128</sup> Biographies published in the *New Mexico Constitutional Convention Book* of 1910 indicate that the delegates who were born in New Mexico also had more than enough intellectual and verbal capacity to understand these distinctions and to make conscious choices in wording and translation.<sup>129</sup>

On similar grounds, one may infer that delegates of various intellectual backgrounds would have been familiar with some of the emerging political philosophies which are now labeled under the rubric of “Social Darwinism.”<sup>130</sup> In particular, the emergence of Social Darwinism before the time of New Mexico’s Constitutional Convention of 1910 is evinced by the well-publicized views of Senator Beveridge, the Chair of the Senate Committee on Territories who blocked New Mexico’s efforts at statehood at the start of the twentieth century.<sup>131</sup> Beveridge expressly ranked the White race above others and thought “[e]ach race . . . had a

127. See Manzoor Elahi, *What is Social Contract Theory?*, SOPHIA PROJECT: PHIL. ARCHIVES, at 2–3 (2005), [http://www.sophia-project.org/uploads/1/3/9/5/13955288/elahi\\_socialcontract.pdf](http://www.sophia-project.org/uploads/1/3/9/5/13955288/elahi_socialcontract.pdf) [<https://perma.cc/HK28-EWUJ>].

128. 1992-NMCA-075, ¶ 22, 114 N.M. 537, 843 P.2d 839 (citing DOROTHY I. CLINE, NEW MEXICO’S 1910 CONSTITUTION: A 19TH CENTURY PRODUCT 30 (1985)).

129. For example, José D. Sena was born in Santa Fe, New Mexico, graduated from St. Louis University in Missouri, and served as the first clerk of the New Mexico Supreme Court; Antonio A. Sedillo was born in Socorro, New Mexico, admitted to practice law here in 1901, and served as official interpreter for the New Mexico legislature thereafter; Nestor Montoya was born in Albuquerque, New Mexico, educated in both Spanish and English, and served as interpreter for the territory’s Second Judicial District Court; Isidoro Armijo was born in Las Cruces, New Mexico, served as interpreter for the Third Judicial District Court, and traveled extensively over the United States and Mexico for over six years; E.A. Miera was born in Algodones, New Mexico and spoke Spanish, English, French and German; and Nepomuceno Segura was born in Santa Fe, New Mexico, admitted to practice law in Las Vegas, New Mexico, and “acknowledged one of the best interpreters and translators both in Colorado and New Mexico, having served in that capacity for nearly 25 years.” NEW MEXICO CONSTITUTIONAL CONVENTION BOOK 8–9, 19, 61, 71, 74 (C.S. Peterson 1910), <https://newmexicohistory.org/centennial/documents/NMConstitutionalConvention-1910Book.pdf> [[perma.cc/KP42-DRVB](https://perma.cc/KP42-DRVB)]; see also PRINCE, *supra* note 69, at 9–10 (noting that “Francisco Sarracino, who had been Governor of New Mexico under the Mexican regime,” later served on the committee which drafted the 1848 petition to Congress “to establish a government purely civil in its character” that would be free from “domestic slavery within our borders”); Carozza, *supra* note 123, at 296–303 (documenting the extent to which “natural rights” philosophies were included in the curriculum of nineteenth-century Latin American educational institutions).

130. See Thomas C. Leonard, *Origins of the Myth of Social Darwinism: The Ambiguous Legacy of Richard Hofstadter’s Social Darwinism in American Thought*, 71 J. ECON. BEHAV. & ORG. 37, 39–40 (2009).

131. See Daniel Levine, *The Social Philosophy of Albert J. Beveridge*, 58 IND. MAG. HIST. 101, 108 (1962).

collective soul which harbored a drive in a certain direction.”<sup>132</sup> He “joined the Social Darwinists, who treated classes within a society and societies as a whole simply as enlarged single organisms.”<sup>133</sup> Applying these racist views toward the native and Spanish-speaking populations of New Mexico reportedly caused Senator Beveridge to be regarded as the “most cordially disliked man in New Mexico” in the years leading up to statehood.<sup>134</sup> That delegates to New Mexico’s Constitutional Convention in 1910 stuck with the broadest and most protective formulation of the “natural rights” language in article II, section 4 further evinces their choice of “natural rights” philosophies over Social Darwinism.<sup>135</sup>

Moreover, the array of different word choices used in the “inherent rights” provisions of the various state constitutions in existence at the time of the 1910 convention refute the theory that there was a singular version of the language from the Virginia Declaration of Rights of 1776 which drafters in other states could mindlessly place in their own state constitutions as “boilerplate.”<sup>136</sup> Indeed, it would be more in line with the view of opponents of New Mexico statehood such as Senator Beveridge to dismiss the “natural rights” language in article II, section 4 of the New Mexico Constitution as the meaningless result of illiterate simpletons playing a game of “monkey see, monkey do” with another state’s constitution.

It is very problematic that such a view could be endorsed, even implicitly, in the portion of the New Mexico Supreme Court’s opinion in *Morris v. Brandenburg* which discussed “natural rights” under article II, section 4 of the New Mexico Constitution.<sup>137</sup> While the portion of the *Morris* opinion which purports to make a simplistic comparison between article II, section 4 and the Virginia Declaration of Rights should be disregarded as rambling dictum, a future opinion from that Court is needed to explain why such a comparison is not as simple as it first seems.

Other portions of *Morris v. Brandenburg* seem to acknowledge a more inclusive view, under which article II, section 4 serves “as a prism through which we view due process and equal protection guarantees,”<sup>138</sup> “a central component of our due process analysis” which provided a “lens” through which to view an incarcerated person’s “right to seek and obtain safety under article II, section 4,”<sup>139</sup> and “an overarching principle which informed the equal protection guarantee of our Constitution.”<sup>140</sup> A similarly inclusive view appears in *Johnson I*, which briefly quotes the “born equally free” language in article II, section 4 before turning its focus

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132. *Id.* at 102.

133. *Id.* at 108.

134. PRINCE, *supra* note 69, at 98.

135. Although there was one Socialist delegate to New Mexico’s Constitutional Convention in 1910, Mabry, *supra* note 58, at 170, and European immigrants had brought Marxism to the United States by that time, see THEODORE DRAPER, *THE ROOTS OF AMERICAN COMMUNISM* 11 (Transaction Publishers 2003), those facts appear to be an unlikely source of any significant influence on the original New Mexico Constitution which took effect in 1912.

136. See Ray, *supra* note 31, at 388, 406.

137. See *supra* notes 30–32 and accompanying text.

138. 2016-NMSC-027, ¶ 46, 376 P.3d 836, 853 (citing *Cal. First Bank v. State*, 1990-NMSC-106, ¶ 44, 111 N.M. 64, 801 P.2d 646).

139. *Id.* ¶ 47–48, 376 P.3d at 853–54 (citing *Reed v. State ex rel. Ortiz*, 1997-NMSC-055, ¶¶ 101–05, 124 N.M. 129, 947 P.2d 86).

140. *Id.* ¶ 49, 376 P.3d at 854–55 (citing *Griego v. Oliver*, 2014-NMSC-003, ¶ 1, 316 P.3d 865, 870).

to the Equal Rights Amendment in article II, section 18 of the New Mexico Constitution.<sup>141</sup>

Combined with the implementing legislation provided by the NMCRA in 2021, the historical and textual analysis provided above should help to overcome the methodological mistakes of the past and lead to the recognition of at least five important principles which make New Mexico's Bill of Rights distinctive from its federal counterpart. First, the "born equally free" and "natural rights" language in article II, section 4 expresses and acknowledges the ethical and philosophical foundations which may guide the interpretation of several other important guarantees in our state constitution's Bill of Rights. Under "natural rights" philosophies in the era of John Locke and his followers, our condition in a "state of nature" is a relatively peaceful one in which individuals are free to pursue their own interests in accordance with a God-given "law of nature" that prohibits us from harming one another.<sup>142</sup> This "state of nature" only devolves into a "state of war" when individuals violate the "law of nature" by enslaving or stealing from one another.<sup>143</sup> And the remedy for such violations of natural law is to form a "social contract" in which the power to adjudicate and enforce that law is vested in a civil government.<sup>144</sup> "Natural rights" philosophers would thus tell New Mexico's story as one of emergence from a state of war characterized by disputes over slavery and territory to a political society based on democratic norms, where a legitimate government exists under a "social contract" recorded in a written constitution, and where part of the legitimacy of that government arises from its open acknowledgment of "natural rights" which precede the existence of its social contract and may be afforded to persons who are not yet fully included in it. Insofar as the concepts of "natural rights" and "popular sovereignty" are premised on the notion of a "social contract," individuals must be afforded a fundamental right to make choices and be the creative agents of their own lives as a precondition for voluntarily entering into such a "social contract" with one another.

Second, while many "natural rights" philosophies of European origin reach their ethnocentric limits and warrant due criticism insofar as they posit indigenous peoples as living in a utopian "state of nature" under "noble savage" stereotypes,<sup>145</sup> New Mexico's steadfast adherence to "natural rights" in article II, section 4 nevertheless must be credited as a rejection of the overtly racist philosophies grounded in Social Darwinism and evinced by the early twentieth-century White Nationalist politics of Senator Beveridge and his contemporaries. The equal protection guarantees in article II, section 18 of the New Mexico Constitution should

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141. See 1999-NMSC-005, ¶ 32, 126 N.M. 788, 975 P.2d 841.

142. See Elahi, *supra* note 127, at 2–3; Celeste Friend, *Social Contract Theory*, INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/soc-cont/> [<https://perma.cc/E4GX-CG4A>].

143. See Friend, *supra* note 142.

144. See *id.*; Elahi, *supra* note 127, at 2–3.

145. See Brooke D. McNaughton, *The Noble Savage and Ecological Indian: Cultural Dissonance and Representations of Native Americans in Literature* (Jan. 3, 2010) (Undergraduate Honors Capstone Project, Utah State University) <https://digitalcommons.usu.edu/honors/70> [<https://perma.cc/KNR5-ZAD4>] (citing, *inter alia*, ROBERT F. BERKHOFFER, *THE WHITE MAN'S INDIAN* (1979)). Locke's "social contract" theory is also founded on an ethnocentric concept of "property," under which indigenous people have no legitimate claim to the land they inhabit because they do not apply their labor to exploit it in a manner recognized by Europeans. See Friend, *supra* note 142.



be read in the context of this important choice to include the “natural rights” language in article II, section 4 and reject Senator Beveridge’s bellicose imperialist rhetoric. Bigotry and prejudice are the opposite of the “law of reason” posited in “natural rights” philosophies. Thus, governmental actions which evince such irrational or discriminatory animus should be among the types of constitutional violations for which judicial remedies are afforded under article II, section 4 when it is made enforceable through the NMCRA and read together with other provisions in our Bill of Rights.

Third, while the precise scope of justiciable protections afforded by article II, section 4 has yet to be determined, one must start from the premise that the specific language New Mexico’s drafters chose for that section of our state constitution aligns with the “natural rights” clauses of other states which not only intended *but actually used* such language to provide a judicially enforceable remedy against state action which ratifies, enables, or engages in slavery or human trafficking.<sup>146</sup> As we catalog the many distinct types of legally cognizable injuries inherent in the practice of enslaving another person, the remedies available under the NMCRA should logically include careful judicial scrutiny of other state actions which bear attributes of involuntary servitude.<sup>147</sup> One such attribute is the denial of an individual’s choice or creative agency with respect to fundamental decisions about one’s bodily integrity, safety, and mental well-being. Thus, when read together with the Equal Rights Amendment in article II, section 18, the protections afforded by article II, section 4 should also extend to prohibiting laws which impose involuntary marital or sexual servitude, including those state restrictions on reproductive freedom which cannot survive strict scrutiny.<sup>148</sup>

Fourth, by describing certain rights as “inalienable” and “natural,” article II, section 4 expressly adds substantive components to the due process guarantees in New Mexico’s Bill of Rights,<sup>149</sup> which some jurists have argued are lacking in the Fifth and Fourteenth Amendments to the United States Constitution.<sup>150</sup> Interpreters of New Mexico’s Bill of Rights should not have to strain to find a textual basis for why certain arbitrary, irrational, and fundamentally unfair government actions are constitutionally prohibited regardless of what procedural protections accompany them. Article II, section 4 provides that textual source. And it is no surprise that slavery and involuntary servitude would kindle the first actionable judicial remedies under “natural rights” clauses such as article II, section 4,<sup>151</sup> because slavery and involuntary servitude are the polar opposites of popular sovereignty and self-government.

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146. See Calabresi & Vickery, *supra* note 108, at 1328–46.

147. The stigmatizing laws and practices which cause these injuries are often phrased as rhetorical tropes such as “badges” or “incidents” of slavery. See Nicholas Serafin, *Redefining the Badges of Slavery*, 56 U. RICHMOND L. REV. 1291, 1310–30 (2022).

148. See N.M. Right to Choose/NARAL v. Johnson (*Johnson I*), 1999-NMSC-005, ¶¶ 43, 54, 126 N.M. 788, 975 P.2d 841.

149. See N.M. CONST. art. II, § 4.

150. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 331–33 (2022) (Thomas, J., concurring); *United States v. Vaello Madero*, 596 U.S. 159, 167–71 (2022) (Thomas, J., concurring).

151. See Calabresi & Vickery, *supra* note 108, at 1330–35 (citing *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836)).

Fifth, neither article II, section 4 nor its enforcement mechanisms in the NMCRA should be read as simply a blank space in which jurists can insert their own personal or commercial preferences under the name of an “inherent right,” as the Supreme Court of the United States did in the era when *Lochner v. New York* was decided.<sup>152</sup> Insofar as only natural persons can be “born equally free” with “natural rights” under article II, section 4, the protections afforded by that section of our state constitution should not extend to corporate personhood.<sup>153</sup> Similarly, government agencies are not “born” and do not have “natural rights.”

**F. New Mexico procedural law retains characteristics which make it distinctive from the standards that federal courts have adopted for pleadings, summary judgment, and appellate review.**

In addition to considering how the *substantive* provisions of the Bill of Rights in the New Mexico Constitution can be independently interpreted without giving privileged status to federal law, it is relevant to consider how such an independent method of state constitutional interpretation is affected by New Mexico’s distinctive *procedural* law in the context of civil litigation.<sup>154</sup> Perhaps the most important *constitutional* procedure is the right to a jury trial, because trial by a jury is the mechanism through which the underlying right to “popular sovereignty” in article II, section 2 of the New Mexico Constitution takes concrete form within the judicial branch of state government.

Both the Seventh Amendment to the United States Constitution and article II, section 12 of the New Mexico Constitution guarantee the right to a jury trial for most civil claims for damages.<sup>155</sup> New Mexico courts have interpreted article II, section 12 as preserving “the right to jury trial in that class of cases in which it existed either at common law or by statute at the time of the adoption of the [New Mexico] Constitution.”<sup>156</sup> Thus, “the phrase ‘as it heretofore existed’ refers to the right to jury trial as it existed in the Territory of New Mexico at the time immediately preceding the adoption of the [New Mexico] Constitution.”<sup>157</sup> Such constitutional rights to a jury trial “cannot [subsequently] be denied by the legislature.”<sup>158</sup>

The Kearny Bill of Rights issued upon the United States’ military conquest of the New Mexico territory in 1846 simply stated that “the right of trial by jury shall

152. See generally 198 U.S. 45 (1905).

153. See generally James G. Wright III, *A Step Too Far: Recent Trends in Corporate Personhood and the Overexpansion of Corporate Rights*, 49 JOHN MARSHALL L. REV. 889, 921–23 (2016).

