Spring 2006

Jurisdiction as May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico

Seth D. Montgomery

Andrew S. Montgomery

Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol36/iss2/3

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the New Mexico Law Review website: www.lawschool.unm.edu/nmlr
JURISDICTION AS MAY BE PROVIDED BY LAW: SOME ISSUES OF APPELLATE JURISDICTION IN NEW MEXICO

SETH D. MONTGOMERY* & ANDREW S. MONTGOMERY**

Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.1

I. INTRODUCTION

The New Mexico Constitution defines the appellate jurisdiction2 of the state’s two principal appellate courts, the supreme court and the court of appeals, largely in terms of what may be provided by law.3 The supreme court is to exercise appellate jurisdiction in all cases “as may be provided by law,” except that a sentence of death or life imprisonment is always to be appealed directly to the supreme court, and in every case an aggrieved party has an absolute right to one appeal.4 The court of appeals is also to exercise appellate jurisdiction “as may be provided by law,” including direct review of decisions of administrative agencies as authorized “by law,” and it may issue writs in aid of its appellate jurisdiction as authorized “by rules of the supreme court.”5

The phrase “provided by law” ordinarily means provided by the legislature. That is the conclusion that New Mexico courts generally have reached when they have considered the issue.6 It is a conclusion in harmony with New Mexico’s legal and constitutional history and with the courts’ proper role in a government of separate powers.7

This Article’s principal thesis, however, is that the supreme court has departed in some instances from the constitutional provisions governing the two courts’ appellate jurisdiction.8 Although the courts have statutory authority to reassign appeals in well-defined circumstances,9 they do not have discretion to redefine their

** Member, State Bar of New Mexico. My father, Seth Montgomery, began work on this Article a few months before his death in 1998. He asked me to assist him in completing it. The inspiration for the Article is his. The delay in getting it into print is mine. Kind thanks to Thomas W. Olson, Edward Ricco, Sarah M. Singleton, and others unnamed for their helpful comments and to Yolanda Sandoval and Robert P. Schelly for their valuable research assistance.

1. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).
2. By “jurisdiction” we mean a court’s power to hear and decide a dispute. See Ballew v. Denson, 63 N.M. 370, 373, 320 P.2d 382, 383 (1958). By “appellate jurisdiction” we mean the power to review and affirm, modify, or set aside a lower tribunal’s decision. BLACK’s LAW DICTIONARY 868 (8th ed. 2004).
3. The New Mexico Constitution also confers appellate jurisdiction on the state’s district courts in some cases. N.M. CONST. art. VI, § 13. The appellate jurisdiction of the district courts is beyond the scope of this Article.
4. Id. art. VI, § 2.
5. Id. art. VI, § 29.
6. 1 Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).
7. Id. art. VI, § 13. The appellate jurisdiction of the district courts is beyond the scope of this Article.
8. See infra Parts III, V.
9. See infra notes 31-34, 205-223 and accompanying text.
jurisdiction contrary to or in absence of a statute. Thus, for example, when the supreme court directs by rule that appeals "shall be taken to the Supreme Court" in matters "in which jurisdiction has been specifically reserved to the Supreme Court by...Supreme Court order or rule," and that "[a]ll other appeals shall be taken to the Court of Appeals," it acts unconstitutionally.

To develop this thesis, the Article reviews the scope of appellate jurisdiction in New Mexico from historical and analytical standpoints. The purpose of this Article is to provide a descriptive analysis of where the law presently stands, how it arrived at that point, and whether any further legislative or judicial changes are advisable.

II. AN OVERVIEW OF APPELLATE JURISDICTION IN NEW MEXICO

A. The New Mexico Constitution

The New Mexico Constitution explicitly mandates in article III, section 1 that the powers of the legislative, executive, and judicial branches are to be separate. The mandate itself, however, does not say what those powers are. Instead, it simply prohibits one government branch from exercising powers "properly belonging" to another. The identification of those powers lies elsewhere.

The powers of New Mexico's judicial department are set out in article VI of the constitution. Since statehood, the judicial power has resided in a supreme court, district courts, other lower courts, and in the senate when sitting as a court of impeachment. Since 1965, judicial power has also resided in an intermediate court of appeals.

Article VI gives the supreme court original jurisdiction in enumerated matters and superintending control over the state's judiciary. These original and superintending powers have remained unchanged since statehood and are not qualified by what may be provided by law. Separate from these powers, the supreme court also has appellate jurisdiction, which has changed considerably. Article VI was amended in 1965 and now defines the appellate jurisdiction of the supreme court as follows:

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal.

The court of appeals' jurisdiction, as established in 1965, is as follows:

The court of appeals shall have no original jurisdiction. It may be authorized by law to review directly decisions of administrative agencies of the state, and it
may be authorized by rules of the supreme court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction as may be provided by law.\textsuperscript{18}

The language of sections 2 and 29 indicates that the appellate jurisdiction of the two courts is to be defined by the legislature in all appeals except those from district court judgments imposing sentences of death or life imprisonment. This conclusion follows from two considerations. The first is the meaning of the phrase “provided by law,” which, as we have noted, is generally understood to mean provided by the legislature.\textsuperscript{19} The second is the New Mexico Constitution’s distinction between that which may be provided by law and that which may be provided by rules. Whereas the court of appeals may exercise appellate jurisdiction “as may be provided by law,” it may issue writs in aid of its jurisdiction as authorized “by rules of the supreme court.”\textsuperscript{20} These different terms presumably have different meanings.\textsuperscript{21}

B. The Basic Statutes

The New Mexico legislature promptly fulfilled its constitutional charge to “provide by law” for the courts’ jurisdiction. In 1966, it enacted two statutes, now compiled as sections 34-5-8 and 34-5-14, that prescribe the appellate jurisdiction of the court of appeals and the supreme court, respectively. Section 34-5-8 provides in part:

The appellate jurisdiction of the court of appeals is coextensive with the state, and the court has jurisdiction to review on appeal:

\begin{enumerate}
\item any civil action not specifically reserved to the jurisdiction of the supreme court by the constitution or by law; \footnote{Id. art. VI, § 29 (emphasis added).}
\item decisions in any other action as may be provided by law. \footnote{See supra note 6.}
\end{enumerate}
review by certification in cases that the court of appeals does not decide but certifies to the supreme court for decision.\textsuperscript{23} The statute also authorizes the supreme court to hear nondiscretionary, direct appeals in some cases: "The appellate jurisdiction of the supreme court is coextensive with the state and extends to all cases where appellate jurisdiction is not specifically vested by law in the court of appeals."\textsuperscript{24}

Together, these two statutes present something akin to the classic conflict-of-law problem of \textit{renvoi}:\textsuperscript{25} a statute that refers to another statute, which in turn refers back to the first—two mirrors facing each other. If neither of these two statutes, nor any other, provides direction to the proper court, then appellate jurisdiction would appear paradoxically to lie in both courts and in neither. In both because the appeal is not specifically reserved by the constitution or by law to the jurisdiction of the other court. In neither because each statute, itself reserving jurisdiction in one court, eliminates it in the other. In practice, the \textit{renvoi} riddle poses only a theoretical problem as long as some other statute assigns jurisdiction. Whether or not an explicit answer can be found, however, the jurisdictional question, as framed by both the constitution and the governing statutes, must be resolved by reference to what the legislature has provided.\textsuperscript{26}

In addition to the statutes just discussed, several other statutes are relevant to the analysis of the courts' appellate jurisdiction as provided by law. Since long before the creation of the court of appeals, three statutes have governed the right of appeal from final judgments and decisions of the district courts. Those statutes, sections 39-3-2, 39-3-3, and 39-3-7, deal with appeals from final judgments or decisions in civil, criminal, and special statutory proceedings, respectively.\textsuperscript{27} Before 1966, each statute provided that an eligible party could appeal to the supreme court, which was, of course, the only court that could review decisions of the district courts.\textsuperscript{28} In 1966, the legislature amended each statute to provide for appeal to the supreme court or the court of appeals, "as appellate jurisdiction may be vested by law in these courts."\textsuperscript{29} The 1966 amendments thus incorporated the legislature's allocation of appellate jurisdiction between the two courts and conformed to the mandate in

\begin{footnotes}
\item[23] Id. § 34-5-14(B), (C) (1972).
\item[24] Id. § 34-5-14(A).
\item[25] See \textit{BLACK'S LAW DICTIONARY} 1324 (8th ed. 2004) (defining "\textit{renvoi}" as "\textit{[t]he problem arising when one state's rule on conflict of laws refers a case to the law of another state, and that second state's conflict-of-law rule refers the case either back to the law of the first state or to a third state}").
\item[26] This conclusion is confirmed by an analysis of the bill that added current subsection 34-5-8(A)(1). See \textit{FISCAL IMPACT REPORT}, H.R. 36-430, 1st Sess. add. (N.M. 1983) (HB 430, SB 277, and SB 326 (identical language)) (on file with the New Mexico Court of Appeals). The analysis notes that under sections 34-5-14 and 34-5-8, the supreme court and the court of appeals would each have appellate jurisdiction over all civil cases not specifically reserved to the other. To determine which civil cases are reserved to which court, \textit{it would be necessary to review any law which might specify the reviewing court.}
\item[29] \textit{Act of Mar. 1, 1966, ch. 28, §§ 35, 36, 39, 1966 N.M. Laws 102, 121-23.}
\end{footnotes}
article VI that the vesting of appellate jurisdiction in the supreme court or the court of appeals is to be "by law."\(^{30}\)

Three more statutes authorize the transfer of cases between courts in certain situations. Section 34-5-8(B) authorizes the supreme court to "provide for the transfer" from the court of appeals to the supreme court "of any action or decision" within the court of appeals' jurisdiction under section 34-5-8.\(^{31}\) As this Article shall elaborate in its examination of appeals in contract cases, this authority enables the supreme court to hear appeals that otherwise would be taken to the court of appeals so as to relieve congestion in the intermediate court's docket.\(^{32}\) Section 34-5-14(C) authorizes transfer from the court of appeals to the supreme court upon the intermediate court's certification that the appeal involves a question of constitutional significance or substantial public interest more appropriately decided by the state's highest court.\(^{33}\) Finally, section 34-5-10 directs that an appeal filed in the wrong appellate court be transferred to the proper court so that no injustice results from a simple error in the place of filing.\(^{34}\)

C. The Supreme Court Rules

Given that the New Mexico Constitution generally confers appellate jurisdiction as may be provided by law, and that the legislature has in fact provided for such jurisdiction by statute, one might reasonably infer that nothing more need be done by rule to identify which court has jurisdiction over an appeal. The constitution mentions supreme court rules, but only in regard to writs that the court of appeals may issue \textit{in aid of} its jurisdiction.\(^{35}\) And while the legislature has authorized transfers of cases in some instances, it might be assumed that the courts' control over how appeals are allocated inter se ends there. It may be somewhat surprising, then, that a rule of appellate procedure, Rule 12-102, prescribes the court to which an appeal should be taken. Rule 12-102 provides:

\begin{quote}
Appeals; where taken.
A. Supreme Court. The following appeals shall be taken to the Supreme Court:
\begin{enumerate}
\item appeals from the district courts in which a sentence of death or life imprisonment has been imposed;
\item appeals from the Public Regulation Commission;
\item appeals from the granting of writs of habeas corpus; and
\item appeals in any other matter in which jurisdiction has been specifically reserved to the Supreme Court by the New Mexico Constitution or by Supreme Court order or rule.
\end{enumerate}
B. Court of Appeals. All other appeals shall be taken to the Court of Appeals.\(^{36}\)
\end{quote}

If this rule was perfectly consistent with the governing statutes, it might serve as a useful summary of the pertinent constitutional and statutory provisions, which vest

\begin{footnotes}
30. See N.M. CONST. art. VI, §§ 2, 29.
32. See infra Part IV.B.
33. NMSA 1978, § 34-5-14(C) (1972).
34. Id. § 34-5-10 (1966).
35. N.M. CONST. art. VI, § 29.
36. Rule 12-102 NMRA.
\end{footnotes}
appellate jurisdiction in one court or the other. Indeed, the first two subdivisions of the rule could reasonably well serve that purpose. The first more or less tracks the mandate to the same effect in article VI itself. The second is consistent with statutes providing that appeals from the state’s principal utility commission, the Public Regulation Commission, are to be taken to the supreme court.

This basic congruence between the rule and the applicable statutes ends, however, with the first two subdivisions. The third, providing that “appeals from the granting of writs of habeas corpus” should be taken to the supreme court, marks a significant break from the appellate jurisdiction provided by statute. Section 34-5-14 makes no provision for supreme court jurisdiction over such appeals. Section 34-5-8 provides that the court of appeals has jurisdiction over appeals in post-conviction remedy proceedings, except where the sentence involved is death or life imprisonment.

The divergence between rule and statute is most conspicuous in the fourth subdivision, which provides that appeals should be taken to the supreme court in all other matters in which jurisdiction is reserved to that court “by the New Mexico Constitution or by Supreme Court order or rule,” while all remaining appeals should be taken to the court of appeals. This subdivision squarely conflicts with section 34-5-8, which provides that the court of appeals has jurisdiction over appeals in all civil actions not reserved to the supreme court by the constitution or by law, and with section 34-5-14, which provides that the supreme court has jurisdiction in all cases not reserved to the court of appeals by law.

Notably, despite what Rule 12-102 says, the court of appeals does not hear all appeals other than those specifically reserved to the supreme court by the constitution or by supreme court order or rule, and the supreme court hears some appeals, although neither the constitution nor any order or rule reserves jurisdiction to it. In practice, the courts appear to exercise appellate jurisdiction as authorized by either a constitutional provision, a statute, a rule, or some combination of these, although doing so usually conflicts with either the statute or the rule.

37. See N.M. CONST. art. VI, § 2.
38. NMSA 1978, §§ 62-11-1 (1993), 63-7-1.1(E) (1998), 63-9A-14 (1998). This subdivision of the rule was amended in 2000, shortly after the Public Regulation Commission was established to replace two predecessor agencies, the State Corporation Commission and the Public Utility Commission. Until 2000, Rule 12-102 had provided for supreme court review of decisions of the two predecessor agencies, but that too was consistent with then-existing constitutional and statutory provisions. See N.M. CONST. art. XI, § 7 (repealed 1999); NMSA 1978, §§ 62-11-1 (1993), 63-9A-14 (1985).
40. Rule 12-102(A)(4), (B) NMRA (emphasis added).
42. See, e.g., Nava v. City of Santa Fe, 2004-NMSC-039, ¶ 1, 103 P.3d 571, 573 (exercising jurisdiction pursuant to NMSA 1978, § 28-1-13(C) (1987), “which provides for direct appeal to the Supreme Court for claims made under the [New Mexico Human Rights Act]”); Gunaji v. Macias, 2001-NMSC-028, 31 P.3d 1008 (exercising jurisdiction over appeal in election contest).
In addition to Rule 12-102, which purports to define the proper court in which to take appeals generally, several other appellate rules govern appeals in specific classes of cases. Most of these rules are adequately grounded in constitutional or statutory authority for the appeals to which they apply. Some rules explicitly cite relevant statutory authority. Others refer generically to applicable constitutional or statutory authority. Several rules do not explicitly acknowledge such authority but are consistent with existing statutes. One rule, Rule 12-505, does a little of each.

