Summer 1985

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Recommended Citation
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SEPARATION OF POWERS AND THE JUDICIAL
RULE-MAKING POWER IN NEW MEXICO:
THE NEED FOR PRUDENTIAL CONSTRAINTS

MICHAEL B. BROWDE* and M. E. OCCHIALINO**

I. INTRODUCTION

Separation of powers among the "co-equal" branches of government is fundamental to our constitutional system. True to the eighteenth century political theory of John Locke,1 from which it derives, the separation of powers doctrine is designed to prevent any one branch from dominating the other two, thereby serving as a check against the tyranny of concentrated governmental power.2

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The authors wish to thank a number of past students who assisted in the development of this article. David Stout collected the early New Mexico history; Sarah Curry Smith provided us with a review of the parallel developments in the fifty states; and Gretta Thomas reviewed the history and present practices at the federal level. Bob Glennen helped to focus attention on the influence of Dean Pound's writings. Judy Durzo assisted with our development of New Mexico law and helped us smooth out numerous rough spots. We also owe a debt of gratitude to Gayle Fletcher and Carol Kennedy for their careful, attentive, and expeditious word processing.

It should also be disclosed that the authors participated as counsel for a group of law firms, amici curiae, in support of the writ of prohibition in State ex rel. Gesswein v. Galvan, 100 N.M. 769, 676 P.2d 1334 (1984), which is discussed in this Article.

1. Under Locke’s theory of the social compact, by which civil governments are created, individuals in an unstructured state of nature surrender a degree of their natural freedom in return for civil protection of their natural rights. John Locke’s Theory of Government, 84 W. Va. L. Rev. 825 (1981). In Locke’s view each individual in nature has the power to preserve his property, and in so doing, to judge and punish breaches of law by others. J. Locke, Second Treatise of Government § 87 (R. Cox ed. 1982). One of the failings of the state of nature is that it lacks "a known and indifferent judge, with authority to determine all differences according to the established law." Id. § 125. In a political society, however, everyone has “quitted this natural power [to judge] [and] resigned it [to] the community. [T]he community [becomes the] umpire...” Id. § 87.

Although the need for an independent judiciary is not addressed in Locke’s unfinished treatise, a government of limited powers is a basic tenet of his social compact theory. G. Mace, Locke, Hobbes, and the Federalist Papers, 16-32 (1979). The separation of powers doctrine is therefore suggested by Locke as a way to prevent governmental tyranny. Id.

2. Montesquieu more fully developed Locke’s views into a functional theory of government calling for the separation of legislative, executive, and judicial powers into three separate branches of government:

When the legislative and executive powers are united in the same person or body there can be no liberty, because apprehensions might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. [Similarly,] [t]here is no liberty if the judicial power be not separated from the legislative and executive. Montesquieu, Espirit des Lois, livre xi, chapitre vi, “De la Constitution d’Angleterre,” quoted in W. Bondy, The Separation of Governmental Powers in History, in Theory, and in the Constitutions
The New Mexico Constitution follows the federal model of dividing governmental powers among the three branches of government. Unlike the federal constitution which only implies that the branches of government are separate, the New Mexico Constitution mandates that "no person . . . charged with the exercise of powers properly belonging to one of those departments, shall exercise any powers properly belonging to either of the others." 3

In recent cases, the New Mexico Supreme Court has declared that this provision requires that matters of pleading, practice, and procedure be left to the exclusive control of the courts. 4 The exclusivity of judicial

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13-14 (1896). The views of Locke and Montesquieu were adopted by Blackstone in his reformulation of the importance of an independent judiciary to the preservation of liberty. See 1 W. Blackstone, Commentaries 146 (1765).

The development of the doctrine of separation of powers from Locke and Montesquieu, to Blackstone, and through the British tradition into the American colonies is carefully reviewed in H.V. Payne, Legislating or Judging? Another Look at the Separation of Powers Doctrine 1-15 (unpublished manuscript on file at the New Mexico Law Review).

The framers of the Constitution perceived the creation of an independent judiciary as an essential check on the other branches and as an essential part of a republican form of government. The Federalist papers are replete with references to the role of the judiciary under the new Constitution. Hamilton saw the judicial department as responsible for protecting the Constitution against abuses. "A Constitution is, in fact, and must be regarded by the Judges, as a fundamental law." The Federalist No. 78 at 542 (A. Hamilton) (H. Dawson ed. 1891). The United States Constitution is "the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution." The Federalist No. 81 at 561 (A. Hamilton) (H. Dawson ed. 1891). "It is . . . rational to suppose, that the Courts were designed to be an intermediate body between the People and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 78 at 542 (A. Hamilton) (H. Dawson ed. 1891).

3. N.M. Const. art. III, § 1. Thirty-four states, including New Mexico, have express separation of powers provisions in their constitutions. A list showing the language used in the constitutions of these states is contained infra Appendix A. In the remainder of the states, as in the federal Constitution, the doctrine is implied from the creation of separate legislative, executive, and judicial branches of government.

No court has relied on the distinction between express and implied separation of powers in deciding whether the judiciary or the legislature has authority to adopt procedural rules. However, in the absence of a specific constitutional provision giving rule-making power to the court, the principle of exclusive judicial power to make procedural rules has been adopted only in those jurisdictions having express separation of powers provisions. A list of states which have held that procedural rule making is an exclusively judicial function is contained infra Appendix B.

The authority over rule-making power is further complicated in other states by constitutional provisions which divide the authority between the legislature and the judiciary, and give final authority to either the legislature or the court. A list showing those states and the particular provisions involved is contained infra Appendix C.


The supreme court has always acknowledged one significant limitation on its rule-making power. That limitation is expressly recognized in the exception contained in N.M. R. Civ. P. 1, which makes the Rules of Civil Procedure inapplicable in the face of "existing rules applicable to special statutory or summary proceedings." In special statutory proceedings, "the procedure prescribed by the statute must be strictly pursued. It is not a civil proceeding, and is not to be governed by any of the rules of procedure in such cases." Hannett v. Mowrer, 32 N.M. 231, 232, 255 P. 636 (1927).
power to write rules of procedure may appear to be a mundane matter of limited interest. This relatively new constitutional principle, however, is but one example of the ongoing tension between the branches of government over the final authority to determine and to implement important matters of public policy.

A fixed and definite allocation of authority among the branches of government is made between "the ordinary and usual actions known to the common law," which are governed by the rules of procedure, and "those extraordinary actions and proceedings, providing summary remedies wholly inconsistent with the liberal provisions" of the normal rules of procedure. Gonzales v. Gallegos, 10 N.M. 372, 401, 62 P. 1103, 1106 (1900) (decided under the territorial code of practice).

The New Mexico cases fail to consider the theoretical basis for not applying the normal procedural rules to statutory or summary proceedings. That construct, however, is firmly rooted in separation of powers principles. As the United States Supreme Court has recognized, correlative to Congress' power to create special tribunals "to examine and determine various matters, arising between the government and others," is the congressional power to decide "the mode of determining matters of this class. . . ." Crowell v. Benson, 285 U.S. 22, 50 (1932). Thus, with the legislative power to establish new rights and responsibilities between a government and its people comes the necessary power to determine the procedural mechanisms for the resolution of disputes with respect to those rights and responsibilities.

The Crowell Court went on to note that even in cases involving "the liability of one individual to another. . . . there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." 285 U.S. at 51. The Court found sufficient Congressional authority over maritime jurisdiction to allow Congress to delegate the power to resolve claims under the Longshoremen's and Harbor Workers' Act to the United States Employees' Compensation Commission. See also, Thomas v. Union Carbide Agricultural Products Co., 105 S. Ct. 3325, 3337 (1985) (public rights doctrine merely reflects "pragmatic understanding" that when Congress selects a quasi-judicial method of dispute resolution that could be determined by the executive and legislative branches "the danger of encroaching on the judicial powers is reduced.").

Unlike the federal model, and that of most other states, New Mexico has held firm to the "public vs. private right" distinction, see State ex rel. Hovey v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), thereby requiring that cases involving private rights be litigated only in the courts. Even though New Mexico holds firm to the "private vs. public right" distinction for purposes of requiring judicial rather than administrative resolution of disputes arising in purely private cases, it has extended the Crowell rationale for legislative rule-making authority in special statutory proceedings by allowing legislative procedures to govern in all instances where the legislature has created new substantive rights or drastically altered the substantive rights which preexisted under the common law.


When the state legislature, in a statutory proceeding, provides a procedure different from that in the general rules of procedure, the legislative procedure must be strictly construed and fully complied with. E.g., Hannett v. Mower, 32 N.M. 231, 232, 255 P. 636, 636 (1927). If, however, the legislature expressly incorporates the district court rules as the procedure to be followed in the statutory proceeding, or does not provide a conflicting procedure, then the existing district court rules apply. See Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 140, 597 P.2d 745, 750 (1979); Bryant v. H.B. Lynn Drilling Corp., 65 N.M. 177, 334 P.2d 707 (1959).

5. It was not until the decision in State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936), that the exclusivity of judicial rule-making power was even suggested in New Mexico. Prior to that time the legislature and the judiciary shared rule-making power. See infra text accompanying notes 20-82.
government is often not possible and perhaps undesirable.\(^6\) Some historic confrontations between the branches of government have provided relatively clear guidelines,\(^7\) but more often the branches seek to avoid the direct confrontations which might require a clear determination of the power of one over the other. Instead, the branches are more likely to test the limits of their respective powers in relatively small skirmishes. The latter process is often preferable because it provides the flexibility necessary to mold government institutions to meet the demand of an ever-changing world.\(^8\)

The subject of this article is the search for a proper balance between the powers of New Mexico’s legislative and judicial branches of government to establish rules governing pleading, practice, and procedure for the courts of New Mexico. With respect to the rule-making power, both the New Mexico Supreme Court and the New Mexico Legislature have acted recently in ways which have unnecessarily fostered confrontation. In the recent cases declaring the exclusivity of judicial power to promulgate procedural rules,\(^9\) the court has declared invalid various statutes governing procedure. In retaliatory fashion, the New Mexico House of Representatives proposed a constitutional amendment which would have granted the legislature the final power to determine what matters are procedural rather than substantive.\(^10\) Although this proposed amendment was, in fact, an expression of legislative dissatisfaction with the court’s assertion of its common-law power to alter the tort doctrine of

6. While the tension among the branches of government derives from the constitutional structure itself, the balance of those powers was greatly affected by the early establishment of the doctrine of judicial review. Indeed, since Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803), one of the unending constitutional debates has been the proper balance between democratic rules through legislative policy-setting, and the anti-democratic counterbalance of judicial review which at times vitiates the majoritarian will and establishes a different policy. See, e.g., Burger, Ely’s Theory of Judicial Review, 42 Ohio St. L.J. 87 (1981).


8. The early struggle in the development of administrative law to overcome the non-delegation doctrine serves as a case in point. It took some creative judicial manipulation to overcome separation of powers constraints against the delegation of legislative rule-making powers to administrative agencies, see e.g., Yakus v. United States, 321 U.S. 414 (1944), and the conferral of judicial-like adjudicatory powers on administrative bodies, see Crowell v. Benson, 285 U.S. 22 (1932).

9. See infra text accompanying notes 186-230.

10. H.R.J. Res. 16, 35th Leg., 1 Sess. (1981). This proposed constitutional amendment would concede to the judiciary the power to promulgate rules of procedure, but would guarantee ultimate authority to the legislative branch by granting the legislature the sole power to declare whether a matter was procedural or substantive. Id. Under the proposal, a declaration by the legislature that a particular matter is one “concerning the substantive law” is denominated as “solely within the prerogative of the legislature.” Id.
contributory negligence, its adoption also would have challenged the supreme court's assertion of exclusive power to determine rules of procedure.

This Article surveys the history of the allocation of the power to make procedural rules in New Mexico. In the process, it analyzes the judicial opinions which have led to supreme court assertions of exclusive judicial power to adopt procedural rules. It concludes with a call for a return to the process of shared procedural rule-making power between the two branches of government whenever possible, and proposes prudential guidelines for determining the appropriate dividing line between the legislature and the courts when a choice between conflicting approaches is necessary.

II. THE HISTORICAL PERSPECTIVE

A review of the history of judicial rule-making in New Mexico exhibits a pendulum-like pattern in the quest for an appropriate balance between legislative and judicial power to determine the rules of procedure. Initially, the legislature was supreme. It exercised unchallenged authority to control


Judicial activism has continued since Scott in related common-law tort areas. In Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982), the court applied comparative fault principles to alter joint and several liability against co-tortfeasors. In Lopez v. Maes, 98 N.M. 625, 651 P.2d 1269 (1982), the court extended the common law to impose a duty on dram shops with respect to the serving of liquor to intoxicated persons. Lopez followed two decisions of the supreme court which had declined to address the issue and had instead invited legislative action. The first case, Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966), deferred to the legislature, while the second, Marciano v. Roper, 90 N.M. 367, 563 P.2d 1160 (1977), specifically warned: "[W]e do not ... feel that it would be improper for this Court to address this issue in the future if the Legislature chooses not to act." Id. at 369, 563 P.2d at 1162. More recently, the court recognized the tort of negligent infliction of emotional distress. See Ramirez v. Armstrong, 100 N.M. 538, 673 P.2d 822 (1983).

In contrast, the supreme court recently reversed a decision of the court of appeals which would have created the "seat belt defense" in New Mexico. See Thomas v. Henson, 102 N.M. 326, 695 P.2d 476 (1985). The court explicitly declared that "the creation of a 'seat belt defense' is a matter for the Legislature, not for the judiciary." Id. at 327, 695 P.2d at 477.

12. See, e.g., Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978). This application of the separation of powers doctrine arises in cases where the court invalidates legislative action as an invasion of the exclusive rule-making prerogative of the court. Thus, the cases always involve a double blow to the legislative branch by the courts—first the invalidation of a legislative action, and second the declaration that the subject matter is out of bounds for the legislature altogether.
judicial procedure by statute.\textsuperscript{13} From the beginning, however, the legislature shared power with the judiciary by delegating a portion of what it perceived to be the legislative power to the supreme court.\textsuperscript{14} In turn, the court acknowledged the supremacy of the legislature when implementing rules of procedure pursuant to legislative authorization.\textsuperscript{15} Thereafter, the court accepted a partnership in rule-making power with the legislature but insisted that the source of the court's authority was an inherent power of the judiciary rather than a delegation of the rule-making authority from the legislature.\textsuperscript{16} The outer swing of the pendulum in favor of the judiciary began in 1975 with the decision of the New Mexico Supreme Court in \textit{State ex rel. Anaya v. McBride}\textsuperscript{17} and continued in 1976 with \textit{Ammerman v. Hubbard Broadcasting, Inc.}\textsuperscript{18} In these cases, the supreme court asserted that the power to promulgate rules of procedure was not only inherent in the judiciary, but also exclusive. According to the court, the legislature lacked any power to participate in the rule-making process. Decisions since 1980 suggest a return to the earlier approach of shared rule-making power.\textsuperscript{19}

\textbf{A. Procedural Rule-Making During New Mexico's Early History}

\textbf{1. The Kearney Code}

The earliest body of local law governing New Mexico under the authority of the United States was the Kearney Code.\textsuperscript{20} Adopted in 1846, it created a court system and allocated jurisdiction among the courts.\textsuperscript{21} It

\begin{itemize}
\item \textsuperscript{13} See infra text accompanying notes 20-69.
\item \textsuperscript{14} See infra text accompanying notes 70-82.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} See infra text accompanying notes 113-85.
\item \textsuperscript{17} 88 N.M. 244, 539 P.2d 1006 (1975).
\item \textsuperscript{18} 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978).
\item \textsuperscript{19} See infra text accompanying notes 299-324.
\item \textsuperscript{20} See 1 N.M. Stat. Ann., Kearney Code of Laws (1846), 3-72 (1978). Brigadier General S. W. Kearney prepared the code after the American occupation of Santa Fe in August 1846. President Polk, through Secretary of War William L. Mercy, had given Kearney three directions—take Santa Fe; establish a temporary civil government; and then move on to California. June 2, 1846, U.S. War Department; Letters Sent; Records Group 107, National Archives, Washington, D.C. In order to ensure a smooth transition, President Polk also ordered Kearney to retain as many local officials as possible and as much local law as practicable. Id. Although Kearney declared void all Mexican law inconsistent with his or United States law, he also incorporated a number of Mexican laws into his code. The code was also based on the laws of Missouri, as well as the Livingston Code and the laws of Texas. See 1 N.M. Stat. Ann., letter from General Kearney to the Adjutant General of the United States, September 22, 1846 (1978).
\item \textsuperscript{21} Even though the Organic Act displaced the Kearney Code after fewer than five years as the governing law of the New Mexico territory, see 1 N.M. Stat. Ann., Organic Act, §§ 1-19 (1978), a number of its provisions have survived in substantially the same form to the present. For a more detailed examination of Kearney's influence on New Mexico law, see R. Larson, New Mexico's Quest for Statehood, 1846-1912 (1968).
\item \textsuperscript{22} The Kearney Code established the various courts of the territory—superior, circuit, prefect, and alcalde. It also delimited their respective jurisdictions and set the times and places for them to sit. 1 N.M. Stat. Ann., Kearney Code of Laws, Courts and Judicial Powers §§ 1-23, 1846 (1978).
also contained many provisions which controlled matters of pleading, practice, and evidence before the courts.\textsuperscript{22} The provisions of the code, though numerous, do not represent a whole procedural system. Indeed, the failure of the Kearney Code to address many of the necessary details of judicial procedure\textsuperscript{23} suggests that the code, while controlling on matters it addressed, probably was not intended to supplant existing court rules and procedures which were not in conflict with the code.\textsuperscript{24} Statutes adopted pursuant to legislative authority provided for in the Kearney Code also dealt with judicial matters and procedure.\textsuperscript{25}

The Kearney Code demonstrates that, from the very beginning of American rule in New Mexico, the legislative component of the government was authorized to establish rules of judicial procedure. The legislature did not fully exercise its power, however, and the courts played some role in the development of rules of procedure at the invitation of the legislature. Indeed, the section of the Kearney Code dealing with pleadings expressly delegated limited rule-making power to the courts: "[Certain] pleadings shall be filed under oath, and in such time as the court shall prescribe."\textsuperscript{26}

2. The Territorial Period

In 1850, the United States government created the Territory of New Mexico. The enabling legislation, the Organic Act,\textsuperscript{27} dealt with legislative and judicial power in a manner typical of state constitutions—confering

\textsuperscript{22} An entire division of the Code is entitled "Practice of Laws in Civil Suits." For example, the code requires that "[a]ll actions . . . shall be commenced by petition, which shall contain a plain statement of the names of the parties, the cause of action, and the relief sought; it shall be sworn to before the clerk of the circuit court." 1 N.M. Stat. Ann., Kearney Code of Laws, Practice of Law in Civil Suits, § 1, 1846 (1978). The code also requires that "[t]he defendant shall forthwith file his answer under oath, fully admitting or denying or confessing and avoiding, every material part of said petition." Id. § 12.

\textsuperscript{23} For example, while the code regulates the content of an answer, it sets no specific time limit for filing and serving the document. Id. The defendant need only "forthwith" file an answer. Id.

\textsuperscript{24} This inference is supported by § 1 of the "Laws" division of the code, which provides that "[a]ll laws heretofore in force in this territory, which are not repugnant to, or inconsistent with the constitution of the United States and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this territory." 1 N.M. Stat. Ann., Kearney Code of Laws § 1 1846 (1978). Thus, the Kearney Code selectively imposed laws on the territory without interfering with existing systems then in force which were not in conflict with the provisions of the code.

\textsuperscript{25} Historical evidence suggests that, even if the courts did not publish rules, they must have exercised rule-making power at least on an ad hoc basis. One commentator has suggested that the supreme court of the time was more a "sanctuary of the Grand Llama" than a court of law, A. Poldervaart, Black-Robed Justice 24 (1948). Such an environment must certainly have given rise to the liberal exercise of rule-making power.

\textsuperscript{26} E.g., "Act, regulating the holding of Circuit Courts," L. 1848 (December 1848). One act concerning replevin provided, for example, that "[i]n case the plaintiff fails to prosecute his suit with effect, and without delay, judgment shall be given for the defendant." 1 N.M. Stat. Ann., Kearney Code of Laws § 7, 1848.

the legislative and judicial power on separate branches of territorial government. 28

The Organic Act did not expressly address judicial rule-making authority, although it did assign to the legislature the power to determine the jurisdiction of the courts and the rules governing the taking of appeals. 29 In its first act dealing with the subject of the judiciary, the territorial legislature adopted a statute which encompassed much more than the two subject areas expressly delegated to the legislature by the Organic Act. The Act of 1851 regulating practice in the courts clearly was intended to cover most of the procedural field. Many of its forty-eight provisions dealt with technical procedural points, such as the notice requirement before hearing motions, and the proper order of pleading defenses. 30 Thus, the first relevant statute passed by the territorial legislature assumed that the legislature had the power to establish court procedures even as to matters that the Organic Act failed to delegate expressly to the legislative branch.

The ultimate power of the legislature to establish procedural rules was confirmed by section nineteen of the Act of 1851. This provision delegated to the supreme court the power to adopt rules for itself and the district courts so long as the rules were not inconsistent with the laws of the territory. 31 This section presumed that rule-making is a legislative prerogative while acknowledging that the power to establish some rules might best be exercised by the courts within bounds set by the legislature. 32

While it is likely that the territorial supreme court engaged in rule-making soon after the Act of 1851, the first published set of rules was

30. "Writs of error ... shall be allowed ... under such regulations as may be prescribed by law." Id.
32. After "three days notice shall have been given against the adverse party." Id. § 15.
33. The defendant must "file all . . . exception[s] . . . at one and the same time." Id. § 25.
34. Section 19 states:
The civil mode of practice is hereby adopted as the rule of practice in civil cases in the several courts of this Territory, Provided that the Supreme Court may from time to time, adopt such rules for its own government and that of the district courts not inconsistent with the laws of the Territory, as it may deem proper.

Id. § 19.
35. Id. The rule-making provisions of the Act of 1851 were reiterated in the Act of February 2, 1859, ch. 24 1859 N.M. Laws 58, which (1) conferred rule-making authority on the court, id. § 6, (2) required that the rules not conflict with existing law, id. § 7, and (3) urged the Court in carrying out its rule-making authority to "endeavor carefully to promote and secure justice and right, and prevent injustice and delay," id. § 9.
adopted in 1872. The 1872 rules made no reference to the authority under which they were promulgated. They were extensive, establishing supreme court rules and separate district court rules for law and equity. Three features of the 1872 rules are of interest in the present context. First, they contained provisions governing admission to the bar, despite the lack of express statutory authority to do so. Second, the rules governing default were somewhat at variance with the corresponding provisions of the 1851 statute. Finally, these early supreme court rules established the practice of sub-delegating rule-making authority to the district courts so long as the local district court rules were not inconsistent with the district court rules established by the supreme court.

In 1880, the territorial legislature adopted the first statute establishing a significant number of rules of evidence for the territorial courts. The statute, however, did not constitute a complete set of rules governing evidence. The piecemeal nature of the statute suggests that the courts were operating under judicially-created rules of evidence to the extent the legislature did not act.

The next developments of consequence occurred in 1887 with the passage of a specific statute allocating to the supreme court rule-making authority.

