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Simona Martinez-McConnell

THE UNSTATED TENSION IN *ALBUQUERQUE RAPE CRISIS CENTER v. BLACKMER*: A DIVERGENCE BETWEEN FORMALISM AND FUNCTIONALISM

SIMONA MARTINEZ-MCCONNELL*

I. INTRODUCTION

The doctrine of separation of powers provides the cardinal framework for federal and state governments in the United States, the importance of which is illustrated in the Constitution[1] and, specific to New Mexico, the New Mexico Constitution.[2] In accordance with the tenets embodied by separation of powers principles, our government is divided into three independent and co-equal branches of government in an effort to prevent the undue concentration of power in one branch.[3] Although seemingly straightforward, separation of powers analysis often proves problematic because the traditional methods of interpreting the doctrine—formalism and functionalism—are dichotomous.[4]

Formalism posits that each branch of government should exercise only the power it constitutionally is authorized to exercise; as a result, the inquiry is limited to the text, origin, and structure of the constitution.[5] Functionalism, on the other hand, advocates a more pragmatic approach and allows the branches to overlap and blend as long as the autonomy and integrity of one branch is not encroached upon by another branch.[6] New Mexico case law has historically vacillated between an application of functionalism and formalism, which is evinced by the New Mexico Supreme Court's decision in *Albuquerque Rape Crisis Center v. Blackmer*.[7] The discord between the majority and dissent in *Blackmer* exemplifies the tensions underlying the competing theoretical approaches to separation of powers issues.[8]

The underlying issue in *Blackmer* was whether an alleged rape victim could assert a statutory testimonial privilege[9] and thus preclude the defendant from access to communications she had with the Albuquerque Rape Crisis Center.[10] The issue compelled the court in *Blackmer* to determine whether the New Mexico Legislature had the constitutional authority to enact a rule affecting court practice and

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1. U.S. CONST. arts. I–III.
2. N.M. CONST. art. III, § 1.
3. Bd. of Educ. v. Harrell, 118 N.M. 470, 483, 882 P.2d 511, 524 (1994).
4. *See* William N. Eskridge, Jr., *Panel I: Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998).
5. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–24 (1991).
6. *See* Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 967 (1995).
7. 2005-NMSC-032, 120 P.3d 820.
8. *Id.*
9. NMSA 1978, §§ 31-25-1 to -6 (2006).
10. 2005-NMSC-032, ¶ 2, 120 P.3d at 821.

procedure.[11] The majority applied a functional framework by practically interpreting case law, employing policy arguments, and deferring to legislative action to uphold the validity of the testimonial privilege. At the same time, the majority asserted judicial supremacy over rules of court practice and procedure.[12] Conversely, the dissent adhered to a formalistic rationale and held the statutory privilege to be unconstitutional; the dissent relied on the New Mexico Constitution, case law, and court rule to hold that the constitutional authority to promulgate a rule of practice and procedure is vested *exclusively* in the supreme court.[13]

This Note examines how New Mexico courts have employed both formalism and functionalism to define the scope of the supreme court's authority to promulgate rules of practice and procedure.[14] Part II, which ultimately discusses where the power to promulgate rules of practice and procedure originated, is divided into three sections, the first of which presents an overview of the separation of powers doctrine. The second section illustrates the tension between formalism and functionalism both on a federal and state level. The third section of Part II demonstrates how the New Mexico Supreme Court acquired the power to promulgate rules of practice and procedure and how New Mexico courts have vacillated between an application of formalism and functionalism to define the scope of that power. Part III provides a brief summary of *Blackmer* and illustrates how a district court discovery dispute found its way to the New Mexico Supreme Court. Part IV then analyzes the rationale of the two opinions filed in *Blackmer*, illustrating why the majority's functional approach supports the constitutionality of the statutory privilege whereas the dissent's formal analysis leads to the opposite conclusion. Part V reviews the approach of each and posits that the majority and dissent could have better served New Mexico law by consolidating parts of their arguments, thereby melding functionalism and formalism. The result of such an amalgamation could have provided for a bright-line rule defining when the legislature may enact rules of practice and procedure and instituted a degree of pragmatism between the two branches in fulfilling their constitutionally prescribed roles.