Although most of the appellate rules thus conform closely to, or at least do not conflict with, the courts' appellate jurisdiction as provided by law, a few rules in addition to Rule 12-102 purport to grant jurisdiction different from, or in the absence of, statutory authority. Rule 12-501, governing the supreme court's discretionary review of orders denying writs of habeas corpus, complements Rule 12-102(A)(3), providing for direct appeal to the supreme court of orders granting habeas relief. Rule 12-501 and Rule 12-102(A)(3) are out of step with section 34-5-8(A)(4) for the same reason. Both rules call for review in the supreme court while (except in cases involving a sentence of death or life imprisonment) the statute authorizes review in the court of appeals.

Rule 12-503 also purports to grant jurisdiction in conflict with an applicable statute. The rule governs the procedure for writs of error, providing in part that "[a]s part of its appellate jurisdiction pursuant to Article 6, Section 29," the court of appeals "is granted authority to issue writs of error" in cases in which it would have appellate jurisdiction from a final judgment. This language conflicts with the court of appeals' jurisdiction under the statute governing writs of error, which provides

44. Rule 12-603(A) NMRA (citing NMSA 1978, §§ 1-8-18 (1981), 1-8-35 (1985)) (governing appeals in nomination contests); Rule 12-606 NMRA (citing NMSA 1978, § 34-5-14(C) (1972)) (governing certification of cases from the court of appeals to the supreme court); Rule 12-608 NMRA (citing NMSA 1978, § 39-3-1.1 (1999)) (governing certification of cases from district courts to the court of appeals).

45. Rule 12-601(A) NMRA (governing appeals from actions of administrative bodies or officials "when the right to a direct appeal is provided by statute"); Rule 12-604(A) NMRA (governing appeals in proceedings for removal of public officials "where jurisdiction is conferred on the supreme court by the constitution or by statute").


47. Rule 12-505 NMRA. Rule 12-505 addresses certiorari review of district court decisions in administrative appeals. It cites statutory authority, NMSA 1978, § 39-3-1.1 (1999), which gives the court of appeals certiorari jurisdiction over many, but apparently not all, such appeals. Rule 12-505(A) NMRA; see Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, ¶¶ 1-10, 89 P.3d 680, 681-83. Two rules of civil procedure, Rule 1-074 and Rule 1-075, prescribe procedures for district court review of administrative agency decisions as authorized by statute and by the constitution, respectively, but do not themselves create a right of review. Rules 1-074, 1-075 NMRA. Rule 12-505 contemplates certiorari review of district court decisions in such appeals, but it likewise does not purport to create a right of review. Thus, there is no indication that Rule 12-505 purports to confer jurisdiction on the court of appeals in the absence of, or in conflict with, an applicable statute. Cf. State ex rel. Pilot Dev. NW., Inc. v. State Health Planning & Dev. Bureau, 102 N.M. 791, 797, 701 P.2d 390, 396 ( Ct. App. 1985) ("[T]his court does not have jurisdiction over an appeal that is not authorized.").

48. Rule 12-501 NMRA (governing "petitions for the issuance of writs of certiorari seeking review of denials of habeas corpus petitions by the district court pursuant to Rule 5-802 of the Rules of Criminal Procedure").

49. Rule 12-102(A)(3) NMRA.


51. Rule 12-503(B) NMRA.
that such writs are to be issued by the supreme court in cases in which the court of appeals does not have appellate jurisdiction.\textsuperscript{52}

In addition, Rule 21-900(C) of the Code of Judicial Conduct purports to create both a right of action in district court and a right of appeal to the supreme court in favor of a candidate for election to judicial office who wishes to challenge an opponent’s violation of the rules of judicial conduct.\textsuperscript{53} No statute authorizes the right of appeal that Rule 21-900(C) creates. Thus, the supreme court’s jurisdiction over such an appeal is provided by rule but not by statute.

To summarize, most of the supreme court’s rules are consistent with the constitutional and statutory provisions providing for the courts’ jurisdiction, but a few are not. We are aware of no court decision or commentary that explains or even acknowledges the inconsistencies. The way in which these inconsistencies came about is discernible, however, from the historical record, to which we now turn.

III. APPELLATE JURISDICTION AS PROVIDED BY LAW:
A SHORT HISTORY

A. Territorial Law and Its Antecedents

Article VI in its present form finds antecedents at least as far back as the Organic Act for the Territory of New Mexico,\textsuperscript{54} by which the U.S. Congress constituted the territorial government of New Mexico in 1850. As the fundamental law for the territory, the Organic Act was a clear break from the Spanish and Mexican forms of government that preceded it, under which a provincial governor exercised executive, legislative, judicial, and military powers.\textsuperscript{55} Local alcaídes\textsuperscript{56} likewise possessed a combination of these powers and sometimes also clerical authority.\textsuperscript{57}

In contrast, the Organic Act embodied the tripartite separation of powers implicit in the U.S. Constitution. A distinctive feature of the Federal Constitution is its express grant to Congress of the power to regulate and limit the U.S. Supreme Court’s appellate jurisdiction. Article III provides that “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”\textsuperscript{58} Congress’s authority to make exceptions and regulations pursuant to this provision has always been understood to include the power not only to limit the Court’s jurisdiction, but also to prescribe it affirmatively, on the theory that Congress makes exceptions by negative implication.\textsuperscript{59}

\textsuperscript{52} NMSA 1978, § 39-3-5 (1966).
\textsuperscript{53} Rule 21-900(C) NMRA.
\textsuperscript{54} Act of Sept. 9, 1850, 9 Stat. 446 [hereinafter Organic Act].
\textsuperscript{56} An alcaide was a government official at the local or district level. Spanish towns and villages were governed by alcaídes, who acted as mayor, justice of the peace, probate judge, and sometimes militia captain. These local officials in turn were under the jurisdiction of district alcaídes. See id. at 27.
\textsuperscript{57} Id. at 27, 35–36.
\textsuperscript{58} U.S. CONST. art. III, § 2 (emphasis added).
\textsuperscript{59} Ex parte McCordle, 74 U.S. (7 Wall.) 506, 513 (1868); Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810).
Moreover, the U.S. Supreme Court has long recognized a legislative power to regulate the courts' appellate jurisdiction, even without reference to the explicit "exceptions and regulations" authority. In *Ex parte Bollman*, an 1807 decision, the Court "disclaim[ed] all jurisdiction not given by the constitution, or by the laws of the United States." Chief Justice Marshall explained: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

The Chief Justice distinguished a power of the courts—"the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions"—separate from their jurisdiction—"the power of taking cognizance of any question between individuals, or between the government and individuals. To enable the court to decide on such question [of the latter sort], the power to determine it must be given by written law."

New Mexico's Organic Act bears some resemblance to Article III of the U.S. Constitution. Where Article III provides that the Supreme Court shall have appellate jurisdiction subject to exceptions and regulations imposed by Congress, the Organic Act provided that the courts' jurisdiction was to be "as limited by law" and that appeals of final decisions of the district courts to the territorial supreme court were to be allowed "under such regulations as may be prescribed by law." The Organic Act's lineage traces not directly to the Federal Constitution, however, but to a parallel sequence of statutes enacted by Congress to govern the American territories. The earliest eighteenth-century versions of these organic acts did not explicitly delegate power over the courts to the territorial assemblies. Nevertheless, the assemblies began assuming "the power to regulate the courts and their jurisdiction," a legislative power that has been described as deriving from "a sort of common consent." This practice was formalized in the 1804 Organic Act for the Territory of Orleans, which explicitly provided for legislative regulation of the courts and their jurisdiction. By the time of the 1836 Organic Act for the Territory

60. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807); cf. Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) ("If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it.").
62. *Id.* at 94.
63. *Id.*
of Wisconsin, a model for territorial government had blossomed and was followed in successive organic acts for territories throughout the American West.\textsuperscript{68} The acts "all contained the same provisions in regard to the legislature and the legislative authority, and to the judiciary and the judicial authority."\textsuperscript{69} They provided in broad outline for a judiciary for each territory, but left the details of the courts and their jurisdiction to regulation by the territorial legislatures. The U.S. Supreme Court explained:

Whenever Congress has proceeded to organize a government for any of the Territories, it has merely instituted a general system of courts therefor, and has committed to the Territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts.\textsuperscript{70}

In light of this history, there is no question that New Mexico's Organic Act, the fifth of seventeen iterations of the Wisconsin model,\textsuperscript{71} gave the territorial legislature power to regulate and prescribe the courts' jurisdiction by providing that it was to be "as limited by law" and that review in the supreme court was to be allowed "under such regulations as may be prescribed by law."\textsuperscript{72} In the 1858 decision \textit{Leitensdorfer v. Webb},\textsuperscript{73} the U.S. Supreme Court ruled definitively that the words "as limited by law" vested New Mexico's territorial legislature "with authority to prescribe the subjects for the cognizance of the courts created by the Act."\textsuperscript{74} The Court confirmed that the legislature was bound to act within the Act's broad provisions, under which the supreme court alone possessed appellate jurisdiction and only the lower courts had original jurisdiction.\textsuperscript{75} Within those broad outlines, however, the legislature could supply the details.

Decisions of New Mexico's territorial supreme court were generally consistent with \textit{Leitensdorfer}. The court recognized, for example, that "we must look alone to the several acts of congress, and of our territorial legislature, as defining the extent of our jurisdiction."\textsuperscript{76} From the beginning, the court affirmed its power to review the legislature's regulation of its jurisdiction, as it would any other legislative act, by the

\begin{itemize}
 \item \textsuperscript{68} \textit{Id.} at 38; see Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 444 (1871).
 \item \textsuperscript{69} Clinton, 80 U.S. (13 Wall.) at 444.
 \item \textsuperscript{70} Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 655 (1873); see also Ferris v. Higley, 87 U.S. (20 Wall.) 375, 380-84 (1874) (recognizing that the territorial legislature was bound to define courts' jurisdiction within limits set by the organic act).
 \item \textsuperscript{71} \textit{See FARRAND, supra} note 64, app. A.
 \item \textsuperscript{72} Organic Act, supra note 54, § 10.
 \item \textsuperscript{73} 61 U.S. (20 How.) 176 (1858).
 \item \textsuperscript{74} \textit{Id.} at 182.
 \item \textsuperscript{75} \textit{Id.} at 183.
 \item \textsuperscript{76} Lynch v. Grayson, 7 N.M. 26, 41, 32 P. 149, 154 (1893), aff'd, 163 U.S. 468 (1896). But see Jung v. Myer, 11 N.M. 378, 383-84, 68 P. 933, 934-35 (1902) (stating in dicta that the territorial legislature lacked authority to regulate the courts' jurisdiction because the Organic Act fully defined their jurisdiction).
\end{itemize}
yardstick of the fundamental law. The court did not intimate, however, that it might assume the authority to define its own jurisdiction.

The legislature and the supreme court cooperated throughout the territorial period in establishing rules of pleading, practice, and procedure for the courts. Apparently there was no confrontation between the two branches in this endeavor because the legislature’s predominant authority was accepted. Thus, the legislature enacted rules of practice and procedure for the courts and also delegated rulemaking authority to the supreme court. The court for its part explicitly acknowledged that its rule-making authority was subordinate by noting, for example, that its rules were promulgated “in perseverance of the directions” of the legislature.

B. Statehood

New Mexico was admitted as the forty-seventh state of the Union in 1912. The state constitution, approved by the people the year before, has been amended many times since. But the judicial article, article VI, remains similar in many respects to its original form. We have noted that the supreme court’s original jurisdiction and superintending control, as conferred by article VI, section 3, have not changed.

At statehood, as in the territorial period, the supreme court was the only court empowered to hear appeals and other applications for review of district court decisions. Section 2 of article VI originally defined the supreme court’s appellate jurisdiction in broad language, extending it to “all final judgments and decisions of the district courts,” as well as to such appeals from district court interlocutory orders and decisions “as may be conferred by law.” From a contemporary vantage point, the expansive language of the original section 2 would seem to accommodate only a minimal role for the legislature. As the supreme court’s jurisdiction over appeals from final orders was unqualified, the legislature’s power to confer or withhold interlocutory jurisdiction was the exception rather than the rule.

Even without an express limitation on the supreme court’s appellate jurisdiction, however, the court soon concluded that the legislature retained the prerogative to decide what appeals the court would hear. In the 1914 decision *State v. Chacon*,

---

77. See Territory v. Ortiz, 1 N.M. (Gild., E.W.S. ed.) 5, 12–13 (1852) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)) (invalidating statute purporting to grant supreme court original jurisdiction to issue writs of mandamus because the Organic Act placed mandamus authority within the supreme court’s appellate jurisdiction); Archibeque v. Miera, 1 N.M. (Gild., E.W.S. ed.) 160, 162 (1857) (holding that Organic Act empowered legislature to confer appellate, but not original, jurisdiction on supreme court and original, but not appellate, jurisdiction on other courts).


79. Id. at 414–18.

80. Id. at 416 & n.46 (quoting 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) (internal quotation marks omitted); see also id. at 416–17 & nn.48–53 (discussing rules promulgated by supreme court to achieve conformity with statute).

81. N.M. CONST. art. VI, § 3; see supra note 16 and accompanying text.

82. The full text of section 2 originally read: “The appellate jurisdiction of the supreme court shall be coextensive with the state, and shall extend to all final judgments and decisions of the district courts, and said court shall have such appellate jurisdiction of interlocutory orders and decisions of the district courts as may be conferred by law.” Id. § 2 (amended 1965).

83. 19 N.M. 456, 145 P. 125 (1914).
the supreme court announced that its appellate jurisdiction "may only be invoked pursuant to a statute conferring the right and prescribing the procedure." The court in *Chacon* understood the constitutional grant of jurisdiction over appeals from final judgments to be plenary, in contrast with its interlocutory jurisdiction, which comprised only such jurisdiction "as the legislature might see fit to confer upon it." A court's jurisdiction to hear an appeal was to be distinguished, however, from a litigant's right to invoke that jurisdiction by bringing the appeal. The court's jurisdiction thus would remain "in abeyance" until "given vitality by legislative authority." The court located the legislative prerogative to grant or withhold the right to appeal not in any constitutional language, but in the notion that appeals are "creatures of statute." That notion was in step with the common law of its time and mirrored a similar conception of Congress's power to regulate the U.S. Supreme Court's appellate jurisdiction. The New Mexico Supreme Court reaffirmed its holding in *Chacon* on many occasions over roughly the three succeeding decades.

Other considerations came into play, however, as legislative predominance over practice and procedure in the courts began to wane. This change first manifested itself in the passage of the Act of March 13, 1933, by which the legislature charged the supreme court with the duty to regulate "pleading, practice and procedure" in the courts, subject to the condition that such rules not "abridge, enlarge or modify the substantive rights of any litigant." The Act provided that existing statutes relating to pleading, practice, and procedure should remain in effect as rules of the court, but only until modified or suspended by supreme court rules. Professors Browde and Occhialino have traced the inspiration for the 1933 Act to the writings and speeches of Dean Roscoe Pound, who argued that courts are best able to say what procedures should be followed in their own proceedings, although procedure should always remain subsidiary to substantive law.