37. Rules Adopted at the Regular Term of the Supreme Court of the Territory of New Mexico in the Month of January A.D. 1872, for the Regulation of Practice in the Supreme and District Courts, Santa Fe, Manderfield & Tucker (1872).
38. Id. Either the court was exercising what it believed to be its inherent authority over this subject, see, e.g., In re Sedillo, 66 N.M. 267, 347 P.2d 162 (1959), or such authority could be construed as consistent with the power to write any and all rules not inconsistent with statute which the 1851 Act authorized.
39. Section 39 of the Act of 1851 calls for default in an action seeking a sum certain if, on the third day of the term, no answer is filed. 1851 N.M. Laws 141 §39. The rule of court does not limit the default judgment to cases dealing with liquidated sums, does not appear to follow the "third day of the term" rule, and provides for reopening of defaults under circumstances not provided for in the statute. See id.
40. "The District Courts may make such further rules in regard to the transaction of business before them, respectively, not inconsistent with the foregoing rules, as they in their discretion may deem necessary." 1872 Rules R. 28. The principle of judicial rule-making by lower courts has been carried down to the present day. See N.M. R. Civ. P. 83.
42. For example, no rules concerning hearsay evidence were included in the statute.
43. An 1880 statute was of minor import. It extended the term of the district court to allow it to sit continuously. Act of Feb. 13, 1880, ch. 8, §1, 1880 N.M. Laws 54. It also included a legislative delegation of rule-making power to the district court to effectuate the change. Id. §2. That law also specifically allowed the district court to make rules in the absence of action by the supreme court. Id.
power and the subsequent court promulgation of rules. The Act of 1887 provided that the supreme court was “empowered to make and prescribe rules regulating the practice in the supreme and district courts of the territory, but such rules shall not conflict with any of the laws of the United States or of the Territory of New Mexico.” The 1887 legislation presupposed the primacy of the legislature in this field. Not only did it presume that an act of the legislature is required to give the court rule-making power, but it also expressly confined the judicial power to the adoption of rules that were not inconsistent with federal or territorial statutes. Supreme court procedural rules were not to conflict with existing statutes.

The 1888 rules adopted pursuant to the Act of 1887 did not greatly alter the pre-existing rules. Significantly, however, the supreme court for the first time expressly acknowledged that in promulgating the rules it was exercising power conferred upon it by the legislature. The volume containing the rules of 1881 begins: “Note. The following rules have been prepared and published in perseverance of the directions contained in Section 3 Chapter 72 of the laws of 1886–87.” The statutory reference is to the section of the statute which authorizes the court to adopt procedural rules and which requires the Clerk of the Court to print and to distribute them.

In 1897, the territorial legislature passed the first comprehensive statute establishing a system of rules governing procedure in civil cases. The statute comprised 182 well-drafted provisions covering every aspect of pleading, practice, and procedure. In keeping with its comprehensive scope, the 1897 statute repealed “all other laws and parts of laws” in conflict with the act. Despite its breadth, the statute called for the judiciary to develop procedural rules not covered by the statute. Section 177 authorized the court to “make such rules as may be necessary and applicable to proceedings under the provisions of this act.”

The same year the supreme court adopted a new set of rules in con-

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44. Act of Feb. 24, 1887, § 1, 1886 N.M. Laws 72. This legislation also recognizes the preeminent position of the supreme court within the judicial system by delegating to it, and not to the district court, the power to write rules for the district court. Id. Unlike the 1880 statute, there was no delegation of power to the district courts to make rules if the supreme court did not. See supra note 43.

45. Rules of the Supreme Court of the Territory of New Mexico for the Regulation of Practice in the Supreme and District Courts in force Jan. 1, 1888. Santa Fe, New Mexican Steam Printing Co., 1887.

46. Id.


48. Act of Mar. 18, 1897, 1897 N.M. Laws 161. The statute included 182 separate sections covering a wide range of procedural issues ranging from who may sue on an infant’s behalf, see id. § 9, to how many copies of the trial transcript the court stenographer must make, see id. § 174.

49. Id. § 180.

50. Id. § 177.
formity with the new statute. It promulgated rules implementing the merger of law and equity mandated by the 1897 statute,\(^\text{51}\) formalizing the bar examination which was to be overseen by a board of bar commissioners,\(^\text{52}\) and bringing the court’s procedural rules into conformance with the statute.\(^\text{53}\)

In 1909, the legislature adopted a statute which evidenced its perception that it had authority to regulate admission to the bar and disbarment proceedings.\(^\text{54}\) The statute set the qualifications for admission to the bar,\(^\text{55}\) established a list of subjects which were to be covered on the bar examination,\(^\text{56}\) enumerated the grounds for disbarment and suspension,\(^\text{57}\) and established the procedures in disbarment and suspension proceedings.\(^\text{58}\) At the same time, the legislation created a Board of Bar Examiners,\(^\text{59}\) authorized the supreme court to appoint the board’s members,\(^\text{60}\) and delegated to the court the power to try lawyers in disbarment proceedings.\(^\text{61}\) One carefully drafted provision seemed to acknowledge that the court had ultimate power to regulate the practice of law within the state. Section 21 provided that “the power to issue certificates to persons to practice law . . . is vested exclusively in the supreme court.”\(^\text{62}\) Yet, another section mandated disbarment of lawyers found guilty of certain crimes,\(^\text{63}\) while allowing the court to determine whether a punishment less than disbarment was appropriate in other instances of misconduct.\(^\text{64}\)

One reading of this statute indicates that the legislature did not delegate power to the judiciary to regulate the bar, but merely acknowledged the judiciary’s inherent power to do so.\(^\text{65}\) The legislation, however, is far too intrusive to support this construction. A more likely construction is that

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51. See id. § 1: “There shall be in this Territory but one form of action . . . which shall be denominated a civil action . . . .”
52. Rule 2 § 5 of the Rules of the Supreme Court of the Territory of New Mexico for the Regulation of Practice in the Supreme and District Courts, adopted August 25, 1897, in force Sept. 1, 1897, Santa Fe, New Mexico Printing Co. 1897, p. 57.
53. For example, Rule 24 of the 1893 rules of the court, Rules of the Supreme Court of the Territory of New Mexico for the Regulation of Practice in the Supreme and District Courts, adopted August 26, 1893, provided for service of process in a manner inconsistent with the 1897 statute.
55. Id. § 14.
56. Id. § 7. The statute mandated that the examination cover 19 subjects “and such other subjects . . . as the board shall direct.” Id.
57. Id. § 34.
58. Id. §§ 36-45.
59. Id. § 1.
60. Id.
61. Id. § 43.
62. Id. § 21.
63. Id. § 35.
64. Id. § 34.
the legislature asserted authority over most aspects of the practice of law, while delegating a significant role in the process to the court.

This short historical sketch illustrates that the legislature was the dominant force in rule-making in territorial New Mexico. Time after time, the legislature assumed power to determine the rules of procedure. The judiciary never challenged the legislative prerogative. Every facet of judicial power was included within the legislative grasp, from the adoption of the almost all-encompassing procedure statute of 1897 to the legislative development of rules of evidence to the control of the qualifications for admission to the bar and grounds for disbarment. At the same time, the legislature delegated some of the rule-making power to the judiciary. The 1887 statute is paradigmatic: the legislature was supreme to the extent that it chose to act, and the supreme court was authorized to fill in details omitted from the legislation. Shared responsibility for rule-making, with the legislature holding the power to prevail if conflicts arose, was obviously a satisfactory arrangement for the era.

3. The Early Years of Statehood

On January 6, 1912, nearly one year after the adoption of the New Mexico Constitution, President William Howard Taft breathed life into that document by signing the proclamation admitting New Mexico into the Union. Under the new constitution the more explicit separation of powers provision of article III, section 1 replaced the implied separation of powers contained in the Organic Act. The constitution also explicitly provided that the supreme court "shall have a superintending control over all inferior courts."

The actions of the legislature and the supreme court in the early years of statehood do not suggest that the new constitutional provisions had any bearing on the relative rule-making powers of the legislature and the courts. Indeed, two provisions in the constitution almost compel the

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66. 1897 N.M. Laws, ch. 73. The statute did not apply to habeas corpus, mandamus, prohibition, quo warranto, replevin, or attachment. Act of 1897, ch. 73, § 175, 1897 N.M. Laws 192.
69. Act of 1887, § 1, 1887 N.M. Laws 72.
71. The powers of the government of this state are divided into three distinct departments . . . and no persons or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.
N.M. Const. art. III, § 1.
72. N.M. Const. art. VI, § 3.
73. [If] the practice and procedure or rule making power of the courts was made within the cognizance of the territorial legislature, and if the legislature exercised that power at all times, then the framers of the Constitution must be held to have
conclusion that the framers of the constitution accepted the premise of legislative rule-making power which had keynoted the territorial experience. Article IV of the constitution, which deals with the legislative branch, provides that "no act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." This prohibition against retroactive applications of procedural and evidentiary statutes presupposes that the legislature has the power to establish prospectively rules of procedure and evidence. To the same effect is the constitutional provision declaring that the legislature "shall not pass local or special laws . . . regulating . . . the practice in courts of justice." This provision implies that general laws regulating procedure are permissible.

Immediately after statehood, the supreme court continued to acknowledge that it was exercising authority delegated to it by the legislature when exercising rule-making authority. In 1917, the legislature repealed several statutes dealing with appellate procedure and provided new statutory provisions governing appellate practice. The legislature followed the pattern established prior to statehood by including in the statute a section delegating rule-making power to the court so long as those "rules shall not conflict with any laws in force in this state." Thus, the period immediately following statehood in New Mexico followed the pattern established during the territorial period. The state constitution seemed to confirm the existence of legislative authority over procedure. The legislature assumed that it had the power to write statutes governing judicial procedure and acted accordingly. The legislature con-

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74. N.M. Const. art. IV, § 34.
75. But see Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969) (N.M. Const. art. III, § 1 precludes construction of the constitution which would implyd authoriz legislative adoption of procedural rules). See infra note 147.
76. N.M. Const. art. IV, § 24.
77. For example, the supreme court rules of 1912 specifically refer to § 15 of the Law of 1909 as the basis for its authority to adopt rules pertaining to bar admission. Rules of Sup. Ct. State of N.M. 1912 p. 10 ch. 53 Rule 8.
79. Id. § 43.
continued to delegate to the supreme court the power to adopt additional procedural rules that were consistent with those promulgated by the legislature. This continued pattern of shared responsibility must have satisfied both branches of government, for there were no reported conflicts between the legislature and the judiciary over the rule-making power during the first decade after statehood.

The allocation of rule-making power was a matter of little consequence during our early history. The exercise of legislative power in this field was quite natural. It was easily assumed that the legislature had the power to create the rules under which the courts would be governed. Furthermore, the legal training of the period conditioned lawyers and legislators to assume that judicial rule-making was a proper subject for legislative control. The natural tendency of the judges of the time was to look for legislative rules or legislative authority for the courts to promulgate rules. Because such authority existed in the statutes, there was no practical need for further inquiry.

The procedural rule-making power was not a source for separation of powers concerns in the laws or practices of New Mexico prior to or in the early years of statehood. Instead, the influence of doctrinal developments outside New Mexico triggered the early antecedents of our current conflict concerning the role of the doctrine of separation of powers in the judicial rule-making area.

80. In this regard the New Mexico experience parallels that which existed generally. One perceptive observation of the early English experience is equally applicable to the early American courts:

There should be little doubt that at a time when the courts were in their formative stage the question of who should prescribe rules of procedure was not hotly contested. In the first place, no one but the courts was interested. And so far as the courts were concerned, we can well imagine it was not so much a question of power as of necessity.


81. The creation of the New Mexico territory and subsequent statehood followed the nineteenth century overhaul of procedure which took place through legislative enactments. See, e.g., The Field Code of 1848, 1848 N.Y. Laws 379. As Dean Pound pointed out:

Both in England and in America, the nineteenth century overhauling of procedure took place at a time when men turned naturally to the legislature to take the lead in all things... It took place when there had come to be a long tradition of parliamentary sovereignty in England and the de facto hegemony of the legislative in America was unchallenged.


82. Dean Pound assigned three reasons for judicial reliance on legislative rule-making authority: (1) the "over-conservatism of the legal profession"; (2) the lack of judicial models for remaking procedure; and (3) the apprenticeship mode of legal education which focused on the details of local procedure, equating law with procedure, which thus fostered a belief that separation of powers required that procedure be left to the legislature. Pound III, supra note 81, at 600-01.
B. The Quest for Procedural Reform and the Rise of Judicial Rule-Making Power

1. The Influence of Roscoe Pound

The most significant external influence on the development of New Mexico procedural law may have been the work of Dean Roscoe Pound, whose articles and speeches in the 1920's urged that the judiciary take a dominant role in procedural rule-making. In the early twentieth century there was a concerted push for procedural reform in the courts of the United States. The leading proponent of that movement was Roscoe Pound. His seminal articles on the subject83 laid the groundwork for a generation-long debate which resulted in adoption of the Federal Rules of Civil Procedure in 1938.84 Part of that debate focused on the issue of whether the legislature or the judiciary should spearhead the reforms.

Dean Pound's thesis was that courts must play a leading role in the formulation of procedural rules.85 To counter the argument that judicial activism without statutory authority would infringe on the legislative prerogative,86 Dean Pound argued that the rule-making power of the courts was very much a part of the judicial function at the time of the adoption of American constitutions.87 This historical rebuttal, however, laid the groundwork for the more radical theory that judicial rule-making was exclusively a judicial function.

Prior to the Pound articles, most other jurisdictions were in a position similar to that of New Mexico. Legislative authority over procedure was assumed, and courts acted only interstitially at the invitation of the respective legislatures to fill in procedural details not inconsistent with statutory law.88 Occasionally, courts would suggest that the judiciary

83. Pound III, supra note 81; Regulation of Judicial Procedure by Rules of Court, 10 Ill. L. Rev. 163 (1915) [hereinafter cited as Pound II]; Pound, Some Principles of Procedural Reform, 4 Ill. L. Rev. 388 (1909) [hereinafter cited as Pound I].
84. For a discussion of the development of the federal approach to rule-making authority questions which avoided any legislative-judicial clash, see infra note 140.
85. See, e.g., Pound I, supra note 83, at 403-07.
86. See infra text accompanying notes 96-101.
87. See Pound II, supra note 83, at 170-75.

Where judicial authority over rule-making was asserted, it was done to fill in details. See, e.g., Snyder v. Bauchman, 8 Serg. & Rawle 336, 338 (Pa. 1822) ("Without this [rule-making] power, it would be impossible for courts of justice to dispatch the public business. Delays [waiting for
possessed an inherent rule-making power which flowed from its power to regulate its own business or its power to provide the "litigant . . . the relief which the court has the power to grant." A few early decisions even hinted that the judicial rule-making power had constitutional underpinnings, but there was no general consensus that courts had a constitutional right or duty to develop procedural rules.

It was against this backdrop that Dean Pound began his campaign for reform. In 1909, in an article urging many procedural reforms, Pound proposed ten comprehensive principles "to insure precision, uniformity and certainty in the judicial application of substantive law." The third principle Dean Pound enunciated was that "[a] practice act should deal only with the general features of procedure . . . leaving details to be fixed by rules of the court." In the course of his discussion, Dean Pound elaborated on the advantages of such a system and dealt with the major practical objections to an increased judicial role in rule-making. The 1909 article was devoid of any suggestion that only the judiciary has rule-making authority. It assumed legislative competence and implied that a legislative delegation of increased rule-making power to the courts is the appropriate vehicle for increasing the role of the courts in judicial rule-making.

In 1915, Dean Pound found it necessary to rebut a fundamental objection to his proposal—the assertion that making rules of procedure is exclusively a legislative function, barred by the doctrine of separation

89. See Prindeville v. People, 42 Ill. 217, 221 (1866). The power is a practical one, to ensure that "the time of the court shall not be unnecessarily consumed in the trial of causes." Id. See also State v. Van Cleave, 157 Ind. 608, 62 N.E. 446 (1902); Maloney v. Hunt, 29 Mo. App. 379 (1888); Gannon v. Fritz, 79 Pa. 303 (1875).


91. See Vanatta v. Anderson, 3 Binn. 416, 423 (Pa. 1811) "[I]t is not denied that [the courts] have power from the nature of the constitution, to make rules for the regulation of their practice." See also Lee v. Baird, 146 N.C. 361, 59 S.E. 876 (1907) (state constitutional provision giving court appellate rule-making authority).

92. Pound I, supra note 83, at 388.

93. Id. at 403.

94. Id. at 404.

95. Id. at 404-06. Dean Pound outlined and sought to rebut four arguments against his proposal: (1) that the condition of cumbersome adjective law was the fault of the courts in the first place; (2) that bench and bar were hostile to change; (3) that even a general statute would create confusion for many years, until its interpretation was finally settled; and (4) that judges did not have the time to undertake the task of procedural reform. Id.

96. Pound II, supra note 83.
of powers from delegation to the judiciary. 97 He began his response by suggesting that separation of powers “does not prescribe an exact analytical scheme.” 98 Instead, he argued that separation of powers requires resort to an historical review of what legislative matters were deemed proper subjects of legislative delegation to the courts at the time of the making of state constitutions. 99 He then made a persuasive case for the historical power of English and early American courts to promulgate rules of court. 100 Dean Pound concluded that the United States had inherited the English system of regulating practice by judicial rules “prior to the taking over of the subject by the legislatures.” 101

Dean Pound’s central thesis in the 1915 article remained the same as stated in the 1909 article: The legislature had rule-making power, but should delegate some or all of that power to the judiciary. His discussion of separation of powers was not intended to make an argument that only the judiciary had the power to write procedural rules. 102 Rather, it was intended to demonstrate that a legislative delegation of rule-making authority to the judiciary was not violative of a constitution simply because that constitution did not expressly grant that power to the judiciary.

Having supported the power of the legislature to delegate increased rule-making power to the judiciary, Dean Pound offered two alternative statutory models for achieving the transference of power:

One is the method . . . adopted in Colorado, namely, to commit the

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97. Id. at 169-70. “[O]ne objection remains namely, the point urged in several recent discussions in bar associations, that making rules of procedure is a legislative function and hence that the proposal to commit this matter to the judges contravenes constitutional provisions as to the separation of powers.” Id.

98. Id. at 170.

99. Id. Pound quoted with approval from State v. Harmon, 31 Ohio St. 250 (1877): “What constitutes judicial power within the meaning of the constitution is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution.” Id. (quoting Harmon, 31 Ohio St. at 258).


101. Pound II, supra note 83, at 171. Dean Pound was able to point to an early precedent in the United States Supreme Court, where in response to an inquiry from the Attorney General, the Chief Justice stated: “The Court considers the practice of the courts of King’s Bench and Chancery in England as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.” Id. (quoting Hayburns Case, 2 U.S. (2 Dall.) 411 (1792)).

At one point, however, Dean Pound argued that “the power to govern procedure by general rules has been universally regarded as part of the judicial function. Pound II, supra note 83 at 172. Even here, Dean Pound’s thesis was not that the courts had exclusive rule-making power, but only that the court’s power to write rules, whether derived from a legislative delegation or an inherent power, was a power properly shared with the legislature. Id. Pound seemed to concede that the legislature could assert its dominance if it wanted to do so. See id.

102. See infra text accompanying notes 92-95.
whole subject of procedure in its entirety to rules of court. The alternative method is to frame a short practice act covering what are deemed the essential principles in a few sections and to commit everything else to rules of court.  

Both alternatives grant rule-making power to the judiciary. Both assume that the legislature has a legitimate role to play in the rule-making process. The “short practice act” alternative expressly acknowledges the superiority of the legislature. It obviously anticipates that the legislative limits set in the initial statute and subsequent amendments could and would supersede judicially-created court rules. In contrast, the Colorado statute, preferred by Dean Pound, totally delegates the rule-making power to the courts. It anticipates that, while the legislature might continue to adopt procedural statutes, the judiciary would make the final decision when a conflict between a court rule and a legislative enactment arose.

By 1926, Dean Pound’s views on the matter of judicial rule-making had become more inflexible. In a speech to the American Bar Association that year Pound reiterated his earlier view that, in order to fashion the necessary reforms, the power to make procedural rules must be returned to the courts. Pound extended the constitutional argument in this speech by suggesting that while the legislature “may” enact codes of procedure it ought to refrain from so doing “as a matter of due regard for the constitutional system of separation of powers.” Pound suggested that only the prior history of judicial deference to legislative activity precluded a claim that the rule-making power was exclusively a function of the judicial branch: “It may be that today, after seventy-five years of codes and practice acts and prolific procedural legislation, we can’t go so far as to pronounce such legislative interference with the operations of a coordinate department to be unconstitutional.”

103. Pound II, supra note 83, at 175-76.  
104. Id. at 176.  
105. The Colorado statute provided that:

Section 1. The Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith. Inferior courts of record may adopt rules not in conflict with such rules or with statutes. Section 2. All acts or parts of acts in conflict herewith are hereby repealed.

“An Act Concerning Practice and Procedure in Courts of Record,” ch. 121, 1913 Colo. Sess. Laws 447. Because the statute declares that rules of court “shall supersede any contrary statute,” this provision constitutes a total abrogation of both rule-making authority and the authority to reverse a rule by a subsequent statute. Only if the Colorado legislature repealed this statute would it arguably be able to reassert legislative power to override procedural rules of court.

106. Pound III, supra note 83.  
107. Id. at 601 (emphasis added). Dean Pound clearly concedes legislative power, and then suggests a rule of prudence against the exercise of that power, out of deference to principles rooted in the separation of powers doctrine. It is but a short step from that position to one which insists that, as a matter of constitutional compulsion, the legislature has no such power. See infra text accompanying notes 110-12.  
for the historical record precluded him from making the leap. Others, less wedded to precedent, would later build on this theme and conclude that any legislative activity in the regulation of procedure was unconstitutional.

In the years immediately following the publication of the Pound articles, courts regularly rebuffed constitutional challenges to judicial rule-making by relying on Pound-like arguments that the legislature could delegate rule-making authority to the courts. More significantly, some courts expanded Pound's arguments beyond the limits he set and held unconstitutional, on separation of powers grounds, state statutes which sought to regulate judicial procedure.

Roscoe Pound never took the position that the legislature could play no role in the formulation of adjective law. Nonetheless, his historical analysis, formulated to defend the need for judicial involvement in procedural reform against the contention that such involvement would invade the legislative prerogative, spawned more expansive arguments in support of the judicial role. Pound's defense of the right of the judiciary to act pursuant to a legislative delegation of authority was easily turned into an affirmative assertion of the inherent and exclusive prerogative of the court to fashion procedural rules. It is in the midst of that development that the New Mexico legislature and supreme court first faced the issue in the 1930's.

2. New Mexico Adopts the Pound Approach: The 1933 Act

In 1933, the New Mexico legislature adopted a statute which obviously embodied the views of Roscoe Pound. The statute explicitly authorized

109. See supra text accompanying notes 96-101. As an advocate for procedural reform, Dean Pound also must have realized that extension of the argument to preclude legislative action would lose his cause more support than it would gain.


111. See, e.g., De Camp v. Central Ariz. Light & Power Co., 47 Ariz. 517, 57 P.2d 311 (1936); Kolkmann v. People, 89 Colo. 8, 300 P. 575 (1931); Bryan v. State, 94 Fla. 909, 114 So. 773 (1927); People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934); Weibel v. Gardner, 45 S.D. 349, 187 N.W. 629 (1922); State v. Superior Court, 148 Wash. 1, 267 P. 770 (1928).