II. POWER TO PROMULGATE RULES OF PRACTICE AND PROCEDURE

A. *Separation of Powers*

In order to understand the different rationales employed in *Albuquerque Rape Crisis Center v. Blackmer* to evaluate the constitutionality of the victim-counselor privilege enumerated in the Confidentiality Act, it is important to appreciate the basic premise of separation of powers. The separation of powers doctrine provided the framework for the majority and dissent opinions with regard to whether the New

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11. 2005-NMSC-032, 120 P.3d 820.
12. *Id.* ¶¶ 5–17, 120 P.3d at 821–26.
13. *Id.* ¶¶ 23–35, 120 P.3d at 827–29 (emphasis added).
14. *See* Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976) (applying predominately a formalistic rationale); State *ex rel.* Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975) (applying, arguably, a combination of formalism and functionalism where the court asserted that the power to promulgate rules of practice and procedure is vested exclusively in New Mexico but did not object to a procedural statute that proved reasonable and workable); State v. Roy; 40 N.M. 397, 60 P.2d 646 (1936) (applying primarily a functional approach); *infra* Part III.

Mexico Legislature may enact rules regulating the practice and procedure of the courts, specifically an evidentiary privilege.[15] It is well settled in New Mexico that the separation of powers doctrine originated on the federal level and is based on the Founding Fathers' fear that "[t]he accumulation of all powers, legislative, executive, and judiciary," in one governmental body would result in tyranny.[16]

Separation of powers, therefore, "is expressed implicitly in the United States Constitution[17] and explicitly in...the New Mexico Constitution."[18] Both constitutions articulate a tripartite framework in which separate powers lie in the Executive, Legislative, and Judicial branches.[19] This tripartite structure creates a system of checks and balances among the three branches so that each branch may balance the power of the other to "safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[20]

Judicial and Legislative Power

The essence of judicial power in New Mexico, as well as on the federal level,[21] can be found in the judiciary's "final authority to render and enforce a judgment."[22] The power, therefore, is one of review.[23] In addition, the judiciary may exercise inherent authority that it deems "'essential to the court's fulfilling of its judicial functions.'"[24]

The scope of the judiciary's inherent authority varies because the New Mexico Supreme Court infers this authority from article I, section 3 and article VI, section 1 of the New Mexico Constitution.[25] Article I, section 3 articulates the delineation of powers among the three branches and article VI, section 1 mandates that the supreme court "shall have a superintending control over all inferior courts."[26] The New Mexico Supreme Court has affirmed that its inherent authority "extends to all

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15. *See Blackmer*, 2005-NMSC-032, 120 P.3d 820; *see also* Seth D. Montgomery & Andrew S. Montgomery, *Jurisdiction as May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico*, 36 N.M. L. REV. 215 (2006). The Montgomery article provides an analysis of appellate jurisdiction in New Mexico and argues that the power to control its appellate jurisdiction is vested in the legislature as articulated in the New Mexico Constitution. The article illustrates separation of powers tensions between the legislature and the judiciary with regard to appellate jurisdiction because the judiciary currently asserts appellate authority, although this power historically has been exercised by the legislature. Although the Montgomery article illustrates different issues than the ones presented in this Note, it provides an interesting examination into the history between the legislature and the judiciary in New Mexico and the underlying tensions regarding the constitutional powers of each branch.

16. Bd. of Educ. v. Harrell, 118 N.M. 470, 483, 882 P.2d 511, 524 (1994) (citing THE FEDERALIST NO. 47 (James Madison)).

17. U.S. CONST. arts. I–III (delineating the powers of the executive, legislative, and judicial branches).

18. *Harrell*, 118 N.M. at 483, 882 P.2d at 524. "The powers of the government of this state are divided into three distinct departments...and no person...charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others." N.M. CONST. art. III, § 1.

19. U.S. CONST. arts. I–III.

20. Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 273 (1991).

21. Virginia v. West Virginia, 246 U.S. 565, 591 (1918).

22. *Harrell*, 118 N.M. at 484, 882 P.2d at 525.

23. Montgomery & Montgomery, *supra* note 15, at 253.

24. State v. Gonzales, 2002-NMCA-071, ¶ 21, 49 P.3d 681, 685 (quoting *In re* Jade G., 2001-NMCA-058, ¶ 27, 30 P.3d 376, 382).