The supreme court, in *State v. Roy*, upheld the 1933 Act over a constitutional challenge, rejecting the contention that the Act delegated an exclusively legislative function to the judiciary. The court reasoned that it could properly regulate judicial practice and procedure by virtue of both the power of superintending control granted

---

84. *Id.* at 461, 145 P. at 127.
85. *Id.*
86. *Id.* at 462, 145 P. at 127 (quoting State *ex rel.* Milwaukee Med. College v. Chittenden, 107 N.W. 500, 513 (Wis. 1906)) (internal quotation marks omitted).
87. *Id.* at 461, 145 P. at 127.
88. *Id.* at 461–64, 145 P. at 127–28 (collecting cases); see, e.g., The "Francis Wright," 105 U.S. 381, 386 (1882) ("What [the appellate] powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control.").
89. See, e.g., *In re Santillanes*, 47 N.M. 140, 152, 138 P.2d 503, 511 (1943); *State v. Eychaner*, 41 N.M. 677, 683, 73 P.2d 805, 809 (1937); *State v. Rosenwald Bros.*, 23 N.M. 578, 580, 170 P. 42, 43 (1918).
91. Act of March 13, 1933, ch. 84, §§ 1, 2, 1933 N.M. Laws 147, 147–48 (codified as amended at NMSA 1978, §§ 38-1-1 to -2 (1966)).
93. *Id.* § 38-1-2.
95. 40 N.M. 397, 60 P.2d 646 (1936).
96. *Id.* at 418, 60 P.2d at 659.
by article VI, section 3 and "an inherent power lodged in us."\textsuperscript{97} Citing Dean Pound, the court found that such regulation is inherently judicial and thus not exclusively legislative, although the court left open the question of whether such regulation is exclusively judicial.\textsuperscript{98}

The premise of Roy, that practice and procedure are creatures of court rule, was bound to collide with the premise of Chacon, that appeals are creatures of statute. The two lines of authority intersected in the 1947 decision State v. Arnold.\textsuperscript{99} Arnold presented the question of whether the time for appeal prescribed by a supreme court rule superseded a longer time prescribed by a statute.\textsuperscript{100} Concluding that the rule was controlling, the supreme court harmonized the doctrines of Roy and Chacon by declaring that it lacked authority to create a right of appeal but could nonetheless regulate the exercise of that right by rule.\textsuperscript{101} The court's holding thus rested on a distinction between substance (the right of appeal) and procedure (the time and manner of perfecting an appeal):

It may be readily conceded that if the legislature had authorized no appeal, this court would be powerless to create the right of appeal by rule. The creating of a right of appeal is a matter of substantive law and outside the province of the court's rule making power. Nevertheless, once the legislature has authorized the appeal, reasonable regulations affecting the time and manner of taking and perfecting the same are procedural and within this court's rule making power.\textsuperscript{102}

The court in Arnold did not invent this distinction between substance and procedure. The distinction is inherent in the 1933 Act, which empowers the judiciary to regulate "procedure" in the courts but not to abridge, enlarge, or modify the "substantive" rights of litigants,\textsuperscript{103} and in Dean Pound's idea that courts can best select the procedures to govern their own proceedings but those procedures should remain subordinate to substantive law.\textsuperscript{104} But the decision in Arnold broke new ground in its delineation of the boundary between the legislature's domain, where the basic right of appeal lies, and the judiciary's domain, where regulations of time, place, and manner are proper. That demarcation was the state of the law in 1965, some eighteen years after Arnold, when amendments of the state constitution were proposed. It may reasonably be presumed that the framers of the 1965 amendments knew and took account of that existing law.\textsuperscript{105}

\textsuperscript{97} Id. at 420–21, 60 P.2d at 660–61.
\textsuperscript{98} Id. at 421–23, 60 P.2d at 661–62 (citing Roscoe Pound, Regulation of Judicial Procedure by Rules of Court, 10 Ill. L. Rev. 163 (1915)).
\textsuperscript{99} 51 N.M. 311, 183 P.2d 845 (1947).
\textsuperscript{100} Id. at 313, 183 P.2d at 845. The rule authorized an appeal in a civil action within three months from the entry of a final judgment. NMSA 1941, § 19-201(5)(1) (1935) (codifying Rule 5(1) of the Rules of the Supreme Court). The statute authorized an appeal in a civil action within six months from the entry of a final judgment. NMSA 1929, § 105-2501 (1917).
\textsuperscript{101} 51 N.M. at 314, 183 P.2d at 846–47.
\textsuperscript{102} Id.; see also Johnson v. Terry, 48 N.M. 253, 260, 149 P.2d 795, 799 (1944) ("[T]he acts necessary to give jurisdiction, as specified in an act of the Legislature, cannot be added to or limited by a rule of court." (quoting Klokke Inv. Co. v. Superior Ct., 179 P. 728, 729 (Cal. Dist. Ct. App. (1919))).
\textsuperscript{103} NMSA 1978, § 38-1-1(A) (1966).
\textsuperscript{104} Pound, supra note 94, at 601–02.
\textsuperscript{105} See, e.g., Jaramillo v. City of Albuquerque, 64 N.M. 427, 430, 329 P.2d 626, 628 (1958) (presuming that the constitution's framers had notice of other states' similar constitutional provisions and interpretations given
C. The 1965 Amendments

As New Mexico’s population grew over the years, so did its litigation.\(^{106}\) Ineluctably, the supreme court fell behind on its caseload, and by the early 1960s, various court reform efforts were undertaken to address the problem.\(^{107}\) One such effort was a proposal to create an intermediate court of appeals.\(^{108}\) To do that, however, would require an amendment of article VI. A constitutional amendment would be necessary both to confer judicial power on the new court and to define the jurisdiction conferred. An amended article VI could delegate the task of defining the new court’s jurisdiction, but that possibility posed the question of which body, the legislature or the supreme court, should carry out the task. As of then, it was always the legislature that had prescribed the courts’ jurisdiction when the fundamental law did not.\(^{109}\) Intellectual currents of the time put that time-honored practice to test, however, as well-respected constituencies argued that state supreme courts should define their jurisdiction as an incident of their rule-making powers.\(^{110}\) The framers of the 1965 amendments ultimately chose to leave in the legislature the power to define the courts’ appellate jurisdiction.\(^{111}\) The historical context in which they acted underscores the significance of that choice.

As the court reform initiative gathered momentum in New Mexico, considerable public attention and discussion surrounded the proposal to revamp the constitution’s judicial article. Comparative analyses of model and existing constitutional provisions circulated.\(^{112}\) The legislature established the Constitutional Revision Commission in 1963 for the purpose of recommending changes in the state constitution.\(^{113}\) The Commission met with various groups and individuals in New Mexico and worked closely with members of the judiciary and the New Mexico State Bar Association. A particularly important event in which the Commission participated was a three-day citizens’ conference in June 1964,\(^{114}\) where the conferees were presented with pertinent provisions of the Model Judicial Article for State Constitutions, recently published by the American Bar Association and the American Judicature Society.\(^{115}\)


\(^{107}\) Id. at 597–98.

\(^{108}\) Id.; see N.M. Const. Revision Comm’n, Why the Adoption of an Intermediate Court of Appeals Is Necessary in the State of New Mexico (unpublished memorandum) (on file with the New Mexico Legislative Council Service Library).

\(^{109}\) See supra Part III.A-B.

\(^{110}\) See infra notes 116–124 and accompanying text.

\(^{111}\) See infra notes 125–149 and accompanying text.

\(^{112}\) League of Women Voters of N.M., An Exploration of the Constitution of New Mexico—The Judicial Article—A Comparative Chart (June 1964) (unpublished memorandum) (on file with the University of New Mexico School of Law Library); League of Women Voters of N.M., State Constitutions—Their Judiciary Articles (1959/61) (unpublished memorandum) (on file with the New Mexico Legislative Council Service Library).


\(^{115}\) Joint Comm. for Effective Admin. of Justice et al., A Citizens’ Conference on New Mexico Courts: Reading Materials (June 11–13, 1964) (on file with the New Mexico State Archives); see also infra note 120.
The Model Judicial Article is the key to the drafting history of the 1965 amendments of article VI. Written during the period of time from 1959 to 1962 by an American Bar Association committee chaired by Justice Tom C. Clark, it followed on the heels of attempts by some in Congress in the late 1950s to withdraw the U.S. Supreme Court’s appellate jurisdiction in entire classes of cases. The proposed legislation initially targeted Warren Court decisions perceived to threaten national security and accommodate subversion but also drew support from opponents of the Court’s decisions in school desegregation cases. These efforts, which the American Bar Association actively opposed, eventually failed, but they were widely viewed as the most serious threat of congressional retaliation against the Court since the Reconstruction era. The propounding of the Model Judicial Article, initiated just a year after this controversy, undoubtedly aimed to protect the courts’ independence and to insulate them from legislative meddling.

The Model Judicial Article vests extensive rule-making power in the judiciary. It empowers the supreme court “to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system,” as well as rules governing admission to the bar and discipline of members of the bar. The Model Judicial Article provides that, in most cases, the supreme court and the court of appeals are to exercise appellate jurisdiction under such terms and conditions as the supreme court shall specify in its rules; it also empowers the supreme court to issue writs in aid of its appellate jurisdiction and to authorize the court of appeals, by rule, to do the same.

119. Id. at 660–62; see generally Elliott, supra note 117.
120. MODEL JUDICIAL ARTICLE FOR STATE CONSTITUTIONS § 9 (1962) [hereinafter MODEL JUDICIAL ARTICLE], reprinted in Holt, supra note 116, at 8–12.
121. Id. §§ 2, 3, 9. The model section on the appellate jurisdiction of the supreme court, with the language on which New Mexico’s amended article VI, section 2 is patterned in italics, is as follows:

Appeals from a judgment of the District Court imposing a sentence of death or life imprisonment, or imprisonment for a term of 25 years or more, shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction under such terms and conditions as it shall specify in rules, except that such rules shall provide that a defendant shall have an absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the Supreme Court in criminal cases, that Court shall have the power to review all questions of law and, to the extent provided by rule, to review and revise the sentence imposed.

Id. § 2.B (emphasis added). The model section on the jurisdiction of the court of appeals is as follows, with the language on which article VI, section 29 is patterned in italics:

The Court of Appeals shall consist of as many divisions as the Supreme Court shall determine to be necessary. Each division of the Court of Appeals shall consist of three judges. The Court of Appeals shall have no original jurisdiction, except that it may be authorized by rules of the Supreme Court to review directly decisions of administrative agencies of the State and it may be authorized by rules of the Supreme Court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the Supreme Court shall specify by rules which shall, however, provide that a defendant shall have an absolute right to one appeal in all criminal cases and which may include the authority to review and revise sentences in criminal cases.
Committee commentary accompanying the model provisions made the case for empowering the supreme court to prescribe appellate jurisdiction as part of its rule-making power:

On the question of whether this allocation of [the appellate] power should be in the Court or in the legislature, the Committee chose the Court for several reasons. Among others, these reasons included: 1) the fact that such power in the Court would enhance the independence of the judiciary; 2) the fact that it would place the power to meet current problems in the hands of those most likely to be expert in the subject; 3) the fact that the rule making power was more flexible than the legislative power in its capacity to meet the demands of judicial administration.122

The commentary also invoked Dean Pound’s arguments for assigning the power to make rules of practice and procedure to the courts—the same arguments that had inspired New Mexico’s legislature and supreme court to recognize a judicial rule-making power during the 1930s.123 Thus, subsuming the authority to prescribe appellate jurisdiction under the rule-making power apparently was rationalized on the basis that jurisdiction is a matter of procedure.124

In New Mexico, the work of drafting a proposed new judicial article fell initially to Thomas A. Donnelly, then counsel to the Constitutional Revision Commission and later a judge on the court of appeals. Judge Donnelly, who had participated in the citizens’ conference at which the Model Judicial Article was presented, created a draft loosely patterned after that document.125 His draft departed from the Model Judicial Article, however, in one particularly notable way. It proposed that the courts’ jurisdiction be as provided by law rather than by court rule, with two exceptions—the court of appeals’ jurisdiction to review administrative agency decisions and to issue writs in aid of its jurisdiction might be provided either by law or by rule.126

Although Judge Donnelly followed the Model Judicial Article to a significant extent, at least one proponent of the Model Judicial Article in New Mexico believed that Judge Donnelly’s draft did not follow it as closely as it should have. Justice David W. Carmody, a pioneer in New Mexico’s court reform efforts,127 submitted a spirited critique of Judge Donnelly’s draft. Justice Carmody observed that the draft appeared to “vary from the model judicial article in reposing in the Legislature a great many of the implementation provisions as distinguished from allowing the Supreme Court to take care of these matters by rule.”128 He emphasized that “this

Id. § 3 (emphasis added).
122. Id. § 2.B cmt.; see id. § 3 cmt. (“The same reasons exist for allotting the power to the supreme court rather than the legislature to specify the jurisdiction.”).
123. Id. §§ 1, 9 cmts.; see Holt, supra note 116, at 6; see also supra notes 94–98 and accompanying text.
124. See Winters, supra note 116, at 280 (“The grant of rule-making power includes trial practice and procedure, appellate jurisdiction, and rules of evidence, as well as admission to the bar and discipline of members of the bar.”).
125. Minutes of the Meeting of the N.M. Constitutional Revision Comm’n 2–3 (July 17, 1964) (on file with the New Mexico State Archives).
126. Id. add. §§ 3, 7, 8 (proposed Judicial Article of New Mexico State Constitution).
127. See Donnelly & Minzner, supra note 106, at 596.
128. Letter from Justice David W. Carmody to Edward E. Triviz, Chairman of the Constitutional Revision
goes to the very foundation of any change in our present system, and the authorities
on the subject are unanimous that, in view of the separation of powers of the three
branches of government, the Judicial Branch should operate as one separate unit."\textsuperscript{129}
He noted that the legislature already had "absolute control over appropriations" and
"final say as to finances," and added, "I firmly believe that the Court is in a much
superior position to determine what may be necessary" in regard to the judiciary's
operations.\textsuperscript{130} He offered a section-by-section commentary on Judge Donnelly's
draft, urging adherence to the language and organization of the \textit{Model Judicial
Article} "as to the...appellate jurisdiction of the Supreme Court" and other provisions
for the supreme court's rule-making power.\textsuperscript{131} He maintained that the courts'
jurisdiction "should be controlled by rule of the Supreme Court, rather than
statute."\textsuperscript{132} Accordingly, he recommended changing the phrase "provided by law"
in Judge Donnelly's draft to "provided by rule of the Supreme Court."\textsuperscript{133}

In a report adopted on September 29, 1964, the Constitutional Revision
Commission published a proposed judicial article incorporating Judge Donnelly's
draft with only minor changes.\textsuperscript{134} The Commission acknowledged the constructive
assistance of Justice Carmody, as well as that of a special committee of the New
Mexico State Bar Association,\textsuperscript{135} but it retained the language specifying that the
courts' appellate jurisdiction should be as provided by law, or in a few cases, as
provided by law or by court rule.\textsuperscript{136} Accompanying commentary explained that the
Commission's recommendations were "designed to meet the proposals of the
American Bar Association and the American Judicature Society for judicial reform"
and cited Dean Pound with approval.\textsuperscript{137} Nonetheless, the commentary, like the text
of the proposed judicial article, generally reflects the view that the legislature should
have authority to regulate the courts and their jurisdiction.\textsuperscript{138}