154. See *The Interpretation of State Constitutional Rights*, *supra* note 9, at 1361 (recognizing the significance of “previously established bodies of state law, independent of federal law, that establish or suggest distinctive state constitutional rights”).

155. Compare U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”) with N.M. CONST. art. II, § 12 (“The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.”).

156. *State ex rel. Bliss v. Greenwood*, 1957-NMSC-071, ¶ 11, 63 N.M. 156, 315 P.2d 223 (emphasis removed).

157. *Id.*

158. *Id.*

remain inviolate.”<sup>159</sup> Section 17 of the federal Organic Act Establishing the Territory of New Mexico in 1850 provided that: “The constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States.”<sup>160</sup> Section 19 of the Organic Act similarly provided that: “[N]o citizen of the United States shall be deprived of his life, liberty, or property, in said Territory, except by the judgment of his peers and the laws of the land.”<sup>161</sup>

In practice, “juries in New Mexico had embraced both Spanish- and English-speakers” for over twenty years before the territorial court expressly protected the rights of Spanish speakers to serve on juries in 1881.<sup>162</sup> These rights are also protected in article VII, section 3 of the New Mexico Constitution, which makes New Mexico “the only state in the country that constitutionally protects every citizen’s right to serve on a jury despite his or her ability to speak the English language.”<sup>163</sup> Thus, the right to a jury trial in New Mexico courts takes on added significance as a means of preserving the roles that the Spanish-speaking population played in state government, as the delegates to the 1910 Constitutional Convention intended.<sup>164</sup>

While the NMCRA does not expressly confer a *statutory* right to a jury trial “in an action to establish liability and recover actual damages,”<sup>165</sup> the provisions of law discussed above will almost certainly lead to the conclusion that claimants have a *constitutional* right to a jury trial in an action for damages under that section of the statute. The Supreme Court of the United States faced a similar question when deciding that there is a federal constitutional right to a jury trial on claims for damages under the corresponding federal civil rights statute.<sup>166</sup> *City of Monterey* was a plurality opinion with four Justices concluding there was a Seventh Amendment right to a jury trial for the particular type of claim at issue,<sup>167</sup> and Justice Scalia taking the broader view that all claims for damages under § 1983 are eligible to be tried by a jury.<sup>168</sup>

New Mexico courts will likely reach the same result with respect to claims for damages under the NMCRA.<sup>169</sup> That is because “[i]t is settled law . . . that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to ‘sound basically in tort,’ and seek

159. Bill of Rights as Declared by Brigadier General Stephen W. Kearny, cl. 5 (Sept. 22, 1846).

160. Act of Sept. 9, 1850, ch. 49, § 17, 9 Stat. 446, 452.

161. *Id.* § 19.

162. Edward L. Chávez, *New Mexico’s Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303, 305 (2008) (citing *Territory v. Romine*, 1881-NMSC-010, 2 N.M. 114).

163. Kyle P. Duffy, *Lost in Translation: New Mexico’s Non-English Speaking Jurors and the Right to Translated Jury Instructions*, 47 N.M. L. REV. 376, 376 (2017) (citing N.M. CONST. art. VII, § 3).

164. See Heflin, *supra* note 56, at 61; Romero, *supra* note 96, at 616–17.

165. See N.M. STAT. ANN. § 41-4A-3 (2021).

166. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 694 (1999) (interpreting 42 U.S.C. § 1983).

167. *Id.* at 721.

168. See *id.* at 730 (Scalia, J., concurring).

169. Cf. *Siebert v. Okun*, 2021-NMSC-016, ¶ 32, 485 P.3d 1265, 1273 (concluding that the constitutional right to a jury trial applies to claims for damages under the Medical Malpractice Act).

legal relief.”<sup>170</sup> In other words, the analysis of a new statute turns on whether “the general nature of the claim” is akin to an analogous, common-law cause of action to which the right to a jury trial historically attaches, and whether “the requested relief is legal or equitable.”<sup>171</sup> On these points, both federal courts and New Mexico courts appear to agree.

What is distinctive about New Mexico law, however, is “the procedure to be followed in securing the right” to a jury trial.<sup>172</sup> Notwithstanding the existence of a constitutional right to a jury trial when a party presents a claim for damages under the NMCRA, New Mexico courts retain the sovereign power to adopt “reasonable rules of court” procedure,<sup>173</sup> which include the rules for hearing and deciding motions for summary judgment under Rule 1-056 NMRA.<sup>174</sup> But unlike federal law—which gives Congress the final say in approving the Federal Rules of Civil Procedure—<sup>175</sup> rulemaking authority for procedures to be followed in state court ultimately rests with the New Mexico Supreme Court under article VI, section 3 of the New Mexico Constitution.<sup>176</sup>

The New Mexico Supreme Court has taken a very different path than federal courts with respect to the standards to be applied to pleadings, summary judgment, and appellate review. While federal courts now interject a “plausibility” requirement as a prerequisite to overcoming a motion to dismiss a pleading in federal court under Federal Rule of Civil Procedure 12(b)(6),<sup>177</sup> New Mexico courts have “maintained our state’s notice pleading requirements, emphasizing our policy of avoiding insistence on hyper technical form and exacting language.”<sup>178</sup> Thus, contrary to current practice in federal court,

New Mexico is a notice-pleading state, requiring only that the plaintiff allege facts sufficient to put the defendant on notice of his claims. As a result, our appellate courts have never required trial courts to consider the merits of a plaintiff’s allegations when deciding a motion to dismiss, and we see no justification for requiring such technical forms of pleading now.<sup>179</sup>

The contrast between state and federal procedural law becomes even more stark with respect to motions for summary judgment. As Justice Sotomayor recently observed in her opinion dissenting from the denial of a petition for a writ of certiorari in *N.S. ex rel. Lee v. Kansas City Board of Police Commissioners*, the “dual

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170. *City of Monterey*, 526 U.S. at 709 (citing *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

171. *Siebert*, ¶¶ 16–17, 485 P.3d at 1269–70.

172. See *Carlile v. Cont’l Oil Co.*, 1970-NMCA-051, ¶ 9, 81 N.M. 484, 468 P.2d 885. As noted above, New Mexico procedural law is also distinctive in securing the rights of Non-English Speakers to serve on juries. See *Duffy*, *supra* note 163, at 376.

173. *Carlile*, 1970-NMCA-051, ¶ 8, 468 P.2d at 887.

174. See *N.M. L. Grp., P.C. v. Byers*, 2018-NMCA-023, ¶¶ 3–4, 413 P.3d 875, 876.

175. See 28 U.S.C. §§ 2074–75.

176. See *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398, 120 P.3d 820 (citing N.M. CONST. art. VI, § 3).

177. See *Ashcroft v. Iqbal*, 556 U.S. 662, 680–83 (2009) (citing FED. R. CIV. P. 8; 12(b)(6)).

178. *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 10, 335 P.3d 1243, 1246.

179. *Madrid v. Vill. of Chama*, 2012-NMCA-071, ¶ 17, 283 P.3d 871, 876 (citations omitted).

mistakes” of “resolving factual disputes or drawing inferences in favor of the police, then using those inferences to distinguish otherwise governing precedent—have become the calling card of many courts” approach to deciding summary judgment motions when a qualified immunity defense is raised in response to a federal civil rights claim.<sup>180</sup> “The result is that a purportedly ‘qualified’ immunity becomes an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations,” which federal courts view as “not worthy of remedy.”<sup>181</sup>

The adjudication of claims under the NMCRA should follow a different procedural course, because “New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits.”<sup>182</sup> New Mexico courts’ rationale for rejecting the federal summary judgment standard is based on the important democratic function performed by jury trials in a state government based on popular sovereignty:

We continue to refuse to loosen the reins of summary judgment, as doing so would turn what is a summary proceeding into a full-blown paper trial on the merits. We do not wish to grant trial courts greater authority to grant summary judgment than has been traditionally available in New Mexico. Permitting trial courts a license to quantify or analyze the evidence in a given case under whatever standard may apply . . . would adversely impact our jury system and infringe on the jury’s function as the trier of fact and the true arbiter of the credibility of witnesses.<sup>183</sup>

The same emphasis on deference to the factfinder at trial is a consistent feature of the standard for appellate review employed by New Mexico courts. “Under this standard, we resolve all factual disputes and indulge all reasonable inferences in favor of the party who prevailed in the trial court.”<sup>184</sup> “Challenges to a district court’s factual findings will not be disturbed on appeal so long as they are supported by substantial evidence,” and appellate courts “[do] not reweigh the evidence . . . [nor] substitute its judgment for that of the fact finder.”<sup>185</sup> Similarly, the New Mexico Supreme Court has emphasized “our state interest in insuring [sic] accuracy and the superior ability of our state courts to make accurate factual findings” under the procedures outlined above as a “sufficient reason” to depart from federal law in habeas cases.<sup>186</sup>

180. 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting). *See also* N.M. C.R. COMM’N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT 20 (2020) (also noting Justice Sotomayor’s dissenting opinions regarding qualified immunity).

181. *N.S. ex rel. Lee*, 143 S. Ct. at 2424 (Sotomayor, J., dissenting).

182. *See* *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280 (citing “the ‘*Celotex* trilogy”).

183. *Id.* ¶ 9, 242 P.3d at 288 (citations and internal quotation marks omitted); *see also* *Ridlington v. Contreras*, 2022-NMSC-002, ¶¶ 12–13, 501 P.3d 444, 448. As noted above, jury trials also function as a means of preserving the rights of Non-English speakers’ participation in state government. *See* *Duffy*, *supra* note 163, at 376.

184. *Ruiz v. Vigil-Giron*, 2008-NMSC-063, ¶ 13, 145 N.M. 280, 196 P.3d 1286 (citations omitted).

185. *Reynolds v. Landau*, 2020-NMCA-036, ¶ 18, 468 P.3d 928, 935 (citations omitted); *accord* *State ex rel. CYFD v. Amanda M.*, 2006-NMCA-133, ¶ 23, 140 N.M. 578, 144 P.3d 137.

186. *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 21, 142 N.M. 89, 163 P.3d 476.

In contrast, recent opinions from the Supreme Court of the United States exhibit almost no deference at all to factual findings of the trial court.<sup>187</sup> Indeed, some of the Justices of that court seek to contradict what they do not like about the trial court record by citing new sources for the first time on appeal.<sup>188</sup> Without an opportunity for counsel to cross-examine the new source cited for the first time on appeal, however, the proposition for which it is cited may turn out to be completely inaccurate.<sup>189</sup>

One of the consistent features of federal procedural law is its effect of transferring decision-making in federal civil rights cases from juries to federal judges, who may opine on whether the law is clearly established with the requisite specificity in successive rounds of pretrial motion practice and appeals before such cases can ever reach a jury.<sup>190</sup> A recent analysis found that “95% of all qualified immunity appeals by defendants” in the Tenth Circuit from 2017 to 2020 “were interlocutory.”<sup>191</sup> Far from protecting against burdens of litigation or improving judicial operations, qualified immunity is better described as a litigation machine that “incentivizes wasteful interlocutory appeals by officers of the denial of qualified immunity which delay cases for years, impose costs on plaintiffs, and deter the filing of civil rights cases” in federal court.<sup>192</sup>

What purpose is served by spending so much time and resources deciding qualified immunity issues through multiple rounds of pretrial motions and interlocutory appeals in federal court? Some scholars argue that the effect of this practice is to allow federal judges to usurp the role traditionally played by a fairly selected jury and thereby censor the perspectives that would otherwise result from the greater levels of racial, economic, linguistic, and gender diversity found in such a jury.<sup>193</sup> Such a tectonic judicial policy shift away from the Seventh Amendment right to a jury trial is accomplished by adding the requirement of “clearly established law” to federal civil rights claims and making it a question of law for judges to

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187. See *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 600 U.S. 181, 343–51 (2023) (Sotomayor, J., dissenting).

188. See, e.g., *id.* at 285 n.12 (Thomas, J., concurring) (citing ALISON STEWART, *FIRST CLASS: THE LEGACY OF DUNBAR 2* (2013) as evidence of “black achievement in ‘racially isolated’ environments”).

189. See Alison Stewart, *Clarence Thomas Cited My Work in His Affirmative Action Opinion. Here’s What He Got Wrong*, HUFFPOST (July 15, 2023), [https://www.huffpost.com/entry/clarence-thomas-affirmative-action-dunbar\\_n\\_64b04512e4b0ad7b75f1b3a1](https://www.huffpost.com/entry/clarence-thomas-affirmative-action-dunbar_n_64b04512e4b0ad7b75f1b3a1) [<https://perma.cc/SZ8G-FY8X>].

190. See David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-Racist Heart of § 1983, Weaponizing Interlocutory Appeal, and the Routine of Police Violence Against Black Lives*, 98 DENV. L. REV. 629 (2021).

191. *Id.* at 629–30, 675–77.

192. *Id.* at 630.

193. See *id.* at 661–65; see also JOANNA SCHWARTZ, *SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE* 122, 280, (Viking 2023) (“Analysis of thousands of qualified immunity decisions revealed that judges appointed by Republican presidents are more likely to grant qualified immunity than judges appointed by Democratic presidents, and judges located in more Republican-leaning regions of the country are more likely to grant qualified immunity.”) (citing Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L. J. 55, 55–122 (2016); Aaron L. Nielson and Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 1–65 (2015)). Federal judges are predominantly white males. See Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELEY LA RAZA L. J. 92, 111–17 (2016).

decide.<sup>194</sup> If the Court's function is to seek truth and justice, not limit diverse perspectives, then the transparency provided by prompt discovery and fair jury trials serves as the best way to filter out meritless cases, not endless rounds of briefing on motions and appeals devoted to an unworkable standard such as "clearly established law."

The differences in procedural law applied by federal and New Mexico courts outlined above have become significant enough to support a recent holding that a plaintiff "did not have a full and fair opportunity to litigate the state law issues in the federal court proceeding," and thus the federal court's earlier ruling had no preclusive effect on those issues in state court.<sup>195</sup> This holding was supported by differences between state and federal court with respect to which issues are decided by a jury rather than a judge, differences in allocating the burden of proof, and the more limited set of facts which the federal court considered.<sup>196</sup>

These factors, along with procedural differences noted above, may explain why it is difficult for a plaintiff to develop the elements of a federal civil rights claim in federal court, much less get a fair hearing on them. Federal courts tend to frame the elements of a federal civil rights claim as questions of law so they can be the subject of dispositive rulings at the pleadings stage, on summary judgment, or for the first time on appeal.<sup>197</sup> New Mexico courts, on the other hand, are less inclined to usurp or diminish the jury's factfinding role at the pretrial stages of litigation.<sup>198</sup> Thus, New Mexico courts focus on defining the elements of a claim in the context of jury instructions that are comprehensible to non-lawyers, instead of relying on a hyper-technical and ever-changing body of federal common law.<sup>199</sup>

Insofar as they are litigated in state court, claims under the NMCRA will be subject to these procedural differences in every single case, regardless of which provision of the Bill of Rights in the New Mexico Constitution is at issue. Federal civil rights claims, on the other hand, are typically filed in or removed to federal court, where they often languish without ever reaching a jury.<sup>200</sup> For these reasons, it does not make sense to give federal court opinions on federal civil rights claims any privileged status when interpreting parallel provisions in our state constitution in the context of an NMCRA claim that is being litigated in state court. Instead, state courts should develop their own body of state constitutional law for NMCRA claims

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194. Maxted, *supra* note 190, at 664–65.

