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# CHURCH, STATE, AND THE NEW MEXICO CIVIL RIGHTS ACT: HOW LITIGANTS AND COURTS CAN INVOKE THE STATE CONSTITUTION TO PROTECT ESTABLISHMENT CLAUSE RIGHTS

Melanie B. Stambaugh\* and Laura Creech\*\*

The First Amendment’s Free Exercise and Establishment Clauses—collectively the “Religion Clauses”—“express the view, foundational to our constitutional system, that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.”<sup>1</sup> Read in tandem, their goal is to strike a balance in the interaction between government and religion in a manner that promotes religious freedom, including the right not to ascribe to any religion.<sup>2</sup> A robust and functional interpretation of the Establishment Clause that maintains the separation of church and state is tantamount to that aim.

Both the federal and New Mexico constitutions contain provisions that enshrine the doctrine of separation of church and state. In the First Amendment of the federal constitution: “Congress shall make no law respecting an establishment of religion. . . .”<sup>3</sup> And in article II, section 11 of the state constitution: “No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.”<sup>4</sup> Both provisions codify the idea that government should not sponsor one religion over another, nor favor religion over secularism. However, in a system of dual sovereigns, open questions abound about how they should be reconciled. Considering recent United States Supreme Court

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1. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 558 (2022) (Sotomayor, J., dissenting) (quoting *Lee v. Weisman*, 505 U.S. 577, 589 (1992)).

2. Religious freedom, as used in this article, encompasses not only the freedom to believe in any chosen religious denomination, but also the freedom not to adhere to any religious sect or prescribed set of religious beliefs. *See, e.g., Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (Neither the federal government or a state can “pass laws or impose requirements which aid all religions as against non-believers, and neither can [it] aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”); *see also id.* at 495 n.11 (including “Secular Humanism” as an example of a religion which embraces human logic rather than a belief in God but is nonetheless protected).

3. U.S. CONST. amend. I.

4. N.M. CONST. art. II, § 11.

precedent eroding federal Establishment Clause rights,<sup>5</sup> the rise of rhetoric by politicians and pundits that purport to declare the United States a “Christian nation”<sup>6</sup> and an upswing in legislative action around the country that furthers the aims of Christian nationalism,<sup>7</sup> resolving these questions has never been more important.

This article discusses how courts can interpret the state establishment clause to serve the rights of New Mexico residents in light of the passage of the New Mexico Civil Rights Act,<sup>8</sup> during a time when the Supreme Court “continues to dismantle the wall of separation between church and state that the Framers fought to build.”<sup>9</sup> In doing so, it will examine: (1) the history of article II, section 11 of the New Mexico Constitution; (2) how New Mexico courts have interpreted the state establishment clause as coextensive with its federal counterpart; (3) the history of federal Religion Clause jurisprudence and how it has evolved to elevate the Free Exercise Clause above the Establishment Clause; and (4) potential modes of constitutional analysis courts can employ in analyzing article II, section 11 claims brought under the New Mexico Civil Rights Act, along with the potential implications of each approach as applied in the establishment clause context. In undertaking this endeavor, we hope to further the conversation on state constitutionalism by illustrating the benefits and drawbacks of the different interpretive approaches our courts can apply under the New Mexico Civil Rights Act through the lens of the state establishment clause and provide information and guidance to litigants who seek to bring article II, section 11 claims under the Act.

## I. HISTORY OF NEW MEXICO’S ESTABLISHMENT CLAUSE

In a 2009 concurring opinion in *State v. Garcia*, Justice Bosson extolled the importance of state constitutionalism:

As New Mexico’s highest court, it is our duty and privilege to interpret and develop the New Mexico Constitution. In a government of dual sovereigns, it is imperative that our state Constitution develop to its full potential and protect the rights of our citizens where we deem federal law lacking.<sup>10</sup>

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5. See discussion *infra* Section III.

6. See Julia E. Fay, “Religious” Secularism and Legitimacy in American Democracy, 57 COLUM. J.L. & SOC. PROBS. 215, 221 n.29 (2024) (collecting sources documenting the rise of “Christian nationalism”); cf. Erwin Chemerinsky, *No, It Is Not a Christian Nation, and It Never Has Been and Should Not Be One*, 26 ROGER WILLIAMS U. L. REV. 404, 407–17 (2021).

7. See *infra* notes 121–123 and accompanying text. For a discussion of white Christian nationalism, its origins, and its integration into mainstream politics, see Stephen M. Feldman, *White Christian Nationalism Enters the Political Mainstream: Implications for the Roberts Court and Religious Freedom*, 53 SETON HALL L. REV. 667, 678–721 (2023).

8. N.M. STAT. ANN. §§ 41-4A-1 to -13 (2021).

9. *Carson v. Makin*, 596 U.S. 767, 806 (2022) (Sotomayor, J., dissenting).

10. 2009-NMSC-046, ¶ 57, 147 N.M. 134, 217 P.3d 1032 (Bosson, J., specially concurring).

To understand how best to actualize this statement and the values that underscore article II, section 11, it is imperative to recognize the context in which the state constitution and its corresponding establishment clause were enacted.

Although New Mexico's statehood efforts were long and tumultuous—and its draft constitutions reflect that strain—there was an establishment clause provision in every iteration of New Mexico's bill of rights.<sup>11</sup> Moreover, the drafters of each proposed version of the state's establishment clause drew the language, not from the federal Bill of Rights, but from the constitutions of other states.<sup>12</sup> In doing so, they enshrined from the beginning the concept that the state of New Mexico is a sovereign whose constitution can and should serve as an independent source of establishment clause rights.<sup>13</sup>

New Mexico's first draft establishment clause was enacted with its formation as a United States territory in 1846 and the contemporaneous promulgation of the Kearny Code.<sup>14</sup> Drafted by two Missouri attorneys, the Kearny Code's bill of rights included an establishment clause heavily inspired by the 1820 Missouri Constitution.<sup>15</sup>

After a volatile start to its territorial status, parties within New Mexico pursued the first of many serious efforts toward statehood, convening New Mexico's first constitutional convention in 1850.<sup>16</sup> The resulting constitution incorporated its own version of the Establishment Clause, lifting some language from the Kearny Code while providing stronger protections against any

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11. See *infra* text accompanying notes 15–38.

12. See *infra* text accompanying notes 15–38.

13. The federal Establishment Clause was not incorporated against the states until 1947. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (“The First Amendment, as made applicable to the states by the Fourteenth, . . . commands that a state ‘shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’”).

14. See Kearny Bill of Rights of 1846, cl. 3 (“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no person can ever be hurt, molested or restrained in his religious professions if he do not disturb others in their religious worship; and that all Christian churches shall be protected and none oppressed, and that no person on account of his religious opinions shall be rendered ineligible to any office of honor, trust or profit.”); see also HOWARD ROBERTS LAMAR, *THE FAR SOUTHWEST, 1846–1912: A TERRITORIAL HISTORY* 66 (1966) (“Kearny’s Code contained even more revolutionary concepts: the separation of Church and State, the existence of taxes and tax collectors, a standing paid militia, and a system of secular public schools.”). For a thorough discussion of the Kearny Code and New Mexico’s statehood efforts, see ROBERT W. LARSON, *NEW MEXICO’S QUEST FOR STATEHOOD: 1846–1912* (1968).

15. Compare Kearny Bill of Rights of 1846, cl. 3, with MO. CONST. of 1820, art. XIII, §§ 4–5 (“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the gospel, or teacher of religion; that no human authority can control or interfere with the rights of conscience; that no person can ever be hurt, molested, or restrained in his religious profession or sentiments, if he do not disturb others in their religious worship. . . . That no person, on account of his religious opinions, can be rendered ineligible to any office of trust or profit under this state; that no preference can ever be given by law to any sect or mode of worship; and that no religious corporation can ever be established in this state.”).

16. LARSON, *supra* note 14, at 30–31.

establishment of religion.<sup>17</sup> In particular, it included the language: “no preference shall ever be given by law to any religious society, mode of worship, or any control or interference with the rights of conscience be permitted.”<sup>18</sup> This constitution was overwhelmingly approved with 8,371 people voting in favor and only 39 people voting against it.<sup>19</sup> However, New Mexico’s 1850 statehood effort failed after the death of President Taylor and the Compromise of 1850 under President Fillmore, and the Kearny Code remained the territory’s ruling authority.<sup>20</sup>

The following year, the newly formed New Mexico Legislative Assembly passed a bill of rights during its first legislative session.<sup>21</sup> This bill incorporated elements of the 1850 constitution but added language from the Missouri Constitution that the Kearny Code drafters chose to omit, resulting in the following provision:

No law shall be enacted binding man to worship God contrary to the dictates of his own conscience; no preference shall be given by law to any religious denomination, and it shall be the duty of the legislature to enact the necessary laws to protect equally all religious denominations so that they may be undisturbed, and secured in the practice of their institutions.<sup>22</sup>

This version of the clause stayed in effect while New Mexico remained a territory.<sup>23</sup>

In 1872, New Mexico again petitioned for statehood.<sup>24</sup> Although there was no corresponding constitutional convention,<sup>25</sup> the committee drafted an 1872 constitution modeled after the Illinois constitution ratified in 1870.<sup>26</sup> The two state establishment clauses are nearly identical. The Illinois constitution read:

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17. N.M. CONST. of 1850, art. I, § 3 (“All men have a natural and indefeasible right to worship God according to the dictates of their own consciences, which right shall never be infringed; and no preference shall ever be given by law to any religious society, mode of worship, or any control or interference with the rights of conscience be permitted.”); *see also* CHUCK SMITH, THE NEW MEXICO STATE CONSTITUTION 9 (Oxford U. Press, 2011) (noting that the 1850 constitution challenged the “spiritual domination of the Catholic Church” through its religious freedom guarantees); Larson, *supra* note 14, at 35 (“Freedom of conscience was guaranteed to every individual and, by law, no preference was to be given to ‘any religious society, [or] mode of worship. . . .’”).

18. N.M. CONST. of 1850, art. I, § 3.

19. LARSON, *supra* note 14, at 38.

20. *Id.* at 55–57.

21. *See* 1851 N.M. Laws 152–53.