112. See e.g., De Camp v. Central Ariz. Light & Power Co., 47 Ariz. 517, 57 P.2d 311 (1936) (after legislation delegated rule-making power to court, subsequent statutes governing procedure would be followed unless they "unreasonably limit . . . the courts in the performance of the duties imposed on them by the constitution"); Kolkmann v. People, 89 Colo. 8, 300 P. 575 (1931) (separation of powers commits rule-making to judiciary and forbids other branches from exercise of that power).

113. Act of Mar. 13, 1933, ch. 84, 1933 N.M. Laws 147. Unfortunately, the legislative history of the act has not been preserved, and there is no explicit link between the act and the Pound articles. However, the structure of the act, and its similarity to the Colorado statute, "An Act Concerning Practice and Procedure in Courts of Record," ch. 121, 1913 Colo. Sess. Laws 447, praised by Pound in one of his articles, Pound III, supra note 83, at 176, suggest the influence of Dean Pound's views.
the supreme court to promulgate rules of pleading, practice, and procedure so long as they did not "abridge, enlarge or modify the substantive rights of any litigant." Following Dean Pound's preferred approach, the statute constituted a total delegation of rule-making authority to the court. The statute neither purported to create general statutory principles of procedure which the court must honor nor to bind the court to legislatively-adopted procedure rules. Instead, the act provided that all existing procedural statutes "shall, from and after the passage of this Act, have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant" to the statute.

The act embodied several fundamental principles. First, the statute was predicated upon the assumption that it delegated to the judiciary a power which the legislature perceived to be a legislative power. Second, the motivation of the legislature was convenience and efficiency rather than a perception that constitutional doctrines were implicated. Third, the statute categorically declared that the court could not use this delegated rule-making authority to affect substantive rights. Finally, by declaring that existing procedural statutes could be overruled by judicially created rules of court, the legislature transferred the ultimate rule-making authority to the courts. The court was authorized to write procedural rules that contradicted and superseded legislative pronouncements.

The supreme court lost little time in exercising its expanded rule-making authority. Almost immediately after passage of the 1933 statute, the court declared all preexisting procedural statutes to be rules of court. Shortly thereafter the court effected substantial changes in these statutes by adopting a body of new court rules. In bold face type preceding the published rules, the court acknowledged that they were "[a]dopted by

115. Id.
116. Id. It would be unnecessary and unavailing for the legislature to pass a statute granting authority to the judiciary if the authority already existed in the judiciary.
117. Id. at 147. "The Supreme Court ... shall ... regulate pleading, practice and procedure in all courts of New Mexico, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits." Id. [Emphasis added].
118. Id.
119. Id. at 148. "All statutes relating to pleading, practice and procedure now existing, shall from and after the passage of this Act, have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto." Id.
120. See Rules of Court, 37 N.M. VI. The statute was approved on March 13, 1933, but did not go into effect until June 19, 1933. 1933 N.M. Laws 84. The supreme court adopted the rule transforming all "now existing statutes" relating to procedure into rules of court on April 13, 1933, to take effect on the effective date of the new statute. 37 N.M. at VI.
121. See 1933-34 Rules, 38 N.M. VII. The new rules were effective on July 1, 1934. Id.
the Supreme Court by authority of Chapter 84, Laws of 1933."\textsuperscript{122} In its per curiam order accompanying the rules, the court reiterated that it adopted the rules under authority of the 1933 statute and referred to the statute as having occasioned "[t]he recent enlargements of the rule-making power" of the supreme court.\textsuperscript{123}

In Rule 2 the court adopted a numbering system for the rules which paralleled the system used in the then extant procedure statute. Rule 2 declared that "[a]ny rule bearing a number identical with that of a section of [the procedural statute] shall be deemed to supersede such section."\textsuperscript{124} Adoption of this numbering system indicates that the court intended to implement the rule-making power to the fullest extent authorized by the statute.

In 1935, the supreme court promulgated a complete rewrite of the appellate rules.\textsuperscript{125} Again the court acknowledged that its authority to do so was found in the 1933 statute.\textsuperscript{126} The appellate rules also followed the pattern of the 1933 Act in adopting preexisting statutory procedural rules as rules of court.\textsuperscript{127}

\textbf{C. The Development of the Judicial Exclusivity Doctrine}

The 1933 Act and the adoption of rules of procedure pursuant thereto by the supreme court stand as admirable examples of legislative and judicial cooperation. New Mexico’s long tradition of shared responsibility for rule-making set the stage for the adoption of Pound’s view that rule-making was more efficiently and effectively accomplished by the courts than by the legislature.

Inevitably however, a litigant whose cause was harmed by the content of the new rules would mount a challenge to them, thereby testing the authority of the legislature to delegate so much authority to the judicial branch. That challenge came in \textit{State v. Roy}\textsuperscript{128} in 1936. The decision in \textit{Roy} began the steady march toward the development of a new doctrine.

\textbf{1. State v. Roy: The Roots of Modern Doctrine}

Hyman Roy was convicted of the murder of Martha Hutchinson and sentenced to die in the electric chair.\textsuperscript{129} On appeal Roy alleged a host of

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\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} 1933-34 Rules, R. 2, 38 N.M. at VIII.
\textsuperscript{125} Revised Rules of the Supreme Court of New Mexico, July 29, 1935, 39 N.M. VII.
\textsuperscript{126} Id. at VIII. In its \textit{per curiam} introduction to the Rules, the Court identified "the recent exposition of the power of the court" in the 1933 act as a reason for the 1935 amendments. \textit{Id.} at VII.
\textsuperscript{127} Id.
\textsuperscript{128} 40 N.M. 397, 60 P.2d 646 (1936).
\textsuperscript{129} Roy was executed after the affirmance of his conviction in this case.
\end{flushright}
procedural errors normally associated with criminal appeals. He also challenged the constitutional validity of the criminal information under which he was charged on grounds which questioned the validity of the 1933 Act and the rule-making power of the court. The court rejected Roy’s constitutional challenge and upheld the conviction and the sentence of death. In so doing, the court laid the foundations of modern doctrine concerning the rule-making power of the court.

The information under which Roy was charged was a “short form” document authorized by the supreme court rules regulating criminal procedure, which had been promulgated pursuant to the 1933 Act. Roy argued that the Act was an unconstitutional delegation of the legislative power to determine judicial procedure. He contended, therefore, that the rules of procedure adopted pursuant to the statute, including the “short form” indictment authorized by the rules, were void. It is in this posture that the conflict between legislative and judicial rule-making power was first presented to the New Mexico Supreme Court.

In response, the attorney general made two arguments. First, he asserted that the court’s authority to write rules of procedure was not dependent upon the 1933 Act because rule-making authority is an inherent power of the judiciary. As a corollary to this argument, the attorney general also asserted that this inherent judicial power to promulgate procedural rules also was exclusive. In effect, the attorney general argued that the doctrine of separation of powers not only assigned rule-making power to the judicial branch but also forbade the legislative branch from sharing in that power. Second, the attorney general asserted that, if the rule-making authority was not the exclusive constitutional prerogative of the courts, then it was a power, not exclusively legislative in nature, thus allowing the conference of that power on the court by the 1933 Act.

After an extensive examination of the state and federal authority on

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130. Id. at 401-02, 60 P.2d at 648-49. Eight of the ten points on appeal related to alleged errors involving the introduction of evidence, instructions to the jury, denial of a motion for continuance, and the setting of the date of execution. Id. The supreme court gave rather short shrift to the six traditional evidentiary and instruction-based challenges to the conviction, and focused on the constitutional challenge to the 1933 act “which we deem the most important.” Id. at 417, 60 P.2d at 658.

131. Id. at 401, 60 P.2d at 648.
132. Id. at 403, 60 P.2d at 649.
133. Id. at 417, 60 P.2d at 658-59.
134. Id.
135. Id.
136. Id.
137. Id.
138. Id. The argument tracks the language of article III, § 1, of the New Mexico Constitution, which grants judicial power to the courts and then provides that no other branch of government “shall exercise any powers properly belonging to [any other branch].” N.M. Const. art. III, § 1.
139. 40 N.M. at 417, 60 P.2d at 658-59.
the subject, the court concluded that "the power to regulate procedure is considered a judicial power, or at least that it is not considered to be a purely or distinctively legislative power." In effect, the court ruled that the power to promulgate procedural rules is an inherent power of the judiciary. As a result, the court rejected Roy's argument that the 1933

140. Id. at 418, 60 P.2d at 659-60. The court relied heavily on In re Constitutionality of Section 251.18, Wis. Statutes, 204 Wis. 501, 236 N.W. 717 (1931), and State ex rel. Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928), for its analysis that procedural rule-making might be neither exclusively legislative nor judicial. Id. Both are post-Pound cases, which rely heavily on the logic of Dean Pound's analysis of judicial power.

Furthermore, the court relied on federal precedent, beginning with the famous dictum from Chief Justice Marshall in Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825): "[t]he courts, for example may make rules ... [and yet] [i]t will not be contended, that these things might not be done by the legislature, without the intervention of the Courts ... ." Indeed, the Roy court echoed the clearest expression of coordinate rule-making power, found in the Hampton Case, 276 U.S. 394 (1928), as reformulated in State ex rel. Wis. Inspection Bureau v. Whitman, 196 Wis. 472, 496, 220 N.W. 929, 938 (1928):

[There never was and never can be such a thing in the practical administration of the law as a complete, absolute, scientific separation of the so-called coordinate governmental powers. As a matter of fact, they are and always have been overlapping. Courts make rules of procedure which in many instances at least might be prescribed by the Legislature.

Thus, while sowing the seeds for the development of a tradition of exclusive court authority for the promulgation of procedural rules, Roy began with a healthy recognition of the overlapping nature of legislative and judicial authority in this area. 40 N.M. at 418-19, 60 P.2d at 659.


Each of the federal delegations contemplates a "promulgate and wait" procedure, whereby the Court, after promulgation, must report the rule's contents to Congress. The promulgated rule only takes effect if Congress fails to take some contrary action within the prescribed period. These statutes thus allow Congress to amend or to veto rules promulgated by the Court, see Sibbach v. Wilson & Co., 312 U.S. 1, 14-15 (1941), although such a veto may only be accomplished by the enactment of a statute, see INS v. Chadha, 462 U.S. 919, 935 n.9 (1983).

There has been much theoretical debate concerning whether rule-making power at the federal level is inherently judicial or legislative. See, e.g., Weinstein, Reform of Federal Court Rulemaking Procedures, 96 Colum. L. Rev. 905 (1976); Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673 (1975). Congressional veto under the "promulgate and wait" procedure, however, was never invoked until action was taken on the controversial proposed Rules of Evidence. See Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975). Congressional veto under the "promulgation of judicial and legislative authority in this area. 40 N.M. at 418-19, 60 P.2d at 659.


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Act was an unconstitutional delegation of exclusively-legislative power to the courts.

The court was exercising an inherent judicial power when it wrote the 1934 rules, the court declared in Roy, thus obviating the non-delegation problem. To reach this decision the court was obligated to disclaim its prior statements that the Rules of 1934 and the Appellate Rules of 1936 were adopted under the authority of the 1933 Act. The court declared that even though promulgated "subsequent to and consequent upon the [1933 Act]," the 1934 rules "were promulgated nevertheless by this court in the exercise of an inherent power lodged in us to prescribe such rules of practice, pleading and procedure as will facilitate the administration of justice."142

Even more significant than what it decided in Roy is what the court avoided deciding. The court viewed as unnecessary a determination whether the legislature "was ever rightfully in the rule-making field, or was a mere trespasser or usurper."143 The court deemed it unnecessary to decide whether the inherent judicial power to promulgate rules was an exclusive power because "[t]here is no conflict at the present time between any rule promulgated by this court with any law enacted by the Legislature."144

Thus, Roy established that procedural rule-making in New Mexico is not exclusively legislative and that the courts have an independent, "inherent" power to prescribe rules of procedure. Beyond that holding, the court chose not to venture. The difficult questions concerning the role of the legislature, if any, were left for future consideration.

2. Tentative Steps Toward Resolution of the Issues Unanswered in Roy

The inconsistent strains of the 1933 Act and Roy—shared legislative and judicial responsibility for procedural rule-making on the one hand145 and possibly exclusive judicial authority rooted in separation of powers

142. Id. at 420, 60 P.2d at 660.
143. Id. at 419, 60 P.2d at 660.
144. Id. at 420, 60 P.2d at 660. In an admirable exercise of judicial restraint the court avoided ruling on that question because "[a] constitutional question, and one so controversial, should not be determined in advance of necessity." Id.

The court also went on to reject Roy's contention that, even if the court had rule-making authority, it had no authority to establish rules for the lower courts "inasmuch as such courts are constitutional courts and can make their own rules." Id. The court rejected that contention by reference to the constitutional provision granting the court appellate and superintending authority over the lower courts. Id. See N.M. Const. art. VI, §§ 2, 3. The court adopted the views of Dean Pound that such constitutional provisions were nothing more than a codification of the common-law practice. In England the superior courts at Westminster had superintending rule-making authority over the lower courts as a means of avoiding "a confusion in the methods of procedure and to provide uniform rules of pleading and practice." 40 N.M. at 420-21, 60 P.2d at 661. See Pound II, supra note 83, at 171.

145. The court developed the concept that procedural rule-making is a fit subject for coordinated legislative and judicial control in the portion of Roy which rebutted Roy's assertion that the 1933
on the other—continued unresolved for more than forty years. During this time there was only intermittent reference to Roy. The few cases on point sought to avoid direct confrontation. In only one case did the act improperly delegated legislative power to the judiciary. 40 N.M. at 417-18, 60 P.2d at 658-59.

In explaining the overlapping power of the coordinate branches of government, the Roy court described how courts often exercise administrative and executive powers, how legislative bodies are often vested with judicial powers, and how executive officers must often interpret the very provisions of law which they are obliged to carry out. Id. at 418-19, 60 P.2d at 659-60. The court concluded that “[c]ourts make rules of procedure which in many instances at least might be prescribed by the Legislature.” Id. at 418, 60 P.2d at 659.

146. The Roy court’s holding that it had inherent power to enact the rules governing procedure is arguably rooted in the court’s conclusion, “[t]hat the power to provide rules of pleading, practice and procedure . . . is lodged in this court by the Constitution of New Mexico.” Id. at 422, 60 P.2d at 662. However, this portion of the opinion involved the constitutional power of superintending control rooted in article VI, § 3, rather than the separation of powers provision in article III, § 1. Id. The court was addressing the source of the supreme court’s supervisory power over the lower courts, rather than determining whether the constitution authorized the legislature, the courts, or both branches to develop procedural rules. Id.

147. Three years after Roy, the court decided the first of several cases which related to rule-making power. In City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939), the court dealt with a statute which called for the dismissal with prejudice of cases which had been pending for over two years without any action to bring them to final termination. Id. at 2, 96 P.2d at 701. The court declined to decide the case on the basis of whether the legislature could exercise rule-making power. See id. Instead, the court resolved the issue by reliance on N.M. Const. art. IV, § 34, which provides that “No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.” Id.

The Holmes court characterized the statute as altering the inherent common law power of courts to dismiss by setting a specific time limit applicable to dismissals for want of prosecution and providing for dismissal with prejudice. 44 N.M. at 3, 96 P.2d at 701-02. The court then reversed the lower court’s order of dismissal because “the case here was a pending case at the effective date of [the statute] . . . and no change in procedure can be permitted therein because of . . . [art. IV, § 34].” 44 N.M. at 6, 96 P.2d at 704. In the process, the court acknowledged the separation of powers problem by reserving the question “[w]hether the Act, operating prospectively only is subject to other constitutional objections, when invoked in a proper case.” Id. at 5, 96 P.2d at 703.

In a subsequent case involving a denial of a dismissal for want of prosecution, the court again recognized the separation of powers problem. In that case, Sitta v. Zimm, 77 N.M. 146, 420 P.2d 131 (1966), the defendant filed a motion for dismissal after the two-year period provided by court rule, but before expiration of the newly amended statutory three year period. Id. at 147, 420 P.2d at 132. Again, relying on article IV, § 34, the court refused to apply the statute which had been passed while the case was pending. See id. at 147, 420 P.2d at 132-33. But in so doing the court “recognize[d] as present certain questions relative to the power of the legislature to enact the change in view of Art. III, § 1, of the New Mexico Constitution, providing for separation of powers . . . .” Id. at 148, 420 P.2d at 133.

Although Holmes and Sitta suggest that article IV, § 34, is an implied constitutional recognition of the legislative power to adopt “rules of evidence or procedure,” Southwest Underwriters v. Montoya, 80 N.M. 107, 109, 452 P.2d 176, 178 (1969), expressly rejected the argument, noting that Article III, § 1, which establishes separation of powers, forbids one department of government from exercising any power belonging to either of the others, except as “expressly directed or permitted” by the constitution. Id. (Emphasis added.) The court read this phrase as forbidding “a construction of the Constitution which would authorize the exercise of such a power by implied authority.” Id.

The Montoya court’s treatment of article IV, § 34 is cursory and perhaps erroneous. First, although legislative rule-making may not be “expressly directed” by article IV, § 34, the power may be “expressly permitted” by that provision. In addition, the court’s rejection of the article IV, § 34 argument treats rule-making as if it must be all legislative or all judicial in nature, thereby ignoring the important teaching of Roy on the overlapping nature of many governmental powers.

For a discussion of the main holding of Montoya, see infra text accompanying notes 165-75.
court find it necessary to declare a procedural statute invalid, and then under circumstances which avoided any real clash with the legislature. Nonetheless, these post-*Roy* cases laid the groundwork for the assertion of judicial rule-making supremacy in the mid-1970's.

The court's initial consideration of the impact of *Roy* added nothing to the development of the law. A 1947 case, *State v. Arnold*, involved an appeal by the state from an adverse judgment in a civil action brought by the state against Arnold. The state filed an appeal after the expiration of the three-month period prescribed in a court rule for bringing appeals but within the six-month period allowed under a state statute for the bringing of appeals.

The supreme court upheld the validity of the court rule reducing the time for appeal from six to three months. The court merely labelled the issue as procedural and concluded that, "whatever the source" of power, *Roy* established that the judiciary "possesses unquestioned power to make rules touching pleading, practice and procedure." The court declined to address the issue of whether the statute was void as a legislative intrusion on the exclusive power of the court to write procedural rules. Nor did the court consider whether it had modified the statute pursuant to the terms of the 1933 Act or by virtue of an inherent judicial power to override otherwise valid procedural statutes to which the supreme court no longer acquiesces. Though the reasoning is incomplete, the implications of the decision are clear. The court determined that statutes affecting procedure do not survive the adoption of conflicting judicial rules. The court thereby set the stage for a future ruling that the legislature has no power to write procedural statutes.

When the issue was next presented in 1957 in *State ex rel. Bliss v. Greenwood*, the court took a reasoned and balanced approach. In *Bliss* the trial court denied the defendant's demand for a jury trial prior to the imposition of contempt for violation of a court order. On appeal, the

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148. *State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957) (statute creating right to jury trial in contempt proceedings held invalid as a violation of separation of powers provision of Organic Act, even though statute had been repealed previously). *See infra* text accompanying notes 152-64.

149. 51 N.M. 311, 183 P.2d 845 (1947).

150. *Id.* at 313, 183 P.2d at 846. The state argued that the setting of the time for the taking an appeal is substantive. *Id.* at 313, 183 P.2d at 845. The court, relying on authority from Colorado, *Ernest v. Lamb*, 73 Colo. 132, 213 P. 994 (1923), however, concluded that, while the decision whether to allow an appeal is indeed substantive, "reasonable regulations affecting the time and manner of taking and perfecting the same are procedural and within this court's rule making power."

51 N.M. at 314, 183 P.2d at 846-47.

151. *Id.* at 313, 183 P.2d at 846.

152. 63 N.M. 156, 315 P.2d 223 (1957).

153. *Id.* at 158, 315 P.2d at 224. The lower court found Greenwood guilty of contempt for irrigating his farm from wells without a valid water right and without a permit, in violation of a permanent injunction prohibiting him from using the water. *Id.* The injunction had issued because Greenwood had drilled the wells without a permit from the state engineer. *Id.* Greenwood was fined $750 and given a six month suspended jail sentence. *Id.* at 158, 315 P.2d at 224-25.
defendant invoked a territorial law which precluded the imposition of a fine for contempt of court in excess of fifty dollars without a jury trial.\(^{154}\) The court determined that the territorial law limiting contempt power in the absence of a jury was void because it violated the separation of powers provisions of the Organic Act which established the territory.\(^{155}\) The court began its analysis with the assertions that the power to punish for contempt is "inherent in the courts" and that its exercise is "the highest form of judicial power."\(^{156}\) The court conceded, however, that judicial power in this area "is not absolute, exclusive and free of all legislative regulation."\(^{157}\) Rather, the court concluded, reasonable legislative regulation, even of subjects within the inherent power of courts, was permissible, so long as the legislation "preserve[d] to the court sufficient power to protect itself from indignities and to enable it effectively to administer its judicial functions."\(^{158}\) Applying this framework of analysis, the court found that a statute requiring jury trials in cases involving indirect contempt "[did] not materially interfere with the power of the courts."\(^{159}\) The court determined, however, that the necessity for summary procedure is greater in direct contempts—where the contempt occurs in the presence of the court—

\(^{154}\) Id. at 160-61, 315 P.2d at 226. "No judge of the district court shall fine any person for contempt or want of respect for the court, in any sum exceeding fifty dollars, without a jury trial." § 1039 of the 1897 Code, C.L. 1865, Ch. 28, § 2.

\(^{155}\) The legislature had repealed the statute by the time the court decided Greenwood. 63 N.M. at 161, 315 P.2d at 226. Greenwood claimed that repeal of the statute after statehood did not negate his right to jury trial because the New Mexico constitution guaranteed the right to trial by jury as it existed at the time the Constitution was adopted. Id. The court noted that article II, § 12 of the New Mexico Constitution provides: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate. . . ." 63 N.M. at 166, 315 P.2d at 226. The terms "as it has heretofore existed" had previously been interpreted as referring to the right to jury trial as it existed immediately preceding statehood. See, e.g., Gutierrez v. Gober, 43 N.M. 146, 87 P.2d 437 (1939). The supreme court agreed that if article II, § 12 was valid initially, its subsequent repeal after statehood could not have the effect of denying Greenwood the right to a jury trial. 63 N.M. at 161, 315 P.2d at 226.

\(^{156}\) 63 N.M. at 161, 315 P.2d at 227.

\(^{157}\) Id. at 162, 315 P.2d at 227. The court relied in part for this conclusion on its holding in \textit{Ex parte Magee}, 31 N.M. 276, 242 P. 332 (1925). In \textit{Magee}, the court had upheld a gubernatorial pardon of a judicially-imposed sentence for contempt against a separation of powers challenge. \textit{Id.} at 282, 242 P. at 334. The court reviewed the history of the pardon power and found that it had extended to criminal contempt "from early times in the English law." \textit{Id.} Furthermore, the \textit{Magee} court concluded that the three branches of government are only "relatively" independent of each other and that the pardoning power of the governor is but one example of the "system of checks and balances whereby justice is secured to the people, and public affairs are wisely administered." \textit{Id.} at 279, 242 P.2d at 333.