25. N.M. CONST. arts. III, § 1, VI, § 3.

26. *Id.*

conduct before the court" in order to function effectively and expeditiously.[27] The inherent authority doctrine is a means employed by the judiciary to maintain its independence and integrity as a branch of government.[28] While necessary to the operation of the judiciary, the inherent authority doctrine has been subject to criticism, primarily when the court exercises this authority as a means to enhance its own power.[29]

The essence of legislative authority, on the other hand, is deemed to be the making of substantive law.[30] The legislature, as the "'voice of the people,'" creates and promotes public policy, thus responding to the contemporary needs of an evolving society.[31] Like its counterpart, the legislature exercises inherent authority that it deems necessary to perform its constitutional functions.[32]

Tensions regarding separation of powers issues between the legislature and the judiciary arise when the authority of one is perceived to be threatened by an act of the other.[33] When such issues arise, the constitutionality of a judicial or legislative act is held to be measured "solely by the yardstick of the constitution."[34] This premise is often difficult to apply because the constitution does not necessarily grant power to either branch but instead is a "limitation[] on the power of each."[35] Ambiguity arises with respect to whether the constitution vests a certain power within the judiciary or the legislature because the answer is often determined purely by inference.[36] That ambiguity is only reinforced when the judiciary and the legislature share that power.

B. Tension between Functionalism and Formalism

The doctrine of separation of powers has caused a breadth of litigation and legal debate on both the federal[37] and state[38] levels.[39] The difficulty arises in how to interpret separation of powers as a theory—that is, may it be construed broadly to allow the branches to function interdependently with one another in an effort to

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27. State *ex rel.* N.M. State Highway & Transp. Dep't v. Baca, 120 N.M. 1, 8–9, 896 P.2d 1148, 1155 (1995).

28. Montgomery & Montgomery, *supra* note 15, at 255–56 (noting that the court will assert a power to be inherent in the judiciary if it views that power necessary to the court's "essential role").

29. *Id.* at 236 (citing Michael B. Browde & M.E. Occhialino, *Separation of Powers and Judicial Rule Making Power in New Mexico: The Need for Prudential Restraint*, 15 N.M. L. REV. 407 (1985)).

30. Adjustments v. N.M. Pub. Regulation Comm'n, 2000-NMSC-035, ¶ 19, 14 P.3d 525, 531 (citing Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, ¶ 28, 980 P.2d 55, 64).

31. State *ex rel.* Taylor v. Johnson, 2003-NMSC-017, ¶ 36, 73 P.2d 768, 774 (Serna, J., specially concurring) (quoting Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995)).

32. *See* Dugger v. City of Santa Fe, 114 N.M. 47, 51, 834 P.2d 424, 428 (1992).

33. Montgomery & Montgomery, *supra* note 15, at 252–53.

34. State *ex rel.* Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), *overruled on other grounds by* Wylie v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

35. Montgomery & Montgomery, *supra* note 15, at 254–55.

36. *Id.* at 255.

37. *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991); Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olson, 487 U.S. 654 (1988); Buckley v. Valeo, 425 U.S. 946 (1976).

38. *See, e.g.*, Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, 120 P.3d 820; State v. Smith, 2004-NMSC-032, 98 P.3d 1022; State *ex rel.* Taylor v. Johnson, 1998-NMSC-015, 961 P.2d 768; State v. Helman, 117 N.M. 346, 871 P.2d 1352 (1994); Bd. of Educ. v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

39. *See* Tanielian, *supra* note 6, at 969–70.

accommodate the needs of an evolving government, or should it be construed more narrowly, whereby each branch is permitted to exercise only those powers authorized by the constitution?[40] These two approaches to separation of powers may be defined as functionalism and formalism, respectively, and are considered "[t]he most prominent theories of constitutional interpretation" because each serves as a useful tool for the court to employ when grappling with such issues.[41] The struggle between these two approaches to separation of powers issues has proved contentious, as evidenced in the U.S. Supreme Court's[42] and New Mexico Supreme Court's[43] inconsistent reliance on both doctrines.[44] As a result, both courts may be seen as either forcing the case, "often artificially, into terms that bring it within the express language of one of the specific [constitutional] provisions, or...supplying some ad hoc general principle of its own."[45]