22. *Id.* at 153 (departing from the Kearny Code’s protection of Christian churches by specifying that no law could give preference to a religious denomination or require someone to engage in religious practice that was contrary to their own religious beliefs, similar to the Missouri Constitution of 1820); *cf.* MO. CONST. of 1820, art. XIII, §§ 4–5.

23. 1897 Compiled Laws of New Mexico, tit. 38, ch. 1, § 3761.

24. *See* LARSON, *supra* note 14, at 99–100.

25. *See id.* at 99.

26. *Id.* at 100. Constitution borrowing was common even after the ratification of the federal constitution. *See* Hon. Jack L. Landau, “First-Things-First” and Oregon State Constitutional Analysis, 56 WILLAMETTE L. REV. 63, 66 (2020).

No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.<sup>27</sup>

New Mexico's proposed 1872 constitution read:

No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denominations or mode of worship.<sup>28</sup>

The differences between the provisions amounted to a single letter. The 1872 constitution was “quickly accepted” by New Mexico legislators but the statehood effort failed again.<sup>29</sup>

Statehood efforts periodically continued, gaining momentum in 1888 and leading to an overwhelmingly Republican constitutional convention.<sup>30</sup> The resulting bill of rights was unlike any previous draft. These differences extended to the 1889 draft constitution's establishment clause:

The free exercise and enjoyment of religious profession and worship, *without discrimination or preference* is hereby guaranteed. . . .<sup>31</sup>

Although the draft Republican constitution included an establishment clause, its language would have afforded weaker protections than prior proposals.<sup>32</sup> Notably, in contrast to every previous version of the state constitution, the 1889 constitution was “decisively” rejected with 7,493 people voting for it and 16,180 people voting against it.<sup>33</sup>

After decades of effort to realize statehood, President Taft signed the Enabling Act for New Mexico and Arizona on June 20, 1910.<sup>34</sup> A Republican-dominated, contentious convention resulted in the constitution's ratification in 1911.<sup>35</sup> Interestingly, the final language of New Mexico's establishment clause

27. ILL. CONST. of 1870 art. II, § 3.

28. N.M. CONST. of 1872, art. II, § 3 (emphasis added).

29. LARSON, *supra* note 14, at 101, 115.

30. *Id.* at 147, 156, 158. Out of seventy-three delegates, there was one Democrat who attended the convention. *Id.* at 156, 158.

31. N.M. CONST. of 1889, art. II, § 14 (emphasis added).

32. Unlike earlier draft constitutions, the 1889 constitution's establishment clause was closely integrated into the free exercise clause rather than set apart as its own provision—and it eliminated language specifying that one had a right to be free from compulsory religious practice. *Compare id.*, with N.M. CONST. of 1872, art. II, § 3 and N.M. CONST. of 1850, art. I, § 3. Although the 1889 constitution's phrase “without discrimination or preference” could arguably afford similar protections, its lack of clarity and secondary position within section 14 would make it susceptible to an interpretation that placed establishment protections far below free exercise protections.

33. LARSON, *supra* note 14, at 168.

34. *Id.* at 270–71.

35. SMITH, *supra* note 17, at 15–20.

discarded the relatively weak 1889 constitutional language and returned to the stronger provisions afforded in the 1872 constitution:

No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.<sup>36</sup>

The only meaningful difference between the 1910 and 1872 versions of the Establishment Clause was the removal of the “against his consent” language in the 1872 version.<sup>37</sup> Removing that language eliminated the potential defense that a person’s constitutional rights are not violated if someone—who consents to being at a place of worship or supports the religious denomination at issue—attends a required religious government-supported event or activity. In that sense, the 1910 Establishment Clause did two things. First, it provided stronger anti-establishment protections than the version proposed forty years earlier. Second, it recognized a crucial nuance: even someone who adheres to a religion maintains the right to contend that the state should not dictate how she practices her faith, nor favor her religion above other religions or above non-religion. On both counts, the state provision prioritizes the importance of the separation of church and state in maintaining the balance between the two Religion Clauses.

Since ratification, New Mexico’s establishment clause has not been amended, and so far, there is no indication of an attempt to substantively amend it.<sup>38</sup> As a result, the provision represents a longstanding recognition of robust Establishment Clause rights within the state.

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36. N.M. CONST. art. II, § 11. This language was submitted to the full convention in its entirety on October 31, 1910. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF NEW MEXICO, HELD AT SANTA FE, NEW MEXICO 79–82 (1910). It remained unchanged even as other provisions were amended. *See id.* at 196–97.

37. *Compare* N.M. CONST. of 1872, art. II, § 3, *with* N.M. CONST. art. II, § 11. In addition to removing “against his consent,” the framers modified the phrase “attend or support any ministry or place of worship” to “attend any place of worship or support any religious sect or denomination.” Since discussions and debates at the convention were not officially recorded, it is unclear why the drafters chose to modify this particular language. *See* Thomas C. Donnelly, *The Making of the New Mexico Constitution Part II*, 12 N.M. Q. 435, 444 (1942). However, an ordinary reader could readily conclude that the adjustment made a simple grammatical change to clarify the object-verb relationships in the sentence. The answer to this question would ultimately depend on New Mexico judicial interpretation.

38. For example, there were zero section 11 amendments on the general election ballot from 1911–1994 and 2001–2022. *See* SMITH, *supra* note 17, at 24–32; *Constitutional Amendments (Arguments For and Against)*, N.M. LEGIS., [https://www.nmlegis.gov/Publications/Constitutional\\_Amendments](https://www.nmlegis.gov/Publications/Constitutional_Amendments) [<https://perma.cc/RTR6-84KJ>]. Additionally, the proposed 1969 constitution did not suggest altering the state establishment clause except to add “sect” to “nor shall any preference be given by law to any religious [sect,] denomination[,] or mode of worship.” N.M. LEGIS. COUNCIL SERV., PROPOSED NEW MEXICO CONSTITUTION 3–4 (1969).

## II. THE “INTERSTITIAL” APPROACH AND CLAIMS UNDER ARTICLE II, SECTION 11

As the history discussed above illustrates, the state establishment clause was not modeled after the federal Establishment Clause. Further, ratification of the New Mexico Constitution preceded incorporation of the federal Establishment Clause by nearly forty years. Together, these facts might suggest that New Mexico courts would come to view the state constitution as a source of complementary yet distinct establishment clause rights.<sup>39</sup> Not so. To date, no New Mexico court has departed from federal precedent in interpreting the state provision.<sup>40</sup>

The selective incorporation doctrine complicated the issue.<sup>41</sup> Until 1947—nearly four decades after ratification of New Mexico’s constitution—the federal Establishment Clause did not apply to a state’s actions.<sup>42</sup> After incorporation, that was no longer the case. This caused a timing issue: “whether, in any given challenge to a state action involving both state and federal constitutional rights, courts should address the state constitution before the federal, or vice versa.”<sup>43</sup>

For half a century, that question remained unanswered. Then, in *State v. Gomez*, the New Mexico Supreme Court outlined the mode of analysis it would use to analyze claims brought under state constitutional provisions with analogous federal provisions incorporated against the states.<sup>44</sup> Under this method, dubbed “the interstitial approach,” “the court first asks 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.”<sup>45</sup> In theory, the interstitial approach allows New Mexico courts to “diverge from federal precedent” and afford greater protections under provisions of the New Mexico Constitution in certain circumstances, notwithstanding the existence of an analogous federal provision.<sup>46</sup> Reasons for departing from federal precedent include “flawed federal

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39. See Landau, *supra* note 26, at 66–67 (noting that duplication between the federal and states’ bills of rights was not an issue at first, because the federal provisions worked to “constrain[] only the federal government” while the states’ provisions only limited what state governments could do).

40. See *infra* text accompanying notes 50–70.

41. Landau, *supra* note 26, at 67. Under the selective incorporation doctrine, portions of the federal Bill of Rights have been applied piecemeal over time to the states through the Due Process Clause of the Fourteenth Amendment. See *id.*

42. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

43. Landau, *supra* note 26, at 67.

44. *State v. Gomez*, 1997-NMSC-006, ¶¶ 20–22, 122 N.M. 777, 932 P.2d 1. For a deeper discussion of *Gomez*, see generally Hon. 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 (2023); Michael B. Browde, *State v. Gomez and the Continuing Conversation over New Mexico’s State Constitutional Rights Jurisprudence*, 28 N.M. L. REV. 387 (1998) [hereinafter Browde I]; Michael B. Browde, *Gomez Redux: Procedural and Substantive Developments Twelve Years On*, 40 N.M. L. REV. 179 (2010) [hereinafter Browde II].

45. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7 (citing *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1358 (1982)).

46. See *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 28, 126 N.M. 788, 975 P.2d 841 (internal quotation marks and citation omitted).



analysis, structural differences between state and federal government, or distinctive state characteristics.”<sup>47</sup>

In spite of the stated rationales for departing from federal precedent in *Gomez*, very little is recognizably “interstitial” in the courts’ actual approach to state constitutional claims in civil cases.<sup>48</sup> New Mexico courts have yet to conclude in a civil case that the New Mexico constitution affords greater protections than the federal constitution under a state provision with a federal counterpart.<sup>49</sup> When presented with a violation of the New Mexico Constitution in a civil case, New Mexico courts have almost always mechanically deferred to federal precedent.<sup>50</sup> With few exceptions, courts either decline to engage in interstitial analysis, make no more than a passing reference to it, or fail to make *any* mention of it whatsoever.<sup>51</sup> The three reasons *Gomez* identifies to justify departure from federal precedent are rarely raised.<sup>52</sup> And even where courts have acknowledged that broader protections may be afforded under state constitutional provisions, they have declined to articulate what those broader protections are.<sup>53</sup> Simply put, despite

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47. *Gomez*, 1997-NMSC-006, ¶ 19, 932 P.2d at 7 (citing *The Interpretation of State Constitutional Rights*, *supra* note 45, at 1359). Although the *Gomez* court did not engage in a discussion of the potential definition and scope of each listed reason, *The Interpretation of State Constitutional Rights* provides a helpful starting point for evaluating whether any or all rationales may apply to a particular civil rights claim. *See supra* note 45, at 1359–61; *see also* Browde II, *supra* note 44, at 187–91 (discussing how New Mexico courts have treated these reasons for departure—sometimes interpreting them quite expansively—within the criminal context).