195. *Hernandez v. Parker*, 2022-NMCA-023, ¶ 33, 508 P.3d 947, 958.

196. *Id.* at ¶ 34–36, 508 P.3d at 959.

197. *See, e.g.*, *Ruiz v. McDonnell*, 299 F.3d 1173, 1183, 1883 n.5 (10th Cir. 2002).

198. *See, e.g.*, *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280.

199. *See Duffy*, *supra* note 163, at 382–97 (noting that "New Mexico has used written [jury] instructions since its territorial days," explaining that "it is mandatory for the judge to send back written instructions in every civil and criminal trial," and arguing for the expanded use of translated written instructions for Non-English speaking jurors).

200. *See, e.g.*, *Pauly v. White*, 874 F.3d 1197, 1205–12 (10th Cir. 2017) (describing the lengthy procedural history of a case removed to federal court in 2012, in which federal civil rights claims became the subject of an interlocutory appeal and were ultimately rejected in 2017); *see generally* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 357–59 (2013); Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2099–109 (2017).

that is tailored to the strong preference for jury trials expressed in the state's standards for pleading, summary judgment, and appellate review described above.

**G. New Mexico's rejection of the common law doctrine of sovereign immunity evinces distinctive state characteristics which apply to civil litigation in the State's courts.**

Another distinctive feature of New Mexico law which has obvious relevance to NMCRA claims is its treatment of sovereign immunity. With a limited exception for legislation to enforce Section 5 of the Fourteenth Amendment, the Supreme Court of the United States has expanded states' sovereign immunity for claims brought under federal statutes, even when such claims are brought in state court.<sup>201</sup> This form of

*constitutional* sovereign immunity as that principle has emerged in U.S. Supreme Court opinions . . . is rooted in concepts of federalism, the Eleventh Amendment, and the compact between states and the federal government inherent in the U.S. Constitution, all of which reserve to the states certain inherent powers of sovereignty. As a principle of federalism, *constitutional* sovereign immunity circumscribes the power of the U.S. Congress to create statutory rights and enforce them against the states absent their consent.<sup>202</sup>

In New Mexico, this *constitutional* sovereign immunity from claims under federal statutes can only be waived by the state legislature, not by state courts.<sup>203</sup>

In contrast, it is up to New Mexico courts, not the federal courts, to decide whether or to what extent our state government has any form of immunity under New Mexico common law.<sup>204</sup> And one of the distinctive characteristics of New Mexico common law is the New Mexico Supreme Court's sweeping abolition of sovereign immunity in *Hicks v. State*.<sup>205</sup>

Thus, when interpreting the NMCRA, it is important to remember both the original rationale for such common-law doctrines of sovereign immunity as well as the more recent and compelling reasons for their abolition:

[I]t is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do

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201. See *Gill v. Pub. Emps. Ret. Bd. of Pub. Emps. Ret. Ass'n of N.M.*, 2004-NMSC-016, ¶ 5–8, 135 N.M. 472, 90 P.3d 491 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706, 711 (1999)).

202. *State ex rel. Hanosh v. State ex rel. King*, 2009-NMSC-047, ¶ 6, 147 N.M. 87, 217 P.3d 100 (emphasis in original).

203. See *Cockrell v. Bd. of Regents of N.M. State Univ.*, 2002-NMSC-009, ¶ 14–15, 132 N.M. 156, 45 P.3d 876.

204. *Hanosh*, 2009-NMSC-047, ¶ 7, 217 P.3d at 103.

205. 1975-NMSC-056, ¶ 15, 88 N.M. 588, 544 P.2d 1153, *superseded by statute*, Tort Claims Act, 1976 N.M. Laws 159 (codified as amended at N.M. STAT. ANN. §§ 41-4-1 to -21 (1976)); see also *Torrance Cnty. Mental Health Program, Inc. v. N.M. Health & Env't Dep't*, 1992-NMSC-026, ¶ 15, 113 N.M. 593, 830 P.2d 145.



no wrong,’ should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where is justly belongs.<sup>206</sup>

This rationale also accords with the concepts of popular sovereignty and self-government stated in article II, sections 2 and 3 of the New Mexico Constitution—concepts which were particularly important to the drafters of the New Mexico Constitution given their long history of being denied statehood while under territorial rule by the federal government.<sup>207</sup>

The New Mexico Supreme Court later interpreted *Hicks* to mean that New Mexico “generally abolished the common law doctrine of sovereign immunity *in all its ramifications*, whether in tort or contract or otherwise, except as implemented by statute or as might otherwise be interposed by judicial decision for sound policy reasons.”<sup>208</sup> “All such common-law notions were swept aside in *Hicks* when this Court made clear that archaic and medieval notions of common-law sovereign immunity (‘the King can do no wrong’) no longer serve the public interest of our state.”<sup>209</sup>

Thus, even before the NMCRA took effect in 2021, it was possible to successfully bring a civil action for declaratory and injunctive relief to remedy a state constitutional violation.<sup>210</sup> Similarly, New Mexico’s courts have recognized for years that “it is completely within the Legislature’s authority to provide greater statutory protection than accorded under the federal Constitution.”<sup>211</sup>

It follows that even when a federal statute is unenforceable against the State due to *constitutional* sovereign immunity recognized by federal courts,<sup>212</sup> the New Mexico Legislature remains free to enact its own legislation providing a remedy under state law for the same type of violation.<sup>213</sup> In interpreting such state statutes, New Mexico courts’ “reliance on methodology developed by federal courts should not be interpreted as an indication that we have adopted federal laws,” because in that context New Mexico courts “cite federal cases only to the extent that we find them instructive and not as binding precedent.”<sup>214</sup> Indeed, the adoption of the interstitial approach to state constitutional interpretation in *Gomez* is an acknowledgment that federal interpretations of parallel provisions in the United

206. *Hicks*, 1975-NMSC-056, ¶ 11, 544 P.2d at 1156 (citations and internal quotation marks omitted).

207. See discussion *supra* notes 68–95.

208. *Torrance*, 1992-NMSC-026, ¶ 14, 830 P.2d at 149 (emphasis added).

209. *Hanosh*, 2009-NMSC-047, ¶ 11, 217 P.3d at 104.

210. See, e.g., N.M. Right to Choose/NARAL v. Johnson (*Johnson I*), 1999-NMSC-005, ¶ 23, 126 N.M. 788, 975 P.2d 841.

211. *State v. Javier M.*, 2001-NMSC-030, ¶ 24, 131 N.M. 1, 33 P.3d 1.

212. See, e.g., *Alden*, 527 U.S. at 711.

213. See, e.g., *Cates v. Regents of the N.M. Inst. of Mining & Tech.*, 1998-NMSC-002, ¶ 15, 124 N.M. 633, 954 P.2d 65 (citing N.M. STAT. ANN. § 28-1-7(A) (1987) (amended 1995) for the proposition that “[t]he New Mexico Human Rights Act prohibits employment discrimination on the basis of age”).

214. *Id.* ¶ 15 n.2, 954 P.2d at 69 n.2 (citations and quotation marks omitted).

States Constitution are not binding on New Mexico courts when interpreting the Bill of Rights in the New Mexico Constitution.<sup>215</sup>

The New Mexico Supreme Court's abolition of common law sovereign immunity, as well as the New Mexico Legislature's authority to impose statutory requirements on state government unconstrained by federalism concerns or constitutional sovereign immunity, provides yet another distinctive state characteristic which diminishes the value of federal court opinions interpreting parallel provisions of the Bill of Rights in the United States Constitution or the body of federal common law which has developed around § 1983. As discussed in the next sections of this article, doctrines of federal civil rights law such as qualified immunity and the limitations on municipal liability are also unnecessary and inapposite to determining a public body's liability under the NMCRA for violating the Bill of Rights in the New Mexico Constitution.

#### **H. The NMCRA provides distinctive statutory characteristics which warrant departure from federal common law interpreting § 1983.**

Distinctive characteristics evident in the text of the NMCRA show that the New Mexico Legislature was aware of many of the features of New Mexico law discussed above and made specific choices to draft that statute differently than § 1983 or the federal common law doctrines which developed around it.<sup>216</sup> Just as the Bill of Rights in the New Mexico Constitution is not a “monkey see, monkey do” imitation of its counterpart in the United States Constitution, the NMCRA is not a “monkey see, monkey do” imitation of a federal civil rights statute.

As it currently appears in the United States Code, the text of § 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act

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215. See *Gomez*, 1997-NMSC-006, ¶ 17, 932 P.2d at 6 (“[S]tates have inherent power as separate sovereigns in our federalist system to provide more liberty than is mandated by the United States Constitution.”).

216. These differences are highlighted in the report that the New Mexico Civil Rights Commission presented to the Legislature, which includes a detailed rationale for rejecting the doctrine of qualified immunity and imposing liability on public bodies instead of individual employees. N.M. C.R. COMM’N, *supra* note 180, at 1–2, app. III.

of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>217</sup>

Recent scholarship has unearthed an additional clause in the original version of the statute passed by Congress in 1871, which never made it into the United States Code due to a series of scrivener's errors.<sup>218</sup> "In between the words 'shall' and 'be liable,' the statute contained the following clause: '*any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding.*'"<sup>219</sup>

Labeled the "Notwithstanding Clause" by Professor Reinert, this language in the text of § 1983 is significant because it provides a textual basis for concluding that Congress intended to preclude common-law defenses to liability under the statute, including the doctrine of qualified immunity.<sup>220</sup> By erasing the "Notwithstanding Clause," current federal precedents interpreting § 1983 loosely infer the opposite intention based on a canon of construction according to which "statutes in 'derogation' of the common law should be strictly construed," absent clear language to the contrary in the statute's text.<sup>221</sup> This canon of construction provides a starting point for the much-criticized federal common law doctrine of qualified immunity, which operates to preclude liability for an individual state actor's violations of a person's federal constitutional rights unless that violation is supported by an increasingly narrow and distorted definition of "clearly established law."<sup>222</sup>

Delving into the vast body of scholarly research and publications criticizing the doctrine of qualified immunity is largely unnecessary for purposes of the present article because one of the distinctive features of the NMCRA is that it expressly prohibits the use of that doctrine as a defense to liability for violations of the Bill of Rights in the New Mexico Constitution.<sup>223</sup> Even assuming the viability of the canon of construction according to which statutes are presumed not to derogate common-law defenses, that canon has no application to a qualified immunity defense under the NMCRA because the statute provides clear language to the contrary and, in any

217. 42 U.S.C. § 1983.

218. See Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 235–37 (2023). Professor Reinert was among the scholars who presented testimony regarding qualified immunity to the New Mexico Civil Rights Commission. N.M. C.R. COMM'N, *supra* note 180, at 9 (listing presenters at the commission's meeting on Sept. 18, 2020).

219. Reinert, *supra* note 218, at 235 (quoting the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (emphasis added)).

220. See *id.* at 235–36.

221. See *id.* at 216–17, 210–11 n.56 (citing *Malley v. Briggs*, 475 U.S. 335, 339–42 (1986); *Briscoe v. Lahue*, 460 U.S. 325, 337 (1983); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)).

222. See *id.* at 212, 216–17. For a broader discussion of qualified immunity and its criticisms, see William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1951–59 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1833–36 (2018).

223. See N.M. STAT. ANN. § 41-4A-4 (2021) (prohibiting the use of qualified immunity as a defense); see also *id.* §§ 41-4A-9 to -10 (2021) (expressly waiving sovereign immunity for claims under the NMCRA but reserving judicial, legislative, and other established forms of immunity).

event, the New Mexico Supreme Court has “generally abolished the common law doctrine of sovereign immunity” in this state.<sup>224</sup>

The creation of the qualified immunity defense in § 1983 litigation is but one of many instances in which federal courts have developed and modified their own federal common law rules or doctrines to fill actual or perceived gaps in the language of the federal statute.<sup>225</sup> Section 1983, for example, does not expressly state a limitations period for claims under the statute,<sup>226</sup> and is silent on how to measure damages for a federal constitutional violation,<sup>227</sup> as well as who or which government agency, if any, should pay monetary judgments or fee awards when such violations are proven.<sup>228</sup>

Similar to the deference afforded to federal law under the interstitial approach to state constitutional interpretation adopted in *Gomez*,<sup>229</sup> federal courts employ “a three-step process in determining . . . the proper rules of decision applicable to [federal] civil rights claims.”<sup>230</sup>

First, courts are to look to the laws of the United States “so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.” If no suitable federal rule exists, courts undertake the second step by considering application of state “common law, as modified and changed by the constitution and statutes” of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not “inconsistent with the Constitution and laws of the United States.”<sup>231</sup>

This three-step process, however, has many shortcomings even in those instances where the court looks to state common law to supply a rule of decision for a federal civil rights claim.

For example, in adopting New Mexico’s three-year statute of limitations period as the rule of decision for federal civil rights claims under § 1983 that arise in this state, the United States Supreme Court relied heavily on “[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation” to support

224. *Torrance Cnty. Mental Health Program, Inc. v. N.M. Health & Env’t Dep’t*, 1992-NMSC-026, ¶ 14, 113 N.M. 593, 830 P.2d 145; *see also* *State ex rel. Hanosh v. State ex rel. King*, 2009-NMSC-047, ¶ 11, 147 N.M. 87, 217 P.3d 100.

225. *See* *Reinert*, *supra* note 218, at 240–41; *see, e.g., Moor v. Cnty. of Alameda*, 411 U.S. 693, 724 (1973) (citing language in 42 U.S.C. § 1988(a) under which “the common law” may be “extended to” fill statutory gaps in 42 U.S.C. § 1983 when it is “deficient in the provisions necessary to furnish suitable remedies and punish offenses against law”).

226. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985); *see also Walker v. Maruffi*, 1987-NMCA-048, ¶ 15, 105 N.M. 763, 737 P.2d 544.

227. *See Smith v. Wade*, 461 U.S. 30, 51, 53–55 (1983) (relying on common law principles to determine whether the jury was properly instructed that it could award punitive damages under § 1983).

228. *See, e.g., Carver v. Sheriff of La Salle Cnty., Ill. (Carver I)*, 243 F.3d 379, 381–82 (7th Cir. 2001), *certifying questions to Carver v. Sheriff of La Salle Cnty (Carver II)*, 787 N.E.2d 127 (Ill. 2003), *vacated by Carver v. Sheriff of LaSalle Cnty., Ill. (Carver III)*, 324 F.3d 947 (7th Cir. 2003).

229. *State v. Gomez*, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1.

230. *Walker*, 1987-NMCA-048, ¶ 16, 737 P.2d at 547.