1. Functional Approach

A functional inquiry asks whether the act of one branch encroaches on the essential functions or aggrandizes its power at the expense of another branch.[46] Functionalism focuses, therefore, on the fundamental balance of power in the tripartite system and whether the exercise of power by one branch threatens to disrupt that balance.[47] As a result, functionalism encourages each branch to be both independent from and interdependent on the other branches as a means to promote autonomy and reciprocity.[48] Courts that employ a functional approach review separation of powers issues pragmatically by exercising balancing tests and flexible standards to promote political efficacy, adaptability, and justice in the law.[49] Functionalism, as a result, provides for greater judicial deference to legislative and executive action because it encourages the court to respect each branch's right to balance and check the power of the others.[50]

New Mexico courts have relied, at times, on the U.S. Supreme Court's functional interpretation of separation of powers to provide a framework when addressing these issues.[51] The Supreme Court's analysis in *Mistretta v. United States*[52] provides an example of this more pragmatic approach and illustrates how New Mexico courts

40. *See* Eskridge, *supra* note 4, at 21; *see also* Tanielian, *supra* note 6, at 966–67.
41. Brown, *supra* note 5, at 1522.
42. *See supra* note 37.
43. *See supra* note 38.
44. Tanielian, *supra* note 6, at 971.
45. Brown, *supra* note 5, at 1522.
46. *Id.* at 1527.
47. Peter L. Strauss, Bowsher v. Synar*: Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?* 72 CORNELL L. REV. 488, 502 (1987).
48. Brown, *supra* note 5, at 1528.
49. Eskridge, *supra* note 4, at 21–22.
50. Tanielian, *supra* note 6, at 967 (stating that "[t]he goal of the separation of powers should be to ensure that each branch retains enough power to continue to act as a check upon the power of the other branches").
51. Bd. of Educ. v. Harrell, 118 N.M. 470, 483, 882 P.2d 511, 524 (1994) (asserting that "[t]he constitution by no means contemplates total separation of each of these three essential branches of Government" and that the Federal Constitution provides some degree of overlap between the three branches (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976))).
52. 488 U.S. 361 (1989). Scalia was the lone dissenter in this case, which is not surprising given his loyalty to formalism. *See id.* at 413.

have employed similar reasoning when faced with analogous separation of powers inquiries.[53] In *Mistretta*, the petitioner argued that the Sentencing Reform Act of 1984[54] (SRA) violated separation of powers because its composition was perceived to meld judicial and executive characteristics into the legislative Sentencing Commission.[55] The Court rejected the petitioner's argument and held that by passing the SRA, Congress "neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate branches."[56] Stressing that "our constitutional system imposes upon the Branches a degree of overlapping responsibility, [and] a duty of interdependence as well as independence," the Court in *Mistretta* held that the provisions of the SRA did not aggrandize the power of one branch to the detriment of another branch.[57] The Court stressed the need for reciprocity between the three branches of government and found that the SRA performed such a function by enabling Congress to address the pressing issue of sentencing reform by permitting the judiciary to aid in the endeavor.[58]

The Supreme Court in *Mistretta* based its analysis on a flexible interpretation of separation of powers.[59] While acknowledging that each branch must remain separate from the other, the Court asserted that some intermingling between the branches is necessary to respond to a complex and evolving society.[60] Although the SRA enabled the legislative, judicial, and executive branches to commingle, this fusion neither disrupted the balance of power between the three entities nor compromised the integrity of either branch and, therefore, was constitutional.[61]

2. Formal Approach

Formalism, unlike its counterpart, is premised on the theory that the government has three distinct branches, each of which must be "'entirely free from the control

53. *See, e.g., Harrell*, 118 N.M. 470, 882 P.2d 511.

54. 18 U.S.C. § 3551 (2000).