48. *See* Vanzi & Baker, *supra* note 44, at 9–16 (illustrating that since *NARAL*, post-*Gomez* decisions in civil cases “reflect an apparent presumption that the New Mexico Constitution should reach no further than federal precedent would allow”).

49. *See* Hon. Linda M. Vanzi, Andrew G. Schultz & Melanie B. Stambaugh, *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. REV. 302, 305–06 (2018) (“[S]ince *Gomez* was decided, our Supreme Court has considered only three civil cases involving a claim under the state Constitution, and has not decided any case based on a determination that the New Mexico Constitution affords greater rights than federal courts have held are available under an analogous federal constitutional provision.”); *see also* Vanzi & Baker, *supra* note 44, at 11 (explaining that the court’s holding in *NARAL* does not “determin[e] that the New Mexico Constitution affords greater rights than the federal courts have held are available under an analogous federal constitutional provision, as the court’s holding rests on its interpretation of a state constitutional provision with no counterpart in the national constitution”).

50. *See* Vanzi & Baker, *supra* note 44, at 10–16.

51. *See, e.g.,* *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶¶ 31–44, 90, 378 P.3d 13 (indicating that New Mexico may have adopted a broader rational basis test for the equal protection clause of the state constitution without making any mention of the interstitial approach or *Gomez*, then stating that New Mexico’s rational basis standard is similar to the heightened rational basis test federal courts apply in limited circumstances and holding that the exclusion at issue failed to meet that standard); *Breen v. Carlsbad Mun. Schs.*, 2005-NMSC-028, ¶ 14, 138 N.M. 331, 120 P.3d 413 (not referring to interstitial analysis but stating that the court will “take guidance from the Equal Protection Clause of the United States Constitution and the federal courts’ interpretation of it” and will “interpret the New Mexico Constitution’s Equal Protection Clause independently when appropriate”).

52. *See* Vanzi & Baker, *supra* note 44, at 10–16.

53. *See id.* at 10 (“Having concluded that the lack of a federal counterpart to New Mexico’s equal rights guarantee rendered federal equal protection analysis inapposite, the *NARAL* Court made no attempt to determine whether the equal protection clause of [a]rticle II, [s]ection 18 affords greater

the *Gomez* court's proclamation that New Mexico courts "no longer follow the lockstep approach,"<sup>54</sup> state constitutional analysis still looks a lot like the lockstep approach in civil cases.<sup>55</sup>

There is no New Mexico case that directly analyzes the protections afforded by the state establishment clause. However, today's 'lockstep disguised as interstitial' approach is evident in *Elane Photography, LLC v. Willock*, which concerns a claim brought in part under article II, section 11.<sup>56</sup> There, defendant Elane Photography ("Elane") asserted that forcing it to photograph a same-sex wedding under the New Mexico Human Rights Act would violate its free exercise right under the First Amendment of the United States Constitution and article II, section 11 of the New Mexico Constitution.<sup>57</sup> Elane argued that article II, section 11 provided broader protection than the First Amendment, contending that there are distinctive state characteristics in the state constitution.<sup>58</sup>

The New Mexico Court of Appeals summarily rejected Elane's argument, stating that Elane "failed to cite any precedent in its brief" to support its interpretation.<sup>59</sup> The court concluded that "no interstitial analysis or approach has been identified to support a deviation from [the First Amendment]," and that Elane's interpretation was "attenuated and contrary to this Court's precedent."<sup>60</sup> Without providing further explanation, the court determined that because the court of appeals and the Tenth Circuit previously treated the state provision as "coextensive with its federal counterpart," it would apply the federal standard to analyze Elane's state constitutional claim.<sup>61</sup> Notably, the court relied on a Tenth Circuit case, *Friedman v. Board of County Commissioners*, that claimed to interpret

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protection than the analogous federal provision under the United States Supreme Court's holding in *Harris v. McRae*." (citations omitted).

54. *State v. Gomez*, 1997-NMSC-006, ¶ 18, 122 N.M. 777, 932 P.2d 1.

55. See Landau, *supra* note 26, at 68–69 (describing lockstep as where a state constitutional provision is interpreted in "lockstep" with the corresponding federal provision).

56. 2012-NMCA-086, ¶¶ 6, 284 P.3d 428, 433, *aff'd*, 2013-NMSC-040, 309 P.3d 53.

57. *Id.* ¶¶ 5–6, 31, 284 P.3d at 433, 440.

58. *Id.* ¶ 32, 284 P.3d at 440–41 (quotations omitted).

59. *Id.*

60. *Id.* The authors note that *Gomez* has specific preservation requirements for parties asserting that a provision of the New Mexico Constitution provides broader protections than its federal counterpart. See *Gomez*, 1997-NMSC-006, ¶ 23, 932 P.2d at 8. However, under *Gomez*, a party is not required to provide specific reasons for departure from federal precedent. *Id.* ¶ 23 n.3, 932 P.2d at 8. Since Elane raised "distinctive state characteristics" to the court of appeals in its argument for broader protections, it is unclear why the court decided to narrowly apply the preservation requirement when Elane's argument sought to distinguish article II, section 11 from the federal Free Exercise Clause. See Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at 16–17, *Elane Photography*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct. Aug. 27, 2009); see also *Elane Photography*, 2012-NMCA-086, ¶ 55, 284 P.3d at 446–47 (Wechsler, J., specially concurring) (noting that Elane's reliance on the first sentence of article II, section 11 at trial rather than its second sentence as the reason that the issue was not preserved). Cf. *State v. Ortiz*, 2023-NMSC-026, ¶¶ 23–24, 539 P.3d 262, 270 ("However, the preservation rule is not absolute, and this Court may address unpreserved issues that involve, among others, the fundamental rights of a party.").

61. *Elane Photography*, 2012-NMCA-086, ¶ 33, 284 P.3d at 441.

state law, rather than a case decided in state court, to determine that the two provisions were the same.<sup>62</sup>

The New Mexico Supreme Court did even less on this account. Although *Elane* raised the state constitutional issue in its petition for writ of certiorari to the supreme court,<sup>63</sup> the court declined to take up the issue in affirming the court of appeals' decision—article II, section 11 is not mentioned anywhere in Justice Chávez's majority opinion or Justice Bosson's specially concurring opinion.<sup>64</sup>

After *Elane*, claims in New Mexico involving the Religion Clauses are analyzed the same in federal and state courts—no greater protection has been afforded under article II, section 11 than under the federal Establishment Clause. Although New Mexico courts have been presented with few opportunities to revisit article II, section 11, they have declined to meaningfully engage with the provision when claims under the state establishment clause have been raised. For example, in *Moses v. Skandera*, the court declined to address a claim brought under article II, section 11.<sup>65</sup> There, the plaintiffs challenged a schoolbook loan program that provided textbooks to students at private schools, claiming that the program violated article II, section 11 and article XII, section 3 (also known as the Blaine Amendment), as well as other state constitutional provisions.<sup>66</sup> Although the issue arguably did not turn on a violation of state establishment clause rights, the New Mexico Court of Appeals followed in *Elane*'s footsteps, mentioning that while there may be broader protections afforded under the New Mexico Constitution, “[the] [p]laintiffs have not argued a basis to do so,” and quickly moving on.<sup>67</sup> Meanwhile, the New Mexico Supreme Court did not reach the issue of whether the plaintiff's rights were violated under article II, section 11 in either its initial ruling or its reconsideration of the case on remand.<sup>68</sup>

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62. See 781 F.2d 777, 791–92 (10th Cir. 1985).

63. *Elane Photography, LLC's Petition for Writ of Certiorari Pursuant to Rule 12-502 NMRA* at 12, *Elane Photography*, No. 30203 (N.M. June 27, 2012) (“Article II, [s]ection 11 of the State Constitution contains language protecting religious exercise that is broader than its federal counterpart.”).

64. See *Elane Photography, LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53.

65. 2015-NMSC-036, ¶ 12, 367 P.3d 838, 841, *vacated sub nom.* *New Mexico Ass'n of Non-public Schs. v. Moses*, 582 U.S. 951 (2017).

66. *Moses v. Ruskowski*, 2019-NMSC-003, ¶ 6, 458 P.3d 406, 409–10 (reconsidering *Moses v. Skandera* on remand from the United States Supreme Court). Article XII, section 3, also known as the Blaine Amendment, “prohibits the use of public funds ‘for the support of any sectarian, denominational or private school, college or university.’” *Id.* ¶ 8, 458 P.3d at 410. There is no federal analog to the Blaine Amendment. *Id.* ¶¶ 14–15, 458 P.3d at 411. For a discussion of article XII, section 3, and its history, see Kori Nau, *Honoring the New Mexico Constitution and Its History: New Mexico's Unique Blaine Amendment and Its Application in Moses v. Ruskowski*, 51 N.M. L. REV. 255, 258–61 (2021).

67. *Moses v. Skandera*, 2015-NMCA-036, ¶ 53, 346 P.3d 396, 409, *rev'd*, 2015-NMSC-036, 367 P.3d 838, *vacated sub nom.* *New Mexico Ass'n of Non-public Schs. v. Moses*, 582 U.S. 951 (2017).