231. *Burnett v. Grattan*, 468 U.S. 42, 47–48 (1984) (quoting 42 U.S.C. § 1988) (citations omitted).

its decision to borrow only the state's general limitations period for personal injury actions, while refusing to consider other limitations periods available under state law that are more tailored to the specific claim at issue.<sup>232</sup> Essentially, *Wilson v. Garcia* adopted a “one size fits all” rule of decision because it did not want to be bothered with accurately sorting out the details of each state's statutes of limitations on a claim-specific level.<sup>233</sup>

Conversely, punting to each state's laws for determining who or which entity is responsible for paying a judgment or fee award under § 1983 and § 1988 could encourage a kind of “huckster's shell game” in which governmental entities and their insurers may attempt to subdivide their duties “in such a fashion that the responsible person can't pay, and the entity that can pay isn't responsible for doing so.”<sup>234</sup> Thus, the three-step process that federal courts apply for arriving at a rule of decision in § 1983 cases can also result in no rule at all.<sup>235</sup>

The NMCRA avoids these problems by expressly filling many of the gaps in federal civil rights law that continue to befuddle federal courts and lead them to inconsistent and inequitable results. The type of three-step process employed in *Wilson*<sup>236</sup> for determining a limitations period is unnecessary, because the NMCRA expressly provides a three-year limitations period “unless a longer statute of limitations is otherwise provided by state law.”<sup>237</sup> That statutory language also makes clear that NMCRA claims are not bound by the uniform three-year limitations period established for all § 1983 claims in *Wilson* and applied in *Varnell*. Instead, New Mexico courts can tailor the NMCRA's limitations period to the specific type of state constitutional claim at issue.

Determining what kinds of damages may be awarded under the NMCRA and which government entity is required to pay them is also guided by express language in the statute. Section 41-4A-3 of the NMCRA provides that:

Claims brought pursuant to the New Mexico Civil Rights Act shall be brought exclusively against a public body. Any public body named in an action filed pursuant to the New Mexico Civil Rights Act shall be held liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body.<sup>238</sup>

The NMCRA sets a “maximum recovery limit” for “actual damages” that increases according to a formula for determining cost-of-living adjustments and post-judgment

232. 471 U.S. 260, 272–76 (1985); *see also* *Varnell v. Dora Consol. Sch. Dist.*, 756 F.3d 1208, 1212 (10th Cir. 2014) (refusing to consider a more specific limitations period for cases of childhood sexual abuse).

233. *See* 471 U.S. at 280 (O'Connor, J., dissenting).

234. *Carver II*, 787 N.E.2d 127, 132 (Ill. 2003).

235. *See Carver I*, 243 F.3d 379, 381, 386 (concluding that “no free-standing rule of federal law requires any particular state or local entity to pay a judgment”).

236. 471 U.S. at 267–68.

237. N.M. STAT. ANN. § 41-4A-7 (2021).

238. *Id.* § 41-4A-3 (2021).

interest.<sup>239</sup> The statute also specifies which entity is required to pay a judgment under the NMCRA:

A judgment awarded pursuant to the New Mexico Civil Rights Act against a person acting on behalf of, under color of or within the course and scope of the authority of the public body shall be paid by the public body. The public body shall also pay for all litigation costs for the public body and for any person acting on behalf of, under color of or within the course and scope of the authority of the public body, including attorney fees.<sup>240</sup>

Finally, the statute requires each public body to “maintain a record of all final judgments and settlements paid by the public body for claims made pursuant to” the NMCRA, which are “subject to disclosure” under New Mexico’s Inspection of Public Records Act.<sup>241</sup>

Each of the provisions of the NMCRA discussed above is a “distinctive state characteristic” that warrants departure under the interstitial approach to state constitutional interpretation. Moreover, these characteristics are so distinctive that they render the corresponding federal rules of decision (or indecision) for § 1983 claims inapposite and inapplicable to NMCRA claims, thereby diminishing the value of the three-step approach that federal courts use to find common-law analogs in § 1983 litigation. Examining differences between federal and state law on this subject at a more structural level, the next section of this article will show how the distinctive provisions of the NMCRA affect not only its administration, but also the substantive elements of the state constitutional claims for which the NMCRA provides a statutory enforcement mechanism.

#### **IV. THE NMCRA EVINCES AND UNDERScores IMPORTANT STRUCTURAL DIFFERENCES BETWEEN THE FEDERAL GOVERNMENT AND THE STATE OF NEW MEXICO WHICH PROVIDE THE FRAMEWORK FOR AN INDEPENDENT METHOD OF CONSTITUTIONAL INTERPRETATION BY THE COURTS OF THIS STATE**

##### **A. Principles of federalism lead to structural differences which constrain a federal court’s review of actions by state government but do not apply to a state court’s review of such actions.**

While mentioning “structural differences between state and federal government” as a potential reason for departing from federal law when interpreting the Bill of Rights in the New Mexico Constitution, *Gomez* neither defined nor applied such a basis for departure when deciding the state constitutional question presented in that case.<sup>242</sup> The note in the *Harvard Law Review* which *Gomez* cites as the source of this reason for departure under the interstitial approach acknowledges

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239. *Id.* § 41-4A-6 (2021).

240. *Id.* § 41-4A-8 (2021).

241. *Id.* § 41-4A-11 (2021) (referencing N.M. STAT. ANN. § 14-2-1 to -12 (2021)).

242. *See State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1.

that “structural differences between federal and state constitutional institutions . . . are virtually omnipresent but are rarely noted by the courts as reasons for independent state constitutional interpretation.”<sup>243</sup> To the extent they can be defined at a more specific level, such “structural differences” may simply be a subset of the broader category of “distinctive state characteristics” discussed above. But again, every state government is structurally different from the federal government in some ways, so this approach hardly yields a limiting principle for adhering to the interstitial method of state constitutional interpretation. On the contrary, structural differences between state and federal government support transitioning from the interstitial approach to a more inclusive and independent method of state constitutional interpretation for all claims under the NMCRA.<sup>244</sup>

The New Mexico Supreme Court relied on and articulated a structural difference between state and federal government when it decided to allow relief for “actual innocence” claims under a writ of habeas corpus pursuant to state law even though there is no such freestanding “actual innocence” claim available under federal habeas law.<sup>245</sup> The relevant “structural difference” in *Montoya* was that the federal habeas statute at issue placed federal courts in the position of reviewing state-court judgments in criminal cases.<sup>246</sup> In that situation, federal courts are constrained by “principles of federalism” which do not apply to a state court’s review of a habeas petition directed at another proceeding within that same state’s court system.<sup>247</sup> Conversely, “the New Mexico Constitution is obligated to protect our State’s sovereignty,” and “[i]ntrinsic within state sovereignty is an interest protecting the credibility of the state judiciary.”<sup>248</sup> Thus, the Court identified “our state interest in insuring accuracy and the superior ability of our state courts to make accurate factual findings” as persuasive reasons to depart from federal habeas law with respect to “freestanding innocence claims brought by habeas petitioners.”<sup>249</sup>

Without identifying any textual differences from their federal counterparts, *Montoya* identified the due process protections in article II, section 18 of the New Mexico Constitution and the prohibition on cruel and unusual punishment in article II, section 13 as the state constitutional grounds on which such “actual innocence” claims could be adjudicated in state court.<sup>250</sup> The Court also identified some of its earlier state-court precedents interpreting other provisions in the Bill of Rights in New Mexico’s Constitution more broadly than federal law as “distinctive state characteristics” warranting departure.<sup>251</sup>

For the reasons discussed in the preceding section of this article, the portion of *Montoya* citing prior case law as a “distinctive state characteristic” is unconvincing as a stand-alone basis for departure under the interstitial approach, particularly when none of that prior case law addressed the same issue or even the

243. *The Interpretation of State Constitutional Rights*, *supra* note 9, at 1360.

244. *See* Vanzi & Baker, *supra* note 4, at 16–20.

245. *Montoya v. Ulibarri*, 2007-NMSC-035, ¶¶ 19–24, 142 N.M. 89, 163 P.3d 476.

246. *See id.*

247. *See id.* ¶¶ 20–21, 163 P.3d at 476.

248. *Id.* ¶ 21, 163 P.3d at 476.

249. *Id.*

250. *See id.* ¶¶ 23–24, 163 P.3d at 476 (citing N.M. CONST. art. II, §§ 13, 18).

251. *See id.* ¶ 22, 163 P.3d at 476.

same provision in our state constitution. What the citation to those cases in *Montoya* does show is that by the time the Court elected to depart from federal habeas law for “actual innocence” claims, New Mexico was already developing a “critical mass” of independent state constitutional law which was starting to displace earlier reliance on federal law under principles of stare decisis, without the need for a supplemental justification for departure under the interstitial approach.<sup>252</sup>

In any event, the “structural difference” involved when federal courts review the actions of a state government official or agency provides a convincing rationale for departure not only with respect to “actual innocence” claims in federal habeas proceedings, but also with respect to federal civil rights claims under § 1983.<sup>253</sup> After all, the limited remedy provided in § 1983 only applies to state action. When adjudicating § 1983 claims, federal courts are operating under similar federalism constraints which would not apply to a state court’s application of the protections in its own state constitution to its own state’s employees or agents. Such reliance on principles of federalism may also help to explain why federal courts are so miserly and hesitant when it comes to filling in statutory gaps in the context of § 1983 litigation under the three-step process for arriving at a federal rule of decision (or indecision) discussed in the previous section of this article.

For all claims alleging state constitutional violations under the NMCRA, the New Mexico Constitution is obligated to protect our State’s sovereignty just as it would in a habeas case, and state courts have an equally important interest in ensuring that state actors comply with the requirements of their own state’s constitution. Just as it would be fundamentally unfair to allow state actors to punish an individual who was actually innocent based solely on the unavailability of federal habeas relief in that situation, it would be fundamentally unfair to allow an individual whose state constitutional rights were violated by a state actor to be deprived of a remedy for that violation based solely on the unavailability of such a remedy under federal common law applying § 1983—particularly where the unavailability of that remedy is caused by a federal common law doctrine such as qualified immunity, or flawed features of federal procedural law such as “plausibility” pleading standards or excessive reliance on summary judgment to prevent jury trials.<sup>254</sup>

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252. It is also questionable why the *Montoya* opinion focused on the prohibition on cruel and unusual punishment in article II, section 13 of the New Mexico Constitution, when no punishment at all would be justified for a habeas petitioner who was proven to be “actually innocent.” See *id.* ¶ 24, 163 P.3d at 476. For reasons also discussed in the preceding section of this article, the “born equally free” and “natural rights” language in article II, section 4 of the New Mexico Constitution would seem to be a better fit, or at least provide added support, for “an actual innocence” claim. See N.M. CONST. art. II, § 4. Incarcerating someone who has committed no crime at all is analogous to the types of involuntary servitude and completely arbitrary government action for which state constitutional provisions like article II, section 4 historically provided a remedy. See Calabresi & Vickery, *supra* note 108, at 1328–1346.

253. See *Montoya*, 2007-NMSC-035, ¶ 21, 163 P.3d at 476.

254. See, e.g., *Youbyoung Park v. Gaitan*, 680 Fed. Appx. 724, 732–738 (10th Cir. 2017) (unpublished disposition granting qualified immunity to sheriff’s deputies after concluding they lacked probable cause for an arrest under New Mexico law); cf. *Hernandez v. Parker*, 2022-NMCA-023, ¶¶ 33–36, 508 P.3d 947, 959 (noting how features of federal law may deprive a litigant of a full and fair opportunity to litigate the elements of a state-law claim in federal court). For several additional examples of federal case law which deny a federal remedy for civil rights violations based on the doctrine of qualified immunity, see N.M. C.R. COMM’N, *supra* note 180, at 23–24.



The NMCRA removes the former impediments to allowing New Mexico's state courts to adjudicate and provide "actual damages" for violations of the Bill of Rights in the New Mexico Constitution committed by the state's own actors. Under these new circumstances, the "structural difference" occasioned by the absence of federalism concerns in state court not only provides a reason for departure from federal law; it provides a reason for departing from the interstitial approach altogether when adjudicating NMCRA claims.

**B. Structural differences in the way state and federal judges are selected and retained support the need for an independent method of state constitutional interpretation in which federal law is not afforded the privileged status that federal judges receive under Article III of the United States Constitution.**

Under the provisions of article VI of the New Mexico Constitution, the State's judges are either appointed by an elected Governor or elected by popular vote for a specific term of office.<sup>255</sup> New Mexico also has a unique statute which creates a "public election fund" to finance judicial elections in the state.<sup>256</sup> Deciding on the number of district judgeships created for each judicial district in New Mexico is up to the state legislature,<sup>257</sup> and busier districts are divided into separate divisions for civil, criminal, children's, and domestic relations cases.<sup>258</sup> Additionally, parties generally have the opportunity to timely exercise one peremptory excusal of a district court judge.<sup>259</sup>

Article VI of the New Mexico Constitution also provides for an independent "Judicial Standards Commission," which may investigate and recommend the discipline, removal or retirement of any justice, judge, or magistrate.<sup>260</sup> "No justice, judge or magistrate who is a member of the commission or supreme court shall participate in any proceeding involving the justice's, judge's or magistrate's own discipline, removal or retirement."<sup>261</sup> Between 1968 and 2022, the Judicial Standards Commission has filed at least 175 petitions for discipline and/or temporary suspension involving 143 judges, resulting in twenty published disciplinary cases, as well as countless unpublished dispositions.<sup>262</sup>

The requirements for serving in the New Mexico judiciary are important structural features of our state government that distinguish it from the federal judiciary, in which federal district judges and appellate judges are appointed for life under Article III of the United States Constitution.<sup>263</sup> Unelected Article III judges in turn hold the power to appoint federal magistrate judges,<sup>264</sup> thereby creating a

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255. See N.M. CONST. art. VI, §§ 33–37.

256. See N.M. STAT. ANN. 1978, §§ 1-19A-2(F), 1-19A-10 (2003).

257. See N.M. STAT. ANN. 1978, §§ 34-6-4 to -16 (2022).

258. See, e.g., Rule 2-103 NMRA.

259. See Rule 1-088.1 NMRA.

260. N.M. CONST. art. VI, § 32.

261. *Id.*

262. See N.M. JUD. STANDARDS COMM'N, FY 2021 ANNUAL REPORT 13, 23 (2021).

263. See U.S. CONST. art. III, § 1.

264. See 28 U.S.C. § 631(a).

situation in which federal magistrate judges are neither elected in their own right nor appointed by an elected official. This situation coincides with a lack of diversity among federal magistrate judges in comparison to the rest of the population.<sup>265</sup>

Under the Local Rules of Civil Procedure for the United States District Court for the District of New Mexico, 100 percent of all civil cases are assigned to a federal magistrate judge to preside over the trial and all dispositive proceedings in the first instance, and then the parties are given the opportunity to consent to that assignment.<sup>266</sup> One of the effects of not consenting to a federal magistrate judge as the trial judge, however, may be to significantly delay the trial date, because the Article III judges in the district, who are not separated into criminal and civil divisions, are preoccupied with a large volume of criminal cases, which are given priority over their civil dockets.<sup>267</sup> Additionally, 100 percent of all civil cases are assigned to a federal magistrate judge to handle discovery and so-called “non-dispositive” matters, with no opportunity to refuse consent or exercise any form of peremptory excusal.<sup>268</sup> In practice, the combination of a heavy criminal caseload generated by the United States Attorney’s Office for the District of New Mexico—and the fact that most of the full-time federal magistrate judges in the district are former Assistant United States Attorneys—means that the primary function of federal courts in New Mexico is to service the needs of the local United States Attorney’s Office, while federal civil rights cases are warehoused at the very back of the district’s caseload.<sup>269</sup>

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265. See Jennifer L. Thurston, *Black Robes, White Judges: The Lack of Diversity on the Magistrate Judge Bench*, 82 LAW & CONTEMP. PROBS. 63, 75–83 (2019).