\(^{158}\) 63 N.M. at 162, 315 P.2d at 227.

\(^{159}\) \textit{Id.} The court acknowledged that a substantial body of authority had struck similar statutes as encroachments on the power of the judiciary. \textit{Id.} Nonetheless, it suggested that where the legislature imposes restraints on the imposition of indirect contempt—that committed outside the presence of the court—less intrusion into the essential powers of the judiciary occurred than if the legislature imposed procedural constraint on the judicial power to punish direct contempts—those occurring in the presence of the court. \textit{Id.}
because "[s]ummary measures may be the only effective means of defending the dignity of judicial tribunals and of ensuring that they are able to accomplish the purpose of their existence." The court concluded that, because the territorial law applied to both direct and indirect contempts, the law was so intrusive on the judiciary's power to fulfill its functions that it was not within the proper limits of legislative regulation. The court held the statute invalid as violative of the Organic Act's requirement of separation of powers.

The significance of Bliss extends beyond the holding that the legislature may not interfere with the power of the courts to punish for direct contempt of court. Bliss explicitly recognized that the legislature has a legitimate role to play in regulating procedure. It also established that the courts may overrule statutes establishing procedural rules under certain circumstances. "[W]hile the legislature may provide rules of procedure which are reasonable regulations of the contempt power it may not . . . by enacting procedural rules . . . substantially impair or destroy the implied power of the court to punish for contempt." Bliss thus represents the first principled attempt to deal with the questions left unanswered in Roy. The court recognized that, even with respect to matters involving "the highest form of judicial power," separation of powers is not absolute. Bliss articulated a "practical standard," mandating the nullification of legislative acts affecting inherently judicial matters only when those acts encroach upon court power "to protect itself from indignities and to enable it effectively to administer its judicial functions." Implicit in this standard is the recognition that both the legislature and the judiciary share rule-making power. The court comprehended that the doctrine of separation of powers should be invoked to invalidate legislative acts only where procedural statutes unreasonably encroach on the essential ability of the courts to function effectively as an independent branch of government.

In Southwest Underwriters v. Montoya, decided twelve years after Bliss, the court ignored the careful balance struck in Bliss and came very close to an express holding that the rule-making power is exclusively a judicial power. In Montoya, the defendant had moved for a Rule 41(e) dismissal for want of prosecution for two years, as authorized by the then-existing rule. The trial court denied the motion on the ground that
a subsequently enacted statute had extended the required time to three years.\textsuperscript{167}

The supreme court reversed. The court conceded that "[i]f the legislature has the right to pass laws regulating pleading, practice and procedure in the courts, then the motion to dismiss . . . was premature."\textsuperscript{168} The opinion acknowledged that the post-Roy cases did not "squarely resolve the specific issue now presented"\textsuperscript{169} but asserted that those cases "have clearly pointed the way to a resolution of the question."\textsuperscript{170} The court then concluded that the three-year statute "purports to direct a change of procedure which infringes on the court's exercise of its constitutional duties."\textsuperscript{171}

The apparent rationale of \textit{Montoya} is that the doctrine of separation of powers precludes the legislature from taking any action to promulgate rules which are clearly procedural.\textsuperscript{172} However, more limited readings of the decision are possible. First, the court may have held merely that the legislature cannot adopt a procedural statute which is in conflict with an existing rule of court.\textsuperscript{173} Alternatively, the court may have authorized limited legislative rule-making so long as the legislation does not touch upon "those rules of pleading, practice and procedure which are essential to the performance of the constitutional duties imposed upon the courts."\textsuperscript{174}

Because \textit{Montoya} can be narrowly interpreted, and because the court failed to cite or to discuss either \textit{Bliss}\textsuperscript{175} or the long range impact of the decision, the opinion is merely a harbinger of decisions to come, rather than the leading New Mexico precedent establishing the exclusive nature of the inherent power of the judiciary to promulgate rules of procedure.

\textsuperscript{167} Act of Mar. 19, 1965, 1965 N.M. Laws 132. The statute extended the required period of inaction to three years and exempted cases which were to be tried by jury. After the filing of the underlying case at issue in this action, but before the motion to dismiss was filed, the supreme court amended Rule 41(e) to extend the period of inaction to three years in all cases, including jury cases. The amended rule only applied, however, to cases filed on or after July 1, 1967. Thus, the conflict in \textit{Montoya} was between the court's two-year rule and the legislature's subsequently adopted three-year statute. 80 N.M. at 107, 452 P.2d at 176.

\textsuperscript{168} 80 N.M. at 107-08, 452 P.2d at 176-77.

\textsuperscript{169} \textit{Id.} at 108, 452 P.2d at 177. The court properly cited \textit{Roy, City of Roswell, and Arnold} as authority for the inherent power of the court to prescribe rules of practice, and the court acknowledged that \textit{Sitta} did not directly present the question of legislative power to enact changes in procedural rules. \textit{Id.} at 108, 452 P.2d at 177.

\textsuperscript{170} \textit{Id.} at 108, 452 P.2d at 177.

\textsuperscript{171} \textit{Id.} at 110, 452 P.2d at 179.

\textsuperscript{172} \textit{Id.} at 109, 452 P.2d at 178. The court conceded that with regard to issues that straddle the fine line between substance and procedure "legislative enactments with respect thereto would be proper." \textit{Id.}

\textsuperscript{173} \textit{Id.} The supreme court was careful to note that this case involved a statute and rule of court that were in direct conflict. \textit{Id.} Moreover, the statute was adopted \textit{after} the court had promulgated the rule in question. \textit{See supra} notes 166-167.

\textsuperscript{174} \textit{Id.} at 109, 452 P.2d at 178.

\textsuperscript{175} Neither party cited \textit{Bliss} in the briefs submitted to the court in \textit{Montoya}. Records of the Case. University of New Mexico School of Law Library.
Four years after Montoya was decided, the supreme court took a more conciliatory approach in determining the proper legislative role in rule-making. In Alexander v. Delgado, 176 the court was presented with the question whether the court of appeals had the power to overrule supreme court precedent. The supreme court held that the court of appeals lacked such power. 177 In its decision, the court relied in part upon a statute regulating the certiorari process. 178 The court conceded that its certiorari power flows directly from the New Mexico Constitution 179 but refused to find that the statute was therefore an invalid infringement on judicial power: "This court has no quarrel with the statutory arrangements which seem reasonable and workable and has not seen fit to change it by rule." 180

This significant declaration incorporates four important principles. First, it acknowledges that statutes affecting procedure are not automatically void and that the legislature has some legitimate role in the rule-making process. Second, it is a tacit judicial recognition of the principle contained in the 1933 Act—that procedural statutes are to be deemed valid rules of court until altered by the court’s exercise of rule-making authority. 181 Third, it demonstrates that, in the absence of conflicting court rules, the court will follow the dictates of procedural statutes which it deems "reasonable and workable." Fourth, the court reserves the power to amend or to revoke legislatively-created rules which are not "reasonable and workable."

As this historical review illustrates, the supreme court never waived from its view that the court had an inherent power to promulgate rules of procedure during the period from 1936 to 1973. The court demonstrated less certainty concerning the role of the legislature. In Montoya, the court flirted with the view that the doctrine of separation of powers barred any participation by the legislature. Bliss and Alexander, however, illustrate a more conciliatory approach. They indicate that a statute affecting procedure is not necessarily void. A procedural statute not in conflict with a court rule can stand as long as it does not compromise the essential integrity and independence of the courts 182 or prove unreasonable or un-

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177. Id. at 718, 507 P.2d at 778. On an appeal from a defense verdict in an automobile-pedestrian accident case, the court of appeals had refused to follow an applicable Uniform Jury Instruction on unavoidable accident, and sought to abolish the common law doctrine. Id. The supreme court granted certiorari and affirmed the conclusion of the court of appeals, but held that it was for the supreme court, and not the court of appeals, to alter supreme court precedent. Id. at 719, 507 P.2d at 780.
178. See N.M. Stat. Ann. § 34-5-14 (Repl. Pamp. 1981). In the words of the Alexander court: "Implicit in the statute is the concept that the Court of Appeals is to be governed by the precedent of this Court." 84 N.M. at 718, 507 P.2d at 779.
179. 84 N.M. at 718, 507 P.2d at 779.
180. Id.
181. See supra text accompanying notes 117-19.
workable in practice. A procedural statute in conflict with a court rule, however, must fall either for constitutional reasons or as a result of the 1933 Act.

The supreme court opinions during this period were ambivalent, if not contradictory. While the court was finally poised to determine the issue, the decision was not preordained by the legal precedents developed by the supreme court during forty years subsequent to Roy.

3. McBride and Ammerman: The Exclusivity Doctrine Fully Developed

The doctrine of exclusive judicial rule-making power, rooted in separation of powers, was developed in two cases decided in the mid-1970's. In State ex rel. Anaya v. McBride and Ammerman v. Hubbard Broadcasting, Inc., the court finally resolved the question left unanswered in Roy and subsequent decisions interpreting Roy. Both cases declared that whenever there is a conflict between a statute and a court rule which seek to control a matter of practice or procedure, separation of powers requires that the rule be given effect over the conflicting statute. These cases seem to reject the concept of coordinate legislative and judicial rule-making power. Instead, they declare that, as a matter of constitutional compulsion, the judiciary possesses exclusive power to control all matters governing practice and procedure. A careful reading of the cases and subsequent decisions applying them suggests, however, that the supreme court intended not to exclude the legislature from the rule-making process but only intended to assure judicial supremacy in any clash between legislative and judicial rules of procedure.

McBride involved a constitutional challenge to the appointment of the respondent as a district court judge. The attorney general, seeking McBride's ouster, filed a quo warranto action as an original action in the supreme court. The attorney general argued that the state constitution prohibited

185. Act of Mar. 13, 1933, 1933 N.M. Laws 84. It is, of course, less intrusive for the court to rely upon the provisions of the 1933 act in giving effect to a court rule over the provisions of a procedural statute. Unlike the separation of powers route, reliance on the 1933 act does not challenge the constitutional authority of the legislature. On the contrary, the Act recognizes the joint power of both branches and expresses a legislative judgment that, on matters of court procedure, the courts may be better able to fashion appropriate rules.
186. 88 N.M. 244, 539 P.2d 1006 (1975).
188. 88 N.M. at 254, 539 P.2d at 1016. Quo warranto is the traditional method of challenging the right of an office holder to his office. See N.M. Stat. Ann. §§44-3-4 to -6 (1978). Because of its historic roots among the extraordinary writs of the early common law, quo warranto is still bound up with many unusual rules of pleading, even in its modern statutory form. See, e.g., Huning v. Los Chavez Zoning Comm'n, 93 N.M. 655, 604 P.2d 121 (1979) (private party may not bring action unless failure to act by attorney general or district attorney is shown).
the appointment of McBride, a member of the legislature, to a civil office within a year after which the legislature increased the salary for that office.\textsuperscript{189}

The rule-making power question arose only as part of the majority's answer to the dissenting view that the court should dismiss the case for want of jurisdiction. Chief Justice McManus, in dissent, began with the premise that because \textit{quo warranto} "is strictly statutory,"\textsuperscript{190} and because an allegation required by statute was missing—\textit{i.e.}, "the name of the person rightfully entitled to the office with a statement of his right thereto"\textsuperscript{193}—the petition was fatally defective and required dismissal.

In response, the majority acknowledged the statutory requirements for \textit{quo warranto}, but disagreed with the dissent's assertion that the writ was purely statutory. The court found specific constitutional authority for supreme court jurisdiction in \textit{quo warranto},\textsuperscript{192} independent of the statute. The court went on to determine that "the statutory provision requiring the name of the person rightfully entitled to the office is clearly procedural."\textsuperscript{193} Finding inherent power to regulate procedural matters in the separation of powers\textsuperscript{194} and superintending control\textsuperscript{195} provisions of the constitution, the court boldly asserted the exclusivity of this judicial rule-making power.\textsuperscript{196} "Under the Constitution, the legislature lacks the power

\textsuperscript{189} 88 N.M. at 247-48, 539 P.2d at 1009-10. There was some confusion over whether McBride was serving as a senator at the time the judicial pay bill was passed because of a reapportionment decision which altered districts and terms of office. \textit{See id.} The main argument on the merits, however, focused on whether the constitutional prohibition applied to judicial offices. \textit{See id.} at 249-50, 539 P.2d at 1011-12. The court found against McBride on the merits and issued the requested Order of Ouster. \textit{Id.} at 252, 539 P.2d at 1014.

\textsuperscript{190} \textit{Id.} at 254, 539 P.2d at 1016 (McManus, C.J., dissenting). The chief justice ignored the constitutional provision confirming \textit{quo warranto} jurisdiction in the supreme court, N.M. Const. art. VI, § 3, and made no mention of the court rule governing original writs under that authority. \textit{See N.M. R. App. P. (Civ.)} 12.

\textsuperscript{191} N.M. Stat. Ann. § 44-3-6 (1978). The attorney general did not name "the person rightfully entitled to the office," because there was none. Indeed, whenever a gubernatorial appointee for any office is subject to challenge, by definition (and until a subsequent appointment by the governor), there is no person "rightfully entitled to the office." Thus, if \textit{quo warranto} is the exclusive method of determining a legal title to an office, \textit{see Conklin v. Cunningham, 7 N.M. 445, 38 P. 170 (1894)}, adoption of the Chief Justice's procedural argument would have immunized all gubernatorial appointees from article IV, § 28 attack.

\textsuperscript{192} "The supreme court shall have original jurisdiction in \textit{quo warranto} . . . against all state officers. . . ." N.M. Const. art. VI, § 3.

\textsuperscript{193} 88 N.M. at 246, 539 P.2d at 1008. In subsequent \textit{quo warranto} cases the court has ignored this aspect of the decision and has rigorously enforced the legislatively imposed pleading requirements of the \textit{quo warranto} statute. \textit{See, e.g., Huning v. Los Chavez Zoning Comm'n, 93 N.M. 655, 657, 604 P.2d 121, 123 (1979) ("Since the statutory requirement for \textit{quo warranto} has not been met in this respect, there is no authority in the plaintiffs to file this application in \textit{quo warranto}.")} \textit{See, e.g., Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973); Sitta v. Zinn, 77 N.M. 146, 420 P.2d 131 (1966); City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939); and State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).}
to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so . . . for the constitutional power is vested exclusively in this court.”

This unequivocal language suggests that the supreme court in McBride intended to bar the legislature completely from the rule-making process. The full opinion, however, contains language suggesting a less dramatic result. Immediately after asserting that the legislature lacked all rule-making power, the court qualified its statement by adding that “statutes purporting to regulate practice and procedure in the courts cannot be made binding.” This language suggests that legislative rule-making may be appropriate, but will not survive a judicial rule to the contrary. This reading is buttressed by the court’s analysis of the specific problem presented in McBride. In McBride, the court noted that “the statute requiring the name of the legitimate officeholder be contained in the petitions is inconsistent with Rule 12(a) of the Rules Governing Appeals.”

The McBride court then quoted with approval from its recent decision in Alexander v. Delgado: “This court has no quarrel with the statutory arrangements which seem reasonable and workable and has not seen fit to change . . . by rule.” Hence, the court suggested that legislative rule-making is not void, but merely voidable—that the legislature may, by statute, promulgate judicial rules which will be applicable unless and until the supreme court adopts a rule of court to the contrary. Under this reading, the statutory requirement was not void because it dealt with procedure but because it conflicted with a rule of court addressing the same procedural issue.

McBride represents, therefore, not the unequivocal banishment of the legislature from the rule-making sphere, but a continuation of judicial ambivalence on the question. The broad language asserting that the legislature has no rule-making power is moderated by other statements suggesting that the legislature has a valid role but must defer to the court’s rule-making authority when there is a conflict.

In Ammerman v. Hubbard Broadcasting, Inc. decided in 1976, the court again broadly asserted that the power to make procedural rules for the courts was vested exclusively with the court. Again, however, the opinion could be read more narrowly to posit that legislative rule-making may be valid but must fall to a contrary rule of the court.

Ammerman involved the validity of an evidentiary privilege for news-

197. 88 N.M. at 246, 539 P.2d at 1008 (emphasis added).
198. Id.
199. Id. The rule of court provides that all prerogative writs be accompanied by a verified petition and sets forth what allegations the petition must contain. The rule does not require that the name of the person entitled to the office be contained in the petition. N.M. Stat. Ann. § 21-12-12(a) (1974 Interim Supp.).
200. 88 N.M. at 246, 539 P.2d at 1008 (quoting Alexander v. Delgado, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973)).
men adopted by the legislature, \(^\text{202}\) including the statutorily-provided mode of de novo appeal to the supreme court of questions involving the assertion of that privilege. \(^\text{203}\) The plaintiffs brought slander actions against media defendants \(^\text{204}\) and sought disclosure of information from the individual defendants concerning their sources. Defendants asserted the privilege provided by the statute, but the district court ordered them to disclose the information sought. The defendants appealed. The appeal presented two constitutional challenges to the statute: (1) whether the statutory newsman’s privilege was invalid as a legislative encroachment on the rule-making power of the court; and (2) whether the appellate procedure set by statute for reviewing determinations of the applicability of the privilege was also violative of separation of powers. \(^\text{205}\)

The court first addressed the validity of the statutory privilege. The court examined whether the privilege was procedural or substantive in nature. Finding that rules of privilege, as exceptions to the general duty of all citizens to furnish evidence, are universally considered rules of evidence, \(^\text{206}\) the court went on to find that rules of evidence, "by reason of the function they serve in the judicial process, are very largely, if not entirely, procedural." \(^\text{207}\)

The court then explicitly framed the crucial question: "[W]hether rules of procedure in judicial proceedings are matters for this court to fashion


\(^{203}\) The statute also provided for interlocutory appeal from such disclosure orders, together with short time-frames for the docketing and hearing of such appeals. N.M. Stat. Ann. § 20-1-12.1(C) (Supp. 1975).

\(^{204}\) The appeal in Ammerman involved the consolidation of five cases involving the same issues concerning the constitutionality of the newsman’s privilege statute. 89 N.M. at 308, 551 P.2d at 1355.

\(^{205}\) Initially, only the issue of the validity of the statutory provisions governing appeal was presented for review by way of the plaintiff’s motion to dismiss the appeal. Id. at 309, 551 P.2d at 1356. At the court’s request, the constitutionality of the statutory privilege itself was also presented to the court. Id.

Had the court merely ruled the procedure unconstitutional, it would have left the lower courts to grapple with the constitutional question of the validity of the privilege itself while leaving no mandatory expeditious route for the appeal of that important question. As a result, consideration of the validity of the statutory privilege was warranted out of due regard for the question’s importance and the efficient administration of justice.

\(^{206}\) "[R]ules of evidence are procedural, in that they are a part of the judicial machinery administered by the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved . . . all rules of evidence (including rules of presumption and privilege) . . . are traditionally considered to be ‘adjective law’ or ‘procedural law.’" 89 N.M. at 310, 551 P.2d at 1357.

\(^{207}\) Id. The court recognized that “the line between substance and procedure is often elusive and that authorities, in endeavoring to follow this dichotomy in the rule-making process, are not always in accord.” Id. Unfortunately, the court then went on to consider the question wholesale, looking only at rules of evidence in general, to determine that rules of evidence are procedural by reason of their function in the judicial process. Then, in an unwarranted leap, the court found that
and adopt, or matters for the Legislature to adopt, or matters which may properly be adopted by either or both the Legislature and this court.\footnote{208} The court acknowledged that in \textit{Roy} it had declined to hold that judicial power in this area was exclusive\footnote{209} and that \textit{Arnold} merely held that a court rule could and did modify a procedural statute.\footnote{210} Relying on language in \textit{McBride}, however, the court reaffirmed that “under our Constitution \textit{the Legislature lacks power} to prescribe by statute rules of evidence and procedure, \textit{this constitutional power is vested exclusively in this court,} and statutes purporting to regulate practice and procedure in the courts cannot be binding. . . .”\footnote{211}

The court then declared that the legislature had invaded the exclusive province of the court by seeking to regulate a matter of pleading, practice, or procedure. The court, therefore, held that the statute was invalid.\footnote{212}

The court then turned to the second issue and struck two provisions of the statute which dealt with appellate review of the trial court ruling concerning the existence of the privilege. The court held that the portion

the mere fact that the supreme court adopted the New Mexico Rules of Evidence conclusively determined that all rules of evidence are procedural. \textit{Id.}

The court ignored the body of well-reasoned authority which supports the proposition that privileges, as distinguished from most rules of evidence, “are intended to serve substantive results extrinsic to the litigation.” J. Weinstein \& M. Berger, 2 \textit{Weinstein’s Evidence} 501-13 (1982). As explained by the most eminent authority on the subject: “The New Mexico Supreme Court has taken what most students of procedure would consider a high-handed attitude of denigrating legislative competence in this field. Its position that privileges are strictly procedural rather than substantive and thus not amenable to legislative action is in the extreme minority.” \textit{Id. See also} Weinstein, \textit{supra} note 140, at 925-26.

The supreme court’s willingness to lump privileges with other rules of evidence is understandable. If privilege rules are substantive, then the legislature and not the court, would have the final say in determining rules of privileges, because substantive law determinations of the judiciary are always subject to legislative override. \textit{See, e.g.}, Scott v. Rizzo, 96 N.M. 682, 683, 634 P.2d 1234, 1235 (1981) (after announcing judicial decision adopting comparative negligence, court noted that “the legislature is now in session and may wish to address the issue”).

208. 89 N.M. at 310, 551 P.2d at 1357.

209. \textit{Id.} at 311, 551 P.2d at 1358. Indeed, \textit{Roy} had acknowledged that many subjects were neither exclusively legislative or judicial and that separation of powers was not necessarily a doctrine of absolutes. \textit{See supra} text accompanying notes 140-44. Rather than emphasizing that aspect of \textit{Roy}, however, the \textit{Ammerman} court emphasized the exclusivity portions of \textit{Roy}, which were articulated in the context of the court’s constitutional power of superintending control, rather than separation of powers. \textit{Id.} The superintending control issues raised in \textit{Roy} under article VI, § 3, related more to the issue of the power of the supreme court juxtaposed against the inherent powers of the lower courts. \textit{See supra} note 146.

Separation of powers and the power of superintending control are distinct constitutional provisions which serve to protect different interests. Despite this, the court has consistently read them together as the joint basis for its exclusive power over procedural rule-making at least since \textit{McBride}.

210. In fact, \textit{Arnold} had merely applied the rule and ignored the statute, once the court had determined that the rule fell within the court’s “inherent” rule-making power. \textit{See supra} text accompanying notes 149-51.

211. 89 N.M. at 312, 551 P.2d at 1359 (emphasis added).

212. \textit{Id.} Given the separation of powers ground for its ruling, the court was careful to declare only that the statute “cannot be relied upon or enforced in \textit{judicial} proceedings” and expressly left open the possibility that the substance of the statute validly may be invoked in legislative and administrative proceedings. \textit{Id.} (emphasis added).
of the statute which required that the court hear the appeal de novo was inconsistent with existing appellate rules of procedure, which the court had previously construed as requiring deference to the fact finding of the trial court. The court also struck the twenty-day time limit for the hearing of the appeal as an unconstitutional legislative incursion into a procedural matter. The court sought to bolster its constitutional argument with a bit of hyperbole, expressing the concern that "[i]t would be utterly impossible for this court to live up to its responsibilities . . . if the Legislature could . . . fix time limitations within which this court must act."