68. See *Moses v. Skandera*, 2015-NMSC-036, ¶ 12, 367 P.3d 838, 841; see also *Moses v. Ruskowski*, 2019-NMSC-003, ¶¶ 47–51, 458 P.3d at 420–21. A discussion of the Blaine Amendment is outside the scope of this article, but *Moses* also illustrates how *Elane* resulted in some confusion on how New Mexico courts should interpret the various state constitutional provisions relating to religion. The court of appeals initially found New Mexico's Blaine Amendment to be coextensive with the Establishment Clause of the First Amendment of the federal constitution under *Elane*, but this

New Mexico courts' analysis has given litigants little reason to pursue action in state court. As a result, claims for violation of the Establishment Clause mostly have been filed in federal court.<sup>69</sup>

### III. EVOLUTION OF FEDERAL ESTABLISHMENT CLAUSE ANALYSIS AND RECENT DEVELOPMENTS

Until recently, the issues surrounding how New Mexico courts have interpreted the state establishment clause as coextensive with its federal counterpart may have not been an issue. Where federal precedent provides sufficient constitutional protection, the need for independent state constitutional analysis is not so pressing. Now, there are few areas where independent state constitutional analysis is more crucial, where the Supreme Court has eliminated many of the limits on direct government involvement in religious activity, “loosen[ed] restrictions on the use of tax dollars to support religious practice and instruction and, indeed, require[ed] government financial support for religious institutions[, as well as] exempt[ed] private religious individuals from the need to comply with general laws promoting public health and protecting against discrimination.”<sup>70</sup>

Although federal precedent remained relatively protective of the separation of church and state for decades, that trend has reversed over the past decade, and it was definitively turned on its head during the 2022 United States Supreme Court term. These changes in Religion Clause jurisprudence have resulted in a nearly wholesale elevation of the Free Exercise Clause above the Establishment Clause. The Justices who have dissented from the Court's Religion Clause cases, as well as more liberal jurists and scholars, believe this evolution has gutted the federal protections separating church from state.<sup>71</sup>

Until recently, the longstanding analysis that “served as the focal point for Establishment Clause discussions” was the *Lemon* test.<sup>72</sup> Under the *Lemon* test, a governmental action passed constitutional muster if: (1) it had “a secular legislative purpose,” (2) “its principal or primary effect” was “one that neither advance[d] nor inhibit[ed] religion,” and (3) it did “not foster an excessive government

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determination was later overturned by the supreme court due to the provision's text and distinct history in the state. *Moses v. Skandera*, 2015-NMSC-036, ¶¶ 16–27, 367 P.3d at 842–45.

69. See, e.g., *Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016); *Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100 (D.N.M. 2020).

70. Erwin Chemerinsky & Howard Gillman, *Symposium: The Unfolding Revolution in the Jurisprudence of the Religion Clauses*, SCOTUSBLOG (Aug. 6, 2020, 10:36 AM), <https://www.scotusblog.com/2020/08/symposium-the-unfolding-revolution-in-the-jurisprudence-of-the-religion-clauses> [<https://perma.cc/X385-U558>].

71. Ira C. Lupu & Robert W. Tuttle, *Response, Kennedy v. Bremerton School District—A Sledgehammer to the Bedrock of Nonestablishment*, GEO. WASH. L. REV.: ON THE DOCKET (July 26, 2022), <https://gwlr.org/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment> [<https://perma.cc/YRH2-QDAS>].

72. STEVEN G. GEY, RELIGION AND THE STATE 219 (2nd ed. 2006). In *Lemon v. Kurtzman*, the Court struck down two state statutes that provided financial aid to religious schools, reasoning that the statutes promoted an unconstitutional entanglement between the states and the religious institutions that benefitted from the aid. 403 U.S. 602, 625 (1971).

entanglement with religion.”<sup>73</sup> By focusing on the purposes and effects of a challenged government action, as well as any entanglement with religion it might entail, the test aimed to be a workable standard applied across the board in Establishment Clause cases. Indeed, over the years, the Court used these factors to resolve a host of Establishment Clause cases on different topics, including religious monuments,<sup>74</sup> student-led prayers before public-school football games,<sup>75</sup> prayers at graduation ceremonies,<sup>76</sup> and school voucher plans.<sup>77</sup>

However, the *Lemon* test was quickly modified. In *Lynch v. Donnelly*, a crèche display case decided in 1984, Justice Sandra Day O’Connor suggested “a clarification of our Establishment Clause doctrine.”<sup>78</sup> Dubbed the “endorsement test,” to determine whether an Establishment Clause violation occurred, the question is whether the government action “convey[s] a message that religion or a particular religious belief is favored or preferred.”<sup>79</sup> Applying endorsement to *Lemon*, “[t]he purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion.”<sup>80</sup> The effects prong asks whether a governmental practice has “the effect of communicating a message of government endorsement or disapproval of religion.”<sup>81</sup> And the test “focuses upon the perception of a reasonable, informed observer.”<sup>82</sup>

Although designed as a framework to resolve all Establishment Clause cases, the *Lemon* test and its endorsement-test offshoot ultimately came to be honored more in their avoidance than their observance. Critics believed that requiring government action to have a “secular purpose” impermissibly infringed on religious liberty and showed hostility toward religious beliefs.<sup>83</sup> And, coupled with a marked increase in the number and breadth of successful Free Exercise cases,<sup>84</sup> a more recent branch of Establishment Clause cases increasingly

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73. 403 U.S. at 612–13 (citations omitted).

74. See *Stone v. Graham*, 449 U.S. 39, 42–43 (1980) (striking down state law requiring Ten Commandments to be posted in public school classrooms); *McCreary County v. ACLU*, 545 U.S. 844, 851–59 (2005) (enjoining display of Ten Commandments in county courthouses).

75. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000).

76. See *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

77. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–44 (2002).

78. 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

79. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring).

80. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

81. *Id.* at 692.

82. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O’Connor, J., concurring).

83. See GEY, *supra* note 72, at 221 (citing Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RESRV. L. REV. 795 (1993)).

84. See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) (exclusion of churches from an otherwise neutral and secular aid program violates Free Exercise Clause); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 584 U.S. 617 (2018) (Colorado Civil Rights Commission’s evaluation of a cake shop owner’s reasons for declining to make a wedding cake for a same-sex couple violates Free Exercise Clause); *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464 (2020) (Montana law that provides funding for education but excludes religious education options violates the Free Exercise Clause); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (civil courts cannot adjudicate employment-discrimination claims brought by an employee

“abandoned” the “ambitious, abstract, and ahistorical”<sup>85</sup> attempt to impose a “grand unified theory” of “neutrality” on all public religious expression.<sup>86</sup>

In *Marsh v. Chambers*, the Supreme Court upheld Nebraska’s practice of opening legislative sessions with prayer by referencing “history and tradition.”<sup>87</sup> In another legislative prayer case, *Town of Greece v. Galloway*, the Court further developed its *Marsh* ruling by holding there was no constitutional violation when a local government with predominately Christian clergy delivered religious invocations.<sup>88</sup> There, the Court explained that “[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”<sup>89</sup> Because the town’s practice “fi[t] within the tradition” carried out by the First Congress and other state legislatures, it was presumptively constitutional.<sup>90</sup> Later, in *American Legion v. American Humanist Association*, the Supreme Court relied on a historical Establishment Clause analysis in a slightly different manner, reasoning that “[t]he passage of time gives rise to a strong presumption of constitutionality.”<sup>91</sup> There, the Court upheld the constitutionality of the Bladensburg peace cross, a 32-foot tall Latin cross on public property which served as a war memorial.<sup>92</sup> In doing so, it asserted that, for longstanding religious monuments, removing or altering them in response to an Establishment Clause challenge “would be seen by many not as a neutral act but as the manifestation of ‘a hostility toward religion that has no place in our Establishment Clause traditions.’”<sup>93</sup>

Although the cases of the past decade previewed the shift in analysis, by the 2022 Supreme Court term, the *Lemon* critics were decisively louder than the adherents, and they had the votes on the United States Supreme Court to back their position. During that term, two free exercise cases solidified the shift in direction the United States Supreme Court had taken: *Carson v. Makin*, and *Kennedy v. Bremerton*.

#### *Carson v. Makin*

In *Carson*, two families challenged the system that Maine uses to provide a free public education to school-aged children, alleging that it violated their free

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against her religious employer, when the employee carried out important religious functions under the Religion Clauses); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (Philadelphia’s refusal to contract with Catholic Social Services (“CSS”) for the provision of foster care services unless CSS agreed to certify same-sex couples as foster parents violates the Free Exercise Clause).

85. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (internal quotation marks omitted).

86. *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 60 (2019) (plurality opinion); *see also id.* at 89 (Ginsburg & Sotomayor, JJ., dissenting) (“Decades ago, this Court recognized that the Establishment Clause . . . demands governmental neutrality among religious faiths, and between religion and nonreligion . . . Today the court erodes that neutrality commitment.” (internal citations omitted)).

87. 463 U.S. 783, 786 (1983).

88. 572 U.S. 565, 569–70 (2014).

89. *Id.* at 577.

90. *Id.* at 577, 591.

91. 588 U.S. at 57.

92. *Id.* at 36–38.

93. *Id.* at 38 (quoting *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)).

exercise rights.<sup>94</sup> In some of the state's rural areas, school districts had elected not to operate their own secondary schools.<sup>95</sup> Instead, they chose one of two options: sending students to other public or private schools that the district designates, or paying tuition at a private school that each student selects.<sup>96</sup> For the latter instance, state law allowed government funds to be used only at nonsectarian schools.<sup>97</sup> In a 6-3 opinion authored by Chief Justice Roberts, the Court underscored that once the government opts to provide funding to private schools, it cannot discriminate between sectarian and nonsectarian schools and concluded that the fact Maine paid tuition for some students to attend private schools, as "long as the schools are not religious . . . is discrimination against religion."<sup>98</sup> It did not matter to the Court that the Maine program was intended to provide students with the equivalent of a free public education, which is always secular.<sup>99</sup>

Justices Breyer and Sotomayor authored dissenting opinions. Justice Breyer underscored that balancing the interests contained in the Free Exercise and Establishment Clauses was essential in "avoiding religious strife" in an increasingly diverse country.<sup>100</sup> He credited Maine's program as promoting this balance and criticized the majority view for ignoring the anti-establishment interests at play "while giving almost exclusive attention to" the Free Exercise Clause.<sup>101</sup> Justice Breyer also noted that, for the first time, the Court had ruled that "a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public education."<sup>102</sup>

Justice Sotomayor's dissent observed that in a very short time, the Supreme Court had "shift[ed] from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars."<sup>103</sup> More generally, she concluded: "Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its

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94. *Carson v. Makin*, 596 U.S. 767 (2022).

95. *Id.* at 773.

96. *Id.* at 773–74.

97. *Id.* at 774.

98. *Id.* at 781.

99. While previous cases distinguished between a school's religious status and its use of funds for religious purposes, the Court held they were essentially the same. In doing so, the Court also collapsed the status-use distinction used in other cases. *See id.* at 782.

100. *Id.* at 791 ("Together [the Religion Clauses] attempt to chart a 'course of constitutional neutrality' with respect to government and religion. . . . They were written to help create an American Nation free of the religious conflict that had long plagued European nations with 'governmentally established religion[s]'. . . . Through the Clauses, the Framers sought to avoid the 'anguish, hardship and bitter strife' that resulted from the 'union of Church and State' in those countries." (citations omitted)).

101. *Id.* at 789.