266. See D.N.M. Civ. R. 73.1; FED. R. CIV. P. 73; see also *Rivero v. Bd. of Regents of Univ. of N.M.*, No. CIV 16-0318 JB/SCY, 2019 WL 1085179, at \*12 n.86 (D.N.M. Mar. 7, 2019) (“In the District of New Mexico, all civil cases are randomly assigned to two Magistrate Judges to handle pursuant to 28 U.S.C. § 636, which allows a Magistrate Judge to ‘conduct any or all proceedings in a jury or nonjury civil matter’ upon the parties’ consent under rule 73 of the Federal Rules of Civil Procedure.”).

267. Criminal cases take priority because of defendants’ constitutional and statutory rights to a speedy trial in those cases. See U.S. CONST. amend. VI; 18 U.S.C. § 3161(c)(1). Article III judges in the district routinely bemoan the fact that “the District of New Mexico sees more felony cases than any other federal district in the country, and more criminal cases than most courts in the country.” See *United States v. DeLeon*, 428 F. Supp. 3d 841, 1135 (D.N.M. 2019), *aff’d sub nom* U.S. v. Herrera, 51 F.4th 1226 (10th Cir. 2022).

268. See FED. R. CIV. P. 72; D.N.M. Civ. R. 73.1.

269. Nationally, “about 24% of the current sitting magistrate judges worked for the United States Attorney’s Office before receiving the appointment to the bench,” as compared to “about 4% [who previously] worked for the United States Federal Defender’s office.” Thurston, *supra* note 265, at 91. Currently six out of the ten full-time magistrate judges serving New Mexico’s federal district court are former Assistant United States Attorneys. See *Judges*, U.S. DIST. CT., DIST. OF N.M., <https://www.nmd.uscourts.gov/judges> [<https://perma.cc/FXB3-FX4K>]; *The Honorable Jennifer M. Rozzoni Appointed United States Magistrate Judge for the District of New Mexico*, U.S. DIST. CT., DIST. OF N.M. (Feb. 10, 2023), <https://www.nmd.uscourts.gov/news/honorable-jennifer-m-rozzoni-appointed-united-states-magistrate-judge-district-new-mexico> [<https://perma.cc/7QXA-XRLE>] (“Judge Rozzoni joins the Court after more than fourteen years as an Assistant United States Attorney . . . .”); *The Honorable Damian L. Martinez Appointed United States Magistrate Judge for the District of New Mexico*, U.S. DIST. CT., DIST. OF N.M. (Mar. 10, 2023), <https://www.nmd.uscourts.gov/news/honorable-damian-l-martinez-appointed-united-states-magistrate-judge-district-new-mexico> [<https://perma.cc/EF37-NAP3>] (“Judge Martinez . . . served as a Special Assistant U.S. Attorney in the U.S. District Courts for the District

Under this scenario, the delays and excessive motion practice occasioned by federal pleading and summary-judgment standards further thwart the development of federal civil rights claims under § 1983 in the District of New Mexico. The combined effect of the factors described above is that civil actions asserting federal civil rights claims against state actors in New Mexico may languish for years and be given insufficient attention, resulting in the lack of a full and fair opportunity to litigate them in that forum.<sup>270</sup>

Moreover, judicial discipline is practically non-existent in federal court. After recent reports alleging that Justice Clarence Thomas repeatedly violated financial disclosure laws,<sup>271</sup> the Supreme Court of the United States hastily adopted an aspirational “code of conduct” with no enforcement mechanism as a kind of post hoc rationalization for known instances of otherwise unlawful behavior.<sup>272</sup> There is also no constitutionally independent authority for investigating federal judges, who are essentially left to police themselves—or not.<sup>273</sup> Absent impeachment and

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of New Mexico and the Northern District of Texas.”); *Gregory J. Fouratt Appointed as U.S. Magistrate Judge*, U.S. DIST. CT., DIST. OF N.M. (Feb. 19, 2016),

<https://www.nmd.uscourts.gov/news/gregory-j-fouratt-appointed-us-magistrate-judge>

[<https://perma.cc/25GL-33DT>] (“From 1997–2014, Mr. Fouratt served as a prosecutor in the United States Attorney’s Office in New Mexico.”); *Laura Fashing Appointed as U.S. Magistrate Judge*, U.S. DIST. CT., DIST. OF N.M. (Sept. 2, 2015), <https://www.nmd.uscourts.gov/news/laura-fashing-appointed-us-magistrate-judge> [<https://perma.cc/D7QB-6LND>] (“She served as an Assistant United States Attorney for the District of New Mexico from October 1996 to August 2015.”); *Topokh v. United States*, 774 F.3d 1300, 1301 (10th Cir. 2014) (identifying Steven C. Yarbrough as the then-Acting United States Attorney for the District of New Mexico); *United States v. Rodriguez-Rodriguez*, 550 F.3d 1223, 1224 (10th Cir. 2008) (identifying Gregory B. Wormuth as then-Assistant United States Attorney).

270. See generally *Behrens v. Pelletier*, 516 U.S. 299, 306–07 (1996) (discussing the numerous opportunities afforded to raise a qualified immunity defense in federal court); see, e.g., *White v. Pauly*, 580 U.S. 73, 78, 81 (2017) (per curiam) (vacating an order denying summary judgment based on qualified immunity to a law enforcement officer involved in a shooting more than five years earlier and remanding the case for further proceedings).

271. See Brett Murphy & Alex Mierjeski, *Clarence Thomas’ 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023, 5:45 AM), <https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court> [<https://perma.cc/QVF3-QA8H>]; Domenico Montanaro, *Justice Thomas Gifts Scandal Highlights ‘Double Standard’ for Ethics in Government*, NPR (Apr. 24, 2023, 5:00 AM), <https://www.npr.org/2023/04/24/1171343472/justice-thomas-gifts-scandal-highlights-double-standard-for-ethics-in-government> [<https://perma.cc/6BL9-6E8D>].

272. See SUP. CT. OF THE U.S., CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (Nov. 13, 2023), [https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices\\_November\\_13\\_2023.pdf](https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf) [<https://perma.cc/Z97R-R239>]. The lack of an enforcement mechanism for the new code was immediately noted by both legal scholars and members of congress. See Lawrence Hurley, *Supreme Court Adopts Code of Conduct Amid Ethics Scrutiny*, NBC NEWS (Nov. 13, 2023, 12:10 PM), <https://www.nbcnews.com/politics/supreme-court/supreme-court-code-of-conduct-rcna124951> [<https://perma.cc/UQ5F-SRCX>].

273. See Dahlia Lithwick, *Are We Finally Ready to Hold Federal Judges Accountable for Workplace Harassment?*, SLATE (Mar. 21, 2022, 4:53 PM), <https://slate.com/news-and-politics/2022/03/judicial-accountability-federal-judges-accountable-workplace-harassment.html> [<https://perma.cc/TU69-6ZXQ>] (reporting on a House Judiciary subcommittee hearing at which the author testified); cf. *Strickland v. United States*, 32 F.4th 311, 328–36 (4th Cir. 2022) (detailing failures of federal judicial policy in redressing sexual harassment within the Federal Public Defenders’ office, which is governed by workplace policies of the Federal Judiciary’s Administrative Office).

conviction, which has happened to only eight of them in our nation’s history,<sup>274</sup> federal judges are essentially unaccountable to the general public. Yet federal judges are entirely responsible for creating the body of federal common law that is used for adjudicating federal civil rights claims under § 1983, including the doctrine of qualified immunity.

The right to popular sovereignty stated in article II, section 2 of the New Mexico Constitution strongly counsels against borrowing the meaning of state constitutional provisions from federal common law contrived by federal judges who do not consider civil rights litigation a priority on their dockets and often over-delegate the task of adjudicating federal civil rights claims to magistrate judges whose power does not derive “from the people” as contemplated in that provision of our state constitution.<sup>275</sup> The same concerns about the need to “protect our State’s sovereignty” and “to maintain credibility within the judiciary” counsel against the unwarranted deference that the interstitial approach affords to unelected and increasingly unaccountable federal judges.<sup>276</sup> Such concerns also resonate with New Mexico’s pre-statehood history, in which the territory “furnished a place of forage for politicians who couldn’t be either supported or elected to any office in their own home states.”<sup>277</sup> Having obtained the right to self-government, New Mexico judges need to responsibly protect that right and be held accountable to the people for doing so.

**C. The NMCRA evinces and is based on significant structural differences between New Mexico’s form of state government and the federal government.**

While federal judges largely operate within their own unconstrained sphere, the process for amending the United States Constitution, as well as enacting and amending implementing legislation such as § 1983, “is often shaped by constraints which are absent or attenuated on the state constitutional level.”<sup>278</sup> The contrast between New Mexico’s passage of the Equal Rights Amendment to article II, section 18 of the New Mexico Constitution and the fate of its federal counterpart illustrates the difficulty of making constitutional amendments at the federal level.<sup>279</sup> Indeed, the most recent amendment to the United States Constitution in 1992 was first proposed 203 years before it was finally ratified by the requisite number of states.<sup>280</sup>

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274. See *Impeachment of Federal Judges*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/impeachments-federal-judges> [<https://perma.cc/G3GP-EBCP>].

275. See N.M. CONST. art. II, § 2.

276. See *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 21, 142 N.M. 89, 163 P.3d 47.

277. See *Mabry*, *supra* note 58, at 169.

278. *The Interpretation of State Constitutional Rights*, *supra* note 9, at 1360.

279. See N.M. Right to Choose/NARAL v. Johnson (*Johnson I*), 1999-NMSC-005, ¶ 29, 126 N.M. 788, 975 P.2d 841 (discussing differences between the history of New Mexico’s Equal Rights Amendment and its federal counterpart).

280. See U.S. CONST. amend XXVII. The congressional pay provisions of the Twenty-Seventh Amendment were originally sent to the states for ratification in 1789. Jessie Kratz, *A Record-Setting Amendment*, NAT’L ARCHIVES (Apr. 11, 2016), <https://prologue.blogs.archives.gov/2016/04/11/a-record-setting-amendment/> [<https://perma.cc/XSM5-Z8DY>].

Both state constitutional provisions and their implementing legislation generally face fewer obstacles to enactment and amendment than their federal counterparts. As discussed above, there are no federal constitutional constraints or federalism concerns which would prevent the State of New Mexico from enacting legislation to enforce the guarantees in the Bill of Rights of the New Mexico Constitution, and in this regard, “it is completely within the Legislature’s authority to provide greater statutory protection than accorded under the federal Constitution.”<sup>281</sup> The NMCRA is itself a product of this structural difference between the respective legislative processes of state and federal governments.

The body of federal common law created by federal judges and applied to federal civil rights claims under § 1983 was crafted around the Eleventh Amendment to the United States Constitution, which generally prohibits states from being summoned into federal court as defendants in civil actions brought under that statute.<sup>282</sup> To reconcile § 1983 with the Eleventh Amendment, federal courts only recognized causes of action against individual defendants<sup>283</sup> and “municipalities” as defined in *Monell v. Department of Social Services*.<sup>284</sup>

The prospect that state actors could be held individually liable for violating a person’s federal civil rights led federal courts to invent the confusing and constantly changing federal common law doctrine of qualified immunity.<sup>285</sup> The expansion of that doctrine, in turn, led to procedural corollaries such as an individual defendant’s right to bring interlocutory appeals,<sup>286</sup> a requirement of determining whether and when the law governing a particular claim was clearly established, which often precluded a determination of whether a federal constitutional violation occurred in the first place,<sup>287</sup> and a hyper-specific requirement for defining what makes the law “clearly established,” which further hampered the development of federal constitutional rights.<sup>288</sup>

The prospect that organizational defendants could be subject to § 1983 claims under the doctrine of “municipal” or *Monell* liability similarly led to another convoluted and constantly changing set of theories and sub-theories under which that doctrine may or may not apply—all centered around a prohibition on holding such organizational defendants vicariously liable for constitutional violations committed by their employees.<sup>289</sup> Those theories, in turn, had to be distinguished from, and reconciled with, separate and sometimes subjective elements for a claim against an individual defendant, as well as the elements of a supervisory liability claim.<sup>290</sup>

The NMCRA expressly rejects the structural underpinnings on which the entire body of federal common law interpreting § 1983 is based. Because there is no

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281. *State v. Javier M.*, 2001-NMSC-030, ¶ 24, 131 N.M. 1, 33 P.3d 1.

282. *See Quern v. Jordan*, 440 U.S. 332, 338–41 (1979).

283. *See Monroe v. Pape*, 365 U.S. 167, 171–87 (1961).

284. *See* 436 U.S. 658, 690–691 (1978).

285. *See Reinert*, *supra* note 218, at 208–17.

286. *See Behrens v. Pelletier*, 516 U.S. 299, 306–07 (1996).

287. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

288. *See, e.g., White v. Pauly*, 580 U.S. 73, 79 (2017).

289. *See, e.g., Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 166 (1993).

290. *See, e.g., Dodds v. Richardson*, 614 F.3d 1185, 1194–1202 (10th Cir. 2010).

need to account for Eleventh Amendment immunity under the United States Constitution when creating an otherwise similar cause of action under state law, the NMCRA does not need to divert liability onto individual defendants or exempt state governmental entities from vicarious liability for constitutional violations committed by their employees. Instead, the NMCRA requires claims to “be brought exclusively against a public body” and makes that public body “liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body.”<sup>291</sup>

These structural differences have an impact on how the elements of claims for specific types of constitutional violations are formulated for purposes of determining liability in a civil action. One effect of such structural differences is that the elements which federal courts require a civil rights plaintiff to prove for purposes of establishing a § 1983 claim based on a federal constitutional violation often do not correspond to the actual text of the constitutional provision at issue or the elements of an analogous, common-law tort claim. The element of “deliberate indifference” required to establish civil liability for a violation of the Eighth Amendment actionable under § 1983, for example, is not derived from the text of the Eighth Amendment itself.<sup>292</sup> Instead, that element was established through federal common law built around the framework of a federal statute that diverts liability onto individuals and municipalities in order to accommodate Eleventh Amendment immunity and federalism concerns when applied to the states.<sup>293</sup> To make those accommodations, federal common law established elements which focused on a heightened level of individual culpability or mens rea of an individual defendant, or an official custom or policy of a municipality, so that federal civil rights liability would not fall vicariously on state government itself.<sup>294</sup>

The divergence from the constitutional text is even more extreme in the case of federal substantive due process claims, where the elements are not drawn from the Fourteenth Amendment itself, as there is often no federal analog to the “natural rights” language in article II, section 4 of the New Mexico Constitution to provide context for an alleged deprivation of “due process.”<sup>295</sup> Consider, for example, the typical elements of a “danger creation” theory of substantive due process under §1983: (1) defendants “created the danger or increased plaintiff’s vulnerability to the danger in some way;” (2) “plaintiff was a member of a limited and specifically definable group;” (3) “defendants’ conduct put plaintiff at substantial risk of serious,

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291. N.M. STAT. ANN. § 41-4A-3(C) (2021).

292. See U.S. CONST. amend. VIII; Carson Thornton González, *A Deliberate Difference?: The Rights of Incarcerated Individuals Under the New Mexico State Constitution*, 52 N.M. L. REV. 548, 552–58 (2022).

293. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 833–40 (1994) (describing the “deliberate indifference” standard as a “judicial gloss” and providing an overview of the standard’s development through case law).

294. See, e.g., *id.* at 833–34 (requiring a “sufficiently culpable state of mind” to impose liability on prison officials in Eighth Amendment cases (internal citation omitted)); *Bd. of Cnty. Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403–10 (1997) (“[A] plaintiff seeking to establish municipal liability . . . must demonstrate that the municipal action was taken with ‘deliberate indifference’ as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice.” (citation omitted)).