The proposed judicial article as introduced in the state senate was substantially
similar to that published in the Constitutional Revision Commission's \textit{1964 Report},
except that it went even further than the Commission in reaffirming the legislature's
authority to provide by law for the courts' jurisdiction. Where the Commission's
proposal (incorporating Judge Donnelly's draft) had allowed that the court of
appeals could be authorized either by law or by rule to review administrative agency
decisions and to issue writs in aid of its
jurisdiction,\textsuperscript{139} the senate bill provided for
such authority by law only.\textsuperscript{140} The bill underwent three amendments as legislators

\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} add. § 3 (commenting on section 3 of Judge Donnelly's proposed article).
\textsuperscript{132} \textit{Id.} add. § 4 (commenting on section 8 of Judge Donnelly's proposed article).
\textsuperscript{133} See \textit{id.}
\textsuperscript{134} \textit{1964 REPORT, supra note 114, at 23–33 (proposing a revised article VI of the New Mexico Constitution).}
\textsuperscript{135} \textit{Id.} at vii.
\textsuperscript{136} \textit{Id.} art. VI, §§ 3, 7, 8, at 24, 26.
\textsuperscript{137} \textit{Id.} art. VI, § 1 cmt., at 23.
\textsuperscript{138} See \textit{id.} art. VI, §§ 3, 7–10 cmts., at 24–27 (commenting that issue of whether to establish court of appeals
and other basic questions of judiciary's organization are left for state legislature's determination).
\textsuperscript{139} See \textit{id.} art. VI, § 7, at 26.
\textsuperscript{140} S.J. Res. 5, 27th Leg., 1st Sess. § 1, at 3 (N.M. 1965).
considered whether to give the supreme court some rule-making discretion in allocating appeals between itself and the court of appeals. In particular, one proposed amendment would have retained the mandate that the court of appeals’ jurisdiction shall be “as provided by law” but would have added that “[t]he supreme court may, by rule, allocate appeals between the supreme court and the court of appeal and provide for further appeal from the court of appeal to the supreme court in its discretion.”\textsuperscript{141} The successive amendments dropped this proposal but retained the mandate that the courts’ jurisdiction be as provided by law.\textsuperscript{142}

The amended bill approved by the legislature\textsuperscript{143} was far less extensive a reform than the Constitutional Revision Commission had proposed. The Commission had sought the repeal of all twenty-seven of the then-existing sections of article VI and the adoption in their place of twenty-three new sections patterned loosely after the \textit{Model Judicial Article}.\textsuperscript{144} In contrast, the constitutional amendments submitted by the legislature for the people’s approval consisted of only a minor change to section 1 (extending the state’s judicial power to “a court of appeals”), the rewriting of section 2, and the addition of new sections 28 and 29. Section 28 sets out operational requirements for the court of appeals, including the number, qualifications, quorum, and method of selection of judges.\textsuperscript{145} Sections 2 and 29 define the appellate jurisdiction of the supreme court and the court of appeals, respectively.\textsuperscript{146} These sections are unmistakably derived from sections 2.B and 3 of the \textit{Model Judicial Article}.\textsuperscript{147} Notably, unlike some of the proposals in the legislature, section 29 follows the \textit{Model Judicial Article} in delegating to the supreme court the power to make rules authorizing the court of appeals to issue writs in aid of its jurisdiction.\textsuperscript{148} Sections 2 and 29 differ from the \textit{Model Judicial Article}, however, in one critical respect. In all cases other than those involving a sentence of death or life imprisonment, the appellate jurisdiction of the two courts is “as may be provided by law” and not, as in the \textit{Model Judicial Article}, under such terms and conditions as the supreme court shall specify by rule.\textsuperscript{149}

Analyses written shortly after the legislature approved these provisions for the people’s consideration indicate that the language “as may be provided by law” was immediately understood to mean as provided by the legislature. The Constitutional Revision Commission commented that “[t]he proposal would create a court of appeals possessing...such appellate jurisdiction as may be invested in such court by the state legislature.”\textsuperscript{150} A legislative study committee similarly observed that the appellate jurisdiction of the court of appeals “will be prescribed by law” and “[t]he
legislature may also authorize the court of appeals to review decisions of administrative agencies.” 151

The people approved the amendments of article VI by a substantial margin in September 1965. There have since been opportunities to amend article VI again. The Constitutional Revision Commission issued a report in 1966 essentially renewing the recommendations in the 1964 Report. 152 These recommendations were incorporated in part in a proposed new constitution adopted at a constitutional convention in 1969. 153 The people rejected the proposed constitution, however, in December 1969. While article VI has since been amended in a few details not pertinent here, sections 2 and 29 remain as the people approved them in 1965.

To summarize, three basic propositions are to be gleaned from the history of today’s article VI. First, the legislature’s authority to regulate the courts’ appellate jurisdiction has been recognized for over two centuries. Second, the right of appeal has been viewed as a matter of legislative prerogative even in the absence of an explicit constitutional directive. Third, in conceiving the 1965 amendments of article VI, the framers thoughtfully and deliberately determined that the courts’ appellate jurisdiction should be as the legislature says, and the people of New Mexico ratified that determination when they approved the amendments. We now consider the extent to which the supreme court’s rules conform to the constitutional regime.

IV. APPELLATE JURISDICTION SINCE 1965

A. Evolution of Rule 12-102

While the New Mexico Supreme Court has promulgated rules of practice and procedure since before statehood, 154 in the wake of the 1965 amendments it apparently saw little need to revise or expand its rules to govern the court of appeals. As of April 1, 1966, when the new court was activated, the supreme court announced that its existing rules of procedure were applicable “in so far as pertinent” 155 in the new court, and soon afterwards it promulgated rules governing petitions for writs of certiorari to, and certifications from, the court of appeals. 156 The supreme court did not adopt comprehensive rules for the new court, however, until 1974. 157

Questions inevitably arose over which was the proper court to hear a given appeal. 158 Nevertheless, the supreme court did not use its rule-making power to authorize appeals or assign appellate jurisdiction, presumably because (if it thought

151. PHILIP T. MANLY, STATE JUDICIAL SYSTEM STUDY COMM., SURVEY OF THE JUDICIAL SYSTEM IN NEW MEXICO 3 (1965) (on file with the New Mexico Supreme Court Library).
152. N.M. CONST. REVISION COMM’N, REPORT OF THE CONSTITUTIONAL REVISION COMMISSION 75-99 (1966) (on file with the New Mexico Legislative Council Service Library); cf. 1964 REPORT, supra note 114, at 23–33.
154. See supra notes 78–80 and accompanying text.
157. See infra notes 160–162 and accompanying text.
158. See infra notes 230–233 and accompanying text.
about the issue at all) it considered that purpose to be served by statutes, including those enacted in 1966.\(^{159}\)

In 1974, the supreme court revised its rules of appellate procedure extensively and reissued them as Supreme Court Rules 1 through 32.\(^{160}\) The new rules did not purport to prescribe the jurisdiction of either appellate court, providing only that an appeal was to be taken “to the appropriate appellate court.”\(^{161}\) Indeed, the supreme court evidently was mindful that the constitution left the definition of the courts’ appellate jurisdiction to the legislature because its new rules prudently cautioned that they should “not be construed to extend or limit the jurisdiction of the appellate courts as established by law.”\(^{162}\) One year later, the court adopted a separate set of rules of appellate procedure for criminal cases and restricted the 1974 rules to civil appeals, special statutory proceedings, and original proceedings.\(^{163}\) Again the court admonished that the rules should not be construed to extend or limit the appellate jurisdiction “as established by law.”\(^{164}\)

Notwithstanding these prudent acknowledgments of the legislature’s authority, other developments in 1975 charted a new direction for the supreme court’s rules. As we shall elaborate in our discussion of post-conviction remedy proceedings,\(^{165}\) a new rule of criminal procedure among the 1975 revisions departed in a subtle but significant way from the statutes providing for the courts’ jurisdiction.\(^{166}\) More conspicuously, in 1975 and 1976, the supreme court issued two decisions holding that the power to make rules governing practice and procedure in the courts is exclusively as well as inherently judicial. The 1975 decision State ex rel. Anaya v. McBride\(^ {167}\) invalidated a statute requiring a quo warranto petition\(^ {168}\) to name the person rightfully entitled to office because the court deemed the statute inconsistent with a rule of appellate procedure.\(^ {169}\) In Ammerman v. Hubbard Broadcasting, Inc.,\(^ {170}\) decided in 1976, the court invalidated a statutory privilege on the ground that it was inconsistent with the court’s rules of evidence.\(^ {171}\) Both decisions predicated the court’s rule-making power on two constitutional provisions: (1) the separation-of-powers mandate in article III, section 1, and (2) the power of superintending control in article VI, section 3.\(^ {172}\)
In 1983, the supreme court issued a miscellaneous order, which for the first time prescribed which classes of appeals should be taken to the supreme court and which should be taken to the court of appeals. The 1983 order included a catch-all provision, designating for supreme court review "appeals in any other matter in which jurisdiction has been specifically reserved to the New Mexico supreme court by the New Mexico constitution or by any other specific provision of state law." By its explicit reference to the constitution or state law, this portion of the order was consistent with the court's authority as provided by law.

In 1986, the supreme court undertook another extensive revision of its procedural rules, republishing them in a comprehensive set entitled the Supreme Court Rules Annotated. Rule 12-102, entitled "Appeals; where taken," first appeared in this new set of rules. Rule 12-102 adopted almost verbatim the court's 1983 Order, with one important exception: whereas the 1983 Order had reserved jurisdiction in the supreme court according to "specific provision of state law," the rule now reserved jurisdiction according to "supreme court order or rule." The 1986 revisions also omitted the admonitions in the 1974 and 1975 rules that those rules should not be construed to extend or limit the courts' appellate jurisdiction as established by law. The 1986 revisions thus rejected prior versions of the court's rules that explicitly acknowledged the legislature's role in defining the courts'
jurisdiction. The 1986 rules asserted a general power in the supreme court to extend or limit the courts’ appellate jurisdiction and even to establish it in the first instance.

Although the justification for these changes was not stated, we surmise that the court had in mind the inherent authority doctrine of McBride and Ammerman, under which any conflict between court rules and statutes on a matter of procedure is to be resolved in favor of the rules.\(^{180}\) The supreme court’s inherent authority could justify the 1986 revisions, however, only if the courts’ appellate jurisdiction was a matter of procedure, a notion that Ammerman itself undermines. Ammerman declares that, subject to the usual exception for sentences of death or life imprisonment, “[u]nquestionably the Legislature has the power to determine in what district court cases, civil and criminal, this court shall exercise appellate jurisdiction.”\(^{187}\) It might be argued that the title of Rule 12-102, “Appeals; where taken,” suggests a concern only with the manner of taking and perfecting an appeal, not the court’s jurisdiction over it, as a litigant cannot very well take an appeal without knowing the proper court in which to file it. But to say that an appeal should be taken to a particular court necessarily implies a determination that the court has the jurisdiction to hear it. The text of the rule bears out that conclusion, as it speaks of the court’s *reservation of jurisdiction* to itself.\(^{182}\)

The inherent authority doctrine as conceived in McBride and Ammerman has been roundly criticized.\(^{183}\) Whatever one may say about the doctrine as a justification for the primacy of judicial rule-making, however, the court in Ammerman was surely correct in concluding that the legislature retains the power to decide the extent of the courts’ appellate jurisdiction. At bottom, the doctrine is grounded in powers inferred from the constitution itself, namely, the separation-of-powers mandate and the supreme court’s power of superintending control.\(^{184}\) Those provisions should be read in harmony with, not in derogation of, the more explicit directives in article VI, sections 2 and 29 that the courts’ appellate jurisdiction is as may be provided by law.\(^{185}\)

Since 1986, Rule 12-102 has been amended in a few of its details. As we shall explain, it was amended in 1995 to return appeals in contract cases to the court of appeals.\(^{186}\) It was amended again in 2000 to cover appeals from the Public Regulation Commission, which replaced two predecessor agencies.\(^{187}\) These amendments are adequately grounded in the governing statutes. Rule 12-102

---

180. *See supra* notes 167–172 and accompanying text.
182. Rule 12-102(A)(6) NMRA (1986) (directing that appeals be taken to the supreme court in matters “in which jurisdiction has been specifically reserved to the supreme court...by supreme court order or rule”).
185. *See, e.g.*, Block v. Vigil-Giron, 2004-NMSC-003, ¶ 9, 84 P.3d 72, 76 (“[W]e interpret constitutional provisions as a harmonious whole...”).
186. *See infra* notes 213–217 and accompanying text.
187. *See supra* note 38.
continues to assert a power in the supreme court, however, to reserve jurisdiction to
itself or to the court of appeals.\footnote{188}

That asserted power, moreover, is no mere abstraction. There have been several
instances over the last three decades in which the supreme court has undertaken to
decide which court will hear appeals in a specific class of cases. In the first,
involving appeals in contract cases, the court properly exercised statutory authority
to transfer a class of cases to itself. In three other instances, the court’s decision to
provide by rule for the courts’ appellate jurisdiction cannot be similarly justified.
We turn now to an examination of supreme court rules directing that specific classes
of appeals be heard in one court or the other.

\subsection*{B. Appeals in Contract Cases}

Until 1995, the supreme court heard appeals in cases in which the complaint
sounded in contract.\footnote{189} It continued to do so even after the legislature, in 1983,
expanded the court of appeals’ jurisdiction as defined in section 34-5-8 to cover
“any civil action not specifically reserved to the jurisdiction of the supreme court by
the constitution or by law.”\footnote{190} We have noted that the supreme court accomplished
this result simply by decreeing that appeals in contract cases should be taken to it.\footnote{191}
This may at first seem puzzling. How could the court exercise jurisdiction over
contract cases when a statute explicitly assigned appeals in all civil cases to the court
of appeals? Admittedly, this question is of primarily historical interest because the
court of appeals now handles contract-case appeals in the ordinary course. But the
answer remains significant because it illustrates how cases can be reassigned from
the court of appeals to the supreme court in a manner consistent with both courts’
jurisdiction as provided by law.