102. *Id.* at 795.

103. *Id.* at 808.

historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens.”<sup>104</sup>

*Kennedy v. Bremerton*

The Court’s decision in *Kennedy v. Bremerton School District*<sup>105</sup> is even more striking than *Carson*. Kennedy involved a public high school football coach who prayed on the fifty-yard line immediately after games, in plain view of his players, and who invited their participation when he did so.<sup>106</sup> This practice emerged after the school prohibited Kennedy from a years-long practice of leading prayers in the locker room and giving religious sermons at midfield after games.<sup>107</sup> The school district, concerned about indirectly coercing students into participating in the prayer and thereby violating the Establishment Clause, suspended Kennedy for defying its request that he stop this activity.<sup>108</sup> He sued, alleging violation of his Free Exercise and Free Speech rights.<sup>109</sup>

The Supreme Court granted certiorari, and a 6-3 majority of the Court held that the Free Exercise Clause and Free Speech Clause protected the prayers Kennedy conducted, and that the Establishment Clause did not prohibit them.<sup>110</sup> The Roberts Court emphasized that Kennedy’s prayers were personal and private, despite the fact that they took place on the fifty-yard line, immediately after games, and that he invited the participation of players and other coaches.<sup>111</sup> And it simply ignored the context that led the district to curtail Kennedy’s behavior in the first instance,<sup>112</sup> thereby abandoning the context-specific inquiry that previously was a hallmark of Establishment Clause analysis.

In reaching its decision, the Court also summarily upturned half a century of Establishment Clause precedent. Without expressly overruling *Lemon* or its endorsement test offshoot, the Court nonetheless observed that *Lemon* and the endorsement test had been “long ago abandoned.”<sup>113</sup> Instead the Court “instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”<sup>114</sup> In particular, the Court stressed that the line “‘between the permissible and the impermissible’ has to ‘accord with history and faithfully reflect the understanding of the Founding Fathers.’”<sup>115</sup> Other than this general description, the *Kennedy* Court did not explain what this type of historical

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104. *Id.* at 810.

105. 597 U.S. 507 (2022).

106. *Id.* at 552–57 (Sotomayor, J., dissenting).

107. *Id.* at 548–52.

108. *Id.* at 538–39 (majority opinion).

109. *Id.* at 520.

110. *Id.* at 542–43.

111. *Id.* at 543.

112. *See id.* at 546.

113. *Id.* at 534.

114. *Id.* at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

115. *Id.* (quoting *Town of Greece*, 572 U.S. at 577).



analysis might entail.<sup>116</sup> With very little guidance as to how the new Establishment Clause test should be applied, the aftermath of *Kennedy* in the lower courts has been confusion.<sup>117</sup>

Justice Sotomayor's dissent, joined by Justices Breyer and Kagan, highlights the way the Court's opinion interprets the Religion Clauses out of balance, once again noting that the majority "pa[ys] almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion."<sup>118</sup> In addition, the dissent emphasizes how the majority rejected "longstanding concerns surrounding government endorsement of religion," and "applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities."<sup>119</sup>

These recent changes in Religion Clause precedent would be less alarming were it not for what they have emboldened in their wake. Public officials across the country now more openly refer to the separation of church and state as a "myth" or "misnomer."<sup>120</sup> Legislators in Texas, Idaho, and Kentucky have weaponized the Court's holdings in *Carson* and *Kennedy* by introducing (and in some instances, successfully passing) laws requiring display of the Ten Commandments,<sup>121</sup> school

116. Previous Supreme Court cases that have dealt with the Establishment Clause in historical terms may suggest the proper approach to be taken. *See, e.g., Town of Greece*, 572 U.S. at 577 (legislative prayer); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 63–65 (2019) (plurality opinion) (religious monuments); *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (religious oaths); *McGowan v. Maryland*, 366 U.S. 420, 437–440 (1961) (Sunday closing laws); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970) (tax exemptions).

117. *See Firewalker-Fields v. Lee*, 58 F.4th 104, 123 n.8 (4th Cir. 2023) ("Open questions abound. What kinds of evidence are relevant? What kinds of evidence are the most useful? Which periods of history are relevant—the era of the Bill of Rights, 1791, or the era of the incorporation of the Bill of Rights, 1868—and which period is most important? This last question might matter a great deal in the Establishment Clause context given the evidence that the understanding of that principle changed significantly between 1791 and 1868. We could go on." (citations omitted)).

118. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 546 (2022) (Sotomayor, J., dissenting).

119. *Id.* at 547.

120. *See, e.g.,* Rebecca Shabad, *Speaker Mike Johnson Says Separation of Church and State is a 'Misnomer'*, NBC NEWS (Nov. 14, 2023, 2:37 PM), <https://www.nbcnews.com/politics/congress/speaker-mike-johnson-says-separation-church-state-misnomer-rcna125181> [<https://perma.cc/7BNQ-TV6D>]; Elizabeth Dias, *The Far-Right Christian Quest for Power: 'We Are Seeing Them Emboldened'*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2022/07/08/us/christian-nationalism-politicians.html> [<https://perma.cc/KGL8-MQZH>] (Pennsylvania governor and state senator Doug Mastriano calling separation of church and state a "myth"); Dana Rubinstein, *Adams, Discussing Faith, Dismisses Idea of Separating Church and State*, N.Y. TIMES (Feb. 28, 2023), <https://www.nytimes.com/2023/02/28/nyregion/eric-adams-religion-church.html> [<https://perma.cc/E6W6-46BD>] (New York Mayor Eric Adams dismissing separation of church and state and suggesting support for compulsory prayer in schools).

121. *See* S.B. 1515, 88th Leg., Reg. Sess. (Tex. 2023); *see also* Zoë Richards, *Ten Commandments Would Be Required in Public Classrooms Under Bill Passed by Texas Senate*, NBC NEWS (Apr. 21, 2023, 7:08 PM), <https://www.nbcnews.com/politics/politics-news/ten-commandments-required-public-schools-texas-bill-rcna80936> [<https://perma.cc/T7N8-Q3F8>].

chaplains,<sup>122</sup> and prayer in schools.<sup>123</sup> And in 2023, Oklahoma state officials created the state's first religious charter school.<sup>124</sup> Prior to 2022, it was difficult to imagine a scenario in which a state funded religious school would survive a federal Establishment Clause challenge. Today, the outcome of such a ruling is less clear. Further, due to the current composition of the Court and recent persistent trends in the Court's Religion Clause decisions, bringing such a challenge now carries the risk that the Supreme Court will further erode what remains of federal Establishment Clause protection.

#### IV. ALTERNATIVE APPROACHES TO STATE ESTABLISHMENT CLAUSE ANALYSIS IN CLAIMS BROUGHT UNDER THE NEW MEXICO CIVIL RIGHTS ACT

Despite these recent federal judicial and legislative trends, those who seek to protect a person's right to be free from government-sponsored religion have another potentially viable source of protection: state constitutions.<sup>125</sup> For that to effectively happen, two things must be present: (1) a mechanism, such as a statute, that creates a private right of action by which state constitutional claims may be brought, and (2) a mode of analysis that insulates state constitutional claims from federal precedent.<sup>126</sup> The New Mexico Civil Rights Act provides the mechanism. However, the mode of analysis remains at issue. As discussed in Section II, *Elane Photography* and subsequent Religion Clause cases brought in state court do no more than pay lip service to the state constitution without applying it any differently than its federal analog.

That needs to change. With the Religion Clauses now heavily skewed to favor free exercise over antiestablishment interests and little guidance about how to apply the new "history and tradition" test, continuing to interpret the state

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122. See S.B. 763, 88th Leg., Reg. Sess. (Tex. 2023); see also Michelle Boorstein, *Texas Pushes Church into State with Bills on School Chaplains, Ten Commandments*, WASH. POST (May 24, 2023, 4:39 AM), <https://www.washingtonpost.com/religion/2023/05/23/texas-commandments-chaplains-christianity/> [<https://perma.cc/S6FA-3PLL>].

123. See H.B. 547, 2023 Gen. Assemb., Reg. Sess. (Ky. 2023); see also H.B. 182, 67th Leg., First Reg. Sess. (Idaho 2023).

124. Sarah Mervosh, *Oklahoma Approves First Religious Charter School in the U.S.*, N.Y. TIMES (June 7, 2023), <https://www.nytimes.com/2023/06/05/us/oklahoma-first-religious-charter-school-in-the-us.html> [<https://perma.cc/E97T-PS37>]; see also Kari King & Kaylee Olivas, *'Unlawful': OK Attorney General Files Lawsuit Over Religious Charter School*, KFOR (Oct. 21, 2023, 12:50 PM), <https://kfor.com/news/ok-attorney-general-files-lawsuit-over-religious-charter-school/> [<https://perma.cc/9XAM-KRBA>].

125. See Ian Millhiser, *The Supreme Court Is Taking a Wrecking Ball to the Wall Between Church and State*, VOX (Aug. 13, 2023, 7:30 AM), <https://www.vox.com/scotus/2023/8/13/23822822/supreme-court-establishment-clause-church-state-separation-carson-bremerton> [<https://perma.cc/6CMR-F98A>]; see also Jenessa Calvo-Friedman & Lily Slater, *To Fight a Stacked Federal Bench, the ACLU Goes to the States*, ACLU (Aug. 12, 2022), <https://www.aclu.org/news/civil-liberties/to-fight-a-stacked-federal-bench-the-aclu-goes-to-the-states> [<https://perma.cc/NC2T-ARRAY>].

126. "New judicial federalism" has gained traction with proponents of state court independence in the interpretation of state constitutions. For an overview of the "new judicial federalism" movement, see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).

establishment clause in line with federal precedent would, at best, subject New Mexico courts to the same confusion that the lower federal courts now suffer, and at worst, strip New Mexicans of meaningful state constitutional protection.

A recent article published in this law review “spotlights the need to develop an approach in which state constitutional provisions with federal analogs are not treated as ‘a mere row of shadows’ and the central focus is on ‘the meaning of the state constitution itself, rather than on comparing it with, or relating it to, the federal constitution.’”<sup>127</sup> That article, which critiques *Gomez* interstitialism and how it has been applied in civil cases, outlines different modes of constitutional analysis that could be applied in cases brought under the NMCRA.<sup>128</sup> As applied to article II, section 11, those modes of analysis, along with their potential benefits and pitfalls, are outlined below.