295. Compare N.M. CONST. art. II, § 4, with U.S. CONST. amend. XIV, § 1.

immediate, and proximate harm;” (4) “the risk was obvious or known;” (5) “defendants acted recklessly and in conscious disregard of that risk;” and (6) “such conduct, when viewed in total, is conscience shocking.”<sup>296</sup> This test is one that federal appeals courts developed in response to the Supreme Court of the United States’ opinion in *DeShaney v. Winnebago County Department of Social Services*, which held that:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.<sup>297</sup>

Thus, federal “danger creation” claims are, as the name suggests, limited to situations where “a state actor affirmatively acts to create, or increase[] a plaintiff’s vulnerability to, danger from private violence.”<sup>298</sup> Under the guise of ensuring compatibility with the Eleventh Amendment and federalism concerns, a final element is added, which requires “a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.”<sup>299</sup>

In the context of federal procedural law where every disputed issue is converted to a question of “clearly established law” so that federal judges can decide it on their own without the need for a jury, what is “truly conscience shocking” is, of course, decided by reference to “the ultimate standard” of what “‘shocks the conscience’ of federal judges,”<sup>300</sup> not what shocks the conscience of “parents” or other members of the public at large.<sup>301</sup> Accordingly, federal judges frame their standard for “shocking the conscience” by returning to their generalized federalism concerns: “(1) the need for restraint in defining the scope of substantive due process claims; (2) the concern that § 1983 not replace state tort law; and (3) the need for deference to local policymaking bodies in making decisions impacting public safety.”<sup>302</sup>

As discussed above, such federalism concerns do not apply when state legislatures enact their own legislation to implement or enforce state constitutional guarantees. Thus, unlike the interpretation of the Fourteenth Amendment provided in *DeShaney*, the New Mexico Constitution can be independently interpreted as not simply “a limitation on the State’s power to act,” but as “a guarantee of certain minimal levels of safety” in certain justiciable contexts.<sup>303</sup> Specifically, article II, section 4 of the New Mexico Constitution recognizes that individuals “have certain natural, inherent and inalienable rights,” which include “seeking and obtaining

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296. *T.D. v. Patton*, 868 F.3d 1209, 1222 (10th Cir. 2017) (quoting *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001)).

297. 489 U.S. 189, 195 (1989).

298. *Currier*, 242 F.3d at 923.

299. *Patton*, 868 F.3d at 1222 (citation omitted).

300. *See Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002).

301. *See id.* at 1183, 1183 n.5 (rejecting appellant’s argument that the court should look to what would shock the conscience of parents in deciding a § 1983 case against a federally funded daycare).

302. *Id.* at 1184 (citation omitted).

303. *See DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989).

safety,”<sup>304</sup> and article XII, section 1 provides “children of school age” with an affirmative right to a “uniform system of free public schools sufficient for [their] education.”<sup>305</sup> Thus, at least in a context where the State is acting pursuant to such an affirmative constitutional mandate, a state constitutional right to “seeking and obtaining safety” may provide an enforceable guarantee to “children of school age” under the NMCRA. And given New Mexico courts’ preference for resolving factual issues through jury trials, the elements for adjudicating such a right should be defined in terms that a reasonable parent, not necessarily a federal judge, can understand and apply through a straightforward set of jury instructions, not a lengthy treatise about federalism.<sup>306</sup>

Using such an independent method of state constitutional interpretation does not lead to an unprincipled free-for-all where lawyers can argue whatever they want to a jury, because state courts are fully capable of drawing on their own established body of common law to assist in defining justiciable elements of state constitutional claims under the NMCRA and crafting jury instructions to communicate those elements in a principled and understandable way. In this regard, it is important to remember that federal courts also relied in part on common law borrowed from the states to construct some of the elements of federal civil rights claims under § 1983.<sup>307</sup>

As noted above, the “second step” of the three-step process that federal courts apply to establish “a rule of decision required to adjudicate” federal civil rights claims when no such rule appears in the statutory text is to consider “application of state ‘common law, as modified and changed by the constitution and statutes’ of the forum State.”<sup>308</sup> For crafting jury instructions stating the elements of a state constitutional claim under the NMCRA, New Mexico courts can do the same thing, only without that step being bracketed by the need “to look to the laws of the United States” or give “predominance” to “the federal interest” in consistency with those federal laws.<sup>309</sup> Without those brackets or the constraints imposed by federal procedural law, New Mexico courts can dispense with the need for an “ultimate standard” defined in terms of what “shocks the conscience of federal judges,”<sup>310</sup> or the absence of a state constitutional “guarantee of certain minimum levels of safety and security.”<sup>311</sup>

When a novel question of state common law arises, for example, New Mexico courts may instead look to public policy considerations, which may be found in “statutes, case law of New Mexico and other jurisdictions, . . . general principles of law, . . . ‘learned articles, or other reliable indicators of community moral norms

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304. N.M. CONST. art. II, § 4.

305. N.M. CONST. art. XII, § 1.

306. See Duffy, *supra* note 163, at 386–97 (explaining the benefits of providing jurors with written jury instructions they can read and understand).

307. See *Burnett v. Grattan*, 468 U.S. 42, 47–48 (1984).

308. *Id.* at 48 (quoting 42 U.S.C. § 1988).

309. See *id.* at 47–48.

310. *Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002).

311. *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989).



and policy views.”<sup>312</sup> Similarly, there are principles of statutory interpretation already recognized by New Mexico courts which may aid them in interpreting language in our state constitution as well.<sup>313</sup> While New Mexico courts may look to similarities with the text of state constitutional provisions in other states as a reason to focus on corresponding case law from those states,<sup>314</sup> there is no compelling reason why, as a threshold matter, New Mexico courts should always afford a privileged status to the law of only one other jurisdiction—whether it be federal law or the law of another state—when crafting jury instructions and other “rules of decision” for defining the elements of a state constitutional claim under the NMCRA.

**V. FEDERAL COURTS’ ANALYSIS OF CIVIL RIGHTS CLAIMS UNDER § 1983 IS FLAWED TO SUCH AN EXTENT THAT IT NO LONGER PROVIDES A WORKABLE MODEL FOR HOW TO INTERPRET THE BILL OF RIGHTS IN THE NEW MEXICO CONSTITUTION WHEN ADJUDICATING CLAIMS UNDER THE NMCRA**

The note published in the *Harvard Law Review* which identified “flawed federal analysis” as a valid reason for departure from federal law under the interstitial approach was published in 1982.<sup>315</sup> But much has changed about federal constitutional and procedural law since 1982. Before that date, the landscape of federal constitutional law was expansively defined by the Warren Court era.<sup>316</sup> During that era, “the preeminence of federal debate and reasoning” was “accentuated,”<sup>317</sup> which may have “encouraged a ‘deferential and retiring’ state constitutional role.”<sup>318</sup> “When federal protections are retreating,” on the other hand, “state courts are likely to perceive the resultant vacuum as an invitation to state constitutional elaboration,” and as that retreat intensifies, “it becomes more appropriate for state courts to recognize the deserted field as their own and turn to more self-reliant interpretation.”<sup>319</sup>

Federal constitutional law has been in full-scale retreat on several fronts since 1982, with the rate of retreat intensifying after *Gomez* first adopted the interstitial approach in 1997. The adoption and expansion of principles of federalism

312. See, e.g., *Morris v. Giant Four Corners*, 2021-NMSC-028, ¶ 28, 498 P.3d 238, 247 (quoting *Davis v. Bd. of Cnty. Comm’rs*, 1999-NMCA-110, ¶ 14, 127 N.M. 785, 987 P.2d 1172).

313. See, e.g., *Pirtle v. Legis. Council Comm. of N.M. Legislature*, 2021-NMSC-026, ¶¶ 34, 44–50, 492 P.3d 586, 597, 600–01 (noting that “questions of constitutional construction are governed by the same rules that apply to statutory construction,” and using historical dictionary definitions in interpreting a state constitutional provision).

314. See, e.g., *City of Farmington v. Fawcett*, 1992-NMCA-075, ¶ 15, 114 N.M. 537, 843 P.2d 839 (looking to states with “virtually identical” constitutional provisions in considering a free speech issue under the New Mexico Constitution); *N.M. Right to Choose/NARAL v. Johnson (Johnson I)*, 1999-NMSC-005, ¶ 26, 126 N.M. 788, 975 P.2d 841.

315. See *The Interpretation of State Constitutional Rights*, *supra* note 9, at 1359.

316. See *id.* at 1368–69, 1349 n.82.

317. See *id.* at 1365.

318. See *id.* at 1366 n.167 (quoting A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 938 (1976)).

319. *Id.* at 1366 (footnotes omitted).

provided one avenue of retreat after 1982.<sup>320</sup> The development of the federal common law doctrine of qualified immunity provided another avenue of retreat.<sup>321</sup> Federal procedural law, including the *Celotex* trilogy expanding federal summary judgment practice,<sup>322</sup> and the adoption of the plausibility pleading standard,<sup>323</sup> provided an additional dead end which is choking off the development of federal civil rights claims. With the *Dobbs* opinion in 2022 and the *Students for Fair Admissions* opinion in 2023, we have seen the wholesale abandonment of longstanding federal constitutional protections which date back to the Warren Court era.<sup>324</sup>

**A. Mere disagreement with federal law does not provide a workable definition for what makes it flawed for purposes of adjudicating state constitutional claims under the NMCRA.**

These dramatic shifts in federal constitutional and procedural law provide further grounds for reexamining New Mexico's reliance on an interstitial approach operating on the presumption that federal law provides the correct answer absent reasons to the contrary, which must be articulated on a case-by-case basis to preserve state constitutional issues. Flaws in the federal courts' analysis of federal civil rights claims are so extensive that they have given rise to an entire body of professional literature which is expanding so fast that scholars in the field cannot even keep up with it.<sup>325</sup> It is also beyond the scope of the present article to take on the Herculean task of reforming federal constitutional law or the federal judiciary based on the ever-growing catalog of grounds for disagreeing with the results or reasoning of recent federal court opinions. While federal judges enjoy the hospitality of undisclosed private jet flights and superyacht cruises provided by their wealthy benefactors, lawyers and judges in New Mexico need to focus on the more austere and laborious task of serving the people of this State with a more independent method of interpreting the New Mexico Constitution that protects the integrity of our courts.

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320. See, e.g., *Gill v. Pub. Emps. Ret. Bd. of the Pub. Emps. Ret. Ass'n of N.M.*, 2004-NMSC-016, ¶¶ 5–8, 135 N.M. 472, 90 P.3d 491 (discussing the Supreme Court's expansion of state sovereign immunity under *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) and *Alden v. Maine*, 527 U.S. 706, 711 (1999)).

321. See *Behrens v. Pelletier*, 516 U.S. 299, 306–07 (1996); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *White v. Pauly*, 580 U.S. 73, 79 (2017)..

322. The *Celotex* trilogy is comprised of the following three opinions: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

323. See *Ashcroft v. Iqbal*, 556 U.S. 662, 680–83 (2009).

324. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (overruling past precedents recognizing a federal constitutional right to reproductive freedom); *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 600 U.S. 181, 213 (2023) (concluding that "race-based admissions" programs designed to remedy past discrimination did not survive strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment).

325. See, e.g., Reinert, *supra* note 218, at 214, 214 n.79 (reporting the results of a Westlaw search identifying 427 law review articles with the words "qualified immunity" in the title since 1980 and at least 1,650 law review articles in which the phrase "qualified immunity" is used ten times or more over the same time period).

That task, however, should not degenerate into a mere pretext for unprincipled forum shopping, in which litigants seek a different result in state court just because they disagree with how an issue was decided in federal court. The focus here is on arriving at a principled *method* for interpreting our state constitution, not simply going to a different judge in the hope of obtaining a different *result*. *Gomez* and other existing New Mexico precedents provide examples where departing from federal law in favor of a different interpretation of a parallel provision of our state constitution did not change the ultimate result in the case decided when that interpretation first became law.<sup>326</sup>

Accordingly, the question more relevant to developing an independent method of state constitutional interpretation is what makes the federal analysis of a constitutional issue flawed in relation to the distinctive state characteristics and structural differences evident in the text, history, and other features of the New Mexico Constitution described in the preceding sections of this article. In this respect, “flawed federal analysis” overlaps significantly with the other two reasons for departure from federal law that *Gomez* recognized under the interstitial approach.

**B. Existing New Mexico precedents depart from federal methods of analyzing constitutional issues when they fail to effectuate the guarantees in our state constitution, do not allow for meaningful judicial review, or lack an empirically sound rationale.**

Although there are several published opinions from New Mexico courts which depart from the federal analysis of a constitutional issue when it is found to be flawed under the interstitial approach, this article will focus on just three of those opinions that illustrate principles which directly bear on the adjudication of state constitutional claims under the NMCRA. The first is Justice Ransom’s opinion in *Gutierrez*, which foreshadows his articulation of the interstitial approach several years later in *Gomez*.<sup>327</sup> After a cursory discussion of state constitutional history and a rambling review of case law from other jurisdictions, *Gutierrez* concluded by finding flaws in the deterrence rationale which underlies the federal exception to the exclusionary rule for Fourth Amendment violations.<sup>328</sup> *Gutierrez* concluded that the exclusionary rule is included within the bundle of state constitutional rights guaranteed by article II, section 10 of the New Mexico Constitution because it is necessary to effectuate those guarantees and not merely relegated to a secondary purpose of deterrence.<sup>329</sup>

The rationale for rejecting the federal good-faith exception in *Gutierrez* parallels the need to reject analogous doctrines of federal common law under which a constitutional violation is excused or rendered unenforceable due to qualified

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326. See *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (applying the interstitial approach to divert from federal precedent regarding warrantless searches of automobiles, while ultimately upholding appellant’s conviction under the newly announced standard); see also *State v. Leyva*, 2011-NMSC-009, ¶ 62, 149 N.M. 435, 250 P.3d 861.

327. See *State v. Gutierrez*, 1993-NMSC-062, ¶ 56, 116 N.M. 431, 893 P.2d 1052.

328. See *id.* ¶¶ 50–56, 893 P.2d at 1066–68 (departing from *United States v. Leon*, 468 U.S. 897, 916 (1984)).

329. See *id.*

immunity, a lack of clearly established law, or other immunity doctrines based on principles of federalism. The protections against search and seizure at issue in *Gutierrez* are not the only state constitutional rights which need to be effectuated through a judicial remedy when they are presented in court, and the remedies provided in the NMCRA should do just that.