Just as it did in McBride, however, the supreme court in Ammerman combined sweeping rhetoric asserting that the legislature lacked the power to write procedural rules with a narrow rationale that legislative pronouncements concerning procedure were valid but could be superseded by a contrary rule of court. The court noted that the newsman's privilege statute contradicted the Rules of Evidence promulgated by the court. New Mexico Rule of Evidence 501 expressly provides that the only privileges applicable in judicial proceedings are those "otherwise required by constitution [and those] provided in these rules or in other rules adopted by the supreme court." The court then characterized the issue as one, like the one faced in McBride, in which the court was "again confronted with a conflict between a statute and a rule of this court."

The court quoted approvingly the broad language of McBride which asserted exclusive judicial authority but also declared that "[c]ertainly statutes purporting to regulate practice and procedure in the Court cannot be made


214. 88 N.M. at 312, 551 P.2d at 1359. See New Mexico State Highway Dep't v. Bible, 38 N.M. 372, 34 P.2d 295 (1934) ("appeal" involves review of proceedings at trial, not a new trial).

215. Ammerman, 89 N.M. at 313, 551 P.2d at 1360.

216. Id. This assertion overstates the case because the 20-day limit is merely expressive of a legislative policy that such privilege questions are important and ought be advanced on the docket for expeditious resolution. Furthermore, the statute does not encroach on the deliberative processes of the court by seeking to require a decision in 20 days; it only requires that the hearing be held within 20 days. Finally, it is no more intrusive on the judiciary than the host of federal statutes which require expedition through advancement on the docket of certain substantive matters which Congress deems especially important. See, e.g., 28 U.S.C. § 2284(b)(2) (1982) ("hearing shall be given precedence and held at the earliest practicable date"). See also 28 U.S.C. § 1826 (1982) (appeal of confined recalcitrant grand jury witness "shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal").

217. 89 N.M. at 311, 551 P.2d at 1358.

218. N.M. R. Evid. 501.

219. Ammerman, 89 N.M. at 311, 551 P.2d at 1358.
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Ammerman thus may be read as decreeing only that legislative enactments concerning procedure are valid until the supreme court has exercised its inherent and superseding power to revoke or to amend the statutory provision.\(^2\)

Despite these undertones of shared responsibility for rule-making with the judiciary making the final determination when a statute and a rule conflict,\(^2\) McBride and Ammerman represent the outer limit of development of the doctrine of exclusive judicial power to fashion rules of practice and procedure. To the extent that they reflect the court’s view that the legislature is impotent to participate to any degree in rule-making, the decisions are weakened by four common failings. First, they oversimplify the often intractable task of drawing a bright line between matters of substance and procedure.\(^2\) Second, they ignore the sound teachings

\(^{220}\) Id. (emphasis added) (citing State ex rel. Anaya v. McBride, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975)).

\(^{221}\) The de novo hearing issue was also resolved on the basis of the superiority of a contrary rule of court. See supra text accompanying notes 213-14.

Apparently, the court found no judicial rule which contradicted the 20-day hearing requirement. This provision was struck on the basis that to permit the legislature to promulgate such a rule would make it “utterly impossible for this court to live up to its responsibilities.” Id. at 313, 551 P.2d at 1360. Despite the absence of a contrary rule of court, this holding need not have been premised on the exclusive judicial power language used in the opinion. Judicial supremacy could be premised here on the power of the court to override specific procedural statutes when necessary “to protect itself from indignities and to enable it effectively to administer its judicial functions.” See State ex rel. Bliss v. Greenwood, 63 N.M. 156, 162, 315 P.2d 223, 227 (1957).

\(^{222}\) The Ammerman court’s treatment of State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947), also supports a narrow interpretation of its holding. The court noted that the judicial procedure rule at issue in Arnold “modified the statute and . . . prevailed over the . . . statute.” 89 N.M. at 311, 551 P.2d at 1358. This language is inconsistent with the view that the statute was void, as beyond the authority of the legislature.

\(^{223}\) See Ammerman, 89 N.M. 307, 551 P.2d 1354. McBride, 88 N.M. 244, 539 P.2d 1006. The newsmen’s privilege struck down in Ammerman is a classic example. Not only does the court’s view that all privileges are procedural represent a distinct minority view, see J. Weinstein & M. Berger, supra note 207, at 501-13, but the important substantive implications surrounding the establishment of a privilege are self-evident. Privileges hamper the truth-determining process in that they are intended to serve substantive results extrinsic to litigation; they are not designed to achieve a more truthful and effective result in the litigation process. See id. at 501-19. Indeed, it has been pointed out that:

Rules of privilege keep out of litigation relevant and material information. They do so because of a substantive policy judgment that certain values—such as preserving confidential relationships—outweigh the detrimental effect that excluding the information has on the judicial truth-finding process. In short, rules of privilege reflect a substantive policy choice between competing values, and this policy choice is legislative in nature.


That is not to say that the Ammerman court was wrong in suggesting that privileges also impact on matters of practice and procedure. Rather, it is clear, to the extent that anything is capable of clarity in this gray area, that privileges are both substantive and procedural in real and substantial ways. As a result, the court should not have rejected the role of the legislature without more careful judicial analysis of the substantive aspects of the privilege.

In 1982, the supreme court adopted, as a rule of evidence, a qualified news-media privilege. See N.M. R. Evid. 514. The rule is more carefully crafted than was the statute. The rule not only
of Roy, which cautioned against a rigid view of separation of powers.\textsuperscript{224} Third, both cases ignore the 1933 Act and the legislative-judicial cooperation in rule-making which it fostered.\textsuperscript{225} Finally, they ignore the long historical tradition in New Mexico of cooperative shared responsibility between the legislature and judiciary for the development of procedure.\textsuperscript{226}

The rigid doctrine of separation of powers which the opinions appear to establish would also have serious and unhealthy consequences for the rule of law. Under the principle of exclusivity, any statute which is deemed procedural is unconstitutional as an encroachment on the exclusive domain of the court. The constitutional test is resolved, therefore, by the process of labelling the issue either as substantive or as procedural. The problem is that, for the most part, there is no clear distinction between substance and procedure.\textsuperscript{227} In all but the most obvious of cases, judicial attempts
delineates specifically the facts that must be demonstrated by the party seeking to obtain the information, but also outlines the procedural steps to be followed in the trial court and on appeal. \textit{Id.}

224. See State v. Roy, 40 N.M. 397, 418, 60 P.2d 646, 660 (1936). A substantial body of law, including Roy, recognizes the mutual interdependence of the co-equal branches of government under our constitutional system. See supra text accompanying notes 4-8. Indeed, former Chief Justice Payne used the occasion of his 1983 State of the Judiciary Address to remind the legislature that disputes over legislative and judicial authority ought not be resolved by attempting to establish "complete, absolute, or scientific separation of functions." Payne, C.J., State of the Judiciary Delivered to the Senate and House Judiciary Committees, 22 N.M. St. B. Bull. 1, 5 (Mar. 17, 1983). Rather, as the Chief Justice recognized, some overlap is appropriate, and a constructive tension is best maintained between the branches, thereby permitting each branch to "exercise some portion of the powers granted to the others . . . [while avoiding] a situation where any one branch becomes subservient to the others." \textit{Id.} It is the equilibrium of this subtle balance which may have been lost under the rigid separation of powers view expressed in McBride and Ammerman.

\textit{Cf.} Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-87 (1982) (plurality opinion) (striking down the 1978 Bankruptcy Act as an unlawful delegation of Article III judicial power): But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power . . . to define the right that it has created. \textit{Id.} at 83.

225. The 1933 Act represents a commendable example of legislative self-restraint that is not matched by McBride and Ammerman. The 1933 Act acknowledges that while the legislature may legitimately play a role in formulating doctrine which is procedural, the experience and expertise of the court merits deference when the court rejects a legislative procedure rule and substitutes a rule of court. See \textit{supra} text accompanying notes 113-27.

226. See \textit{supra} text accompanying notes 20-82.

227. The hornbook definition would describe substantive law as "[t]hat which creates duties, rights and obligations," Johnson v. Terry, 48 N.M. 253, 258, 149 P.2d 795, 797 (1944), as distinguished from the procedural or adjective law "which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective." Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc., 74 N.M. 458, 465, 394 P.2d 978, 983 (1964).

The hornbook definition, however, is uniquely unhelpful to the resolution of all but the clearest of cases. For example, in State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947), where the court characterized the time limit for bringing an appeal as procedural, the court drew a distinction between the right to bring an appeal and the "regulations affecting the time and manner of taking and perfecting
the same." Id. at 314, 183 P.2d at 846-47. Similarly, in Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973), the court assumed that the statute governing certiorari was procedural, although again there is a reasonable argument that the statute confers jurisdiction, and therefore is substantive in nature.

By contrast, it is interesting to note how the court has dealt with questions concerning venue in suits against the state. The court has held that "venue may not be equated with jurisdiction," but can be waived by failing to contest the matter. New Mexico Livestock Bd. v. Dose, 94 N.M. 68, 71, 607 P.2d 606, 609 (1980). Furthermore, the procedures for attacking venue are covered by the N.M. R. Civ. P. 12(b), and questions of proper venue are matters which involve the operation of the court. Nonetheless, in this area—unlike the time limits for taking appeals or the procedures for certiorari—the court has denied judicial power to order a change of venue absent statutory authority from the legislature. Jones v. New Mexico State Highway Dep't., 92 N.M. 671, 672, 593 P.2d 1074, 1075 (1979). But see State ex rel. Southern Pacific & Transp. Co. v. Frost, 102 N.M. 369, 695 P.2d 1318 (1985) (Common law doctrine of forum non conveniens used to effect change of venue).

Once the principle of exclusive judicial power over procedural matters is established, the resolution of the substance/procedure debate is virtually outcome determinative. That is especially troublesome when certain statutes so clearly involve both procedure and substance and no principled dividing line between the two can be discerned. See infra text accompanying notes 337-49.

One case which demonstrates the inherent difficulties in this area is illustrative. The Supreme Court of Pennsylvania promulgated a limited prejudgment interest rule, Pa. R. Civ. P. 238, pursuant to its specific constitutional authority to promulgate procedural rules. See Pa. Const., art. V, § 10(C).

Subsequently, in Bullins v. City of Philadelphia, 516 F. Supp. 728 (E.D. Pa. 1981), the federal court was confronted with the question of whether the "procedural" prejudgment interest rule was "substantive" for Erie purposes and therefore applicable in federal court. The court acknowledged that the question of whether the rule is substantive or procedural for Erie purposes presents a different inquiry from the question of whether it is substantive or procedural for purposes of determining the state supreme court's promulgation power. Id. at 728. The court then held that the rule was substantive for Erie purposes, because the application of the rule in diversity was more consistent with the intent of the Erie doctrine to end discrimination against non-citizens and to discourage forum shopping. Id. at 730.

Thereafter, the Supreme Court of Pennsylvania upheld its constitutional authority to adopt the rule, noting the distinction made by the Bullins court, and concluding that "[t]his Court should not be prevented from exercising its duty to resolve procedural questions merely because of a collateral effect on a substantive right." Laudenberger v. Port Authority, Pa., 436 A.2d 147, 155 (1981).

Finally, in Jarvis v. Johnson, 668 F.2d 740 (1982), the Third Circuit entered the fray. It resolved the diversity question in conformity with Bullins and also commented with approval on the Laudenberger result, while articulating a functional approach to the substance/procedure dichotomy:

A particular issue may be classified as substantive or procedural in determining whether it is within the scope of a court's rule-making power, or in resolving questions of conflict of laws, or in determining whether to apply state law or federal law. These are three very different kinds of problems. Factors that are of decisive importance in making the classification for one purpose may be irrelevant for another. To use the same name for all three purposes is an invitation to a barren and misleading conceptualism. Id. at 747.

Even if the substance/procedure distinction were easy to draw in a given context, it is not so clear that substantive law is only for the legislature, and procedural law is only for the courts. Certainly, both the courts and the legislature create substantive law. It is, for example, well-settled in New Mexico that the courts, as developers of the common law, are free to alter common-law principles and doctrine. See, e.g., Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982); Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1976). In each of these cases the court has recognized that the substantive matters being decided are ultimately subject to change by the legislature. See, e.g., Lopez, 98 N.M. 625, 651 P.2d 1269 (imposing dram shop liability); Hicks, 88 N.M. 588, 544 P.2d 1153 (abolishing sovereign immunity).

It is the premise of this article that the development of procedural law should follow an analogous pattern: procedural matters may be addressed by the legislature but are ultimately subject to change by the courts.
to make a principled distinction between substance and procedure necessarily fail. The cases which follow this absolutist view of *McBride* and *Ammerman* inevitably fail in their attempts to draw principled distinctions between procedural and substantive law. The opinions in this area, therefore, appear to be driven more by a determination to reach a given result, coupled with a concern for the maintenance of the previously asserted judicial power, than by a considered application of constitutional law principles.²²⁸

The later cases which apply *McBride* and *Ammerman* have exhibited some unnecessary muscle-flexing by the courts.²²⁹ Fortunately, not all of

²²⁸ The result in *Ammerman* may well have been foreclosed as early as the adoption of the Rules of Evidence in April 1973. The New Mexico rules were taken almost verbatim from the then-existing draft of the federal rules. Despite the recommendation of the drafting committee that Rule 501 be subject to statutory privileges, in conformity with the federal rule and practice, see *Fed. R. Evid.* 501, the supreme court deleted the provision which would have deferred to such action by the legislature. While this action by the court reflected its attitude about the wisdom of legislative activity in this area, in retrospect it may also have represented a prejudgment of the constitutional question later presented in *Ammerman*.

Indeed, in support of its conclusion that rules of evidence are procedural, the *Ammerman* court found its prior adoption of the rules of evidence "conclusive" on the matter. 89 N.M. at 310, 551 P.2d at 1357. Under this reasoning, the actions of the court in its rule-making capacity would be immune from challenge by way of a lawsuit invoking the court's adjudicative power.

The court of appeals uncovered a further area of concern in *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325 (Ct. App.), *cert denied*, 91 N.M. 610, 577 P.2d 1256 (1978). In the context of his otherwise successful appeal from a conviction for fraud, Thoreen claimed that the lower court had denied him due process by the grant of immunity to a defense witness. The court denied the claim, but questioned the validity of N.M. R. Crim. P. 58, which authorizes the district court to grant immunity: "Its validity is questionable because: (a) immunity from prosecution is qualitatively different from the privilege not to testify discussed in *Ammerman v. Hubbard Broadcasting, Inc.*; and (b) the granting of immunity from prosecution is a legislative function." 91 N.M. at 627, 578 P.2d at 328. The appeals court declined to consider the point under the doctrine of *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973), which precludes the court of appeals from rejecting a supreme court rule. If adoption of Rule 58 as a rule of procedure is "conclusive" of the procedural nature of the subject, see *Ammerman*, 89 N.M. at 310, 551 P.2d at 1357, then the issue of whether Rule 58 is an invalid attempt to establish substantive law by rule of court also would be unreviewable.

²²⁹ A mere hint of just how far reaching the exclusivity rationale could be came less than a year after *Ammerman* in a wholly unrelated context. In *State v. Doe*, 90 N.M. 536, 565 P.2d 1053 (Ct. App. 1977), a child appealed a commitment order which resulted from an amended petition to revoke probation. The child claimed that a prior increase in the length of probation followed by the subsequent commitment pursuant to the revocation amounted to prohibited double punishment. The state countered that the double jeopardy question was not before the court because it had not been raised below or in the docketing statement on appeal. Doe responded that, *by statute*, the defense of double jeopardy may not be waived and may be raised at any time. See N.M. Stat. Ann. § 50A-1-10 (1953 Comp.) (now codified at N.M. Stat. Ann. § 30-1-10 (1978)).

The court noted that this latter assumption "raises the question of whether [the statute] is unconstitutional, in that it is a legislative attempt to regulate court procedure." 90 N.M. at 539, 565 P.2d at 1056. While the court avoided the question by finding the double jeopardy question properly before the court for review on other grounds, the suggestion of an *Ammerman* problem whenever one invokes a statutory right which touches in any way on court procedures indicates just how far the exclusivity rationale of *Ammerman* could reach.

Indeed, Judge Sutin has suggested that under the doctrine of *Ammerman* the supreme court's power "is absolute, not relative," *Poteet v. Roswell Daily Record, Inc.*, 92 N.M. 170, 176 584 P.2d 1310, 1316 (Ct. App. 1978) (Sutin, J., concurring specially). In Judge Sutin's view, the court's
the decisions after McBride and Ammerman have applied the exclusivity principle which those opinions established. On balance, the most recent decisions reflect a reconsideration of the need for or the desirability of exclusive judicial power to adopt procedural rules. The cases constitute an emerging movement back to the shared-responsibility position which New Mexico traditionally followed.

D. Post-Ammerman Cases: A Return to Shared Responsibility

Despite the determination in McBride and Ammerman that procedural rule-making for the courts is an exclusive function of the judiciary, subsequent decisions continue to vacillate between that view and the more restrained view of shared legislative and judicial power. The decisions are not always consistent, but a pattern has emerged. The exclusive judicial function rationale has been preserved for two categories of cases; those which involve statutes which trench on the “essential functions” of the judiciary, and those in which testimonial privileges are involved. In all other cases involving legislative attempts to play a role in setting judicial procedure the court has withdrawn from the McBride/Ammerman dictum that the legislature is devoid of all rule-making power. Instead, the opinions on the general subject of rule-making are evolving toward the view that the legislature may adopt statutes regulating procedure, subject to the authority of the court to promulgate contrary rules which supersede such legislative enactments.

1. The Essential Function Cases

was an unusual case. It dealt not with the traditional clash concerning rule-making power but with issues that are totally outside the scope of judicial procedure. It cited neither Roy nor Ammerman. Yet, it broadly defended the judiciary from what the court perceived to be a serious intrusion upon the power of the judicial branch of government to protect its essential control over its own staff.

In Mowrer, municipal court judges challenged the validity of a city ordinance which gave the city’s chief administrative officer the power to hire and to supervise court personnel. The ordinance also required executive approval of the judicial budget prior to submission to the city council. The supreme court overcame a difficult mootness problem in order to reach the merits of the claim. The court held that the doctrine of separation of powers barred the executive branch from controlling the hiring of court personnel and prevented the executive from reviewing the judicial branch budget prior to its submission to the legislative branch.

The analysis in Mowrer began with the assertion that, although the

233. Id. at 48, 618 P.2d at 686. See Albuquerque, N.M., Rev. Ordinances § 3-1-13 (1979).
234. Id. at 50, 618 P.2d at 890.
235. Id. at 52, 618 P.2d at 890. In 1979, the New Mexico Legislature enacted N.M. Stat. Ann. §§ 34-8A-1 to -9 (Cum. Supp. 1980), which abolished the Albuquerque Municipal Court and replaced it with a new metropolitan court which was to come into existence in July 1980. Thus, the case went to trial in the district court in 1979 challenging a local statutory scheme which had been superseded, although the effective date was some months away. The lower court ruled that the case was not moot and proceeded to the merits of the case. Mowrer, 95 N.M. at 50, 618 P.2d at 888.

The supreme court conceded that the new statute creating the metropolitan court gave metropolitan judges authority over personnel and budgetary processes, id. at 51, 618 P.2d at 889, and acknowledged that under the New Mexico Declaratory Judgment Act an actual controversy had to have existed at the time the action was filed in the trial court. id.; see also N.M. Stat. Ann. §§ 44-6-1 to -15 (1978). Finding that there was an actual controversy when Mowrer was filed, the court went on to conclude that even though the case had subsequently become moot, it was proper for the appellate court to consider the cause under the “substantial public interest” exception to the mootness doctrine. 95 N.M. at 51-52, 618 P.2d at 889-90.

236. Mowrer, 95 N.M. at 55, 618 P.2d at 893. “Personnel directly employed by the courts cannot constitutionally be included in a general merit system or ordinance.” Id.
237. Id. at 50-51, 618 P.2d at 888-89.

We also hold that any municipal ordinance or any portion of any municipal charter, or indeed any statute, which requires that the judiciary first submit its requested budget to the mayor or any part of the executive branch of government prior to submitting the same to the legislative branch of government is unconstitutional as violative of Article III of the Constitution of New Mexico.

Id.

In this portion of its “holding” the court goes well beyond the municipal ordinance question before it and speaks to “any statute which requires . . . [judicial budget submission] to . . . any part of the executive branch of government.” The ruling in Mowrer thus would apply to nullify the statute requiring that the supreme court submit its budget to the State Department of Finance and Administration prior to submission to the legislature. N.M. Stat. Ann. § 6-3-7 (Repl. Pamp 1983) requires each state agency to submit a budget to the state budget division which budget “shall be subject to the approval of the state budget division.” Another statute defines “state agency” as “any department . . . of government.” N.M. Stat. Ann. § 6-3-9 (Repl. Pamp. 1983); see also N.M. Stat. Ann. § 34-6-35 (1978).

The real issue is not the question of prior submission, but rather of executive power to alter or to amend judicial budgets. Prior submission to the executive might be appropriate to allow for
line of demarcation of separation of powers may be difficult to perceive, an independent judiciary must possess rights and powers consistent with its status as a branch of government equal to the executive and legislative branches. \(^{238}\) Included among those rights is the power to protect itself against any impairment of its prerogative by the conduct of the other branches. \(^{239}\) After detailing how the ordinance would place control over court personnel in the executive branch and, thereby, remove it from the judiciary, the court concluded that the ordinance was tantamount to giving the executive “the power to coerce the judiciary into compliance with the wishes or whims of the executive.” \(^{240}\)

The court found substantial authority for the proposition that the judiciary must, as a matter of separation of powers, maintain control of its own personnel. \(^{241}\) It concluded that the ordinance was an unconstitutional attempt to limit the inherent power of the court. \(^{242}\) Similarly, the court, following a parallel body of authority, \(^{243}\) held that the budget submission requirement was unconstitutional because “any requirement that the judicial branch first submit its budget request to the executive branch dilutes and could render impotent the inherent power of the judiciary.” \(^{244}\)

*Mowrer* transcends the issue of the rule-making power. It involves more fundamental issues and seeks to protect the essential independence and ability of the judiciary to perform its essential tasks. *Mowrer* declares, in no uncertain terms, that whenever another branch of government asserts a power which, if exercised, could “render impotent” or even “dilute” the essential powers of the courts, the supreme court will void such an act on separation of powers grounds. \(^{245}\)

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\(^{238}\) 95 N.M. at 53, 618 P.2d at 891.

\(^{239}\)  *Id.* at 54, 618 P.2d at 892 (quoting Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 197, (Pa.) cert. denied, 402 U.S. 974 (1971)). The court also decided, as a preliminary matter, that the separation of powers strictures of article III apply to municipal courts. The court reasoned that the common source of all judicial power is found in article VI, §1, of the constitution, that it expressly includes all inferior courts created “in any district, county or municipality of the state,” and that article III bars any infringement “upon the power and the authority of the judiciary . . . at any level of state or local government.” 95 N.M. at 52, 618 P.2d at 890.