### *Lockstep*

The “lockstep” approach means exactly what the name implies: state courts interpret their constitutional provisions in lockstep with their corresponding federal provisions.<sup>129</sup> States that have adopted the lockstep approach do not engage in any state constitutional analysis.<sup>130</sup> State provisions with federal analogs automatically embody the Supreme Court’s interpretation of the federal provision.<sup>131</sup> If there is no protection available under a federal provision, the court will not independently consider its state provisions.<sup>132</sup> Proponents of the lockstep approach note the advantage of having uniformity between state and federal constitutional interpretation, and it results in a relatively straightforward application of a state constitutional claim.<sup>133</sup> States that have applied the lockstep approach in Establishment Clause cases include Alabama,<sup>134</sup> Arizona,<sup>135</sup> North Dakota,<sup>136</sup> and South Carolina.<sup>137</sup>

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127. Vanzi & Baker, *supra* note 44, at 3.

128. *Id.* at 4–6.

129. *Id.* at 4–5.

130. Jennifer C. Juste, *Constitutional Law—The Effect of State Constitutional Interpretation on New Mexico’s Civil and Criminal Procedure—State v. Gomez*, 28 N.M. L. REV. 355, 357–58 (1998).

131. *Id.* at 357.

132. *Id.* at 358.

133. See Landau, *supra* note 26, at 69.

134. *Alabama Educ. Ass’n v. James*, 373 So. 2d 1076, 1081 (Ala. 1979) (“[W]e now hold the Alabama constitutional provisions concerning the establishment of religion are not more restrictive than the Federal Establishment of Religion Clause in the First Amendment to the United States Constitution.”); see also *Magee v. Boyd*, 175 So. 3d 79, 137–38 (Ala. 2015).

135. See *Kotterman v. Killian*, 972 P.2d 606, 616–21 (Ariz. 1999) (en banc); see also *Niehaus v. Huppenthal*, 310 P.3d 983, 986 (Ariz. Ct. App. 2013) (“[T]he Arizona Supreme Court’s interpretation of the Religion Clause was ‘virtually indistinguishable from the United States Supreme Court’s interpretation of the federal Establishment Clause.’”).

136. *Bendewald v. Ley*, 168 N.W. 693, 696 (N.D. 1917) (“The first amendment to the Constitution of the United States denies to Congress the power to make any law respecting an establishment of religion, or prohibiting the free exercise thereof. To the same effect is section 4 of article 1 of the Constitution of the state of North Dakota.”); *State v. Burckhard*, 1998 ND 121, ¶ 10–12, 579 N.W.2d

However, there are many critics of this approach, notably former Supreme Court Justice William Brennan and Chief Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit.<sup>138</sup> These critics, among many others, argue that the lockstep approach is contrary to the concept of federalism, ignoring our nation's system of dual-sovereignty, and allows a state judiciary to eschew its obligation and responsibility to independently interpret its constitution.<sup>139</sup>

If New Mexico adopted the lockstep approach, it would subject New Mexicans to automatic deference to the Supreme Court's interpretation of what constitutes an establishment of religion, including the recent pronouncements in *Kennedy*. While doing so certainly could further the conceptual idea of having uniformity between state and federal constitutional interpretation,<sup>140</sup> it also is problematic.

First, this approach ignores the well-established and widely accepted concept that the federal constitution serves as a floor, not a ceiling, for personal liberties.<sup>141</sup> Second, this approach fails to take into account the fact that Article II, Section 11 was not modeled after its federal counterpart, but rather molded from other existing state constitutional provisions, and principally the provision contained in the Illinois constitution.<sup>142</sup> This is particularly notable for a later-formed state such as New Mexico, where the framers had a choice as to whether they would model the state constitutional language after the federal constitution or after any of the 46 states whose statehood preceded it. Relatedly, applying the lockstep approach to Establishment Clause jurisprudence blindly ignores the resulting textual differences between the state and federal provisions. And it fails to take into account the basic principle that state constitutions are intended to protect the rights and liberties of the people who actually live in those states.

In addition, the new "history and tradition" test espoused in *Kennedy*, which requires adherence to norms at the time of the country's Founding Fathers, refers to a time before New Mexico was even a state, and therefore fails to take into

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194, 196–197 (affirming *Ley's* contention that the First Amendment of the Constitution and article 1, section 3 of the North Dakota Constitution are the same).

137. *Durham v. McLeod*, 192 S.E.2d 202, 204 (S.C. 1972); *Hunt v. McNair*, 187 S.E.2d 645, 648–50 (S.C. 1972) ("The language of the [F]irst [A]mendment to the Constitution of the United States and the language of [a]rticle 1, [s]ection 4, of the Constitution of South Carolina are, for all intents and purposes, the same. Accordingly, our reasoning is applicable to both constitutional provisions."); *Carolina Amusement Co. v. Martin*, 115 S.E.2d 273, 284–86 (S.C. 1960).

138. See *Vanzi & Baker*, *supra* note 44, at 16–20.

139. *Juste*, *supra* note 130, at 358.

140. The Supreme Court consistently has ruled that the interest in uniformity "does not outweigh the general principle that States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees. . . . Nonuniformity is, in fact, an unavoidable reality in a federalist system of government." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008).

141. Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 228 ARIZ. L. REV. 227, 228 (2008) ("One of the most widely accepted notions in American constitutional law is that the federal Constitution and interpretations of that Constitution by the Supreme Court of the United States set a 'floor' for personal liberties.")

142. *LARSON*, *supra* note 14, at 100.

account the unique circumstances at play when New Mexico's constitution was drafted and its statehood first defined. And because ratification of the New Mexico constitution predates the incorporation of the federal Establishment Clause against the states, the lockstep approach would strip article II, section 11 as an independent source of rights, thereby rendering our state constitution no more than a neutered document.

The lockstep approach would also mean it does not matter if a government action is religiously motivated, what the effect of the government action is, or whether the action appears to endorse a particular religion. Instead, the new test reduces the clause to a prohibition against practices proscribed at the time of the Founding Fathers, when the country was predominately Christian. In our diverse state, the consequences of doing so will be far reaching to both minority religions and non-adherents.

Such an interpretation runs contrary to the tenets espoused in the American system of dual sovereigns. It also is at loggerheads with the intent of the New Mexico legislature, which enacted the New Mexico Civil Rights Act specifically to invigorate the state constitution as a means by which the New Mexico populace can vindicate their civil rights within the state system.<sup>143</sup> For these reasons, the lockstep approach is not in line with how advocates and courts should view and analyze the state constitutional guarantee concerning an establishment of religion.

#### *Interstitial or Criteria/Factor*

The “interstitial approach”—the approach adopted by New Mexico—is discussed extensively in Section II. Interstitial analysis first considers federal precedent. If there are no federal protections, the court next will analyze the state provision.<sup>144</sup> In theory, interstitial analysis also provides a way for state courts to diverge from federal precedent in limited circumstances.<sup>145</sup> The criteria/factor approach is considered to be a variation of interstitial. It “essentially presumes that federal case law construing parallel provisions of the federal constitution is controlling, but allows the presumption to be rebutted by significant differences in texts or by textual or historical contexts.”<sup>146</sup> States that have applied some form of the interstitial or criteria/factor approach in the Establishment Clause context include California,<sup>147</sup> Connecticut,<sup>148</sup> Idaho,<sup>149</sup> Illinois,<sup>150</sup> Iowa,<sup>151</sup> Kentucky,<sup>152</sup>

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143. N.M. C.R. COMM’N, NEW MEXICO CIVIL RIGHTS COMMISSION REPORT, at 1 (2020).

144. *State v. Gomez*, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (citing *The Interpretation of State Constitutional Rights*, *supra* note 45, at 1359).

145. *Juste*, *supra* note 130, at 359–60.

146. Landau, *supra* note 26, at 70. The authors note that Landau’s definition of interstitial does not quite describe the approach adopted in *Gomez*, even though Landau relies on *Gomez* as a model for interstitial. In New Mexico, interstitial more closely resembles Landau’s definition of the criteria/factor approach. See *supra* text accompanying notes 45–47. Noting the approaches’ similarities, other authors have also incorporated interstitial and criteria/factor into one approach. See *Vanzi & Baker*, *supra* note 44, at 5 n.23.

147. *Paulson v. Abdelnour*, 51 Cal. Rptr. 3d 575, 590 (Cal. Ct. App.2006) (“While the California Constitution is a document of independent force, the protections it creates in article I, section 4,

Minnesota,<sup>153</sup> Nebraska,<sup>154</sup> New Jersey,<sup>155</sup> Pennsylvania,<sup>156</sup> Tennessee,<sup>157</sup> Vermont,<sup>158</sup> West Virginia,<sup>159</sup> and Wisconsin.<sup>160</sup>

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concerning the establishment of religion are no broader than those created by the First Amendment of the United States Constitution and ‘coincide with the intent and purpose’ of the federal Establishment Clause. The construction given by California courts to the Establishment Clause of article I, section 4, is guided by decisions of the United States Supreme Court.”); *see also* E. Bay Asian Loc. Dev. Corp. v. State, 13 P.3d 1122, 1125–26 (Cal. 2000) (interpreting both the federal and the state Establishment Clauses).

148. *Snyder v. Town of Newton*, 161 A.2d 770, 772 (Conn. 1960) (interpreting the 1955 Connecticut Constitution); *see also* Bd. of Educ. v. State Bd. of Educ., 709 A.2d 510, 517 (Conn. 1998) (holding that the *Snyder* decision applies to the newer Connecticut Constitution even after its amendment).

149. *Bd. of Cnty. Comm’rs v. Idaho Health Facilities Auth.*, 531 P.2d 588, 599 (Idaho 1974) (“The appropriation of public funds to public hospitals operated by religious sects does not violate the First Amendment to the Constitution of the United States. But this does not mean that such commitment of funds is not violative of the Idaho Constitution. The Idaho Constitution places a much greater restriction upon the power of state government to aid activities undertaken by religious sects than does the First Amendment to the Constitution of the United States.” (citations omitted)).