A second New Mexico precedent which warrants attention for its rejection of a flawed federal analysis is *Rodriguez v. Brand West Dairy*, which declined to rely on the federal version of the “rational basis test” for reviewing due process challenges to economic regulation on the grounds that it was “toothless” and “a virtual rubber stamp.”<sup>330</sup> The federal version of rational-basis review exhibited these flawed characteristics for three reasons: it (1) “invites dishonest and entirely speculative defenses,” (2) “[s]add[es] . . . plaintiffs with a technically unattainable burden of proof and requir[es] them to construct a trial court record sufficient to rebut arguments that have not been made yet,” and (3) “is particularly subject to inconsistent, result-based interpretations.”<sup>331</sup>

The same types of criticisms have been leveled at the doctrine of qualified immunity and associated standards for determining “clearly established law” as prerequisites for prevailing on a federal civil rights claim under § 1983.<sup>332</sup> Moreover, recognition of the state “constitutional duty to protect discrete groups of New Mexicans from arbitrary discrimination by political majorities and powerful special interests” in *Rodriguez*<sup>333</sup> accords with the need to provide judicial remedies that effectuate state constitutional guarantees, which the Court previously recognized in *Gutierrez*.<sup>334</sup> Properly interpreted in this context, the NMCRA also serves to effectuate such guarantees by providing additional remedies such as “actual damages” and attorney fees for state constitutional violations.<sup>335</sup>

A third category of flawed federal analysis was recently recognized in *State v. Martinez*,<sup>336</sup> which rejected the federal standard for admissibility of eyewitness identification evidence articulated in *Manson v. Brathwaite*.<sup>337</sup> *Martinez* ultimately concluded that the federal standard violated the due process guarantee in article II, section 18 of the New Mexico Constitution because it is “both scientifically and jurisprudentially unsound and hence flawed under our interstitial review.”<sup>338</sup> In particular, the *Manson* standard was flawed because it is “untethered to any sound

330. 2016-NMSC-029, ¶ 27, 378 P.3d 13, 25 (quoting *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 30, 125 N.M. 721, 965 P.2d 305).

331. *Id.* (alteration in original) (quoting Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 898, 905–13 (2005)).

332. *See, e.g., N.S. ex rel. Lee v. Kansas City Bd. of Police Comm’rs*, 143 S. Ct. 2422, 2424 (Sotomayor, J., dissenting from denial of certiorari) (“These dual mistakes—resolving factual disputes or drawing inferences in favor of the police, then using those inferences to distinguish otherwise governing precedent—have become the calling card of many courts’ qualified immunity jurisprudence.”).

333. 2016-NMSC-029, ¶ 27, 378 P.3d at 25.

334. 1993-NMSC-062, ¶¶ 50–56, 116 N.M. 431, 893 P.2d 1052.

335. *See* N.M. STAT. ANN. §§ 41-4A-3 to -5 (2021).

336. 2021-NMSC-002, ¶ 71, 478 P.3d 880, 903.

337. 432 U.S. 98, 113–14 (1977).

338. 2021-NMSC-002, ¶ 71, 478 P.3d at 903.

scientific knowledge” and based on “factors derived from prior rulings and not from empirically validated sources.”<sup>339</sup>

The rejection of flawed federal analysis in *Martinez* resonates with the rejection of federal habeas law regarding “actual innocence” claims in *Montoya*, which emphasized the need to protect “our state interest in insuring accuracy and the superior ability of our state courts to make accurate factual findings.”<sup>340</sup> *Martinez* also provides an example of a new state constitutional standard that is tailored to the factfinding role of juries, rather than the federal courts’ obsession with converting every federal civil rights claim into a question of law for appellate judges to decide based on their own preconceptions and implicit biases. Tailoring the elements of a state constitutional claim to the factfinding role of jury trials (and the service of non-English speaking jurors) will be an important task for adjudicating state constitutional claims under the NMCRA, given the distinct features of New Mexico procedural law which disfavor deciding disputed claims at the pleadings or summary-judgment stages of civil litigation.

**C. Interpretation of the New Mexico Constitution should proceed independently under the NMCRA without the need to identify a particular flaw in federal civil rights law as a reason for departure.**

New Mexico courts should become less reliant on identifying particular flaws in the federal analysis of civil rights claims as they develop their own “critical mass” of precedents which have already departed from federal law and provide independent interpretations of our state constitutional guarantees. The New Mexico precedents reviewed in preceding sections of this article suggest that we may have already reached such a “critical mass” and are ready to transition away from the interstitial approach to a more independent method of state constitutional interpretation for NMCRA claims.

Conversely, the whole field of federal civil rights law may soon reach a tipping point at which its flaws are so pervasive that it becomes almost impossible to extract the federal analysis of a single issue from the systemic defects which render the remaining body of federal civil rights law unpersuasive as a basis for adjudicating violations of the Bill of Rights in the New Mexico Constitution under the NMCRA. As we approach that tipping point, it is not necessary to disregard federal law entirely when interpreting our state constitution. Rather, New Mexico courts can simply decline to afford federal law the privileged status given to it under the interstitial approach, so that federal analysis no longer provides the presumptively correct answer to state constitutional questions. Without getting distracted by the daily hijinks of federal judges behaving badly, we can look inward at our own State’s distinctive characteristics and make thoughtful connections between the existing body of New Mexico precedents interpreting the New Mexico Constitution differently than its federal counterparts.

The efficiency rationale articulated in *Gomez*<sup>341</sup> for deciding questions of federal law first before determining whether to depart from federal law also drops

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339. See *id.* ¶ 54, 478 P.3d at 897 (citations and internal quotation marks omitted).

340. *Montoya v. Ulibarri*, 2007-NMSC-035, ¶ 21, 142 N.M. 89, 163 P.3d 47.

341. See *State v. Gomez*, 1997-NMSC-006, ¶ 21, 122 N.M. 777, 932 P.2d 1

away in the context of civil litigation where plaintiffs are not concurrently asserting their federal and state constitutional rights. Instead, the deficiencies and disincentives of litigating in a federal forum discussed above may lead plaintiffs to assert only state-law claims under the NMCRA in state court and to expressly disavow any federal claims. In that scenario, there is no good reason for courts to hypothetically decide in the first instance what remedy, if any, federal law would provide under the federal counterpart to a state constitutional provision, because the plaintiffs are not seeking such a remedy under a federally recognized cause of action.

Without the concerns that arise from holding state actors individually liable for constitutional violations under federal law, the perceived need for the federal common law doctrine of qualified immunity does not exist with respect to NMCRA claims, and the statute expressly prohibits the use of that doctrine.<sup>342</sup> As there is no individual liability in the first place and no qualified immunity from suit for NMCRA claims, there is also no sound basis on which to adopt the corollaries to that doctrine, such as an automatic right to pursue interlocutory appeals, a requirement of clearly established law, or the need for hyper-specificity to determine when the law is clearly established.

Instead, New Mexico courts can and should proceed straight to determining the elements of an NMCRA claim and allowing juries to apply those elements to the facts of each case. In doing so, they can dispense with the federal “plausibility” pleading standard,<sup>343</sup> as well as the federal courts’ preference for resolving matters through summary judgment instead of trials on the merits.<sup>344</sup> Regardless of whether they are regarded as flaws underlying the federal analysis of civil rights claims or distinctive characteristics of state law, New Mexico’s rejection of those intertwined aspects of federal procedural law undercuts the rationale for giving priority or privileged status to federal substantive law when adjudicating state constitutional claims in the context of a civil action brought under the NMCRA.

## **VI. NEW MEXICO HAS THE TOOLS IT NEEDS TO CRAFT A MORE INCLUSIVE AND INDEPENDENT APPROACH TO STATE CONSTITUTIONAL INTERPRETATION FOR CLAIMS UNDER THE NEW MEXICO CIVIL RIGHTS ACT**

Once we turn away from the interstitial approach based on the systemic reasons for departure from federal law identified in preceding sections of this article, it is not that hard to envision what civil rights litigation under the NMCRA should look like. First, there is no sound basis for requiring state courts to hear and decide the threshold issue of whether there are reasons for departing from federal precedent on a claim-by-claim basis in each case brought under the NMCRA. The same reasons for departure articulated above will apply to *all* claims brought under the NMCRA, regardless of which particular section or clause in article II of the New Mexico Constitution is alleged to have been violated. Thus, application of the interstitial approach to state constitutional interpretation leads to its own demise with respect to all claims brought under the NMCRA and clears the way for New Mexico courts to

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342. See N.M. STAT. ANN. § 41-4A-4 (2021).

343. See *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶¶ 10–13, 355 P.3d 1243, 1246–47.

344. See, e.g., *id.* ¶ 9, 335 P.3d at 1246.

analyze and adjudicate such claims using many of the same principles and methods they have already used for other types of novel claims—without giving priority or privilege to federal law.

The basic elements of the most common NMCRA claims should resemble those already recognized for tort claims under New Mexico common law: duty, breach, causation, and damages.<sup>345</sup> Such analogies to the common law of torts, however, do not mean that duty and breach are defined in terms of a simple negligence standard. Rather, New Mexico courts may look to analogous, objective standards for professional, corporate, and institutional negligence for guidance in defining elements of NMCRA claims where appropriate.<sup>346</sup> Jury instructions for analogous statutory claims may also warrant consideration in helping to define the elements of an NMCRA claim in an understandable way.<sup>347</sup> Special verdict forms will need to be modified, because punitive damages are not allowed under the NMCRA,<sup>348</sup> and comparative fault is generally not a defense to a constitutional violation.<sup>349</sup>

To be sure, state constitutional claims need to be defined at a textually specific enough level to make them justiciable and preserve them for appellate review, with citation to the applicable provision in article II of the New Mexico Constitution. Similarly, breaches or violations of a person's state constitutional rights need to be defined with reference to specific governmental acts, omissions, or patterns of behavior. For some types of claims, it may be possible to extract a few of the more basic pattern jury instructions developed by federal courts for use in this task.<sup>350</sup> But as a whole, such federal pattern instructions are needlessly cluttered with add-ons that simply do not apply to NMCRA claims for the reasons stated above.

The definition of what constitutes “actual damages” for a specific state constitutional violation, or what types of evidence can support such a claim, may require supplementation beyond the standard categories provided in New Mexico's uniform jury instructions.<sup>351</sup> For example, some federal courts have recognized that “[t]he damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical

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345. See, e.g., UJI 13-302A-E NMRA (statement of issues); UJI 13-305 NMRA (causation), UJI 13-1802 NMRA (measure of damages).

346. See, e.g., UJI 13-1101 to -1102, 13-1119A to -1119B NMRA (defining duties of doctors, specialists, and hospitals with respect to professional negligence claims).

347. See, e.g., UJI 13-2307 NMRA (defining Human Rights Act violation); UJI 13-2321 NMRA (identifying elements of Whistleblower Protection Act claim).

348. See N.M. STAT. ANN. §§ 41-4A-3(B) to -6 (2021).

349. See Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 1023–29 (2003).

350. See, e.g., NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 9.11 (2017) (stating three basic elements of a First Amendment retaliation claim under a burden-shifting framework similar to that used for claims under New Mexico's Whistleblower Protection Act, N.M. STAT. ANN. §§ 10-16C-1 to -6 (2010)); COMM. ON PATTERN CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR., FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 7.07 (2017) (stating three basic elements of a claim for false arrest under the Fourth Amendment).

351. See UJI 13-1803 to -1810B NMRA; UJI 13-1830 NMRA.

harm, embarrassment, or emotional suffering.”<sup>352</sup> Accordingly, a more inclusive and independent approach to state constitutional interpretation under the NMCRA may result in less reliance on arbitrary “factors derived from prior rulings” to define what kinds of “actual damages” may be awarded for a state constitutional violation.<sup>353</sup>

Plaintiffs may experience additional, enhanced, or aggravated injuries when a constitutional violation is committed by state actors in an institutional setting or under the badge of state authority.<sup>354</sup> Moreover, people of different ages and cultural backgrounds may verbalize or describe their injuries and suffering differently, so it is important to define “actual damages” for a state constitutional violation under the NMCRA in an empirically grounded and culturally competent way.<sup>355</sup> As a matter of procedural law, the “natural rights” and “due process” protections afforded by the Bill of Rights in the New Mexico Constitution should require additional measures so that persons already traumatized by a constitutional violation are not retraumatized by the legal process for adjudicating their claims under the NMCRA.<sup>356</sup>

Taking its cues from the “natural rights” philosophies on which article II, section 4 of the New Mexico Constitution is based, litigation under the NMCRA should proceed under the law of reason within the “social contract” evinced by the Creed of Professionalism of the New Mexico Bench and Bar,<sup>357</sup> not as a Social

352. *Kerman v. City of New York*, 374 F.3d 93, 125 (2d Cir. 2004); *see also* *Guzman v. City of Chicago*, 689 F.3d 740, 748 (7th Cir. 2012) (citing *Kerman* as grounds for questioning the use of a jury instruction that did not account for “a compensable claim for loss of time” during an unconstitutional search and seizure); *Martinez v. Port Auth. of N.Y. & N.J.*, 445 F.3d 158, 161 (2d Cir. 2006) (recognizing that “emotional distress and loss of liberty [are] separate components of [a] false arrest claim” which are “separately compensable”); *Gardner v. Federated Dep’t Stores, Inc.*, 907 F.2d 1348, 1353 (2d Cir. 1990) (concluding that damages for loss of liberty are meant to “redress the denial of free movement and the violation done to [the plaintiff’s] dignity as a result of the unlawful detention, and not the physical and mental injuries arising from the incident”).

353. *State v. Martinez*, 2021-NMSC-002, ¶ 54, 478 3d. 880, 897 (citations and internal quotation marks omitted).

354. *See, e.g.*, Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575, 576–82 (2014) (discussing the evolving understanding of trauma and betrayal in institutional settings where constitutional violations may occur); Jonathan Shay, *Moral Injury*, 31 PSYCHOANALYTIC PSYCH. 182, 183 (2014) (discussing psychological trauma which may result from “betrayal of what’s right . . . by someone who holds legitimate authority . . . in a high stakes situation”).

355. *See, e.g.*, Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 707–09, 707 n.6 (2019) (drawing on “empirical poetry” to describe the traumatic and post-traumatic experiences of young people of color growing up in an inner-city environment); Karina Walters, *Indigenous Perspectives in Survey Research: Conceptualising and Measuring Historical Trauma, Microaggressions, and Colonial Trauma Response*, in PROCEEDINGS OF THE MĀTAURANGA TAKETAKE: TRADITIONAL KNOWLEDGE CONF. 27–43 (2007) (defining “historical trauma” and discussing alternative ways of naming the injuries and damages caused by it).

356. *See* *Ledezma v. Young Life*, No. 20-cv-01896-NYW, 2021 WL 2823261, at \*5 (D. Colo. Jan. 8, 2021) (“Unfortunately, at times, the justice system has also contributed to a survivor’s experiences of stigmatization and marginalization.” (citing CHANEL MILLER, *KNOW MY NAME* (2019))); Rebecca Campbell, *The Psychological Impact of Rape Victims’ Experiences With the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCH. 702, 704–05 (2008); JUDITH HERMAN, *TRAUMA AND RECOVERY* 72–73 (1997) (“Women who have sought justice in the legal system commonly compare this experience to being raped a second time.”).

357. *Creed of Professionalism*, STATE BAR OF N.M., <https://www.sbnm.org/Leadership/Supreme-Court-Committees-and-Commissions/Commission-on-Professionalism/Creed-of-Professionalism> [<https://perma.cc/ZFA4-KMTL>] (promoting ideals of “civility” and “commitment to the public good”).



Darwinist test of survival in which the parties trade bigoted and hateful rhetoric in a misguided effort to show they are stronger than their opponents. That means a truly inclusive approach to state constitutional interpretation gives due consideration not only to historically marginalized and disadvantaged people, but also to the civil-rights defense bar, court staff, and law enforcement professionals. Both the courts and the general public benefit from the use of dialectical reasoning in which the defense bar plays a deliberative role to aid in screening out meritless claims and protecting the public treasury so that funds are kept available to fully and fairly compensate those with worthy claims.