\(^{240}\)  *Mowrer*, 95 N.M. at 55, 618 P.2d at 890. The court may have been discussing matters more theoretical than real. Establishment of “administrative” authority over personnel in someone other than the judge only poses a threat to the independence of the judiciary if the executive officer exercises that authority contrary to the desires of the judge. It is therefore the potential for executive interference with the judicial function, in addition to the reality of such interference, which is constitutionally forbidden under the doctrine of *Mowrer*.

\(^{241}\)  See *id.* at 55, 618 P.2d at 893.

\(^{242}\)  *Id.*

\(^{243}\)  See *id.* at 56, 616 P.2d at 894.

\(^{244}\)  *Id.* Again, the potential for executive interference, rather than any actual or even alleged interference, triggers the constitutional principal articulated here.  See *supra* note 240.

\(^{245}\)  95 N.M. at 56, 61 P.2d at 894.
It is difficult to fault the court for failing to apply the flexible approach of shared responsibility to those legislative enactments which impair the essential functions of the court. The problem, however, is that the "essential function" rubric defies precise definition.\textsuperscript{246} As a result, judicial authority to determine when such functions are undermined by legislation, represents uncabined discretion to enhance judicial power at the expense of the legislature. Fortunately, since \textit{Mowrer}, the court has demonstrated admirable restraint in not overusing the "essential function" doctrine.\textsuperscript{247} Indeed, in two cases decided after \textit{Mowrer} the court decided separation of powers issues in a manner that reflected sensitivity to legislative prerogatives and to the need for avoiding use of the "essential function" doctrine if at all possible.

In \textit{State v. Mabry},\textsuperscript{248} the supreme court demonstrated that the "essential function" rule is a two way street that sometimes requires a surrender of judicial power in order to allow the legislature to carry out its essential functions. In \textit{Mabry}, the court applied reasoning similar to the "essential function" doctrine articulated in \textit{Mowrer}\textsuperscript{249} to hold that the courts may not assert or use an inherent judicial power to suspend sentences when to do so would interfere with an explicit legislative scheme calling for mandatory minimum sentences for certain crimes.\textsuperscript{250} The significance of

\textsuperscript{246} There is no bright line distinction between functions which are essential and thus require exclusive judicial control, and those which are not essential and thus may be amenable to legislative direction. The resolution of such questions requires a careful evaluation of the facts and circumstances of a particular case, in which the court must also weigh the competing institutional values involved.

\textsuperscript{247} \textit{Mowrer} itself is hardly a model of restraint. See supra note 235.

\textsuperscript{248} 96 N.M. 317, 630 P.2d 269 (1981).

\textsuperscript{249} 95 N.M. 98, 618 P.2d 886 (1980). In \textit{Mowrer}, the court framed the issue in terms of the judiciary's need to exercise the "inherent power of a constitutional court to sustain its own independent existence." \textit{Id.} at 56, 618 P.2d at 894. In \textit{Mabry}, the court upheld the sentencing statute "as a necessary incident" of the legislature's exclusive power to establish penalties for criminal behavior. \textit{State v. Mabry}, 96 N.M. 317, 321, 630 P.2d 269, 273 (1981). Though the operative language differs in the two cases, the principle established is the same.

\textsuperscript{250} Mabry challenged a mandatory sentence statute, N.M. Stat. Ann. § 31-18-3(A)(1978), updated by 1977 Laws of New Mexico, ch. 216. He asserted that the statute encroached on the trial
Mabry is twofold. First the court could have, but did not enhance its own power by asserting that the power to suspend sentences was a "essential function" of the judiciary which required that mandatory minimum sentencing statutes be declared void. On the contrary, the court enhanced legislative power at the expense of the judiciary. Second, the court acknowledged that not all statutes which touch on the inherent power of courts to carry out judicial functions must fall. To ensure that ultimate power over sentencing resides in the legislature, the legislature may "place some restrictions on the ability of the judiciary to avoid imposing legislatively-mandated penalties for crimes by indefinitely suspending sentences." 251 Third, like Mowrer, Mabry lies outside the direct line of cases traced in this article. None of the cases in the Roy/Ammerserman line was discussed or cited in Mabry. The essential function cases are doctrinally separate from the cases dealing with the powers of the court and legislature to write rules of procedure. 252

Mabry also suggests that the court will be careful not to overuse the essential function category to expand judicial power. A court so sensitive to the legislative prerogative to set sentences, is unlikely to broaden unduly the essential function test in order to escape from the better reasoned and more reasonable approach to shared rule-making power which the court is currently developing in cases not involving essential functions.

The decision in Gonzales v. Atnip 253 exhibits the same sensitivity to the need for restraint when offered an unnecessary opportunity to expand the "essential function" category. In Gonzales, the court of appeals affirmed a district court order enforcing an oral settlement against the plaintiff's claim that to do so would violate the provisions of the Release court's inherent power to suspend sentences in the court's discretion, 96 N.M. at 320, 630 P.2d at 272. The supreme court assumed the existence of the common law power of courts to suspend sentences, but concluded that the common law power must give way to the legislative power to set sentences, including minimum sentences.

251. 96 N.M. at 321, 630 P.2d at 273.

252. One case could be read to overlap the essential function cases and those dealing with the rule-making power. In State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957), the court declared that the power of a court to punish for contempt "is inherent in the courts and its exercise is the exercise of the highest form of judicial power." Id. at 161, 315 P.2d at 227. Having determined, in effect, that the power of contempt was an essential function "found in the separation of powers," id., the supreme court nonetheless conceded that "the power of the courts to punish for contempt is not absolute, exclusive and free of all legislative regulation." 63 N.M. at 162, 315 P.2d at 227. Reasonable legislative regulation of matters within the inherent powers of the courts are valid, declared the court. Id.

Bliss affords an opportunity for the supreme court to avoid the "all or nothing" results which the essential function cases now require. Instead of declaring all legislative acts void which have the potential to touch upon an essential judicial function as the court did in Mowrer, the supreme court might, in the future, legitimate legislative attempts to regulate inherent judicial powers, at least where the statutory regulation "preserve[s] to the court sufficient power to protect itself from indignation and to enable it effectively to administer its judicial functions." 63 N.M. at 162, 315 P.2d at 227. For a further discussion of Bliss, see supra text accompanying notes 152-64.

The court rejected the plaintiff's reading of the statute, and held that the act does not apply to settlements made during the course of a lawsuit by an attorney specifically authorized to settle the case.

The court reached that conclusion by applying settled principles of statutory construction. The plaintiff claimed that the act applies to "all" settlements, and that its applicability is subject to no limitations. The court noted that such an interpretation might encroach on the court's inherent "supervisory control over their dockets" and therefore, construed the act to avoid that constitutional clash. The court "presumed that the Legislature, in enacting the statute, has performed its duty of keeping within constitutional bounds" and read the act as inapplicable to the case at hand. This construction avoided the constitutional problem.

Gonzales demonstrates that established principles exist to avoid unnecessary clashes between the legislature and judiciary even when legislation touches upon the essential functions of the court. By resort to statutory construction principles which enforce a presumption in favor of the validity of legislative actions, the court often can protect its essential integrity and still avoid the Ammerman-like clashes which undermine the essential working relationship among the branches of government.

In one class of cases the court is likely to continue to use the "essential function" characterization to assert exclusive rule-making power. Regulation of the practice of law, including admission to the bar and disciplining of lawyers is likely to remain within the exclusive province of the courts despite early precedent suggesting that the subject was one in which the legislature had a legitimate if subordinate role.
Prior to statehood, the legislature extensively regulated both the criteria for admission to the bar and the disciplining of lawyers. In 1916, the supreme court decided that the legislature might have a role to play in the setting of criteria for admission to the bar, but the power to discipline and suspend attorneys was “an inherent right in all courts.” Thereafter the court softened its stance somewhat. In cases preceding Roy, the court seemed to acknowledge the legitimacy of a legislative role in the regulation of the practice of law while seeking to prevent the legislative branch from encroaching on the ultimate power of the court to regulate the profession. In re Gibson is illustrative. Because Gibson failed to pay the license fee imposed by the State Bar Act of 1927, the Board of Bar Commissioners suspended him from the practice of law. Gibson argued before the supreme court that the State Bar Act was unconstitutional for several reasons; it was an invalid tax, it improperly compelled him to become a member of the bar association, it constituted special legislation, and it delegated judicial power to the Board over the suspension power in violation of principles of separation of power. The court found no fault with most of the legislation because statutes regulating the legal profession were found to be “a valid exercise of the police power over an important profession.” Only the section of the statute authorizing the Board to suspend persons for non-payment of fees was held unconstitutional. That provision, declared the court, was an impermissible attempt to “confer the judicial power of suspension and disbarment” on the Board in violation of the doctrine of separation of powers.

Having thus fixed the power to discipline attorneys as a judicial power, the court considered the source of the judiciary’s power to do so. With ambivalence typical of the era preceding Roy, the court noted that because one section of the State Bar Act conferred plenary disciplinary power on the supreme court, it was unnecessary to decide whether the statutory language merely was “intended as a disclaimer of intention on

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262. See supra text accompanying notes 54-65.
263. State ex rel. Wood v. Raynolds, 22 N.M. 1, 4, 158 P. 413, 414 (1916). In 1928, the supreme court reaffirmed that “the disbarring of an attorney is a strictly judicial function” and held that legislation purporting to authorize the Board of Bar Commissioners to disbar an attorney independent of the approval of the supreme court was void. In re Royall, 33 N.M. 386, 268 P. 570 (1928).
264. 35 N.M. 550, 4 P.2d 643 (1931).
265. Laws of 1927, ch. 113 which modified the State Bar Act of 1925, Laws of 1925 ch. 100. The 1925 Act imposed a $5 annual license fee on attorneys, created a Board of Bar Commissioners, and conferred extensive powers on the Board. The 1927 amendments granted the Board the power to suspend from practice attorneys who did not pay the annual fee. See 35 N.M. at 556, 4 P.2d at 647.
266. Id. at 561-574, 4 P.2d at 649-654.
267. Id. at 557, 4 P.2d at 647.
268. Id. at 565, 4 P.2d at 651.
269. See supra , text accompanying notes 70-82 and 113-27.
270. Laws of 1925, ch. 100, §6, discussed at 35 N.M. at 565, 4 P.2d at 651.
the part of the Legislature to deprive the supreme court of any part of its inherent power,"271 or was, instead, a legislative declaration investing the court with power.272

In 1941, in an action that paralleled its action in the procedural rule-making field in 1933,273 the legislature adopted a statute which declared that the supreme court "shall by rules . . . define and regulate the practice of law in New Mexico."274 The passage of the statute was followed by an increased willingness on the part of the court to free itself from any legislative constraints in the regulation of the legal profession. In Application of Sedillo,275 the supreme court declared invalid a statute which sought to create an exception276 to the court's rule that only graduates from accredited law schools could enter the bar.277 The court determined that the legislature could not undermine the minimum standards set by the court for admission to the bar by creating exceptions.278 Any attempt to do so must fail as an unconstitutional invasion by the legislature upon the judicial power.279 The court did not use the occasion to entirely exclude the legislature from a role in setting criteria for admission to the bar. Instead it conceded that the legislature may have sufficient interest in the competence of lawyers280 to set minimum standards for admission to the bar though it cannot undercut a judicial determination to add additional requirements beyond those imposed by the legislature.281

Since the decisions in McBride and Ammerman, the court has been

271. 35 N.M. at 565, 4 P.2d at 651.
272. Id. The court merely concluded that the statute was a legislative "declaration" of plenary power whether or not the declaration created the power. Id.
273. Laws of 1933, ch. 84, § 1.
276. Laws of 1957, ch. 106, § 1. The statute compelled the court to admit to practice long term residents of New Mexico who had studied law in a law office for three years and had practiced before certain federal administrative bodies for a lengthy period of time.
277. The court rule was initially proposed by the Board of Bar Commissioners, for final approval by the court. 66 N.M. at 269, 347 P.2d at 163. The court, by then, had concluded that the Board, though a creation of the legislature, was actually operating not by authority granted by the legislature, but by authority "supplemented, if not completely embraced, by the adoption by the supreme court of its rule" empowering the Board to act on behalf of the judiciary. Id. The unresolved issue as to the source of the Board of Bar Commissioner's authority was finally resolved in 1979 when the legislature enacted a statute declaring that the board of bar commissioners and the board of bar examiners were "bodies of the judicial department and are not a state agency," N.M. Stat. Ann. § 36-2-10 (Repl. Pamp. 1984), though the thrust of the statute is directed at allocating financial responsibility rather than resolving separation of powers disputes. See id.
278. 66 N.M. at 271-272, 162 P.2d at 164-65 (quoting with approval from Application of Kaufman, 69 Idaho 297, 206 P.2d 528 (1949)).
279. Id.
280. The court did not, in Sedillo, identify the legislative interest. In re Gibson, 35 N.M. 550, 557, 4 P.2d 643, 647 (1931), however, had anchored the legislative power in the "exercise of the police power over an important profession [which has] immemorially . . . exercised a great and enduring influence upon the business, social and political life of the people."
281. 66 N.M. at 271-272, 162 P.2d at 164-65.
increasingly bold in its declarations concerning the power of the judiciary over the entire field of the regulation of the practice of law. For example, recent cases dealing with the regulation of the unauthorized practice of law have unequivocally declared that "the authority of the supreme court to define and regulate the practice of law is inherently contained in the grant of judicial power to the courts by the Constitution," and that the court "has the exclusive right to regulate the practice of law." Significantly, none of the cases dealing with the regulation of the practice of law rely upon McBride or Ammerman as authority for their exclusive judicial power holdings. The court clearly views this issue as being outside the line of decisions dealing with the rule-making power which are exemplified by McBride and Ammerman. Instead, the court treats these cases as "essential function" cases. It is because the regulation of the practice of law is intimately tied to the ability of the court to administer its judicial functions effectively, that the court has declared the subject to be within the exclusive control of the judicial branch of government.

2. Testimonial Privilege Cases

In two opinions dealing with attempts to create testimonial privileges by other branches, the supreme court reaffirmed its broad declaration in Ammerman that only the court has the authority to create testimonial privileges.

In State ex rel. Attorney General v. First Judicial District Court, the attorney general claimed a privilege concerning official documents relating to his investigation of the causes of the 1980 New Mexico State Penitentiary riots. In response to discovery attempts by various civil plaintiffs and criminal defendants, the attorney general asserted three privileges: executive privilege, public interest privilege, and privilege based on federal law. The supreme court denied the claim of public interest privilege and found inapplicable any privilege based on federal law. The court, however, did acknowledge a qualified, constitutionally-based executive privilege.

The court began its analysis with a restatement of the Ammerman principle that the creation of rules of evidence, including privileges, is

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285. Id. at 259, 629 P.2d at 335. The asserted privilege "protects communications between private individuals and government officials." Id. at 258, 629 P.2d at 334. The court concluded that there was no constitutional basis for the existence of such a privilege in this state. Id. at 259, 629 P.2d at 335.
286. Id. at 260-61, 629 P.2d at 336-37.
an inherent judicial function because such rules "are part of the judicial machinery administered by the courts."\textsuperscript{287} The court noted that New Mexico Rule of Evidence 501 recognizes this fact by declaring that the constitution and rules of the supreme court are the only two legitimate sources of testimonial privileges.\textsuperscript{288} The court decided that the attorney general could assert executive privilege because such a privilege is implicit in the New Mexico Constitution, which acknowledges his power as an independent executive officer.\textsuperscript{289} Finding no similar authority in the constitution and no court rule creating a public interest privilege, the court rejected that claim as in conflict with Rule 501.\textsuperscript{290}

First Judicial District reinforced the exclusive power of the court to establish testimonial privileges by holding that the only New Mexico authority beyond the supreme court itself which could create a testimonial privilege was the state constitution. The opinion is distinguishable from the court's treatment of Ammerman, however, because the legislature had played no role in the attempt to create a public interest privilege. The attorney general was relying not on a statute granting the privilege but on an argument that the constitution implicitly required the existence of a public interest privilege.

The privilege issue presented to the court in Maestas v. Allen\textsuperscript{291} replicated the Ammerman conflict between the legislature and judiciary and reached the result dictated by Ammerman. Maestas involved a paternity suit brought by the State Department of Human Services to recover reimbursement for state welfare expenditures and to establish the father's responsibility for future support.\textsuperscript{292} When the state sought discovery from the putative father relevant to the issue of paternity, Maestas asserted a privilege against responding based on the state statute which declares that in paternity actions the mother and alleged father "shall be competent, but not compellable, to give evidence."\textsuperscript{293} The court held that the statute was either an improper attempt to create an evidentiary privilege or an inappropriate attempt to assert the constitutional fifth amendment privilege

\begin{itemize}
  \item \textsuperscript{287} Id. at 257, 629 P.2d at 333.
  \item \textsuperscript{288} Id. See N.M. R. Evid. 501.
  \item \textsuperscript{289} 96 N.M. at 257-58, 629 P.2d at 333-34. "The executive department is independent within its own sphere and has the implied rights vested in it by the Constitution in order to maintain its independence. Inherent in the successful functioning of an independent executive is the valid need for protection of communications between its members." Id.
  \item \textsuperscript{290} Id. at 259, 629 P.2d at 335. The court rejected the argument that the substance of a "public interest privilege" could be found in Rule 510 (informant privilege) or Rule 502 (disclosures to government required by law). Id.
  \item \textsuperscript{291} 97 N.M. 230, 638 P.2d 1075 (1982).
  \item \textsuperscript{292} Id. A New Mexico statute authorizes "third parties furnishing support or defraying the expenses" to sue to enforce the parent's duty to support. N.M. Stat. Ann. §40-5-4 (Repl. Pamp. 1983).
\end{itemize}
“because there is no criminal liability that a non-spouse faces for failure to support unless . . . he violates a court order.”

In rejecting the legislature’s attempt to create an evidentiary privilege, the court identified Ammerman as the leading authority and applied it to hold the statute invalid. The court, however, did not discuss or apply the broad statements in Ammerman which declare all attempts by the legislature to establish procedural rules to be void. Instead, the decision applied the more limited rationale that “[a]ny conflict between our rules and statutes that relate to procedure must be resolved in favor of the rules.” The court declared that the statute, if it sought to create a privilege, “must fail because it is in conflict with . . . New Mexico’s Rule of Evidence 501.”

First Judicial District may be distinguishable from Ammerman because it did not involve a legislative attempt to create a privilege and Maestas may have focused on the more conciliatory reading of Ammerman. Whatever the rationale, however, the result in every testimonial privilege case decided by the supreme court or the court of appeals, has been the same: only privileges inherent in the constitution or created by the court in the Rules of Evidence are valid.

3. Other Procedural Issues: The Emerging General Rule

While the results in the privilege cases uniformly favor the judiciary’s power, the same cannot be said for rules of evidence other than privileges. For example, the court of appeals, in State v. Herrera, interpreted Ammerman in a manner which resulted in upholding a statutory rule of evidence.

Herrera involved a challenge to a statute which declared that, “[a]s a

294. 97 N.M. at 231, 638 P.2d at 1076.
295. Id.
296. Id.
297. Id.
298. In Salazare v. St. Vincent Hospital, 96 N.M. 409, 631 P.2d 315 (Ct. App. 1980), the plaintiff in a medical malpractice action appealed from the lower court’s refusal to allow him to depose a member of the malpractice panel. The defendants claimed that the panel member’s testimony was privileged on the basis of the portion of the Medical Malpractice Act which provides that “[t]he deliberations of the panel shall be and remain confidential.” N.M. Stat. Ann. § 41-5-20 (1978), and under the rules of the Commission. See Salazar, 96 N.M. at 412, 631 P.2d at 318. The court of appeals rejected both arguments holding that neither the act nor the rules create a privilege which precludes the deposing of a panel member with respect to the matters which are otherwise properly discoverable. Id. The court, however, declared that:

if any portion of the Medical Malpractice Act or its internal operating rules could be construed to grant such a privilege, it would be an invalid provision. Such a notion of statutorily-created privilege was emphatically dispelled by the pronouncement of our Supreme Court in Ammerman v. Hubbard Broadcasting, Inc.

Id.
matter of substantive right” in rape cases, “evidence of the victim’s past sexual conduct . . . shall not be admitted” except under certain circumstances.300 The defendant, charged with rape, sought to introduce evidence forbidden by the statute. The defendant claimed that the statute could not bar the evidence because the statute was void as an impermissible attempt by the legislature to promulgate a rule of evidence contrary to the decision in Ammerman.

A unanimous court of appeals upheld the validity of the statute. Judge Wood, writing for the court, rejected the legislative categorization of the statute as “substantive” and determined that the statute did “regulate the admission of evidence” and, therefore, as a provision affecting “practice and procedure, . . . pertains to matters within the control of the Supreme Court.”301

Despite the fact that it found that the statute dealt with an issue of procedure, the court rejected the defendant’s argument that Ammerman required the court to declare the statute void. Instead of accepting the assertion that procedural rule-making was exclusively the province of the supreme court, the court held that the power was shared by the legislature and the judiciary until there is a conflict between a statute and a rule. “While a statute regulating practice and procedure is not binding in the Supreme Court, it nevertheless is given effect until there is a conflict between the statute and a rule adopted by the Supreme Court. See Ammerman v. Hubbard Broadcasting Inc. . . . State ex rel. Anaya v. McBride.”302 The court concluded that the legislative provision of evidence did not conflict with a judicial rule and, therefore, held that though “the legislation may not be binding upon the Supreme Court [it] is to be given effect until a conflict exists.”303

301. Herrera, 92 N.M. at 12, 582 P.2d at 389.
302. Id.
303. Id. at 13, 582 P.2d at 390. Since Herrera, the court of appeals has consistently followed the conflict approach, reserving the exclusive judicial power rationale solely for the resolution of cases involving testimonial privileges. See supra text accompanying notes 284-98.

In Prieto v. Home Educ. Livelihood Program, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980), the court was confronted with the question of whether failure to serve a complaint immediately upon issuance of process will bar the action. The parties focused their attention on the interpretation of the relevant statute, N.M. Stat. Ann. § 37-1-13 (1978) (process shall issue immediately and shall be deemed the commencement of the action.). Id. at 741, 616 P.2d at 1126. The court held that under the statute, delay in service alone is not sufficient to reinstate the statute of limitations bar. Id. at 741, 616 P.2d at 1126. The court went on, however, and found that N.M. R. Civ. P. 3 and 4 are later court rules which would control service of process questions were there a conflict. Id. The court, in dicta, expressed the view that the statute had no further usefulness “because Rules 3 and 4 cover the subject and they are, therefore, exclusive.” Id.