The year 1983 saw a reprise of the problem of a growing caseload—the same
problem that had led to the creation of the court of appeals two decades earlier.\footnote{192}

Over the years, the court of appeals met the challenge of a still-increasing caseload
in various ways—many of them innovative, most of them quite effective—including
expansion of the court’s membership, employment of staff attorneys, and a summary
calendar system.\footnote{193} But while the court of appeals’ capacity to decide cases thus
increased, no similar innovations were made at the supreme court, and the burden
on the high court remained. The prevailing belief in 1966 appears to have been that
the overall appellate caseload should be divided more or less equally between the
two courts.\footnote{194} The objective in 1983 was to redistribute some of the burden from the

\footnotesize{\begin{itemize}
\item \footnote{188} Rule 12-102(A)(4) NMRA.
\item \footnote{189} See, e.g., Gonzales v. Surgidev Corp., 120 N.M. 151, 152, 899 P.2d 594, 595 (1995); Solon v. WEK
Drilling Co., 113 N.M. 566, 566 n.1, 829 P.2d 645, 645 n.1 (1992); Sims v. Craig, 96 N.M. 33, 35, 627 P.2d 875,
the supreme court has “reserved jurisdiction over appeals from the district courts in which one or more counts of
the complaint allege a breach of contract or otherwise sound in contract”). Since an amendment of Rule 12-102 in
1995, the court of appeals has heard contract-case appeals. See infra notes 213–215 and accompanying text.
\item \footnote{190} NMSA 1978, § 34-5-8(A)(1) (1983).
\item \footnote{191} See supra note 173.
\item \footnote{192} Donnelly & Minzner, supra note 106, at 595–98.
\item \footnote{193} Id. at 603–13.
\item \footnote{194} Id. at 602 (“The original intent of the legislature appears to have been to divide the appellate caseload
...
supreme court to the court of appeals and to find a means of equilibrating the two courts’ workloads going forward.

Legislation to accomplish this objective was proposed in two memoranda authored by Art Encinias, then counsel to the Administrative Office of the Courts, later a judge of the District Court for the First Judicial District. Judge Encinias’ analysis is notable for its unflinching recognition of the constitutional constraints on any alteration of the two courts’ jurisdiction and its ingenuity in proposing a means of managing the appellate workload within those constraints. He noted that the “New Mexico Constitution establishes the broad outlines for jurisdiction of the Supreme Court and the Court of Appeals and leaves much room for the Legislature to define in greater detail the sphere of each court’s influence.” He thus read the constitutional directive that appellate jurisdiction shall be “as may be provided by law” to mean “as the Legislature determines.”

Given these constitutional limitations, the question was how best to address the recurring problem of imbalances in the courts’ workloads. The suggestion had been made that “the legislature consider granting the Supreme Court the power to assign jurisdiction by rule.” The preferred solution, however, was to “honor the constitutional mandates.” The legislature could continue to amend the jurisdictional statutes on a piecemeal basis, but that approach was inflexible and potentially would require legislative action every few years. Judge Encinias proposed instead that the legislature take two actions: (1) expand the court of appeals’ jurisdiction to encompass essentially all civil cases as well as appeals from all of the state’s administrative agencies, and (2) create a “transfer mechanism” to “vest the Supreme [C]ourt with the ability to apportion the appellate workload by court rule.” This statutory authority would “provide the needed flexibility in the courts” to control the appellate workload, such that, “[s]hould the Court of Appeals find itself overwhelmed by its case load,” the supreme court could “more equitably” redistribute the appellate burden. In addition, the statutory scheme would “retain legislative control over general appellate jurisdiction.” In short, much of the supreme court’s appellate caseload (then an estimated 220 of 647 cases filed in the last year) would be reassigned to the court of appeals’ jurisdiction, but the supreme court would have discretion immediately to transfer back to itself some of the cases within that expanded jurisdiction.
The legislature and the supreme court, through coordinated action, reached exactly the result that Judge Encinias had proposed. The legislature amended section 34-5-8 to extend the court of appeals' jurisdiction to "any civil action not specifically reserved to the jurisdiction of the supreme court by the constitution or by law." In addition, the legislature added new subsection (B), which authorizes the supreme court to "provide for the transfer of any action or decision enumerated in this section" from the court of appeals to itself.

The supreme court, for its part, issued the 1983 Order, in which it enumerated the classes of appeals to be filed with it. The first such category was "appeals from the district courts of this state in which one or more counts of the complaint alleges a breach of contract or otherwise sounds in contract." The court made the order effective concurrent with the amendment of section 34-5-8, leaving no doubt that the statute and order were a coordinated effort to reallocate jurisdiction between the two courts. The court of appeals thus had jurisdiction over civil actions generally, but all contract cases were immediately transferred to the supreme court.

Were it not for the legislative history of section 34-5-8, one might question whether the authority to transfer "any action or decision" extends to a wholesale transfer of an entire class of cases, as opposed to case-by-case transfers in specific matters. The two pre-existing transfer statutes plainly envision transfers only of the latter sort. Yet the purpose of section 34-5-8(B), as evinced by the events leading to its enactment, is precisely to permit redistribution of cases in substantial numbers to better manage the overall appellate caseload. The supreme court carried out that purpose when it announced that it would continue hearing appeals in contract cases notwithstanding the court of appeals' newly acquired jurisdiction over civil actions. Although one might infer from an isolated reading of the 1983 Order that the court was providing for its own jurisdiction, its continued exercise of jurisdiction over contract cases had an adequate basis in statute. That is, it was as "provided by law" as article VI requires.

The supreme court continued to hear appeals in contract cases until 1995. Between 1983 and 1995, the court of appeals' membership expanded to ten judges and progress continued to be made in the management of its caseload. Writing in 1992, Judges Donnelly and Minzner summarized the situation:

Appeals from district court decisions involving contracts constitute the last remaining major area of appellate jurisdiction retained by the supreme court. It is probable that within the next several years these cases will be transferred to the court of appeals and the supreme court will become more nearly a court of last resort, reviewing decisions of the court of appeals by writ of certiorari and those other cases reserved to the supreme court by the state constitution.

206. Id. § 34-5-8(B).
207. 1983 Order, supra note 173.
208. Id.
209. See id.
212. Id. at 615.
These words proved prescient. In 1994, Rule 12-102 was amended to provide for the transfer to the court of appeals, upon that court’s request, of individual appeals in contract cases. 213 One year later, the direction that such appeals be taken to the supreme court was withdrawn in its entirety. The 1994 provision for transfer of individual appeals to the court of appeals was withdrawn as well. 214 Because Rule 12-102 provided, as it always had, that “[a]ll other appeals shall be taken to the Court of Appeals,” 215 the withdrawal of the references to appeals in contract cases meant that they were thereafter to be taken to the court of appeals.

We presume that, in this instance too, the supreme court was acting pursuant to section 34-5-8(B) to transfer cases—or, more precisely, to stop transferring them. The statute authorizes transfer only “from the court of appeals to the supreme court,” 216 and the 1994 and 1995 amendments of Rule 12-102 went the opposite way, first on a case-by-case basis and then all at once. But the supreme court was effectively undoing what it had done in its 1983 Order. If the court could validly order the transfer of all contract-case appeals to itself, it could surely also rescind that order and put an end to the transfer of such appeals. 217

The incorporation of contract cases into the court of appeals’ docket does not appear to have imposed an overwhelming burden. 218 Moreover, as Judges Donnelly and Minzner anticipated, the supreme court now functions to a large extent as a true supreme court rather than merely an error-correcting court. Its evolution toward a court of last resort has tended to obviate debate about the extent to which the court can assign cases to itself or the court of appeals. Simply stated, if there is only one court of general appellate jurisdiction (as there was until 1966), there should be only rare occasion to ask who defines that jurisdiction.

To the extent that workload pressures or other concerns still give cause to consider redistributing the appellate workload, it may be tempting to conclude that the statutory transfer mechanism in section 34-5-8(B) gives the supreme court plenary authority to move cases back and forth between itself and the court of appeals. Such a conclusion would be unfounded. Section 34-5-8(B) authorizes the supreme court to reassign classes of cases from the court of appeals to itself. 219 It does not, however, furnish the power to alter either court’s underlying jurisdiction.

217. Granted, this rationale does not fully justify the 1994 amendment of Rule 12-102, which provided for the transfer of cases already in the supreme court back to the court of appeals. As previously stated, section 34-5-8(B) authorizes transfers only from the intermediate court to the high court. Cf. State v. Weddle, 77 N.M. 420, 424, 423 P.2d 611, 614 (1967) (expressing doubt, but not deciding, whether statute authorizing transfer of appeal filed in wrong court gave appellate courts “power to alter jurisdiction”). Any doubt about the supreme court’s authority to transfer cases pursuant to the 1994 amendment was short-lived, however, and, after the 1995 amendment, moot.
218. Recent court statistics indicate that summary calendar cases, comprising approximately two-thirds of the court of appeals’ docket, are decided in roughly seven months on average. General calendar cases, comprising the remainder of its docket, are decided in an average of about twenty-one months. See N.M. COURT OF APPEALS STATS., AVERAGE DAYS (2005–2006), http://coa.nmcourts.com/statistics/averagedays20052006.pdf.
219. NMSA 1978, § 34-5-8(B) (1983) (authorizing supreme court to provide for transfer of any action or decision enumerated in section 34-5-8 from court of appeals to supreme court).
as prescribed by the legislature or, in other words, the power to "specifically reserve[]" jurisdiction to one court or the other, independent of statute.220

It follows that section 34-5-8(B) does not empower the court (1) to preempt a statutory right of direct appeal to the court of appeals and replace it with a right to request discretionary review in the supreme court,221 (2) to direct that a class of appeals be taken to the court of appeals in the face of a statute divesting that court of jurisdiction,222 or (3) to create a new right of action with an appeal to the supreme court in the absence of statutory authority for the right of action or the right of appeal.223 In such cases, reserving jurisdiction to one court or the other is inconsistent not only with the transfer authority in section 34-5-8(B), but also with the constitutional mandate that the courts' appellate jurisdiction shall be as provided by law. We proceed to consider concrete instances in which the court has, in our view, exceeded its constitutional authority.

C. Appeals in Postconviction Remedy Proceedings

Immediately following the 1965 amendments of article VI, procedures governing postconviction remedy proceedings were established by both a statute, now compiled as section 31-11-6,224 and a rule, former Rule 93 of the Rules of Civil Procedure.225 The rule and statute were materially identical and were put in place side by side to avoid the question of which body, the legislature or the supreme court, had authority to prescribe the procedures.226 They provided that an appeal could be taken from an order on a motion for postconviction relief "in the manner and within the time provided in" former Supreme Court Rule 5.227 Promulgated in 1935, Supreme Court Rule 5 specified the time and manner of perfecting an appeal.228 The rule provided that an appeal from a final judgment of the district court was to be taken to the supreme court.229 Because the rule was promulgated long before the creation of the court of appeals, however, this provision could not have been intended to direct appeals to one appellate court instead of another. Rather, the supreme court was the only court to which an appeal from the district court could be taken.

The question of which court had jurisdiction over appeals in postconviction proceedings arose soon after the court of appeals began its work because the first cases that it heard were postconviction remedy proceedings.230 When the supreme court first addressed the jurisdictional question, it looked not to its rules, but to the relevant statute. As enacted in 1966, section 34-5-8 did not grant the court of

220. Rule 12-102(A)(4) NMRA.
221. See infra Part IV.C.
222. See infra Part IV.D.
223. See infra Part IV.E.
229. Id.
appeals jurisdiction over postconviction remedy proceedings as such.\footnote{231} The statute did, however, contain the provision authorizing review in criminal actions not involving a sentence of death or life imprisonment.\footnote{232} The question thus reduced to whether postconviction remedy proceedings were criminal actions. The supreme court answered that such proceedings were civil rather than criminal and that the court of appeals therefore lacked jurisdiction.\footnote{233}

Even as the supreme court rendered that answer, the legislature was in the process of amending section 34-5-8(A) to give the court of appeals jurisdiction over appeals in “postconviction remedy proceedings except where the sentence involved is death or life imprisonment.”\footnote{234} As appeals under the new statutory provision wound their way through the courts, the supreme court acknowledged the amendment in dictum,\footnote{235} and the court of appeals proceeded for a number of years to exercise jurisdiction over such appeals.\footnote{236}

In 1975, the supreme court promulgated a new rule, Rule 57 of the Rules of Criminal Procedure, to supersede Rule 93 of the Rules of Civil Procedure.\footnote{237} Rule 57 was modeled on the federal statute providing for postconviction remedies, 28 U.S.C. § 2255, as Rule 93 and section 31-11-6 had been, but it differed significantly from Rule 93 because it incorporated changes proposed for the federal statute in 1973.\footnote{238} Following the recommendations of an advisory committee to the United States Judicial Conference, postconviction remedy proceedings under Rule 57 were to be treated as a further step in a prisoner’s criminal proceeding rather than as a separate civil proceeding—hence the promulgation of a rule of criminal procedure in place of a rule of civil procedure.\footnote{239} More significant for present purposes, a district court’s order on a motion for a postconviction remedy was “final and not subject to appeal” under Rule 57.\footnote{240}

As late as 1980 in \textit{State v. Castillo},\footnote{241} the court of appeals reaffirmed its jurisdiction over postconviction remedy proceedings as conferred by section 34-5-8(A)(4). The court did so based on an expansive interpretation of “post-conviction remedy proceedings,” adding that Rule 57 did not “dictate or even indicate a contrary conclusion.”\footnote{242}

But the vitality of the \textit{Castillo} decision was short-lived. Just three years later, the supreme court issued the 1983 Order directing that “appeals from the granting of

\begin{footnotes}
\footnotetext[231]{Act of Mar. 1, 1966, ch. 28, § 8, 1966 N.M. Laws 102, 106.}
\footnotetext[232]{NMSA 1953, § 16-7-8(C) (1966) (recodified at NMSA 1978, § 34-5-8(A)(3) (1983)).}
\footnotetext[233]{State v. Weddle, 77 N.M. 420, 423, 423 P.2d 611, 613–14 (1967).}
\footnotetext[235]{State v. Garlick, 80 N.M. 352, 353, 456 P.2d 185, 186 (1969) (recognizing that 1967 amendment of section 34-5-8 “placed jurisdiction of appeals from postconviction proceedings in [the court of appeals]”).}
\footnotetext[236]{See, e.g., Salazar v. State, 82 N.M. 630, 631, 485 P.2d 741, 742 (Ct. App. 1971).}
\footnotetext[237]{NMSA 1953, § 41-23-37 (1975) (superseded 1986).}
\footnotetext[238]{Donnelly & MacPherson, \textit{supra} note 226, at 300–01.}
\footnotetext[240]{NMSA 1953, § 41-23-57(a) (1975) (superseded 1986).}
\footnotetext[241]{94 N.M. 352, 610 P.2d 756 (Ct. App. 1980).}
\footnotetext[242]{\textit{Id.} at 354–55, 610 P.2d at 758–59.}
\end{footnotes}
writs of habeas corpus" be taken to the supreme court.\textsuperscript{243} It may not have been immediately apparent that this order conflicted with the court of appeals' jurisdiction to hear appeals in postconviction remedy proceedings. One might have concluded that proceedings on writs of habeas corpus were distinct from both (1) a prisoner's underlying criminal trial and appeal and (2) postconviction proceedings under Rule 57.\textsuperscript{244} The courts' rules and decisions soon collapsed this distinction, however, and confirmed that a prisoner had no right to a direct appeal from a denial of either a Rule 57 motion or a writ of habeas corpus.

Thus, in 1984, the court of appeals held in \textit{State v. Garcia}\textsuperscript{245} that Rule 57 had abolished the right of appeal in postconviction proceedings.\textsuperscript{246} The court reasoned that Rule 57 was procedural, that the supreme court had exclusive power to regulate matters of procedure, and that the rule therefore superseded the statutory provision for appeal in section 31-11-6.\textsuperscript{247} Curiously, the court did not mention section 34-5-8(A)(4), but one may suppose that if Rule 57 superseded section 31-11-6, then it superseded section 34-5-8(A)(4) as well.