150. *See McKinley Found. at Univ. of Ill. v. Illinois Dep’t of Lab.*, 936 N.E.2d 708, 718–19 (Ill. App. Ct. 2010); *People v. Falbe*, 727 N.E.2d 200, 207 (Ill. 2000) (“The restrictions of the Illinois Constitution concerning the establishment of religion have been held to be identical to those imposed by the first amendment to the Constitution of the United States.”); *People ex rel. Klinger v. Howlett*, 305 N.E.2d 129, 130 (Ill. 1973) (“[A]ny statute which is valid under the first amendment is also valid under the constitution of Illinois.”); *Toney v. Bower*, 744 N.E.2d 351, 359 (Ill. App. Ct. 2001) (“However, that court is not bound in every case to follow this doctrine. Rather, the court has looked to the intent behind our constitution to determine if its provisions should receive a similar interpretation to those given comparable federal constitutional provisions. Where the language of our constitution or the debates and committee reports of the constitutional convention show that the framers intended a different construction, our supreme court will construe similar provisions in a different manner than has the United States Supreme Court.”); *see also* Landau, *supra* note 26 at 69 n.16 (noting “the Illinois Supreme Court has long been identified with the lockstep approach to state constitutional interpretation,” but “[m]ore recently . . . has backed off from its adherence”).

151. *See Rudd v. Ray*, 248 N.W.2d 125, 129–33 (Iowa 1976).

152. *See Ky. Off. of Homeland Sec. v. Christerson*, 371 S.W.3d 754, 759–60 (Ky. Ct. App. 2011); *see also* *Neal v. Fiscal Ct.*, 986 S.W.2d 907, 909–10 (Ky. 1999) (“[O]ur state provisions mandate a much stricter interpretation than the Federal counterpart found in the First Amendment’s ‘establishment of religion clause.’”); *Fiscal Ct. v. Brady*, 885 S.W.2d 681, 686–87 (Ky. 1994).

153. *See In re Rothenberg*, 676 N.W.2d 283, 293–94 (Minn. 2004); *Ams. United Inc. v. Indep. Sch. Dist.*, 179 N.W.2d 146, 149–57 (Minn. 1970); *Minn. Fed’n of Tchrs. v. Mammenga*, 485 N.W.2d 305, 308 (Minn. 1992).

154. *See State ex rel. Sch. Dist. v. Neb. State Bd. of Educ.*, 195 N.W.2d 161, 163–64 (Neb. 1972).

155. *See Freedom from Religion Found. v. Morris Cnty. Bd. of Chosen Freeholders*, 181 A.3d 992, 1004–12 (N.J. 2018).

156. *See Sch. Dist. v. Pa. Dep’t of Educ.*, 382 A.2d 772, 775–77 (Pa. Commw. Ct. 1978), *aff’d sub nom* *Springfield Sch. Dist. v. Dep’t of Educ.*, 397 A.2d 1154 (Pa. 1979).

157. *See Martin v. Beer Bd. for Dickson*, 908 S.W.2d 941, 949–51 (Tenn. Ct. App. 1995); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956) (noting that the First Amendment and the Tennessee Constitution “are practically synonymous” and that “[i]f anything, [Tennessee’s] organic law is broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience, in that ‘no preference shall ever be given, by law, to any religious establishment or mode of worship’”); *Tenn. Dep’t of Hum. Servs. v. Priest Lake Cmty. Baptist Church*, No. M2006-00302-COA-R3-CV, 2007 WL 1828871, at \*8 (Tenn. Ct. App. June 25, 2007) (reaffirming *Carden*); *State ex rel. Swann v. Pack*, 527

In theory, the interstitial approach could be applied in a manner that gives credence to the broader protections espoused in article II, section 11. There are, after all, significant differences in the text and historical contexts of the federal and state Establishment Clauses.<sup>161</sup> Moreover, as discussed in Section III, recent federal Establishment Clause jurisprudence both (1) represents a sea change in how the United States Supreme Court analyzes religion cases, and (2) has come under intense scrutiny for favoring the Free Exercise clause and casting aside the Establishment Clause.

Theory aside, and as discussed in Section II, one cannot ignore how New Mexico courts have actually applied the interstitial approach—particularly in civil cases, including in cases concerning the Religion Clauses like *Elane* and *Moses*.<sup>162</sup> Because our courts have analyzed the state constitution as coextensive with its federal counterpart and have used federal precedent to analyze the state Religion Clauses in these cases, the version of the “interstitial” approach New Mexico courts have applied is functionally identical to the lockstep approach.<sup>163</sup> For this reason, the interstitial approach in practice is subject to the same critiques as the lockstep approach.<sup>164</sup> The courts’ manner of implementing interstitial analysis may also suggest that, while conceptually appealing, it has been and may continue to be unworkable in practice.

At a minimum, to make interstitial analysis a viable means by which to protect the Establishment Clause rights of New Mexicans, the way it is applied must dramatically change. Both advocates and courts would need to emphasize the reasons for departing from federal precedent that *Gomez* anticipated—and then actually depart from federal precedent and engage in independent state constitutional analysis of article II, section 11. Whether that can happen remains to be seen, but the fact it has not been done in the past twenty-five years since *Gomez* was decided does not bode well.<sup>165</sup>

S.W.2d 99, 107–12 (Tenn. 1975) (noting that Tennessee’s constitution “contains a substantially stronger guaranty of religious freedoms”); *Steele v. Waters*, 527 S.W.2d 72, 73–74 (Tenn. 1975); *Scopes v. State*, 289 S.W. 363, 365–67 (Tenn. 1927).

158. See *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 6, 205 Vt. 586, 178 A.3d 313 (“[A] violation of the Compelled Support Clause of the Vermont Constitution is analogous to an Establishment Clause violation.”); *Chittenden Town Sch. Dist. v. Dep’t of Educ.*, 738 A.2d 539, 547 (Vt. 1999); *State v. DeLaBruere*, 577 A.2d 254, 266–72 (Vt. 1990); *Swart v. S. Burlington Town Sch. Dist.*, 167 A.2d 514, 518 (Vt. 1961).

159. See *Janasiewicz v. Bd. of Educ.*, 299 S.E.2d 34, 35–38 (W. Va. 1982); *State ex rel. Cooper v. Bd. of Educ.*, 478 S.E.2d 341, 344–46 (W. Va. 1996) (reaffirming *Janasiewicz*).

160. See *Holy Trinity Cmty. Sch., Inc. v. Kahl*, 262 N.W.2d 210, 211–17 (Wis. 1978); *Jackson v. Benson*, 578 N.W.2d 602, 620–21 (Wis. 1998); *State ex rel. Wis. Health Facilities Auth. v. Lindner*, 280 N.W.2d 773, 783 (Wis. 1979); *King v. Village of Waunakee*, 517 N.W.2d 671, 682–83 (Wis. 1994).

161. See discussion *supra* Sections I & II.

162. See generally *supra* Section II.

163. See generally *supra* Section II.

164. For a good critique of the interstitial approach as it applies in civil cases, see *Vanzi & Baker, supra* note 44, at 8–16.

165. Recently, in *Grisham v. Van Soelen*, a partisan gerrymandering case brought under the state Equal Protection Clause, the Court declined to engage in interstitial analysis because a lack of “clarity as to the existence of federal protection,” made it impossible to answer whether the plaintiffs’ equal

### Primacy

The “primacy” approach is the direct opposite of the lockstep approach and the inverse of the interstitial approach. This view “abjures any notion that courts should begin their constitutional analysis by considering federal case law construing parallel provisions of the Federal Bill of Rights.”<sup>166</sup> Under primacy, federal provisions provide a “second layer of protection” that is considered only if a state provision fails to provide protections first.<sup>167</sup> While many scholars have embraced primacy, it has been adopted only in a minority of states<sup>168</sup> and was expressly rejected in *State v. Gomez*.<sup>169</sup> Citing *Developments in the Law—The Interpretation of State Constitutional Rights*,<sup>170</sup> the *Gomez* court rejected primacy for its “inefficient route to an inevitable result” and lack of “cogency” compared to “reasoned” federal court analysis.<sup>171</sup>

In spite of the *Gomez* court’s critiques, primacy may be a viable mode of constitutional analysis, but only so long as advocates and courts utilize structured and consistent principles to guide how they interpret the state constitution in the first instance. Courts in several states have analyzed their state Establishment Clauses under the primacy approach: Indiana,<sup>172</sup> Louisiana,<sup>173</sup> Missouri,<sup>174</sup>

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protection right was protected under the federal constitution. 2023-NMSC-027, ¶ 16, 539 P.3d 272, 280. Without a “clear” scope of federal protection, the question before the Court was resolved under the state constitution. *See id.* ¶ 19, 539 P.3d at 281. Although the court’s willingness to depart from interstitial analysis is encouraging, only discarding the interstitial approach for “lack of clarity” on a piecemeal basis whenever federal precedent is unclear on a particular constitutional provision may create further confusion for courts and practitioners as they work toward developing a cohesive and independent body of state constitutional law. The authors therefore advocate for the courts to apply a more standardized approach.

166. Landau, *supra* note 26, at 71.

167. Juste, *supra* note 130, at 358 (quoting John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don’t the “Primacy” States Practice What They Preach?*, 54 UNIV. PITT. L. REV. 1019, 1025 (1993)); *see also* *State v. Gomez*, 1997-NMSC-006, ¶ 18, 122 N.M. 777, 932 P.2d 1.

168. Landau, *supra* note 26, at 71.

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

170. *The Interpretation of State Constitutional Rights*, *supra* note 45.

171. *Gomez*, 1997-NMSC-006, ¶ 21, 932 P.2d at 7 (quoting *The Interpretation of State Constitutional Rights*, *supra* note 45, at 1357).

172. *See, e.g.*, *Meredith v. Pence*, 984 N.E.2d 1213, 1225–26 (Ind. 2013); *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dep’t of Redevelopment*, 744 N.E.2d 443, 445–51 (Ind. 2001) (“When Indiana’s present constitution was adopted in 1851, the framers who drafted it and the voters who ratified it did not copy or paraphrase the 1791 language of the federal First Amendment. Instead, they adopted seven separate and specific provisions, Sections 2 through 8 of Article 1, relating to religion. Clearly, the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. We reject the contention that the Indiana Constitution’s guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees.” (footnotes omitted)); *Burke v. State*, 943 N.E.2d 870, 876–78 (Ind. Ct. App. 2011).