Similarly, it should be remembered that the recommendations of the New Mexico Civil Rights Commission included not only the draft of a proposed statute which was later enacted as the NMCRA, but also a series of recommendations for improving the New Mexico Law Enforcement Academy.<sup>358</sup> A bill to implement some of those recommendations recently became law as a result of the 2023 legislative session.<sup>359</sup> These statutory changes which complement the passage of the NMCRA show that litigation is not necessarily the only way to give effect to state constitutional guarantees or deter state constitutional violations, nor are those tasks limited to lawyers and judges. Being inclusive when interpreting the Bill of Rights in the New Mexico Constitution does not mean being divisive or disrespectful toward other professionals who share responsibility for upholding the rule of law.

One of the problems engendered by the interstitial approach adopted in *Gomez* is that its claim-by-claim preservation requirements, as well as the privileged status it affords to federal law, have been used as a procedural obstacle to unduly cut off debate and deliberation about the meaning of our state constitution.<sup>360</sup> Textualist and originalist theories of constitutional interpretation also can be misused as simplistic rhetorical tropes aimed at arbitrarily excluding or denying fair consideration of opposing viewpoints or new perspectives.<sup>361</sup>

Confining state constitutional interpretation to the task of fixing the meaning of a given constitutional provision at the time it was first drafted ignores the historical fact that the document was created with a future focus. In other words, the people who drafted and approved the original version of the New Mexico Constitution were not just seeking to preserve the status quo under which they lived when they wrote or approved it. Rather, they were seeking to change that status quo in significant ways so that the years after enacting our state constitution would be different and better than the territorial era they had endured for more than sixty years before gaining statehood. In these respects, interpreting a foundational document such as a state constitution bears some resemblance to interpreting a dream or a vision of a desired future, not simply an artifact permanently stamped with a meaning fixed at its origin.

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358. See N.M. C.R. COMM’N, *supra* note 180, at app. IX (2020).

359. See 2023 N.M. Laws, ch. 86, §§ 2–6 (codified as amended at NMSA 1978, §§ 29-7-3, 29-7-4.3, 29-7-6.1, 29-7-7.1, 29-7-16 (2023)).

360. See, e.g., Vanzi & Baker, *supra* note 4, at 25–26 (quoting from Justice Bosson’s concurring opinion in *State v. Garcia*, 2009-NMSC-046, ¶¶ 56–57, 147 N.M. 134, 217 P.3d 1032); cf. *State v. Leyva*, 2011-NMSC-009, ¶¶ 38–49, 149 N.M. 435, 250 P.3d 861 (acknowledging that some past opinions have construed the preservation requirements for state constitutional claims too strictly).

361. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

A more cogent analog for describing the independent method of state constitutional interpretation which should replace the interstitial approach would be differential diagnosis, or “reasoning to the best explanation,” which is generally regarded as reliable in the medical context and in expert testimony which requires the interpretation of data to arrive at an opinion about the source or cause of an occurrence.<sup>362</sup>

Unlike a logical inference made by deduction where one proposition can be logically inferred from other known propositions, and unlike induction where a generalized conclusion can be inferred from a range of known particulars, inference to the best explanation—or ‘abductive inferences’—are drawn about a particular proposition or event by a process of eliminating all other possible conclusions to arrive at the most likely one, the one that best explains the available data.<sup>363</sup>

In the medical context,

inference to the best explanation can be thought of as involving six general steps, some of which may be implicit. The scientist must (1) identify an association between an exposure and a disease, (2) consider a range of plausible explanations for the association, (3) rank the rival explanations according to their plausibility, (4) seek additional evidence to separate the more plausible from the less plausible explanations, (5) consider all of the relevant available evidence, and (6) integrate the evidence using professional judgment to come to a conclusion about the best explanation.<sup>364</sup>

In the legal context, the interpretive task is to identify possible *meanings* of a particular word, clause, or provision of our state constitution, rather than to identify potential *causes* of a disease or accident. But the reasoning process is similar insofar as we are ultimately reliant on our independent professional judgment about how to interpret the textual and contextual data.

That such “reasoning to the best explanation” is reliable enough to meet admissibility standards for opinion testimony under state and federal rules of evidence does not mean it lacks creative agency. In both art and science, the creative process involves divergent thinking, or generating a range of plausible explanations by considering all of the relevant available evidence, as well as convergent thinking, or sifting through all other possible conclusions to arrive at the most likely one that best explains the available data.<sup>365</sup> We cannot adequately complete the latter step in this creative process if we start the first step by categorically excluding potential or

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362. See *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1236–38 (10th Cir. 2005); *Acosta v. Shell W. Expl. & Prod., Inc.*, 2016-NMSC-012, ¶¶ 33–34, 370 P.3d 761, 768.

363. *Bitler*, 400 F.3d at 1237 n.5.

364. *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 17–18 (1st Cir. 2011) (citing the expert testimony of “Dr. [Carl F.] Cranor, Distinguished Professor of Philosophy at the University of California, Riverside”).

365. See generally Weitao Zhang, Zsuzsika Sjoerds & Bernhard Hommel, *Metacontrol of Human Creativity: The Neurocognitive Mechanisms of Convergent and Divergent Thinking*, 210 NEUROIMAGE, 116572, 2020.

plausible sources of meaning, or by giving them an arbitrary presumptive rank that is not empirically validated. Diversity among the judiciary, the legal profession, and the jury pool is the sociological analog to the role of divergent thinking in the creative process. Such diversity aids in expanding the range of plausible explanations or meanings of a state constitutional provision that warrant consideration during the preliminary stages of the abductive reasoning process described above.<sup>366</sup>

Insofar as they are not subject to the jurisdictional, prudential, and federalism concerns which call for greater restraint by federal judges whose power derives from Article III of the United States Constitution,<sup>367</sup> New Mexico courts have good reasons to take a more diverse and inclusive approach to deciding what sources of law are relevant to interpreting the Bill of Rights in the New Mexico Constitution. In addition to the traditional sources discussed above, such an approach might consider, for example, sources of law and public policy arising from the distinctive and deeply rooted traditions of indigenous sovereigns within the State's territorial boundaries, the State's international border with Mexico, and features of Spanish or Mexican law which may warrant consideration under article II, section 5 of the New Mexico Constitution and the Treaty of Guadalupe Hidalgo. Those provisions remind us that Spanish-speaking "*Nuevomexicanos* constituted the majority of New Mexico's population and statehood required that the population ratify the 1910 constitution."<sup>368</sup> Moreover, the New Mexico Constitution has protected the rights of Spanish speakers since its inception.<sup>369</sup> These facts may lead to consideration of the Spanish version of the text (and relevant analogs in Spanish or Mexican law) in determining the meaning of a particular state constitutional provision. To arrive at the best interpretation of a particular state constitutional provision, we cannot exclude or erase these potential sources of relevant data at the outset.

None of these options foreclose the possibility of looking to federal law interpreting an analogous or textually identical provision of the United States Constitution when adjudicating a claim under the NMCRA. The factors discussed above should simply end the practice of giving privileged status to federal law, operating under a presumption that federal law provides the correct answer to a question of state constitutional law under the NMCRA, or requiring the proponent of a claim under the NMCRA to provide a specific reason for departing from federal law before proceeding to argue the merits of that claim. To the extent any presumptions apply in this context, a party advocating the adoption of federal law

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366. See generally Pinar Celik et al., *A New Perspective on the Link Between Multiculturalism and Creativity: The Relationship Between Core Value Diversity and Divergent Thinking*, 52 *LEARNING & INDIVIDUAL DIFFERENCES* 188, 191–94 (2016). The description of New Mexico's 1910 Constitutional Convention as "many-sided and colorful, being as it was on the border line where two civilizations had met," accords with this view. See Heflin, *supra* note 56, at 61.

367. See N.M. Right to Choose/NARAL v. Johnson (*Johnson I*), 1999-NMSC-005, ¶ 12, 126 N.M. 788, 975 P.2d 841.

368. Gonzales, *supra* note 63, at 31.

369. See N.M. CONST. art. XX, § 12 ("For the first twenty years after this constitution goes into effect all laws passed by the legislature shall be published in both the English and Spanish languages and thereafter such publication shall be made as the legislature may provide."); *id.* art. VII, § 3 ("The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write the English or Spanish languages except as may be otherwise provided in this constitution.").

for adjudicating a specific claim under the NMCRA may be called upon to explain why that source of law should not be rejected in light of the distinctive and problematic features of federal civil rights jurisprudence discussed above. Similarly, New Mexico courts may need to reconsider earlier opinions which relied too heavily on federal law to interpret state constitutional rights and reexamine those opinions in light of the more inclusive methodology outlined above.

## VII. CONCLUSION

The passivity induced by overreliance on federal law allows both state legislatures and “state courts to disavow responsibility for decisions in often controversial areas of the law.”<sup>370</sup> Thus, it often takes a crisis of the dimensions of the January 6 insurrection to stir them out of such passivity and take responsibility “to use state constitutions as a double check on federal constitutional protections and as an independent source of supplemental individual rights.”<sup>371</sup>

The historic circumstances confronting New Mexicans when the NMCRA was enacted during the 2021 legislative session presented such a crisis. Just as delegates to our state’s constitutional conventions in the pre-statehood era of the early twentieth century were burdened with the obstructionist tactics and demeaning rhetoric of Senator Beveridge, New Mexicans had just endured four years of a vitriolic President espousing similar Social Darwinist views, culminating in the January 6 insurrection. During the former President’s 2020 campaign, one of his most ardent New Mexico supporters who attended the Capitol insurrection, former Otero County Commissioner Couy Griffin, had recently broadcast a speech in which he told Black athletes to “go back to Africa,” called people “vile scum” for portraying the Confederate flag as racist, and threatened civil war over COVID-19 public health restrictions.<sup>372</sup> The previous summer, several protesters calling for the removal of a statue of Spanish conquistador Don Juan de Oñate in front of the Albuquerque Museum were violently attacked by a provocateur who was defended by members

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370. *The Interpretation of State Constitutional Rights*, *supra* note 9, at 1362.

371. *Id.*

372. See Morgan Lee & Russell Contreras, *Cowboys for Trump Founder Couy Griffin Defends “Go Back to Africa” Comments*, ALAMOGORDO DAILY NEWS (July 28, 2020, 8:00 AM), <https://www.alamogordonews.com/story/news/local/new-mexico/2020/07/28/cowboys-trump-founder-defends-go-back-africa-comments-facebook-video/5524026002/> [<https://perma.cc/J5A4-5HR7>]. Mr. Griffin was later removed from office in response to a petition invoking Section 3 of the Fourteenth Amendment, a provision originally enacted in response to insurrection during the Civil War. See Aaron Blake, *Effort to Bar Jan. 6 Figures From Office Notches Historic Win. What Now?*, WASH. POST (Sept. 6, 2022, 3:43 PM), <https://www.washingtonpost.com/politics/2022/09/06/couy-griffin-fourteenth-amendment-insurrection/> [<https://perma.cc/7547-5XFE>]. The Supreme Court of the United States declined to overturn the state court’s decision to remove Mr. Griffin from his position as a county commissioner, concluding that “States may disqualify persons holding or attempting to hold *state* office” under Section 3 of the Fourteenth Amendment.” *Trump v. Anderson*, 601 U.S. 100, 144 S. Ct. 662, 667 (2024) (per curiam); see *Griffin v. New Mexico*, No. 23-279, \_\_\_ S. Ct. \_\_\_, 2024 WL 1143663 (mem.) (Mar. 18, 2024), *denying cert. to N.M. ex rel. White v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M. Dist. Ct. Sept. 6, 2022).

of a private militia allegedly linked to white supremacist hate groups.<sup>373</sup> Similar private militia groups had menaced New Mexicans attending local protests over the police murder of George Floyd earlier that year.<sup>374</sup>

Viewed in the wake of these events, the NMCRA should be interpreted as a call to reason, not a call to arms. A more inclusive method of state constitutional interpretation need not be a more divisive one. Accordingly, this article concludes with an invitation to further dialectical reasoning and constructive feedback, not a finite, zero-sum endpoint. What errors, omissions, and erasures can be found in the arguments set forth above? How can we correct or overcome them?

Every attempt to set forth a creative vision is limited by the author's own blind spots. Here there are several: a lack of sufficient attention to, or comprehension of, Spanish-language sources which bear on New Mexico's state constitutional history; even greater ignorance of Afro-Mexican history and its relation to the formal abolition of slavery in New Mexico before its conquest and purchase by the United States; and perhaps most of all, tone deafness to indigenous voices and unwritten languages which predated the first English-language record in New Mexico's state constitutional history and may continue to be unheard.

Historically, state governments were often viewed as adversaries of indigenous sovereigns, who relied on protections granted by federal law to keep those state governments in check.<sup>375</sup> Thus, perhaps the greatest remaining structural error in our state constitution is the lack of adequate measures to change that relationship from an adversarial one to a truly voluntary alliance in which popular sovereignty invites and includes indigenous sovereignty, so no one is relegated to the involuntary status of a territorial subject that many New Mexicans endured before statehood.<sup>376</sup>

A second and equally overlooked topic for further inquiry is whether or to what extent there is, or should be, a state constitutional obligation to provide for

373. See Kalen Goodluck, *New Mexico's Thin Blurred Line: Police in the State Have Long Flirted with Radical Right-wing Vigilantism*, HIGH COUNTRY NEWS (July 20, 2020), <https://www.hcn.org/issues/52.8/south-corruption-new-mexicos-thin-blurred-line> [<https://perma.cc/RQK2-VPPJ>].

374. See Andrew Hay, *Militia at Violent New Mexico Protest Linked to White Supremacy, Domestic Terror—Mayor*, REUTERS (June 16, 2020, 8:10 PM), <https://www.reuters.com/article/us-new-mexico-protest/militia-at-violent-new-mexico-protest-linked-to-white-supremacy-domestic-terror-mayor-idUSKBN23N2RL/> [<https://perma.cc/PAL2-CL9Q>].

375. See, e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020) (explaining how, in the process of breaching its own “treaty promises that had once allowed tribes . . . to try their own members[.] . . . Congress only allowed the federal government, not the States, to try tribal members for major crimes”).

376. This failure to reconcile our model of state government with indigenous sovereignty may be prompted by flaws in “social contract” theory, such as its overreliance on concepts of “property” and “labor” which fail to recognize alternative relationships between indigenous people and the places they inhabit. See *supra* note 145 and accompanying text. Such concepts also may help to explain why President Lincoln's administration presented the Pueblos of New Mexico with federal land patents and canes symbolizing their sovereignty in 1864 while denying such recognition to more nomadic peoples who did not exhibit forms of architecture or agriculture that Europeans could easily identify. See Martha LaCroix Dailey, *Symbolism and Significance of the Lincoln Canes for the Pueblos of New Mexico*, 69 N.M. HIST. REV. 127, 128 (1994).

future generations.<sup>377</sup> New Mexico’s recent spate of wildfires caused by catastrophic errors on the part of the federal government raises the question of how the climate crisis should affect our understanding of state constitutional rights.<sup>378</sup> Do “natural rights” for those “born equally free” include the right to a future? What meaning does our state constitution hold without one?

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377. Loss of the ability to “dream” or form a vision of one’s own future may also be among the types of injuries that young people experience from the deprivation of their constitutional rights. See Bell, *supra* note 355, at 732–36 (describing “the problem of *leveled aspirations*” and asking: “What does it mean to be an American if you cannot dream of a bright future?”).

378. See Andrew Hay, *Forest Service Says It Started All of New Mexico’s Largest Wildfire*, REUTERS (May 27, 2022, 4:18 PM), <https://www.reuters.com/business/environment/forest-service-says-it-started-all-new-mexicos-largest-wildfire-2022-05-27/> [<https://perma.cc/CNQ8-39UQ>].