The court in \textit{Garcia} relied explicitly on the inherent authority doctrine and on Ammerman v. Hubbard Broadcasting, Inc. in particular.\textsuperscript{248} Far from supporting the holding in \textit{Garcia}, however, Ammerman reaffirmed, as beyond question, that the legislature properly determines the extent of the courts' appellate jurisdiction.\textsuperscript{249} Thus, whether or not one begins with the premise that the supreme court has exclusive authority over procedural matters, the subject of \textit{Garcia}'s holding—the right of appeal—cannot be deemed procedural. Rule 57 was, of course, a rule of criminal procedure, but the circularity of reasoning on that basis alone is apparent—the supreme court properly promulgated Rule 57 because it is a rule of procedure, and Rule 57 is a rule of procedure because the supreme court properly promulgated it.\textsuperscript{250}

The court in \textit{Garcia} also invoked the distinction in \textit{State v. Arnold}\textsuperscript{251} between substantive law, by which a right to appeal may be created, and procedural law, by which restrictions may be placed on the time and manner of exercising that right.\textsuperscript{252}

\begin{itemize}
\item \textsuperscript{243} 1983 Order, supra note 173.
\item \textsuperscript{244} The supreme court's prior decisions treated postconviction remedy proceedings and habeas corpus proceedings as distinct—the former appealable, the latter not. See \textit{State v. Weddle}, 77 N.M. 420, 422, 423 P.2d 611, 613 (1967) (observing that postconviction remedy proceeding under Rule 93 "has not been replaced or supplanted habeas corpus which is not suspended, as indeed it could not be under Art. I, Sec. 9, U.S. Const., and Art. II, Sec. 7, N.M. Const."). \textit{Compare} \textit{State v. Garlick}, 80 N.M. 352, 353, 456 P.2d 185, 186 (1969) (recognizing in dictum that appeal in postconviction remedy proceedings may be taken to the court of appeals), with \textit{State v. Sisk}, 79 N.M. 167, 168, 441 P.2d 207, 208 (1968) (holding that no appeal is available in habeas corpus proceedings).
\item \textsuperscript{245} 101 N.M. 232, 680 P.2d 613 (Ct. App. 1984).
\item \textsuperscript{246} \textit{Id.} at 235, 680 P.2d at 616 ("The clear language of Rule 57(a) states that orders of the district court on a motion under the rule are not appealable.").
\item \textsuperscript{247} \textit{Id.} at 234–35, 680 P.2d at 615–16.
\item \textsuperscript{248} \textit{Id.} at 235, 680 P.2d at 616 (citing Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976)).
\item \textsuperscript{249} \textit{See} Ammerman, 89 N.M. at 312, 551 P.2d at 1359.
\item \textsuperscript{250} \textit{Cf.} \textit{id.} at 310, 551 P.2d at 1357 ("The 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."). \textit{But see} Browde & Occhialino, supra note 78, at 466 (deeming it unwise "to bootstrap the existence of a procedure rule into conclusive proof that the rule is procedural").
\item \textsuperscript{251} 51 N.M. 311, 183 P.2d 845 (1947).
\item \textsuperscript{252} \textit{Garcia}, 101 N.M. at 234, 680 P.2d at 615; \textit{see} \textit{Arnold}, 51 N.M. at 314, 183 P.2d at 846–47.
\end{itemize}
The court proceeded, however, to affirm the power of the judiciary not merely to modify a time limitation for an appeal, but to eliminate the right of appeal altogether.\textsuperscript{253} If the creation of a right of appeal is substantive and outside the supreme court’s rulemaking power, it follows that the elimination of that right is also substantive.\textsuperscript{254}

Rule 57 was superseded in 1986 as part of the supreme court’s comprehensive revision of its rules.\textsuperscript{255} In place of Rule 57, the court promulgated Rule 5-802, a rule of criminal procedure governing habeas corpus practice, and Rules 12-102(A)(5) and 12-501, rules of appellate procedure governing appeals in habeas corpus proceedings.\textsuperscript{256} Rules 5-802 and 12-102(A)(5) codified the provision in the 1983 Order giving the state a direct appeal to the supreme court from a district court order granting a writ of habeas corpus.\textsuperscript{257} Together with Rule 12-501, Rule 5-802 also made explicit what might have been inferred from the 1983 Order, namely, that a prisoner may request discretionary review of an order denying habeas relief by petitioning the supreme court for a writ of certiorari.\textsuperscript{258}

The replacement of Rule 57 with Rule 5-802 eliminated any distinction between a postconviction motion under the former rule and a petition for writ of habeas corpus.\textsuperscript{259} Indeed, the very purpose of Rule 5-802 was “to simplify and expedite post-conviction proceedings” by, among other things, eliminating the potentially redundant step of a Rule 57 motion as a precondition of habeas review.\textsuperscript{260} Just as the court of appeals deemed Rule 57 to abrogate the right of appeal in section 31-11-6,\textsuperscript{261} however, so, in its 1990 decision in \textit{State v. Peppers},\textsuperscript{262} did the court conclude that Rule 5-802 “preempted” the statutory right of appeal in section 31-11-6. The court relied for this conclusion on “the supreme court’s predominance when a supreme court rule and a statute conflict on matters of procedure.”\textsuperscript{263} It declined to consider a challenge of Rule 5-802 on constitutional and statutory grounds, citing its duty to follow supreme court rules.\textsuperscript{264} It also added in dicta that the appellant’s statutory argument was answered by \textit{Garcia}, although it did not specify whether section 34-5-8(A)(4) was among the statutes at issue.\textsuperscript{265}

\textsuperscript{253} \textit{Garcia}, 101 N.M. at 234–35, 680 P.2d at 615–16 (holding that, upon adoption of Rule 57 in 1975, “the statute was not effective to provide a post-conviction remedy to the extent it conflicted with Rule 57”).

\textsuperscript{254} \textit{See Arnold}, 51 N.M. at 314, 183 P.2d at 846–47; \textit{see also Johnson v. Terry}, 48 N.M. 253, 260, 149 P.2d 795, 799 (1944) (recognizing that, even when the supreme court exercises inherent rule-making power, “the court does not assume to affect substantive rights of the parties”); \textit{cf. NMSA 1978, § 38-1-1(A) (1966) (providing that court rules governing procedure shall “not abridge, enlarge or modify the substantive rights of any litigant”).}

\textsuperscript{255} \textit{State v. Peppers}, 110 N.M. 393, 396, 796 P.2d 614, 617 (Ct. App. 1990) (“[T]he supreme court superseded Rule 57 with Rule 5-802 in February 1986...”).


\textsuperscript{257} Rules 5-802(G)(1), 12-102(A)(5) NMRA (1986).

\textsuperscript{258} Rules 5-802(G)(2), 12-501 NMRA (1986).

\textsuperscript{259} \textit{See Martinez v. State}, 110 N.M. 357, 358–59, 796 P.2d 250, 251–52 (Ct. App. 1990) (holding that a petition styled as a petition for a writ of habeas corpus under Rule 5-802 was a postconviction remedy proceeding).

\textsuperscript{260} \textit{Peppers}, 110 N.M. at 396, 796 P.2d at 617.

\textsuperscript{261} \textit{See supra} notes 245–247 and accompanying text.

\textsuperscript{262} 110 N.M. 393, 796 P.2d 614 (Ct. App. 1990).

\textsuperscript{263} \textit{id.} at 396, 796 P.2d at 617.

\textsuperscript{264} \textit{id.} at 397–98, 796 P.2d at 618–19.

\textsuperscript{265} \textit{id.} at 398 n.2, 796 P.2d at 619 n.2.
The decision in *Peppers* recognized that the habeas procedure of Rule 5-802 was not the exclusive means of seeking postconviction relief and that other avenues might be available for seeking specific remedies after a conviction. These include a motion under Rule 5-614 for new trial, a motion under Rule 5-801 to reduce a sentence, and perhaps a motion under section 39-1-1 for relief from a judgment. The court of appeals continues to hear appeals of some rulings on such motions, apparently on the basis that they are preliminary to, and merged into, the final judgment in a criminal case and thus within the court's jurisdiction under section 34-5-8(A)(3).

In the wake of *Peppers*, however, it is firmly entrenched that Rule 5-802 prescribes the method of seeking review in most postconviction proceedings. The alternative postconviction motions identified by the court in *Peppers* serve limited purposes and can be brought only within relatively short periods after a criminal conviction. The habeas petition, in contrast, has become the one-size-fits-all procedural device for litigating a wide array of claims challenging "the constitutionality or legality of a confinement or detention" or other custodial deprivation. This Article does not question the propriety of applying the "Great Writ" flexibly to a broad range of claims. But the presumed efficacy of the habeas remedy does not justify the preemption by rule of a prisoner's right to a direct appeal, and the court's jurisdiction to hear the appeal, in the full range of postconviction proceedings.

Rule 5-802 was amended in 2002 and now provides for separate sets of procedures in death penalty and non-death penalty cases. The rule provides for an automatic right to appeal to the supreme court by any aggrieved party in a death penalty case. In non-death penalty cases, by contrast, Rule 5-802 retains the automatic right to appeal to the supreme court by any aggrieved party in a non-death penalty case.
disparate provisions for an automatic right to an appeal when the state seeks review of an order granting habeas relief, but only a discretionary appeal when a prisoner seeks review of an order denying relief.275

We emphasize that the appeal provided by Rule 5-802 is not an appeal under section 34-5-8(A)(4) by a different name. The supreme court’s very power to issue writs of habeas corpus is not statutory at all, but constitutional. It is part of the supreme court’s original jurisdiction under article VI, section 3 and is concurrent with the district courts’ original jurisdiction under article VI, section 13.276 Before the adoption of Rule 5-802, the supreme court effectively reviewed district court denials of relief in habeas proceedings by entertaining petitions for writ of habeas corpus in most cases only after the petitioner had unsuccessfully sought relief in the district court.277 Nonetheless, the supreme court long held that there was no right of appeal in habeas corpus proceedings (as distinguished from statutory postconviction remedy proceedings) because the legislature had not granted such a right.278 Thus, Rule 5-802 notwithstanding, the supreme court’s jurisdiction in habeas proceedings is original.

In contrast, the court of appeals’ jurisdiction in postconviction remedy proceedings is strictly statutory since the intermediate court has no original jurisdiction.279 Rule 5-802 conflicts with the constitutional regime both by asserting an appellate jurisdiction in the supreme court in habeas corpus proceedings and by supplanting the appellate jurisdiction of the court of appeals in postconviction remedy proceedings.280

Nor can Rule 5-802 be understood as an exercise of the supreme court’s authority under section 34-5-8(B) to transfer appeals in postconviction remedy proceedings from the court of appeals to itself. Because review under section 34-5-8(A)(4) is mandatory, it is exclusive of the supreme court’s exercise of a power under Rule 5-802 to decline to hear an appeal by denying a petition for certiorari. An appeal under Rule 5-802, which in some cases is mandatory and in other cases discretionary, is fundamentally inconsistent with an appeal under section 34-5-8(A)(4), which in all cases is mandatory.281

275. Rule 5-802(H) NMRA (providing in non-death penalty cases that “if the writ is granted, the state may appeal as of right pursuant to the Rules of Appellate Procedure,” and “if the writ is denied, a petition for certiorari may be filed with the Supreme Court”).

276. N.M. CONST. art. VI, §§ 3, 13; see Ex parte Nabors, 33 N.M. 324, 326, 267 P. 58, 59 (1928).


278. See California v. Clements, 83 N.M. 764, 764, 497 P.2d 975, 975 (1972) ("[P]etitioner has no right of appeal to this court from the denial by the district court of his petition for writ of habeas corpus."); State v. Sisk, 79 N.M. 167, 168, 441 P.2d 207, 208 (1968) ("[N]o appeal is available in habeas corpus proceedings."); Notestine v. Rogers, 18 N.M. 462, 467, 138 P. 207, 208 (1914) (holding that courts will not recognize right of appeal in habeas corpus cases until legislature provides for such right "in clear and unequivocal language, and under suitable regulations which do not impair the constitutional provisions governing the right to the writ"); see also supra note 244.

279. N.M. CONST. art. VI, § 29; see State ex rel. Townsend v. Court of Appeals, 78 N.M. 71, 73, 428 P.2d 473, 475 (1967).

280. Rule 5-802(F)(6), (H) NMRA; see State v. Peppers, 110 N.M. 393, 396, 796 P.2d 614, 617 (Ct. App. 1990) (holding that Rule 5-802 “pre-empted” the right of appeal in postconviction remedy proceedings as provided by statute).

In summary, the appellate jurisdiction currently asserted by the supreme court in postconviction remedy proceedings is contrary to article VI, section 2 because it is as provided by rule rather than statute. Section 34-5-8(A)(4) confers jurisdiction on the court of appeals in all postconviction remedy proceedings. In contrast, the supreme court’s rules assert jurisdiction in the supreme court itself to hear mandatory appeals by either party in death penalty cases, and mandatory appeals by the state but only discretionary appeals by prisoners in non-death penalty cases.

D. The Writ of Error in the Court of Appeals

The writ of error was once the procedural vehicle for judicial review of proceedings at law, while an appeal was the vehicle for review of proceedings in equity. After the merger of law and equity, and by the time of the 1992 decision in Carrillo v. Rostro, the writ of error procedure had “fallen into almost complete disuse” and was “largely a dead letter.” In Carrillo, however, the supreme court announced that it was adapting the writ of error to a new role, that of implementing in New Mexico the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp. The court intended that the writ of error would permit immediate review in exceptional cases in which the remedy by way of appeal after final judgment was inadequate and an interlocutory appeal under the existing statutory authority was unavailable.

Carrillo made clear that the supreme court would issue writs of error, but whether it contemplated that the court of appeals might also do so is unclear: “[T]he aggrieved party will have to apply to this Court for a writ of error, which will be issued or not in our discretion.” The decision noted that, in designating the writ of error as the appropriate procedural device to be employed in these circumstances, the court was exercising its constitutional power of superintending control. Absent a constitutional limitation, the court presumably could invoke its superintending power.