173. *See, e.g.*, *Seegers v. Parker*, 241 So. 2d 213, 216–19 (La. 1970) (“We have no need to resort to the establishment and free exercise clauses of the First Amendment to the United States Constitution for a determination of the issues before us since our Article 1, Section 4, embodies those provisions in full



Oregon,<sup>175</sup> Utah,<sup>176</sup> and Washington.<sup>177</sup> Before discounting that approach entirely, both litigants and courts should examine these cases to determine whether their analytical framework makes sense. It may. First, there are:

prudential reasons [which] counsel consulting the state constitution first: finality, stability, and predictability. Finality, because cases decided on independent state law grounds are unreviewable by the U.S. Supreme Court, so long as no separate federal law argument is made and the state court decision itself does not violate valid federal law or the U.S. Constitution. Stability and predictability, [because state court] decisions need not follow the vagaries and shifting tides of federal jurisprudence.<sup>178</sup>

These reasons have become strikingly apparent in light of an increasingly-politicized federal bench and the sea change in federal jurisprudence in the Establishment Clause arena in recent years. For the NMCRA to be an effective mechanism by which to vindicate state antiestablishment rights, claims brought under the statute must be insulated from federal review. Further, the evolution of federal Establishment Clause jurisprudence demonstrates that independent review of the state provision may prove more stable and predictable than what has happened in the federal system, so long as New Mexico courts and advocates

and expounds upon them in greater detail.”); *State ex rel. Singelmann v. Morrison*, 57 So. 2d 238, 240–43 (La. Ct. App. 1952).

174. *See, e.g., Oliver v. State Tax Comm’n*, 37 S.W.3d 243, 250–52 (Mo. 2001) (en banc); *Paster v. Tussey*, 512 S.W.2d 97, 99, 101–03 (Mo. 1974) (en banc) (“As a state court we are charged, primarily, with the duty of ruling on the constitutional validity of the legislative enactments herein challenged in light of those provisions of the Missouri Constitution which are relevant thereto. If such constitutional provisions proscribe the same, we have no alternative in the performance of that duty but to so rule, unless and until such provisions have been made inoperative by the United States Constitution as interpreted and construed by the Supreme Court of the United States or the people of Missouri have amended the same. . . . From all of which, it becomes readily apparent that the provisions of the Missouri Constitution declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution.”); *Congregation Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 453–56 (Mo. 1959).

175. *See, e.g., Landau, supra* note 26, at 71–73 (citing *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981)).

176. *See, e.g., Soc’y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921–29 (Utah 1993) (analyzing the history of the Utah Establishment Clause in conjunction with the Mormon church in Utah to interpret the Utah clause); *Sumnum v. Pleasant Grove City*, 2015 UT 31, ¶ 8, 345 P.3d 1188, 1190 (noting *Society of Separationists* created a two-step test for establishment violations under Utah Constitution: first, does the practice constitute “religious worship, exercise, or instruction”? If yes, then is it direct or indirect?); *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 18, 73 P.3d 325, 329 (affirming analysis from *Society of Separationists*).

177. *See, e.g., State ex rel. Gallwey v. Grimm*, 48 P.3d 274, 284–87 (Wash. 2002) (en banc) (considering the structural and historical underpinnings of Washington’s Establishment Clause); *Witters v. State Comm’n for the Blind*, 771 P.2d 1119, 1121–23 (Wash. 1989) (en banc); *Saucier v. Emp. Sec. Dept. of State*, 954 P.2d 285, 288 (Wash. Ct. App. 1998); *Malyon v. Pierce County*, 935 P.2d 1272, 1277–89 (Wash. 1997) (en banc).

178. *Clint Bolick, Principles of State Constitutional Interpretation*, 53 ARIZ. ST. L.J. 771, 780 (2021).

develop a consistent and structured way of analyzing the state Establishment Clause independent of more recent federal precedent.

Second, because the federal Bill of Rights was not incorporated against the states when the New Mexico constitution was enacted, neither the drafters of the New Mexico constitution nor those who approved the state constitution could have known—much less intended—that the federal constitution and body of law accompanying it would protect the rights and liberties of New Mexicans. In that sense, by looking to the state constitution first, our courts would pay proper homage to the state’s legal foundations, the federalist system of government, and the differences between the state and federal constitutions and courts.

Third, only state court judges are charged with interpreting and upholding state constitutions. Without state court judges paying careful attention to those protections, they remain toothless. And, “if we subordinate state constitutional protections to federal constitutional jurisprudence, we risk sacrificing liberties that were important to our state constitution’s framers.”<sup>179</sup>

Viewed through this lens, primacy makes sense. But, how does work in practice? Under primacy:

The right question is not whether a state’s guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state’s guarantee means and how it applies to the case at hand.<sup>180</sup>

To answer this question, the Washington Supreme Court, which has adopted the primacy approach, employs the following “neutral principles to guide state constitutional interpretation”<sup>181</sup>:

(1) the textual language; (2) differences in the texts of the state and federal constitutions; (3) [state] constitutional history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) matters of particular state or local concern.<sup>182</sup>

In the context of the Establishment Clause, these factors could be applied as follows. First, in examining the textual language of article II, section 11, advocates and courts could engage in a traditional textual analysis. Whereas the Establishment Clause in the First Amendment of the federal constitution reads: “Congress shall make no law respecting an establishment of religion[.]”<sup>183</sup> article II, section 11 of the state constitution provides: “No person shall be required to

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179. *Id.*

180. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

181. Bolick, *supra* note 178, at 779 (describing principles set forth in *State v. Gunwall*, 720 P.2d 808, 811 (1986) (en banc)).

182. *Id.* (quoting Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington’s Experience*, 65 TEMP. L. REV. 1153, 1161 (1992)).

183. U.S. CONST. amend. I.

attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.”<sup>184</sup> This language, of course, is facially distinct. And a plain reading of the two provisions—using the ordinary meaning of the language—indicates that the New Mexico provision may very well provide broader protections. In this regard, it is notable that in 2020, the New Mexico Civil Rights Commission— whose work ultimately led to the drafting and passage of the New Mexico Civil Rights Act in 2021<sup>185</sup>—identified article II, section 11 and the First Amendment as two provisions that have “meaning[ful] differences.”<sup>186</sup> Based on their text, the Commission stated that “[t]he religious rights in the [New Mexico] Constitution are broader than [those in the] federal Constitution.”<sup>187</sup> As a launching point for a primacy analysis, a plain text reading alone makes apparent that the New Mexico constitution may well provide more robust protections than its federal analog.

Advocates and judges also could look to states with identical or substantially similar language in their state establishment clauses. Those states include Alabama,<sup>188</sup> Colorado,<sup>189</sup> Idaho,<sup>190</sup> Illinois,<sup>191</sup> Indiana,<sup>192</sup> Kentucky,<sup>193</sup> and South Dakota.<sup>194</sup> To the extent courts in those states have performed a textual analysis of their own establishment clauses, those analyses could help shape and inform how litigants and courts here do so.

184. N.M. CONST. art. II, § 11.

185. N.M. STAT. ANN. §§ 41-4A-1 to -13 (2021).

186. N.M. C.R. COMM’N, *supra* note 143, at 13–14.

187. *Id.* at 14.

188. ALA. CONST. art. I, § 3 (“That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this State; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles.”).

189. COLO. CONST. art. II, § 4 (“No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.”).

190. IDAHO CONST. art. I, § 4 (“No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.”).

191. ILL. CONST. art. I, § 3 (“No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.”).

192. IND. CONST. art. 1, § 4 (“No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.”).

193. KY. CONST. § 5 (“No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship. . .”).

194. S.D. CONST. art. VI, § 3 (“No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship.”).

Further, as discussed extensively in Section I, the New Mexico constitution and its corresponding establishment clause have a storied history that differs from the history of the federal constitution. Litigants and courts could look to this history as a source of information for what the state framers intended when they enacted article II, section 11.<sup>195</sup> To that end, it is telling that New Mexico's framers abandoned a version of the establishment clause that would have weakened its protections in favor of adopting more robust language in the 1910 version that was adopted and that has not since been amended.<sup>196</sup>

Simply put, both the text and the history of the state provision emphasize the importance of the separation of church and state in maintaining the balance between the two Religion Clauses in a manner the federal system no longer does. Those advocating for more robust establishment clause rights in the state could use these factors as a means to separate New Mexico's article II, section 11 from federal Establishment Clause jurisprudence. When viewed in line with the goals of the legislature when it enacted the New Mexico Civil Rights Act, primacy provides another potential lens through which to consider cases brought under the Act that seek to vindicate state establishment clause rights.<sup>197</sup>

## CONCLUSION

Against a federal backdrop that increasingly has “encroach[ed] on the sanctity of th[e] guarantees”<sup>198</sup> espoused in the establishment clause and which now consistently favors free exercise above anti-establishment principles, it is time for New Mexico courts to step in. The enactment of the New Mexico Civil Rights Act and the corresponding potential for our state courts to employ different modes of constitutional analysis have paved the way for this to happen. More recently, in *Grisham v. Van Soelen*, the New Mexico Supreme Court indicated that it may be prepared to consider new ways of addressing state constitutional questions by “encourag[ing] 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>199</sup> It is now up to litigants, advocates, and courts to formulate a principled approach to state establishment clause analysis that adequately protects the ideals espoused in article II, section 11.

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195. In addition, because the New Mexico constitution was modeled on the Illinois constitution, issues surrounding the adoption of the Illinois constitution may be informative. See *supra* notes 24–29 and accompanying text.

196. See *supra* text accompanying notes 30–38.

197. There is also a third approach that is essentially a combination of the primacy approach and a traditional federal constitutional analysis: the “dual sovereignty” approach. This mode of analysis considers state and federal constitutional rights as independent and equivalent. Juste, *supra* note 130, at 360. Under dual sovereignty, state courts will examine both sources in each case, regardless of whether protections are afforded under the first provision it considers. *Id.* Although dual sovereignty is perhaps the most faithful approach to the concept of federalism, it has been criticized as “an inefficient and impractical use of judicial resources.” *Id.*

198. *State v. Gutierrez*, 1993-NMSC-062, ¶ 32, 116 N.M. 431, 863 P.2d 1052.

199. 2023-NMSC-027, ¶ 19 n.7, 539 P.3d 272, 281 n.7.