More recently, in Otero v. Zouhar, 102 N.M. 493, 697 P.2d 493 (Ct. App. 1984), rev’d in part, 102 N.M. 482, 697 P.2d 482 (1985), the court continued to view Ammerman as applicable only when a statute conflicts with an existing procedural rule promulgated by a court. Otero involved an attack on the validity of the Medical Malpractice Act provision requiring the filing of claims before
The supreme court denied certiorari in *Herrera* and, thus, did not review the court of appeal’s interpretation of *Ammerman*. In its most recent decision applying *Ammerman*, however, the supreme court tilted toward the interpretation of *Ammerman* provided by Judge Wood in *Herrera*. In *State ex rel. Gesswein v. Galvan*, a district court judge refused to honor a notice of peremptory challenge seeking to disqualify him from presiding at trial. The judge asserted that the fifty-year-old statute authorizing peremptory challenges and the judicial rule providing the mechanism for exercising the challenge were both invalid. The supreme court determined that the statute had both substantive and procedural ramifications. The substantive right embodied in the statute was the “right to a fair and impartial tribunal,” as guaranteed by provisions of the state and federal constitutions. The procedural aspect of the statute provided that an affidavit, charging in conclusionary language that the party believed the judge could not be impartial, was sufficient evidence to disqualify the judge. In a rule of court adopted in 1982, the supreme court provided a different and even easier procedure for disqualification. The rule provided that “the statutory right to disqualify” could be accom-

the malpractice tribunal as a precondition to the filing of an action for damages. *Id.* at 496, 697 P.2d at 496. See N.M. Stat. Ann. § 41-5-15(A) (Repl. Pamp. 1982). The plaintiffs, who had failed to file before the tribunal, claimed, *inter alia*, that the act violated separation of powers because the statute deals with procedures in judicial proceedings which “the Legislature lacks authority to regulate.” *Id.* at 502, 697 P.2d at 502. On this point, the court assumed that the act deals with procedure, but concluded that the violation of separation of powers arises only “[w]here the legislation conflicts with procedure adopted by the Supreme Court.” *Id.* In the absence of such conflict, however, the court mandated that “the legislation is to be given effect.” *Id.* (citing *Herrera*, 92 N.M. 7, 582 P.2d 384).

The Supreme Court, on the other hand, held more to its exclusivity line in reversing with respect to plaintiff’s claim against the doctor. See *Otero v. Zouhar*, 102 N.M. 482, 486, 697 P.2d 482, 486 (1985) (“The [Medical Malpractice Act] provision that claimants against health care providers first submit their claims to the commission before filing suit is a purely procedural requirement and cannot, therefore, be deemed binding.”).

304. 91 N.M. 751, 580 P.2d 972 (1978).
305. 100 N.M. 769, 676 P.2d 1334 (1984).
308. *Gesswein*, 100 N.M. at 770, 676 P.2d at 1335. The court found that the right was anchored in the fourteenth amendment to the United States Constitution, U.S. Const. amend. XIV; the New Mexico constitutional provision guaranteeing due process, N.M. Const. art. II, § 14; and the explicit constitutional provision covering disqualification of judges, N.M. Const. art. VI, § 18. 100 N.M. at 770, 676 P.2d at 1335.
309. The statute authorized disqualification when a party filed an affidavit stating that “according to the belief of the party making the affidavit [the judge cannot] preside over the action or proceeding with impartiality.” N.M. Stat. Ann. § 38-3-9 (1978). In *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 410 P.2d 732 (1966), the supreme court concluded that the absence of impartiality could be equated with the constitutional mandate that a judge not preside at a trial “in which he has an interest.” See N.M. Const. art. VI, § 18. Thus, the statutory ground for disqualification is rooted in the constitutional provision.
plished without an affidavit by merely filing a "notice of disqualification."³¹⁰

In Gesswein, the supreme court did not void the procedural aspects of the disqualification statute but merely assumed that these statutory provisions had been superseded by the more liberal provisions of the court-created rule. The court concluded that "the current procedure under the statute and rule present . . . significant problems," due to the great number of peremptory challenges filed, and the resulting "burden on the system."³¹¹ To remedy the situation, the court decided to revoke and rewrite the rule of court which had liberalized the process set out in the statute for exercising the statutory right to challenge a judge.³¹² Contemporaneously with its Gesswein opinion the court issued new, stricter rules requiring that, in order to exercise the "statutory right to disqualify," the party must file an affidavit which must "state sufficient facts showing the bias, prejudice or intent of the judge being disqualified."³¹³ At the same time, the supreme court adopted rules of court³¹⁴ which modified the statutory provision³¹⁵ governing the assignment of a different trial judge to the case after a successful disqualification.

Gesswein resulted in substantial changes in the disqualification law of

³¹¹ Gesswein, 100 N.M. at 773, 676 P.2d at 1338. The court cited statistics showing that in 1981-82 "over 2000 district court disqualifications were filed in the course of one year," and concluded that the "increasing number of disqualifications constitutes an unreasonable burden on the system." Id. The rationale behind this conclusion is that a great number of disqualifications disrupt the orderly administration of the judicial system. Id.

The court, however, failed to show how those numbers translated into actual disruption. There are a number of factors, other than the raw numbers, which might bear on the extent of the burden imposed by disqualifications. Those factors include: (1) the number of disqualifications in multi-judge districts; (2) the proportional spread of those disqualifications among the judges in a given district; (3) projected increases in recusals which may result from a tightening of the ability to disqualify; and (4) the statistics on court calendar congestion in relation to disqualifications. Further consideration, in light of these factors, might show that the number of disqualifications involved do not significantly burden the system.

In the absence of any explanation of what those burdens were, the decision in Gesswein appears to be based more on the potential for disruption rather than the actuality. Compare supra note 240. The best course would be for the court neither to act on abstract possibilities, nor to refrain from acting until the system is about to fall, but rather to seek a middle ground—overriding statutory procedures only when the problem rises to substantial proportions. See, e.g., Solberg v. Superior Court, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977) (suggesting that the court can wait to act until the problem becomes acute).

³¹² Gesswein, 100 N.M. at 773, 676 P.2d at 1338. Although the court held "that Rule 34.1 is inappropriate and is hereby retracted," the court applied the rule to the pending case. Id. The court followed existing precedent which holds that, like the legislature, the court is constitutionally precluded from applying new procedure rules or rulings to cases pending at the time of the ruling. See, e.g., Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967), (construing N.M. Const. art. IV, § 34). Thus, the peremptory challenge of Judge Galvan, which complied with the existing Rule 34.1, was allowed to stand. Gesswein, 100 N.M. at 773, 676 P.2d at 1338.
New Mexico. Remarkably, those changes were accomplished without resort to the confrontational rhetoric contained in Ammerman. Instead of declaring the statute void to the extent it affected procedure, the court used its power to modify the statute by adopting a contrary rule. The court implied that the procedural aspects of the statute were valid until modified by rule of court when it held that the court "can adopt a rule of procedure when the operation of the court is involved and the existing process has created a problem" and then applied the existing law to the pending case until a different rule of court was promulgated.

Gesswein marks a rejection of the exclusivity argument suggested in Ammerman and McBride and heralds a return to the traditional pattern of accommodation between court and legislature in the rule-making field. The decision assiduously avoids a holding based on exclusive judicial power, recognizes a role for the legislature in rule-making, and weaves the role of legislature and judiciary into a single fabric. Yet, it maintains the court's prerogative to monitor and to remedy problems resulting when procedural statutes pose an "unreasonable burden" on the judicial system.

A further mark of the ebbing of legislative-judicial discord on this subject has followed the Gesswein opinion. The 1985 legislature adopted a new statute which provides expressly for the right of each party to one peremptory challenge to a district judge. Subsequently, the court reversed its prior position in Gesswein and amended rules 88 and 88.1 of the New Mexico Rules of Civil Procedure and rules 34.1 and 34.2 of the New Mexico Rules of Criminal Procedure to bring them into conformity with the new act. The new rules specifically reference "[t]he statutory right to excuse the district judge before whom the case is pending."

This subsequent development evinces a welcome cooperative spirit between the legislature and the judiciary on a matter which combines considerations of substantive policy coupled with concerns for procedural regularity. The legislature and court, acting in tandem, changed the law regarding judicial disqualifications, thus avoiding squabbles over whether the issue was substantive or procedure and whether the court alone could change the existing law if the issue were labelled procedural.

316. An informal survey of practitioners in the Second Judicial District by the authors failed to turn up a single successful use of the judicial disqualification statute pursuant to the new rules in the first nine months following the Gesswein decision.
318. Gesswein, 100 N.M. at 772, 676 P.2d at 1337.
319. Id. at 773, 676 P.2d at 1338.
Even when the court avoids the exclusivity approach, the way in which conflicts between statutes and rules are resolved may be as important as the resolution itself. The next section of this article suggests that when a problem arises concerning the impact of a procedural statute that is not the subject of a current court rule, the proper remedy is the adoption of a rule different from the statute rather than a judicial declaration of invalidity aimed at the statute.  

The view that statutes governing procedure are valid but only until supplanted by later adopted rules of procedure is within the letter and spirit of the 1933 Act. It also avoids direct confrontations between the branches of government. The only possible drawback in the use of the approach is that the court should apply the existing statutory procedure to the pending case and then promulgate new rules to govern subsequent cases.

III. SOME PRUDENTIAL GUIDELINES FOR THE FUTURE

The current retreat from the extreme position that McBride and Ammerman represent is both correct and wise. It is correct because there is no support in history or logic for the position that in New Mexico only the supreme court may promulgate procedural rules. It is wise because the supreme court’s return to a theory of shared power with the final authority in the court adequately protects the judiciary’s interest in assuring its ability to function as an independent branch of government while avoiding unnecessary and unfortunate clashes with the legislature. What follows are some tentative suggestions, drawn from the supreme court’s decisions, as to the appropriate approach to take and the factors to consider in resolving the additional issues which will inevitably arise concerning the allocation of the rule-making power.

322. See infra text accompanying notes 376-79. In at least one recent case the exclusive judicial power basis of Ammerman was used to invalidate a statute not involving the question of privilege, even in the absence of a contrary rule of court. In Miller & Assocs., Ltd. v. Rainwater, 24 N.M. St. B. Bull. 65 (Jan. 3, 1985), the court held unconstitutional the statutory requirement that actions on open accounts must be verified and answers to such actions must also be verified. The court properly noted that the statutory requirement derived from a desire to obviate the need for the introduction of the original entry books into evidence, and that the underlying problem had been overcome by the new rules of evidence which allow for the introduction of summaries of such records. Id. at 66. Rather than letting the statute remain pending promulgation of a new rule of evidence, however, the court resorted to Ammerman and McBride and held the statute unconstitutional as a legislative incursion into the judicial rulemaking sphere. Id. at 67.

323. See infra text accompanying notes 113-27.

324. Gesswein, 100 N.M. at 773, 676 P.2d at 1338.

325. The potential questions are legion. Among them are the following:

A. Abandon the Exclusivity Doctrine

The claim that only the judiciary may enact procedural rules has no place in New Mexico law. The historical record demonstrates that the court and legislature have shared the rule-making power. McBride and Ammerman contain language to the contrary, but that language is inconsistent with pre-existing precedent, and has not been consistently followed in subsequent opinions.

More importantly, the exclusivity argument is not necessary in order to accomplish the legitimate goals which the supreme court sought to achieve when it posited the theory. There can be no doubt that the judiciary must have ultimate responsibility for rule-making if it is to function as a co-equal branch of government. The court can assume ultimate responsibility without resort to the claim of exclusive judicial power. For fifty years, the legislature has steadfastly conceded to the court the power to revoke or to revise any statute affecting court procedure. In response, the court has created a line of precedent confirming the legislative view that the supreme court has the ultimate power to adopt procedural rules.

The court solidly grounded that view in the constitutional requirement of separation of powers and the constitutional grant of authority to the supreme court to exercise superintending control over the courts. This "final say" power assures the independence of the judiciary and grants

P.2d 825, 827 (1975) ("We have repeatedly equated the 'transaction of business'—insofar as the acquisition of long-arm jurisdiction under our statute is concerned—with the due process standard of 'minimum contacts'. . . .");

(2) May the court apply common law principles to order a change of venue when not specifically provided by statute? Compare N.M. Stat. Ann. § 38-3-1 to -3 (1978) (requiring motion of party) with Valdez v. State, 83 N.M. 720, 497 P.2d 231 (1972) (court may order change of venue sua sponte). See also State ex rel. Southern Pac. Transp. Co. v. Frost, 102 N.M. 369, 695 P.2d 1318 (1985) (applying doctrine of forum non conveniens intrastate to defeat proper venue under applicable statute);

(3) May the court increase or decrease the number of peremptory challenges to jurors which is set by statute? Compare N.M. Stat. Ann. § 38-5-14 (1978) with N.M. R. Civ. P. 38(e); and


326. See supra text accompanying notes 13-127.
327. See supra text accompanying notes 186-230.
328. See id.
329. See supra text accompanying notes 231-324.
331. See supra text accompanying notes 299-324.
332. N.M. Const. art. III, § 1; N.M. Const. art. VI, § 3; e.g., State ex rel. Anaya v. McBride, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1978).
the court all the authority it will ever need to prevent improper legislative encroachment on the judicial authority over procedural matters. The power to revoke a procedural statute by promulgating a contrary rule of court is functionally equivalent to the power to declare a procedural statute void on exclusivity grounds.333

Though the functional result may be the same, the "final say" formulation is superior to the exclusivity doctrine for several reasons. First, it comports with the historical record in New Mexico.334 Second, it incorporates rather than conflicts with the legislature's view that the legislative branch has a legitimate, if subservient, role to play in the rule-making process.335 This approach, therefore, avoids confrontation between the branches without weakening the power of the court.

Another important reason exists for preferring the "final say" approach to the exclusivity argument. The judiciary can only be enriched by exposure to the considered views of the legislature, embodied in a procedural statute. The legislative arena, with its lay orientation, and its more open fact-finding processes can sometimes enlarge the perception of problems in the operation of the judicial system. In addition, the legislature may, on occasion, be in a superior position to gather data and to construct a tentative solution. The court, in turn, can either accept the legislative solution or reject it, either immediately or after watching the statute's operation for a time. The legislature will not often devote its energy to rule-making, but when it does, it may well develop sound and workable rules.336

B. Restructure the Substance/Procedure Inquiry

If the supreme court accepts the principle that the legislature and the judiciary share procedural rule-making power, it will reduce, but not eliminate, the need to distinguish between substance and procedure. The

333. There is one practical difference. If the exclusivity approach is used, then procedural statutes are void and are inapplicable to the case determining their unconstitutionality. E.g., Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 310, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978). If procedural statutes are valid until revoked or modified by the passage of a subsequently enacted rule of court, then the procedural statute applies to the parties in the action in which the applicability or wisdom of the statute is in question and to other actions filed before the court enacts a contrary rule of procedure. N.M. Const. art. IV, § 34. See State ex rel. Gesswein v. Galvan, 100 N.M. 769, 676 P.2d 1334 (1984).

334. See supra text accompanying notes 13-127.


courts and the legislature would each then have power to develop both substantive and procedural law. There would be no need to distinguish between substance and procedure so long as conflicting rules did not come from the separate branches of government. Were a conflict to arise, however, the substance/procedure distinction would continue to be significant. If the issue were substantive, the legislature’s decision would control, and the opposing judicial decision or rule would necessarily yield to the statute. If the issue were procedural, the court would have the power to choose its rule of procedure in preference to the provisions of the procedural statute.

Where a statute and a rule conflict and the court must resolve the substance/procedure dichotomy, the court should restructure its focus in order to diminish the confrontational clash between coordinate branches of government. Presently, the court focuses on the legislature’s statute and determines whether the statute is procedural or substantive. This approach places the judicial focus on the legitimacy of legislative action and assumes the validity of the court’s rule.

In a regime of shared power, the court should shift its inquiry from the legitimacy of the statute to the validity of the court’s rule. The shift
in focus will diminish the sense of confrontation between the branches but will not ease the judicial task. The supreme court must decide whether its previous decision to adopt a rule of court was an unlawful exercise of the judicial power.\(^{343}\) The court, in effect, becomes the final arbiter of its own power.\(^{344}\)

No simple definition of the distinction between substance and procedure can infallibly direct the court to a correct determination of the limits of its rule-making power.\(^{345}\) Indeed, the court should reject simplistic solutions, especially those which favor a finding that the rule is procedural and, thus, within the ultimate power of the court. For this reason, it was unwise for the court in *Ammerman* to bootstrap the existence of a procedure rule into conclusive proof that the rule is procedural. After stating that the substance/procedure distinction “is often elusive,” the court declared that, “[t]he very fact of adoption of the New Mexico Rules of Evidence . . . by this Court, is conclusive of its determination that at least these rules, as adopted, are procedural.”\(^{346}\) In contrast, the United

*Hanna* affirmed federal legislative power to enact the Enabling Act, as well as the Court’s power to draft and submit the rule under that act, whereas the New Mexico Supreme Court is faced with denying state legislative power in upholding the validity of the state rules. The focus in the *Erie* context is somewhat helpful here, however, because, under *Hanna*, the Court shifts the focus away from the substantive nature of the applicable state statute, and looks instead to the validity of the rule as a proper delegation of constitutional authority under the Enabling Act. This latter approach diminishes the threat of an ultimate clash of legislative and judicial power over the subject of rule-making.

343. The supreme court’s power to promulgate rules of procedure flows, at least in part, from the constitutional grant to the court of superintending control over the inferior courts. See N.M. Const. art. VI, § 3. This power of superintending control “carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government.” State ex rel. Anaya v. McBride, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975). No power to develop substantive law through rule-making can be implied under this analysis. See e.g., Johnson v. Terry, 48 N.M. 253, 260, 149 P.2d 795, 798-99 (1944). Moreover, the supreme court has limited the scope of the rules of civil procedure to non-substantive matters: “Rule 1. Scope of Rules. These rules govern the procedure in the district courts of New Mexico . . . .” N.M. R. Civ. P. 1.

In the federal system, the prohibition against changing substantive law through the rule making process is explicit: “The Supreme Court shall have the power to prescribe by general rules, . . . the practice and procedure of the district courts. . . . Such rules shall not abridge, enlarge, or modify any substantive right. . . .” 28 U.S.C. § 2072 (1982); see Sibbach v. Wilson, 312 U.S. 1 (1941).

The same limitation exists in the 1933 act by which the legislature purported to delegate rule making power to the supreme court. Act of Mar. 13, 1933, ch. 84 § 1, 1933 N.M. Laws 84 (codified at N.M. Stat. Ann. § 38-1-1 (1978)).

344. For a discussion of the dangers inherent in the court being the final arbiter of its own power, see infra text accompanying note 357.

345. The supreme court acknowledges that “the line between substance and procedure is often elusive,” but has attempted to define “procedural” in general terms for purposes of determining the scope of its rule-making function: “Pleading, pre-trial, all rules of evidence (including rules of presumption and privilege) and other trial and post-trial mechanisms, designed to accomplish a just determination of rights and duties granted and imposed by the substantive law, are traditionally considered to be ‘adjective law’ or ‘procedural law.’” *Ammerman* v. Hubbard Broadcasting, Inc., 89 N.M. 307, 310, 551 P.2d 1354, 1357 (1976), cert. denied, 436 U.S. 906 (1978). For a discussion of the difficulty arising from a principled distinction between substance and procedure, see supra note 227.

346. *Ammerman*, 89 N.M. at 310, 551 P.2d at 1357.
States. Supreme Court, confronted with a similar argument, rejected the notion that, because court rules legitimately can affect only procedure, all court rules are inevitably procedural: "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency."\(^{347}\)

The New Mexico Supreme Court should retreat from its absolutist position in Ammerman. It should return to its prior position that the supreme court can and should declare its rules of procedure invalid when, on reflection, the court is convinced that they constitute "judicial legislation" and, therefore, should be void because the rule-making power "does not assume to affect substantive rights of the parties."\(^{348}\)

The fact that the court promulgated a rule pursuant to its power to promulgate procedural rules may, in effect, create a "prima facie" case that the disputed rule is procedural.\(^{349}\) That fact, however, should not preclude the court from taking a fresh look at the decision made in the rule-making process when presented with the question in the context of a disputed issue in an adversary proceeding.

C. Return to the Principles of the 1933 Act in Allocating the Rule-Making Power

The idea of shared power over rule-making with ultimate authority in the judiciary is not new. In 1933, the legislature determined that this approach struck the appropriate balance between court and legislature when it provided that procedural statutes then in existence could be amended or revoked by subsequently adopted rules of court.\(^{350}\) In 1933, the supreme court adopted a rule of procedure to the same effect.\(^{351}\)

The provision

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\(^{349}\) In the context of deciding whether state or federal law should apply in a federal court when jurisdiction is based on diversity of citizenship, the Supreme Court sometimes must decide whether a federal rule of civil procedure is substantive or procedural. In such cases, the rule of procedure normally applies, and "the court ... can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question" is procedural. Hanna v. Plumer, 380 U.S. 480, 471 (1965). See Johnson v. Terry, 48 N.M. 253, 260, 149 P.2d 795, 799 (1944) ("it is quite understandable that the trial court in applying the rule indulged the presumption that this court had acted within its power in adopting it.")


\(^{351}\) All statutes relating to pleading, practice, and procedure in judicial proceedings in any of the courts of New Mexico, existing upon the taking effect of the Act of the Eleventh Legislature, approved March 13, 1933 (L. 1933, ch. 84) ... known as Senate Bill No. 130, and all statutes since enacted by any session of the legislature relating to said subjects or any of them except as any of said statutes heretofore may have been or hereafter may be amended or vacated by order of this court, shall remain and be in effect and have full force and operation as rules of court.

Rule of Court, 37 N.M. VI (adopted Apr. 13, 1933; effective June 9, 1933).
now is embodied in rule 91 of the New Mexico Rules of Civil Procedure. The current rule accepts this division of authority, implicitly acknowledges the legislature’s role since 1933 in adopting procedural statutes, and provides that all procedural statutes before or since 1933 “shall remain and be in effect . . . as rules of court” until they are “amended or vacated” by order of the supreme court.

Both branches, thus, agree on the proper allocation of rule-making authority. The agreed-upon process embodies a spirit of cooperation, provides additional perspectives from which to view and to remedy procedural problems, and yet absolutely assures that the judiciary will be able to protect its independence. McBride and Ammerman threaten this mutually agreeable partnership and unnecessarily substitute conflict and confrontation in its place. The courts should construe those opinions narrowly, in order to reconfirm the appropriateness of the partnership forged in the 1933 Act and Rule 91.

D. Restrain the Use of Judicial Power To Override Procedural Statutes

Because the court may revoke or amend a procedural statute and substitute a court-made rule, the court is the final arbiter of the legislature’s power and its own power. The court should exercise restraint and rule in favor of its own power only when impelled to do so for significant reasons. In another context, Justice Powell recently explained the need for judicial self-restraint in defining the scope of the court’s own power. He said, “[w]ere we to utilize this power . . . indiscriminately . . . we

352. N.M. R. Civ. P. 91. There is no corresponding rule in the New Mexico Rules of Criminal Procedure.
353. Id.
355. [The need for prudential rules of self-governance is] found in the delicacy of . . . [the function of judicial review], particularly in view of possible consequences for others . . . ; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character. . . .

Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947). The Court in Rescue Army articulated a number of rules of self-governance “under which it has avoided constitutional questions pressed upon it for decision,” including the following:

[Such] matters will not be determined in friendly, non-adversarial proceedings; in advance of the necessity of deciding them; in broader terms than are required . . . ; if the record presents some other ground [for decision]; at the instance of one who fails to show that he is injured; or if a construction of the statute is fairly possible by which the question may be avoided.

Id. at 569.
356. See Justice Brandeis’ venerable admonition in Ashwander v. TVA, 297 U.S. 288, 436 (1936) that this Court reaches constitutional questions last.
may witness efforts by the representative branches drastically to curb its use.\textsuperscript{357}

New Mexico has already witnessed legislative attempts to curb the power of the court because the legislature perceived that the courts improperly expanded the scope of its own power.\textsuperscript{358} Fears of legislative reaction and a conflict between branches is not the only reason to defer to legislative rule-making. Respect for the views of a coordinate branch of government and a willingness to experiment with new procedures created by the legislature until the procedures are found to be deficient also counsel in favor of a presumption of legitimacy for legislative efforts in the rule-making field.