---

283. 114 N.M. 607, 845 P.2d 130.
284. Id. at 617-18, 845 P.2d at 140-41.
285. 337 U.S. 541 (1949); see Carrillo, 114 N.M. at 617-18 & n.9, 845 P.2d at 140-41 & n.9. The court in Carrillo quoted a recent articulation of the collateral order doctrine by the U.S. Supreme Court as follows: “The collateral order doctrine is a ‘narrow exception,’ whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. To fall within the exception, an order must at a minimum satisfy three conditions: It must ‘conclusively determine the disputed question,’ ‘resolve an important issue completely separate from the merits of the action,’ and ‘be effectively unreviewable on appeal from a final judgment.’” Id. at 613, 845 P.2d at 136 (quoting Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430-31 (1985) (other citation omitted)).
286. See Carrillo, 114 N.M. at 617-19, 845 P.2d at 140-42; cf. NMSA 1978, §§ 39-3-2 (1966) (conferring jurisdiction over appeal in civil case from “any final judgment or decision”), 39-3-4 (2) (1999) (conferring jurisdiction over interlocutory appeal when district court certifies that order or decision involves controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal may materially advance ultimate termination of litigation).
287. Carrillo, 114 N.M. at 617, 845 P.2d at 140 (emphasis added); see also Rule 12-503 NMRA (1992) (“Writs of error will be issued by the supreme court only upon a showing that the remedy by way of appeal is inadequate.”) (emphasis added), quoted in Carrillo, 114 N.M. at 617, 845 P.2d at 140.
power to amend Rule 12-503 and to authorize the court of appeals to issue writs of error in cases within its jurisdiction. The supreme court appears to have intended that result when, one year after Carrillo, it rewrote Rule 12-503. As amended in 1993, the rule provides that the court of appeals, as well as the supreme court, can issue writs of error. Rule 12-503(B), entitled "Jurisdiction to issue," reads as follows: "As part of its appellate jurisdiction pursuant to Article 6, Section 29 of the Constitution of New Mexico, the Court of Appeals is granted authority to issue writs of error in those cases over which it would have appellate jurisdiction from a final judgment."289

This "grant" of authority to the court of appeals is difficult to reconcile, however, with either the court of appeals' jurisdiction pursuant to article VI, section 29, or the supreme court's power to make rules authorizing the court of appeals to issue writs necessary or appropriate in aid of its jurisdiction. The court of appeals' jurisdiction is as may be provided by law.290 As the court in Carrillo recognized, a statute, section 39-3-5, grants authority to issue writs of error to the supreme court, but it limits that authority to cases in which the court of appeals does not have jurisdiction:

"Writs of error to bring into the supreme court any cause adjudged or determined in any of the district courts, as provided by law, may be issued by the supreme court, or any justice thereof, if application is made within the time provided by law for the taking of appeals. A writ of error shall issue from the supreme court to the district court only in those actions wherein appellate jurisdiction has not been vested by law in the court of appeals."291

Section 39-3-5 is not the only source of the supreme court's power to issue writs of error. As the court in Carrillo also recognized, the constitution confers that power on the supreme court as part of its original jurisdiction.292 As previously noted,293 however, the court of appeals has no original jurisdiction and cannot issue writs available to the supreme court except insofar as it is authorized to do so by rule in aid of its appellate jurisdiction.294 The constitutional question reduces, then, to whether the supreme court, through Rule 12-503, could authorize the court of appeals to issue writs of error as necessary or appropriate "in aid of" the intermediate court's appellate jurisdiction.295

We must conclude that the supreme court could not do so because authority to issue writs in aid of jurisdiction cannot be granted where no underlying jurisdiction is provided by law. No statute grants the court of appeals jurisdiction in the instances before final judgment when it issues writs of error. To the contrary, the only circumstances in which writs of error are authorized by statute are precisely those under section 39-3-5 in which the court of appeals lacks jurisdiction.296
12-503 itself purports to grant the court of appeals authority to issue writs of error when it would not otherwise have jurisdiction inasmuch as that authority is to be exercised only when the court of appeals "would have" jurisdiction after a final judgment. 297 It follows that, but for Rule 12-503, the court of appeals would lack jurisdiction for want of a final judgment. 298 Under both section 39-3-5 and Rule 12-503 itself, then, the court of appeals' authority to issue writs of error is not in aid, but in absence, of its appellate jurisdiction.

There are sensible reasons for the supreme court to have sought, through Rule 12-503, to authorize the court of appeals to issue writs of error. As the rule anticipates, the court of appeals would have jurisdiction, after final judgment, in at least some of the cases in which immediate review is sought. Indeed, New Mexico courts have thus far recognized only two types of orders reviewable by writ of error: (1) denials of claims of sovereign immunity in breach-of-contract actions and (2) denials of claims of qualified immunity in civil rights actions. 299 Appeals from final judgments in both contract and civil rights actions are within the court of appeals' jurisdiction over civil actions generally. 300 It is logical from the standpoint of judicial economy that the court of appeals should hear an appeal before judgment in a case in which it may hear another appeal after judgment. It may have been just such considerations that led the supreme court to "grant" jurisdiction to the court of appeals to conduct immediate review by writ of error.

Be that as it may, expediency and wisdom cannot save Rule 12-503 from constitutional infirmity any more than mere silliness would condemn it. 301 The revival of writ of error procedure in Carrillo apparently began with the assumption that the supreme court itself would exercise that power. The court of appeals' jurisdiction as provided by law is not compatible with the intermediate court's use of the writ of error.

E. Judicial Election Contests

Until recently, the New Mexico Code of Judicial Conduct, like similar rules in other states, restricted candidates for election to judicial office in what they could say in the electoral process. A candidate was prohibited to "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court" or to "announce how the candidate would rule on any case or issue that may come before the court." 302 In the 2002

297. Rule 12-503(B) NMRA.
298. See id.; see also Carrillo, 114 N.M. at 612–13, 845 P.2d at 135–36 ("It is of course firmly established that, subject to certain exceptions, this Court has no jurisdiction to review an order or decision that is not final..."); State v. Apodaca, 1997-NMCA-051, ¶ 11, 940 P.2d 478, 481 ("[O]ur Supreme Court has not adopted the view of the United States Supreme Court that an order satisfying the collateral order doctrine is a 'final decision.'").
301. See State ex rel. Clark v. Johnson, 120 N.M. 562, 570, 904 P.2d 11, 19 (1995) ("Although it is not within the province of this Court to evaluate the wisdom of an act of either the legislature or the Governor, it certainly is our role to determine whether that act goes beyond the bounds established by our state Constitution.").
decision in *Republican Party of Minnesota v. White*, the U.S. Supreme Court announced that a similar prohibition in Minnesota violated the First Amendment right of free speech. After the decision in *White*, New Mexicans undoubtedly were concerned that, without some restraints on the political activity of candidates for judicial office, election campaigns could so degenerate as to undermine public confidence in the judiciary.

The result in New Mexico was to repeal the restrictions on candidate speech quoted above but to retain other restrictions not directly addressed in *White* and to establish new means of enforcing them. Among the remaining restrictions are requirements that candidates for election to judicial office maintain the dignity appropriate to judicial office, refrain from making promises inconsistent with the impartial performance of adjudicative duties, and refrain from campaign fund-raising activities having the appearance of impropriety. To enforce these and other standards in the Code of Judicial Conduct, the supreme court recently amended the Code to create a private right of action. Rule 21-900(C) provides that a judicial election candidate may bring an action to challenge an opponent’s violation of Rule 21-700 or Rule 21-800, relating to political and campaign fund-raising activities. The new rule prescribes detailed procedures for such actions. In addition, the rule creates a right of direct appeal to the supreme court: “Appeals shall be taken directly to the Supreme Court of New Mexico pursuant to the provisions of Rule 12-603 NMRA of the Rules of Appellate Procedure.”

Rule 12-603, to which Rule 21-900(C) refers, “governs appeals taken pursuant to NMSA 1978, §§ 1-8-18 and 1-8-35.” Sections 1-8-18 and 1-8-35, in turn, grant a right of appeal to the supreme court in an action by a voter challenging the qualifications of a candidate for nomination by a political party or for primary election. Section 1-8-18, which creates the underlying right of action, specifies the two grounds on which the candidate’s qualifications may be challenged, namely, party affiliation and place of residence. Rule 12-603 poses no apparent conflict with sections 1-8-18 and 1-8-35 as the rule does not purport to alter the supreme court’s jurisdiction to hear the appeals that the statutes authorize, and indeed, the procedural details that it establishes appear consistent with those provided in section 1-8-35.

---

304. Id. at 788.
305. Rule 21-700(B)(1) NMRA.
306. Rule 21-700(B)(4)(a) NMRA.
307. Rule 21-800 NMRA.
309. See, e.g., Rule 21-900(C)(1) NMRA (specifying filing, service, and venue requirements); Rule 21-900(C)(3) NMRA (specifying procedure for hearing); Rule 21-900(C)(5) NMRA (specifying procedure for discovery).
310. Rule 21-900(C)(6) NMRA.
311. Rule 12-603(A) NMRA.
312. NMSA 1978, § 1-8-18(B) (1981); id. § 1-8-35(A) (1993).
313. Id. § 1-8-18(A)(1)–(2).
314. Compare id. § 1-8-35(A) (specifying that appeal shall be to supreme court and notice of appeal shall be filed within five days after district court’s decision), with Rule 12-603(B)–(C) NMRA (specifying the same).
Rule 21-900(C), by contrast, is not sanctioned by section 1-8-18, section 1-8-35, or any other statutory authority. The right of action that the rule establishes is independent of that authorized by section 1-8-18. A judicial candidate's challenge of an opponent's failure to maintain the dignity appropriate to judicial office, for example, need not have anything to do with the opponent's party affiliation or place of residence. Whereas Rule 12-603 addresses the procedure to be followed in appeals taken “pursuant to” specific statutes, Rule 21-900(C) cites no statute pursuant to which an appeal is to be taken. Rule 21-900(C) thus does not merely specify the procedure for appeal, but creates the right of appeal itself and, by implication, the supreme court's jurisdiction to hear the appeal. That is precisely what *State v. Arnold* says the court is “powerless” to do because creating a right of appeal is a matter of substantive law beyond the court's rule-making power.  

One might argue that the supreme court’s inherent authority and supervisory control over the lower courts empower it to create a right of action and to grant a right of appeal when necessary to the enforcement and vindication of its rules of professional and judicial conduct. But this view of Rule 21-900(C) cannot be squared with the inherent authority doctrine on its own terms. The rule’s designation within the Code of Judicial Conduct does not in and of itself legitimize it. On its face, the rule is not limited to regulating the practice of law or the conduct of attorneys or judges in judicial proceedings. The remedies that it authorizes—“any remedial decrees for cessation of violations, retractions, corrective publications or other relief as may be reasonably required to rectify the effects of the violation”—are explicitly cumulative of the courts' authority to refer alleged violations to the Judicial Standards Commission or the Disciplinary Board of the Supreme Court for enforcement. The power to enforce standards of judicial conduct is delegated in the first instance to the district courts, which possess neither the supreme court’s authority over disciplinary proceedings nor its power of superintending control over the entire court system. The conduct at which the rule is directed, moreover, occurs almost of necessity outside judicial proceedings, in election campaigns and political discourse by which candidates seek to become or remain judges.

Election campaigns are an area in which the supreme court has in the past been especially reluctant to invoke its rule-making power in conflict with the legislature’s actions. In *Eturriaga v. Valdez*, the court held that a thirty-day period prescribed by statute for initiating an election contest prevailed over a fifteen-day time

---


317. *See supra* note 250 and accompanying text.

318. Rule 21-900(C)(4) NMRA.

319. *Id. Compare N.M. Const. art. VI, § 3* (granting supreme court superintending control over all inferior courts), *with art. VI, § 13* (granting district courts superintending control over courts and tribunals inferior to district courts).

limitation established in Rule 1-087(B) of the Rules of Civil Procedure. The court construed the thirty-day period as "a limitation on the substantive right the legislature has created as well as on the remedy afforded any particular aggrieved party," and it explained that election contests traditionally have been viewed as "special proceedings" in which legislative rules are "binding on the district court as well as the parties." Whereas the court in Arnold held that regulations affecting the time of taking an appeal are a proper subject of court rules, the decision in Eturriaga clarifies that, where election contests are concerned, even the seemingly procedural detail of the time in which to commence an action is for the legislature to decide.

Perhaps the result in Eturriaga merely demonstrates the elusiveness of the substance-procedure distinction on which the decision rests. Courts and commentators have remarked that the distinction frequently is invoked to announce an outcome rather than to justify it. The discipline of identifying and evaluating pertinent considerations of public policy is a vital part of judicial decision making and should not be short-circuited by wooden application of judicial constructs such as the substance-procedure dichotomy. Still, the distinction persists, and its sheer durability suggests a continuing utility as shorthand for the underlying interests at stake. Thus, Eturriaga's classification of a time limitation as substantive may denote an implicit, policy-based determination that the legislature should be given wide berth in its regulation of election contests. Agreeing with that premise, we conclude that a court rule such as Rule 21-900(C) extends too far into the legislature's domain when it establishes a right to bring an action challenging election conduct and a right to appeal from an adverse decision in such a case.

V. THE JUDICIARY'S PLACE IN A GOVERNMENT OF SEPARATE POWERS

The issue of whether the legislature or the judiciary should have the power to regulate the courts' appellate jurisdiction ultimately reduces to a debate over the proper balance of powers as between the two branches. We believe that there is a structural reason for concluding that the framers of article VI struck the right balance. That reason lies in the core functions of the legislature, the executive, and the judiciary. In the simplest terms, "'[t]he Legislature makes, the executive..."
executes, and the judiciary construes the laws.”

Although these functions inevitably overlap, the basic powers of each branch “are nonetheless ‘functionally identifiable’ one from another.” The “very essence of judicial duty,” in the archetypal enunciation of *Marbury v. Madison*, is “to say what the law is.” The province to say what the law is, has ever since been understood to entail the power to review acts of the legislature and the executive—that is, to declare that such acts are not “the law” when they are found to conflict with the fundamental law. To review and invalidate an act of a co-equal government branch is surely among the most far-reaching of judicial powers. It also poses a subtle but significant risk when it is exercised. When a court strikes down an act of the legislature or the executive, it frustrates the popular will. The courts’ legitimacy is vulnerable to attack when their actions impede the efforts of the government’s political branches.

Concomitant with the courts’ power of review, then, is the importance of restraint if the courts are to succeed in maintaining a sound balance of powers. In this regard too, *Marbury* stands as the seminal authority. “[I]t is apparent,” Chief Justice Marshall wrote, “that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature....[C]ourts, as well as other departments, are bound by that instrument.” The judiciary is the final arbiter, however, of whether any branch of government, including itself, is acting constitutionally. For that very reason it should not be free to expand its own power at will. That is the essential problem with empowering the courts to prescribe their own jurisdiction. To invoke *Marbury* once again, prescribing limits on the legislature’s actions while “declaring that those limits may be passed at pleasure” would give “to the legislature a practical and real omnipotence.”

A comparable risk is presented when the judiciary announces limits on its own authority but reserves to itself the option to pass those limits at its pleasure. It may be too much to say that the judiciary, “the least dangerous” branch, will become omnipotent if it is permitted to write its own work assignments. Nonetheless, judges, like other humans, surely are susceptible to the “hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives.” We have sought to identify instances, few though they are, in which the New Mexico Supreme Court has asserted authority that the constitution reserves to the legislature. The issue is not merely that the court has trespassed into the “substantive” realm in such instances,

---


329. 5 U.S. (1 Cranch) 137 (1803).

330. *Id.* at 177-78.


333. *Id.* at 178.


although that is how New Mexico law commonly puts it. The more fundamental problem is that empowering the courts to decide the extent of their own power threatens to disrupt the judiciary’s relationship with co-equal branches of government. A power of self-appointment threatens to accrue too much power to a single branch. It gives the judiciary a roving commission to decide what it sees fit to hear and to reserve to itself the last word on what it decides. It poses the countervailing risk, as well, of provoking an opposite reaction in the political realm, a retaliatory act by another branch of government or an undermining of public confidence in the courts.

The drafters of the Model Judicial Article argued that a power in the supreme court to prescribe the courts’ jurisdiction would enhance the judiciary’s independence. That is a truism—enhanced independence is a euphemism for greater power. But to shift a power traditionally exercised by the legislature to the judiciary is to alter the balance of powers, and proponents of such a shift bear the burden of demonstrating an imbalance. Unless the respective powers of the several branches have until now been in disequilibrium—unless the legislature has been wielding excessive power over the courts for more than 200 years—an enhancement of the judiciary’s independence risks disrupting the existing balance.

Advocates of greater judicial power have also sometimes invoked the principle of separation of powers. In State ex rel. Anaya v. McBride and Ammerman v. Hubbard Broadcasting, Inc., the supreme court relied in part on the New Mexico Constitution’s separation-of-powers mandate as the source of an inherent and exclusive power to regulate practice and procedure in the courts. Justice Carmody likewise cited the separation-of-powers principle in urging that the 1965 amendments should follow the Model Judicial Article and empower the judiciary to define its own jurisdiction.

These authorities read too much into the separation-of-powers principle. The constitutional mandate of separate powers does not assign particular powers to any government branch but merely prohibits each branch from assuming powers “properly belonging” to another. To determine whether the power to regulate the courts’ appellate jurisdiction properly belongs to the legislature or the judiciary, one must look to other constitutional provisions, such as sections 2 and 29 of article VI. In this sense the operation of the separation-of-powers mandate is purely negative. It serves to limit the exercise of powers that the constitution elsewhere affirmatively grants. The supreme court has sometimes said that “state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are
limitations on the powers of each.'\textsuperscript{343} While that is an overstatement—some sections of the constitution plainly do grant power affirmatively—it aptly describes the separation-of-powers mandate.

When a court relies on the separation-of-powers principle to justify its exercise of a given power, it has already reached the conclusion, whether explicitly or not, that the power in question properly belongs to it. The question remains whether the court is correct in claiming that power. Under existing law, the validity of judicial acts, like that of legislative or executive acts, ultimately is to be measured "solely by the yardstick of the constitution."\textsuperscript{344} The power to prescribe the courts' appellate jurisdiction, in particular, belongs to the legislature and not the courts because the constitution says so explicitly.\textsuperscript{345} Thus, what has sometimes been perceived as legislative encroachment on the judiciary's domain is more accurately a function of the constitutional plan. If the judiciary's power of review is a legitimate check on legislative and executive power, the legislature's power to regulate the courts' jurisdiction is a legitimate check on judicial power.\textsuperscript{346}

There is, as we have noted, a more specific and explicit delegation to the supreme court of authority over the judiciary, namely the power of superintending control in article VI, section 3. Superintending control has never been thought of as a basis on which the courts might alter their own jurisdiction, however, as the decision in Ammerman makes clear.\textsuperscript{347} Rather, the power is limited by its terms to control over "inferior courts,"\textsuperscript{348} meaning the lower courts enumerated in article VI.\textsuperscript{349} The supreme court has from time to time invoked its superintending control to perform the adjudicatory function of affording review of a lower court's action under unusual circumstances in which an appeal is deemed inadequate.\textsuperscript{350} The court can also put its superintending control to administrative purposes, such as designating a procedure for obtaining review.\textsuperscript{351} The focus in all events, however, is the judiciary's internal operations rather than its external relations with other branches of government. To regulate the conduct of the lower courts and the litigants who come before them is a superintending function. To alter the supreme court's own power, and thus the judiciary's position in relation to other government branches, is not.

Finally, there is the possibility that the judiciary should have the power to define its own jurisdiction because such power is necessary to the courts' essential role and


\textsuperscript{344} Id. (quoting Hovey Concrete Prods., 63 N.M. at 252, 316 P.2d at 1070).

\textsuperscript{345} See N.M. CONST. art VI, §§ 2, 29.

\textsuperscript{346} See, e.g., In re Daniel H., 2003-NMCA-063, ¶ 17, 68 P.3d 176, 180 ("T]he separation of powers doctrine precludes the legislature from stepping into the judiciary's exclusive domain of prescribing the rules of judicial practice and procedure and similarly precludes the judiciary from overturning or contradicting a constitutional legislative declaration of substantive law.").

\textsuperscript{347} See supra note 181 and accompanying text.

\textsuperscript{348} N.M. CONST. art. VI, § 3.


\textsuperscript{350} See In re Extradition of Martinez, 2001-NMSC-009, ¶ 12, 20 P.3d 126, 131.

functioning—because, in short, it is inherently judicial. Recent New Mexico decisions continue to posit inherent powers in the courts, powers that the supreme court deems within its province to define precisely because they are inherently judicial. The conception of inherent power in these decisions is notably more restrained than the inherent authority of earlier decisions such as Ammerman and McBride. Thus, the court has described inherent powers as those “‘powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others,’” and it has explained that a court’s use of inherent powers is justified when necessary to protect “the court’s ability to perform its essential judicial functions.” In the federal sphere, debate continues over the similar question of whether Congress’s power under Article III of the U.S. Constitution to make exceptions and regulations governing the U.S. Supreme Court’s appellate jurisdiction is limited by the Court’s essential role.

We have no quarrel with the premise that a court possesses inherent powers to be deployed “to protect itself from indignities and to enable it effectively to administer its judicial functions.” It is also clear that the legislature’s power to regulate the courts’ jurisdiction is not unlimited. If the legislature simply abolished appellate jurisdiction altogether, for example, it would not be “providing by law” for the courts’ jurisdiction in any meaningful sense. More than that, the legislature would infringe the constitutional guarantee of “an absolute right to one appeal” if it withdrew or failed to extend any appellate recourse to an aggrieved party.

But neither the courts’ inherent power to perform their essential functions, nor any limitation on the legislature’s power to regulate their jurisdiction, suggests that the courts will be left defenseless if they do not possess the power to prescribe their own jurisdiction. The courts are protected in other ways, both political and legal, from meddling by other government branches. The first line of defense is the popular will. Historically, attempts by the legislative and executive branches to interfere with the courts’ functioning have almost always failed for the simple reason that they have been unpopular. If that defense fails, the courts’ well-accepted protection against unconstitutional attempts to undermine their authority


353. See N.M. Right to Choose/NARAL, 1999-NMSC-028, ¶ 27, 986 P.2d at 458 (stating that courts should invoke their inherent powers “‘sparingly and with circumspection’” (quoting Baca, 120 N.M. at 8, 896 P.2d at 1155)).


357. State ex rel. Bliss v. Greenwood, 63 N.M. 156, 162, 315 P.2d 223, 227 (1957); accord Hudson, 11 U.S. (7 Cranch) at 34; Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807).

358. N.M. CONST. art. VI, § 2.

359. See, e.g., WILLIAM H. REHNQUIST, THE SUPREME COURT 120–33, 267–73 (rev. ed. 2001) (describing public outcry over court-packing plan and other attacks on the U. S. Supreme Court); Elliott, supra note 118, at 604–08 (recounting failure of attacks on U.S. Supreme Court, including President Franklin Delano Roosevelt’s court-packing plan); Gunther, supra note 356, at 896–97 (noting that attempts to curb the U.S. Supreme Court’s jurisdiction have recurred throughout the Court’s history but, with one exception during the Reconstruction era, have always failed).
APPELLATE JURISDICTION IN NEW MEXICO

is the power of review.\textsuperscript{360} The courts’ essential role remains one of \textit{review}, however, not of prescription.\textsuperscript{361} To enlist a power to prescribe jurisdiction would be to abandon the essential role of the judiciary in the name of preserving it.

Consistent with this conclusion, the supreme court’s recent pronouncements emphasize that inherent judicial powers should not extend to broad public policy determinations outside the confines of case-by-case judicial decision making.\textsuperscript{362} Public policy choices are first and foremost the mission of the legislature, second, that of the executive, and for the judiciary “only when the body politic has not spoken and only with the understanding that any misperception of the public mind may be corrected shortly by the legislature.”\textsuperscript{363} In the familiar shorthand, the courts should not make substantive law.\textsuperscript{364} The most compelling reason that the courts should avoid that thicket, however, is not the moniker “substance.” It is instead that the notion of inherent judicial power fails to furnish principled grounds for decision making by the government’s least politically accountable branch.\textsuperscript{365} By asserting the power to define its own appellate jurisdiction, the supreme court assumes the role of primary policy maker, deciding which classes of appeals are worthy of review and which are not. Such policy choices are constitutionally unreviewable and in large part politically unaccountable. It is that combination that the framers of article VI avoided, properly in our view, when they kept the power to provide for the courts’ appellate jurisdiction in the legislature.

VI. RECOMMENDATIONS AND CONCLUSION

This Article has argued that the supreme court’s rules depart in a few scattered but significant instances from the constitutional and statutory provisions governing the appellate jurisdiction of the supreme court and the court of appeals. If one accepts that argument, it remains to be determined how the conflict should be resolved. The single most important step toward a resolution is recognition of the conflict. Upon a clarification of the respective constitutional responsibilities of the legislature and the supreme court in providing for and implementing the courts’ jurisdiction, existing incongruities between statutes and rules can readily be eliminated and future ones can be avoided.

Such incongruities could perhaps be disposed of in one fell swoop if the legislature simply ceded to the courts the power to provide for their jurisdiction under article VI. The legislature could simply provide by statute that the courts’ jurisdiction shall hereafter be as provided by court rule, much as, in the 1933 Act,

it provided that pleading, practice, and procedure are to be regulated by court rule. The constitutionality of such an act presumably would depend on whether the legislature’s power to provide by law for courts’ jurisdiction can be delegated or whether instead it is exclusively legislative. However that may be, this Article posits that an open-ended delegation of legislative power to prescribe the courts’ jurisdiction would be unwise. Article VI contemplates that the legislature will have an ongoing role in regulating the courts’ appellate jurisdiction, and there are good reasons that it should. The authors’ share Judge Encinias’s view, enunciated in response to a similar proposal in 1983, that the better course is to “honor the constitutional mandates.”

Short of the legislature relinquishing its power to provide for the courts’ jurisdiction, the task is to identify the concrete changes that are needed in order to harmonize the pertinent rules and statutes. In fact, the necessary changes are quite modest. The supreme court’s evolution toward a true court of last resort has tended to restore to the court of appeals the general error-correcting role assigned to it by the basic jurisdictional statute, section 34-5-8. This trend is most evident in the return of contract case appeals to the court of appeals, but the evolution in the two courts’ respective roles extends beyond contract cases.

A simple change of wording should suffice to correct the discrepancy in Rule 12-102(A)(4). To conform the rule to article VI, the 1986 amendment replacing “specific provision of state law” with “supreme court order or rule” should be undone. This change would appropriately acknowledge the legislature’s constitutional authority to provide for the courts’ jurisdiction, and it would eliminate the implication that the supreme court does not exercise jurisdiction as provided by law. Perhaps Rule 12-102(A)(4) is merely emblematic of an underlying problem, but solving the problem begins in this instance with a change of emblem.

The remaining discrepancies noted in this Article should be addressed through the cooperative efforts of the supreme court and the legislature. In each case, the discrepancy between rule and statute could be eliminated in either of two ways: (1) the supreme court could withdraw a rule insofar as it purports to extend or withdraw appellate jurisdiction, or (2) the legislature could codify and effectively ratify the policy embodied in the rule.

For postconviction remedy proceedings, the basic question is whether appeals should be heard in the first instance by the court of appeals in accordance with section 34-5-8(A)(4) or by the supreme court in accordance with Rule 5-802. Recognition of the court of appeals’ statutory jurisdiction over appeals in such proceedings (except those involving a sentence of death or life imprisonment) is most consistent with the trend toward general error-correcting jurisdiction in the court of appeals and discretionary review in the supreme court. The supreme court

366. NMSA 1978, § 38-1-1 (1966); see supra notes 91–92 and accompanying text.
370. See infra notes 177–178 and accompanying text; cf. N.M. Const. art. VI, §§ 2, 29.
APPELLATE JURISDICTION IN NEW MEXICO retains original jurisdiction under article VI, section 3 to issue writs of habeas corpus, and that power would not change; but if it adhered to its past decisions, the court would exercise its original power in the first instance only upon a showing of controlling necessity. The lessons learned from two decades of experience under Rule 5-802 are nonetheless relevant. In particular, the 2002 amendment of Rule 5-802, establishing separate procedures for death penalty cases, goes part way toward a logical division of appeals in postconviction proceedings. This portion of the rule, if extended to encompass cases involving sentences of life imprisonment as well as death, would dovetail with the supreme court’s appellate jurisdiction over such cases as established by the constitution and existing statutes. A further amendment of Rule 5-802 might acknowledge the court of appeals’ jurisdiction over appeals in postconviction remedy proceedings not within the supreme court’s appellate jurisdiction.

Rule 21-900(C) presents a similar set of choices. There are practical reasons for preferring the supreme court as the appellate forum in actions challenging conduct in judicial election campaigns. The supreme court has superintending control over the judiciary generally and authority to enforce disciplinary standards in particular. The supreme court is the court to which the legislature has directed appeals in other electoral disputes. The abbreviated time in which such disputes occur also favors a right of direct appeal to the supreme court. All of these circumstances are relevant to the legislature’s consideration, but the fundamental question of whether to create a right of action and an incident right of appeal is for the legislature to decide. The legislature, in consultation with the supreme court, should determine whether to enact a statute incorporating the provisions (or at least the substantive provisions) of Rule 21-900(C). If the legislature ultimately rejects the proposition that judicial candidates should have a right of action to contest election conduct, the supreme court should withdraw Rule 21-900(C).

Finally, we believe that the writ of error is not well-suited as a procedural mechanism for invoking the collateral order doctrine in the court of appeals. It would be a simple matter, however, for the legislature to enact a statute authorizing review in accordance with the collateral order doctrine. An existing statute, section 39-3-4, already authorizes interlocutory appeals under stated conditions. The legislature could extend the authority for interlocutory appeal to the conditions specified by the collateral order doctrine as adopted by the New Mexico Supreme Court.

371. See, e.g., Ex parte Nabors, 33 N.M. 324, 326, 267 P. 58, 59 (1928).
372. See Rule 5-802(F) NMRA.
376. If the legislature chose to codify Rule 21-900(C) in its entirety, provisions deemed procedural would presumably be subject to modification by supreme court rule in accordance with NMSA 1978, § 38-1-2 (1933) and Rule 1-091 NMRA. See Lovelace Med. Ctr. v. Mendez, 111 N.M. 336, 340-41, 805 P.2d 603, 607-08 (1991).
377. NMSA 1978, § 39-3-4 (1971) (authorizing interlocutory appeal where district court certifies that order or decision involves controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal may materially advance ultimate termination of litigation).
This Article has suggested that coordinated efforts of the supreme court and the legislature hold out the best prospect for a successful resolution of the incongruities that have been noted. But while collaboration is preferable, it should proceed from a shared understanding of the legislature’s constitutional prerogative to provide for the courts’ appellate jurisdiction. It is axiomatic that the courts have the last word on whether the legislature has acted within its constitutional authority. It should also be remembered that the legislature has the first word on the extent of the appellate power.