Deference to legislative initiatives does not imply subservience to the legislative will. In \textit{State ex rel. Bliss v. Greenwood},\textsuperscript{359} the supreme court established a standard which should serve as a guideline for judicial exercise of the power to revoke or to amend legislation affecting procedure. In \textit{Bliss}, the court struck down a statute which sought to regulate the procedures applicable before a court could declare a litigant to be in contempt of court.\textsuperscript{360} The court acknowledged that the separation of powers mandated by the constitution "was never intended to be complete."


\textsuperscript{358} For example, the New Mexico Supreme Court abolished the common-law defense of contributory negligence and substituted the doctrine of comparative negligence in 1981. See Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981). During the 1981 session of the legislature, the Speaker of the House sponsored a constitutional amendment which he acknowledged was designed to curb such expansive common-law judicial law making. Albuquerque Journal, Mar. 8, 1981, at A-10, col. 5. The proposed amendment provided: "The supreme court is vested with procedural rule-making power. Matters concerning substantive law are solely within the prerogative of the legislature, and a legislative determination that a law is substantive shall be final." H.J.R. 16, 35th Legislature, 1 Sess. (1981).

The proposal is particularly interesting because it would seem, on its face, to concede that the sole power to promulgate procedure rules lies with the supreme court, \textit{id.}, which is the same position espoused by the supreme court in Ammerman and McBride. However, by giving finality to the legislative determination that a matter was not procedural, \textit{id.}, the proposed amendment would have left the court at the mercy of an unreviewable legislative labelling process.

\textsuperscript{359} 63 N.M. 156, 315 P.2d 223 (1957).

\textsuperscript{360} Id. at 162, 315 P.2d at 227. \textit{See supra} text accompanying notes 152-64.

\textsuperscript{361} 63 N.M. at 162, 315 P.2d at 227.
and then established a test for determining when legislative enactments may not interfere with the court's power to determine procedural rules: "The practical standard is the reasonableness of the legislative regulation. The statutory regulation must preserve to the court sufficient power to protect itself from indignities and to enable it effectively to administer its judicial functions." Bliss contains two grounds for judicial modification. The first is that the court may strike legislation that may undercut its ability to perform its essential functions. The second is that the court may negate statutory procedures which interfere with the effective and efficient operation of the courts.

1. The Rare "Essential Function" Intrusion

Legislation which the court determines threatens the judiciary's ability to perform essential operations impinges upon the ability of the judicial branch to perform its role as an independent branch of government. Statutes which have this effect are invalid; the court must have the power to declare them so even if the court has not promulgated a judicial rule of court to the contrary. Bliss is exemplary. The court declared invalid the legislative mandate of a jury trial for summary contempt despite the absence of a formal judicial rule to the contrary. Mowrer v. Rusk is another case where the court perceived a threat to the "core function" of the judiciary and invalidated a statute even though the statute did not contradict a rule of procedure. In Mowrer, the supreme court declared invalid a statute which gave the executive branch of government the power to control personnel employed in the judicial branch of government and interfered with the court's power to submit budgets directly to the legislature. Though there was no rule of court to the contrary, the court exercised its power of nullification. In Mowrer, the supreme court determined that the statute granted the executive "power to coerce the judiciary into compliance with the wishes or whims of the executive," thus threatening the independence and integrity of the judicial branch of government.

362. Id.
363. Id. at 161, 315 P.2d at 227. "$\text{T}he power to punish for contempt is inherent in the courts and its exercise is the exercise of the highest form of judicial power. . . . The statutory regulation must preserve to the court sufficient power to protect itself from indignities. . . ." Id.
364. Id. at 162, 315 P.2d at 227. "The statutory regulation must enable [the court] effectively to administer its judicial functions." Id.
365. Id. at 156, 315 P.2d 223 (1957).
366. 95 N.M. 48, 618 P.2d 886 (1980).
367. Id. at 50, 618 P.2d at 888.
368. Id. at 55, 618 P.2d at 893.
369. Id. "$\text{The inherent power of a constitutional court to sustain its own independent existence has always been assumed.}" Id. at 56, 618 P.2d at 894. The budget provision was held invalid because it "dilutes and could render impotent the inherent power of the judiciary." Id.
These cases and the issues raised in them are beyond the scope of the 1933 Act and Rule 91. They involve not a conflict in procedural rules but an intrusion into the fundamental powers necessary for the operation of an independent judiciary. The exclusivity holdings applied in these cases must be reserved for those few situations where legislation truly threatens the ability of the courts to function. Mere hypothetical threats ought not be sufficient; nor should the court avail itself of the power if the threat is not immediate. This power should be utilized only when a real and immediate threat to the independence of the judiciary exists and the court is able to articulate that threat and to explain carefully the necessity of its action.

2. Resolving Conflicts Between Procedural Statutes and Rules of Court

Most situations discussed in this article do not involve significant intrusions on the fundamental powers needed by the courts to operate. They involve clashes between procedural statutes and procedural rules which differ in content and perhaps in underlying policy, but which do not amount to serious disputes about essential power. Bliss correctly acknowledges the power of the judiciary to apply a rule of court contrary to a procedural statute if application of the rule is necessary "to enable [the court] effectively to administer its judicial functions." In this category of cases, the court should determine whether the statute or the rule provides the more efficient mechanism for facilitating the correct resolution of substantive disputes. When the statute is preferable, the court should apply the statute and incorporate it into the rules, pursuant to the 1933 Act and Rule 91. Where the rule is preferable, the court should declare the statute to be superseded by the rule, in the manner provided in the 1933 Act and Rule 91.

370. *But see* Mower v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980) (moot issues addressed); *State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1951) (repealed statute held unconstitutional). Perhaps, *Mower* and *Bliss* illustrate an unfortunate corollary rule: when there are no practical ramifications to the court's assertion of exclusive inherent power, the court is more likely to flex its muscles.

371. One commentator has concluded that well-reasoned decisions are a necessary check on the personal predilections and biases of the decision-maker. R. Wasserstrom, *The Judicial Decision* 92-97 (1961). In his view, reasoned decisions: (1) force the judge to evaluate his conclusions and require him to persuade himself on external grounds of the desirability of his decision; (2) help keep open avenues of independent criticism and verification; (3) establish reliable grounds for future action; and (4) prevent the appearance of arbitrariness. *Id.*

Similarly, the nature of the judicial role requires attention to see that the decisions rendered by our courts are principled. "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons which transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of any other branches of the Government . . . those choices must, of course, survive." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959).

372. *Bliss*, 63 N.M. at 162, 315 P.2d at 227.
E. The Formal Rule-Making Process as the Preferred Forum for Resolving Conflicts

The supreme court's rule-making power is not exercised in the caldron of litigation. The court has several standing committees which consider amendments to rules, evaluate the necessity and wisdom of rule changes, and submit proposed rule changes to the court for final approval and promulgation.373 The rules committees should be alert for the existence of statutes regulating procedure which are inconsistent with proposed rules of procedure and should seek to resolve conflicts between proposed rules and existing statutes pursuant to the methods set forth in the 1933 Act and Rule 91.374 The rules committees provide an ideal vehicle for a consideration of the relative merits of an existing statute and a proposed rule. The issue can receive the focused attention of the committee and the court, free from extraneous factors often present in the litigation process. Furthermore, the committees and court may gather relevant data from any source to assist their deliberation. They are not limited to the briefs and arguments presented by the parties in adversary proceedings, in which the resolution of the rule/statute issue is not an end in itself but only a means to achieve victory. Finally, the committees may hold hearings or otherwise solicit views and thereby obtain the input of all persons interested in the outcome of the issue.375


(a) Authority to appoint. The supreme court may appoint standing committees and special or temporary committees to make recommendations to the court and/or to assist the court in drafting and revising rules and instructions of the supreme court.

(b) Rule-making Procedure.

(3) If new rules or amendments are recommended to the Code of Professional Responsibility, Supreme Court Rules Governing Discipline, Disciplinary Board, Revised Rules of Procedure, Rules Governing the New Mexico Bar, Rules Governing Bar Examiners, Bar Examinations and Admission to the Bar, or the Code of Judicial Conduct, said recommendations will be submitted to the President of the New Mexico State Bar prior to the court’s final action on such proposal in order to provide for input from the bar. Upon final enactment by the court on such rules or amendments, they shall be submitted for publication by the State Bar at least 45 days prior to the effective date. If the supreme court determines that it is necessary to have a different effective date than that provided for in this paragraph, it shall so provide in its order of adoption.

374. The committees could fulfill another important role. When the New Mexico statutes are periodically recompiled, the compilers apparently make ad hoc decisions of whether existing statutes have been superseded by subsequent adoption of rules of procedure. See, e.g., N.M. R. Civ. P. 18, Compiler's Notes (“This rule is deemed to have superseded 105-406 C.S. 1929, which was substantially the same.”) The determination that a conflict exists and that the rule supersedes the statute should be made by the committees and the court when the rule is adopted.

375. For a discussion of the need to inject public processes into the judicial rule-making authority, see J. Weinstein, Reform of Court Rule-Making Procedures 87 (1977); Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905 (1976); Parness & Manthey, Public Process and Ohio Supreme Court Rulemaking, 28 Clev. St. L. Rev. 249 (1979).
Where a rule of court is already in effect and a contrary statute is adopted, litigation is not always necessary to resolve the conflict. Upon passage of the statute, the appropriate committee could meet to evaluate the statute. If the committee concluded that the statute was procedural, the committee could then decide whether to incorporate the new statute into the rules of court pursuant to Rule 91 or whether to reject it by proposing a contrary rule of court or by standing firmly in support of an existing rule of court that conflicts with the statute. An active and invigorated committee process could, in this way, act to resolve potential conflicts between the legislature and judiciary before they come to a head in litigation challenging the validity of a statute on the grounds that it dealt with judicial procedure. Over time, perhaps the legislature itself would acknowledge the role of the Rules Committees which the legislature’s 1933 Act made possible. Instead of developing judicial procedure through the cumbersome process of adopting a statute which the legislature acknowledges can be modified by the court, perhaps the legislature would submit proposed rules changes directly to the committees for consideration and promulgation as rules of court.

IV. CONCLUSION

A survey of the history of procedural rule-making in New Mexico discloses a pendulum-like pattern of development. Initially, the legislature asserted power over rule-making for the courts, and the courts acceded to that power. Early on, however, the legislature began delegating the rule-making power to the courts, and the courts exercised that authority within the framework of the legislative delegation. In the 1930’s, influenced by national developments in this area, two events shifted the existing balance. First, the legislature abrogated its authority to write binding procedural rules for the courts, and second, the court decided that it had inherent, if not exclusive, authority to engage in rule-making, independent of legislative-delegated authority. Thereafter, the supreme court consolidated its inherent rule-making power, including its authority to override legislative enactments which conflicted with court-created rules. The outer swing of the pendulum in favor of judicial power came in the 1970’s when the court asserted that its inherent power over rule-making was exclusive, leaving no role at all for the legislative branch. While the exclusive judicial power cases have not been overruled, the most recent

376. The Committee will usually have adequate time to consider the value of the newly adopted statute before it becomes applicable in judicial proceedings. Normally, laws go into effect "ninety days after the adjournment of the legislature enacting them." N.M. Const. art. IV, § 23. Legislation declaring that immediate applicability is "necessary for the preservation of the public peace, health or safety" goes into effect immediately upon approval of two-thirds of the vote of each house. Id. Presumably, procedural statutes will seldom have so weighty a public impact. Even those that do bear an emergency clause cannot be applied to cases pending on the date of passage. N.M. Const. art. IV, § 34.
cases sound a judicial retreat toward the view that the rule-making power is a shared power, with the court having ultimate authority where conflicting procedural rules are promulgated by the two branches.

The recent movement away from the exclusivity rulings of the 1970’s is to be applauded, and, indeed, the court should go further and adopt a series of prudential constraints to lessen the tension between court and legislature over this issue, while attempting to remove, to the extent possible, rule-making concerns from the litigation process. The court should restrain the use of its ultimate power to override procedural statutes, using it only when necessary to protect essential judicial functions, or when the statutory procedure is inefficient and the court has designed and promulgated a better judicial rule in its place. Finally, the court should recognize that lawmakers may offer a helpful perspective on rule-making problems, and that a formal rule-making process, open to the members of the legislature, the bar and public alike, provides the best method for the formulation and alteration of procedural rules.

APPENDIX A: SEPARATION OF POWERS IN THE STATES

Jurisdictions with Specific Constitutional Provisions
Establishing Separation of Powers

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Ala. Const. art. III, §43: “In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.”</td>
</tr>
<tr>
<td>Arizona</td>
<td>Ariz. Const. art. III: “The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.”</td>
</tr>
</tbody>
</table>
Arkansas
Ark. Const. art. IV, § 2: see Ariz. Const. art. III, quoted supra (substantially the same).

Colorado
Colo. Const. art. III: see Ariz. Const. art III, quoted supra (substantially the same).

Connecticut
Conn. Const. art. II: "The powers of government shall be divided into three distinct departments, and each of them is confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Florida
Fla. Const. art. II, § 3: see Ariz. Const. art. III, quoted supra (substantially the same).

Georgia

Idaho
Idaho Const. art. V, § 13: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly belongs to it."

Illinois
Ill. Const. art. II, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

Indiana
Ind. Const. art. III, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

Iowa
Iowa Const. art. III, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

Kentucky
Ky Const. § 28: see Ariz. Const. art. III, quoted supra (substantially the same).

Louisiana

Maine
Me. Const. art. III, § 2: see Ariz. Const. art. III, quoted supra (substantially the same).

Massachusetts

Michigan

Minnesota
Minn. Const. art. III, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).
Mississippi

Missouri
Mo. Const. art. II, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

Montana
Mont. Const. art. III, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

Nebraska
Neb. Const. art. II, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

Nevada
Nev. Const. art. III, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

New Hampshire
N.H. Const. Pt. I, art. 37: “[T]he three essential powers . . . ought be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.”

New Jersey
N.J. Const. art. III, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

New Mexico
N.M. Const. art. III, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

Oklahoma
Okl. Const. art. IV, § 1: see Ala. Const.art. III, §43, quoted supra.

South Dakota
S.D. Const. art. II: “The powers of the government of the state are divided into three distinct departments, the legislative executive and judicial; and the powers and duties of each are prescribed by this Constitution.”

Tennessee
Tenn. Const. art. II, §2: see Ariz. Const. art. III, quoted supra (substantially the same).

Texas

Utah
Utah Const. art. V, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

Vermont
Vt. Const. ch. II, §5: see Ariz. Const. art. III, quoted supra (substantially the same).
Virginia

Va. Const. art. III, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

West Virginia

W. Va. Const. art. V, § 1: see Ariz. Const. art. III, quoted supra (substantially the same, with added phrase: "nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature").

Wyoming

Wyo Const. art. II, § 1: see Ariz. Const. art. III, quoted supra (substantially the same).

APPENDIX B: SEPARATION OF POWERS IN THE STATES

Jurisdictions in Which Procedural Rule-Making Is Exclusively a Judicial Function

I. Based on Separation of Powers Alone

<table>
<thead>
<tr>
<th>State</th>
<th>Seminal Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td><em>Winberry v. Salisbury</em>, 5 N.J. 240, 74 A.2d 406 (1949) (N.J. Const. art. VI, §2, (qar) 3, which provides that supreme court “shall make rules . . . subject to the law [on] practice and procedure in all . . . courts” means subject only to common law).</td>
</tr>
</tbody>
</table>

II. Based on a Specific Constitutional Rule-making Provision

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Ariz. Const. art. VI, §5(5): “The Supreme Court shall have . . . [p]ower to make rules relative to all procedural matters in any court.”</td>
</tr>
<tr>
<td>State</td>
<td>Constitution Reference</td>
</tr>
<tr>
<td>------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Colorado</td>
<td>Colo. Const. art. VI, § 21:</td>
</tr>
<tr>
<td>Delaware</td>
<td>Del. Const. art. IV, § 13:</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Hawaii Const. art. V, § 6:</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Ky. Const. § 116:</td>
</tr>
<tr>
<td>Michigan</td>
<td>Mich. Const. art. VI, § 5:</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. Const. art. VI, § 3:</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Pa. Const. art. V, § 10:</td>
</tr>
</tbody>
</table>
| West Virginia | W. V. Const. art. VIII, § 3: | "The supreme court shall have power to promulgate rules for all cases
and civil and criminal proceedings, civil and criminal for . . . all of the courts . . . relating to . . . practice and procedure, which shall have the force and effect of law.”

### III. Based on Legislatively Delegated Power (Independent of Inherent Judicial Power)

<table>
<thead>
<tr>
<th>State</th>
<th>Statutory Provision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maine</td>
<td>Me. Rev. Stat. Ann. Tit. 4, § 8: “The Supreme Judicial Court shall have the power to prescribe, . . . the forms of process, rules for writs, pleadings and motions and the practice and procedure in civil actions at law. . . . All laws in conflict therewith shall be of no further force or effect.” See id. at § 9 (authority to promulgate criminal rules).</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev. Rev. Stat. §2.120(2) (1981 repl. pg): “The supreme court . . . shall regulate . . . practice and procedure. . . . Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the constitution of the State of Nevada.”</td>
</tr>
<tr>
<td>New Mexico</td>
<td>N.M. Stat. Ann. §38-1-1 (1978): “The supreme court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico. . . .”</td>
</tr>
</tbody>
</table>
Washington  
Wash. Rev. Code Ann. §§ 2.04.190 and 2.04.190 (1961): “The supreme court shall have the power to prescribe . . . by rule . . . procedure to be used in all suits.

**IV. Based on Inherent Judicial Power and Separation of Powers Principles**

<table>
<thead>
<tr>
<th>State</th>
<th>Authority</th>
</tr>
</thead>
</table>

**APPENDIX C: SEPARATION OF POWERS IN THE STATE**

Jurisdictions Which Share Rule-Making Authority Between the Legislature and the Court

**I. Final Authority in the Legislature**

<table>
<thead>
<tr>
<th>State</th>
<th>Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Ala. Const. amend. 328, § 6.11: “The supreme court shall make and promulgate rules . . . governing practice and procedure in all courts. . . . These rules may be changed by a general act of state-wide application.”</td>
</tr>
<tr>
<td>Alaska</td>
<td>Alaska Const. art. IV, § 15: “[The supreme court] shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by a 2/3 vote of the members elected to each house.”</td>
</tr>
<tr>
<td>California</td>
<td>Cal. Const. art. 6, § 6: “To improve the administration of justice [the judicial Council] shall . . . make recommendations to the Governor and Legislature [and shall] adopt rules for court administration, practice and procedure, not inconsistent with statute . . . .”</td>
</tr>
<tr>
<td>Florida</td>
<td>Fla. Const. art. V, § 2: “The supreme court shall adopt rules for the practice and procedure in all courts. . . . These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the Legislature.”</td>
</tr>
</tbody>
</table>
Georgia

Grindle v. Eubanks, 152 Ga. App. 58, 262 S.E.2d 235 (1979) (court has power to enact rules not inconsistent with statutes).

Iowa

Iowa Const. art. V, § 14: “It shall be the duty of the General Assembly to provide . . . for a general system of practice in all Courts of this State.” But see Iowa Civil Liberties Union v. Critell, 244 N.W.2d 564 (Iowa 1976) (courts have supplementary power to fill in gaps in legislative rules).

Kansas

Bourne v. Atchison, Topeka & Santa Fe Ry., 209 Kan. 511, 497 P.2d 110 (1972) (courts have inherent power to adopt rules of procedure, subject to statutory enactments).

Louisiana

La. Const. art. 5, § 5(A): “[The supreme court may establish procedural and administrative rules not in conflict with law. . . .”

Maryland

Md. Const. art. IV, § 18(a): “The Court of Appeals shall adopt rules concerning the practice and procedure which shall have the force of law until rescinded, changed, or modified by the Court of Appeals or otherwise by law.”

Missouri

Mo. Const. art. 5, § 5: “The supreme court may establish rules relating to practice, procedure and pleading for all courts. . . . Any rule may be annulled or amended in whole or part by a law limited to the purpose.”

Montana

Mont. Const. art. VII, § 2(3): The Supreme Court “may make rules governing . . . practice and procedure for all other courts . . . Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.”

Nebraska


New York

NY. Const. art. VI, § 28 creates a judicial board to advise the legislature in its supervision of the court system, and the appellate division of the supreme court (trial courts) has authority to make rules to

North Carolina

N.C. Const. art. IV, §13: "The General Assembly may make rules of procedure and practice [in original courts], and . . . may delegate this authority . . . [retaining the power to] alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court. . . ."

Ohio

Ohio Const. art. IV, §5(B): "The supreme court shall prescribe rules governing practice and procedure in all courts of the state. . . . Such rules take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval."

Oklahoma

Okla. Const. art. 7, §5: "The . . . appellate courts [rules] shall be as provided by rules of the Supreme Court until otherwise provided by statute." See also Oklahoma County Sheriffs v. Hunter, 615 P.2d 1007 (Okla. 1980) (legislative rule controls when a court rule conflicts with a statute).

Oregon

Wright v. Lane County District Court, 16 Or. App. 284, 517 P.2d 1208 (1974) (the court may promulgate a rule which covers for government of the court which is not controlled by statute).

South Carolina


South Dakota

S.D. Const. art. V, §12: "The Supreme Court shall make rules of practice and procedure and rules governing . . . all courts . . . . These rules may be changed by the Legislature."

Tennessee

Tennessee Department of Human Services v. Vaughn, 595 S.W.2d 62 (Tenn. 1980) (court rules concerning practice are law until superseded by legislation, or further court rule legislatively approved by both houses under Tenn. Code Ann. §16-3-404 (Repl. Vol. 1980)).
Texas

Tex. Const. art. 5, § 25: “The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State . . . .”

Vermont

Vt. Const. art. 2, § 37: “The supreme court shall make rules of practice or procedure . . . . Any rule adopted by the Supreme court may be revised by the General Assembly.”

Virginia

Va. Code § 8.01-3 (1984) allows the court to promulgate rules subject to modification by the legislature, and the Court has acceded to the legislative power in this area. See Raiford v. Raiford, 193 Va. 221, 68 S.E.2d 888 (1952).

Wisconsin

Wis. Const. art. 7, § 22: “The legislature . . . shall provide for the appointment of commissioners [who shall adopt] rules of practice, pleadings, forms and proceedings [for the court] subject to [the legislature’s] modification and adoption. . . .”

Wyoming

State ex rel. Frederick v. District Court, 399 P.2d 583 (Wyo. 1965) (courts have inherent power to prescribe rules of practice and procedure consistent with the constitution and legislative enactments).

II. Final Authority in the Courts

State

Illinois

People v. Cox, 82 Ill.2d 268, 412 N.E.2d 541 (1980) (legislature may make rules, but judicial rules control where there is a conflict only in matters within court’s authority).

Indiana


Minnesota


Mississippi

Newell v. State, 308 So.2d 71, 76 (Miss. 1975) (court will defer to legislative judgment “unless determined to be impediment to justice or impingement upon the constitution”).