55. 488 U.S. 361, 380 (1989). The Sentencing Reform Act of 1984 was enacted to address sentencing reform in federal courts. The Act created the U.S. Sentencing Commission as a means to carry out this legislation. The Commission was responsible for promulgating sentencing guidelines for the federal courts. *Id.* at 367–69. The Petitioner challenged the "constitutionally of the Sentencing Guidelines promulgated by the United States Sentencing Commission." *Id.* at 362. The Court considered four issues with respect to the petitioner's claim: first, whether the delegation of power by Congress to the Judiciary to promulgate such guidelines offended the separation of powers under the nondelegation doctrine; second, whether the Act itself violated separation of powers; third, whether the location and member structure of the Commission offended separation of powers; and fourth, whether the power of Presidential appointment and removal to the Commission "prevent[ed] the Judicial Branch from performing its constitutionally assigned functions." *Id.* at 362–408.

56. *Id.* at 384. "Although the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches, we conclude...that petitioner's fears for the fundamental structural protections of the Constitution prove...to be 'more smoke than fire'. . . ." *Id.*

57. *Id.* at 380–97.

58. *See id.* at 407–08.

59. *Id.* at 372.

60. *See id.* (stating that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power").

61. *Id.* at 393.

or coercive influence, direct or indirect, of either of the others....'"[62] Formalism focuses on the text, structure, and origin of the Constitution in order to promote a clear substantive divide between the three branches.[63] As a result, the court looks to which branch is acting, what power the branch is exercising, and whether the branch has the constitutional authority to do so.[64] This inquiry leads to the application of bright-line rules that, in theory, promote transparency, predictability, and continuity in the law.[65]

Like functionalism, formalism has influenced the New Mexico Supreme Court's separation of powers jurisprudence.[66] The court has employed the same formalistic principles articulated in U.S. Supreme Court opinions to assert that "each branch of government maintains its independent and distinct function," stressing that the power of one branch may not be exercised by the other.[67]

The U.S. Supreme Court's analysis in *Bowsher v. Synar* illustrates such a formalistic approach.[68] The Court in *Bowsher* held the Balanced Budget and Emergency Deficit and Control Act of 1985 to be unconstitutional because it authorized the Comptroller General, an agent of the legislature,[69] to make budget cuts and therefore to execute the law, a power exclusively reserved to the executive branch.[70] The Court emphasized that the Constitution divides our government into three defined categories in order to prevent tyranny.[71] In addition, the division of powers between the legislative, executive, and judicial branch serves to check and balance the power among the three branches.[72] Consequently, a power properly exercised by one branch could not, at the same time, be exercised by the other.[73] The provisions of this Act were unconstitutional because the legislation attempted to weave the legislative and executive branches into the same fabric.[74] In the Court's view, the "'fundamental necessity of maintaining the three general departments of government entirely free from the control or coercive influence, direct or indirect, of the others'"[75] overrode any need for malleability or practicality in the law.[76]

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62. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting) (quoting Bowsher v. Synar, 478 U.S. 714, 725 (1986)).

63. Eskridge, *supra* note 4, at 21–22; *see* Brown, *supra* note 5, at 1525 (noting that formalists "posit that the structural provisions of the Constitution should be understood solely by their literal language and the drafters' original intent regarding their application").

64. *See* Strauss, *supra* note 47, at 510.

65. Eskridge, *supra* note 4, at 21–22.

66. *See* State *ex rel.* Taylor v. Johnson, 1998-NMSC-015, ¶ 19–22, 961 P.2d 768, 774.

67. *Id.* ¶ 21, 961 P.2d at 774.

68. 478 U.S. 714 (1986).

69. *Id.* at 720 (stating that the Comptroller General is "removable not by the President but only by a joint resolution of Congress or by impeachment").

70. *Id.* at 736.

71. *Id.* at 721.

72. *Id.*

73. *Id.* ("'[T]here can be no liberty where the legislative and executive powers are united in the same person.'" (quoting THE FEDERALIST NO. 47 (James Madison))).

74. *Id.* at 726.

75. *Id.* at 725 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629–30 (1935)).

76. *See* Strauss, *supra* note 47, at 489.

3. Eclectic Approach

Not wedded exclusively to either rationale, the U.S. Supreme Court[77] and the New Mexico Supreme Court have incorporated both approaches to separation of powers inquiries.[78] This "eclectic"[79] approach was first employed by the U.S. Supreme Court in *McCulloch v. Maryland*[80] where Chief Justice Marshall "wove both formalist and functional lines of thinking and argumentation" to adopt a "constitutional policy of expansive national power."[81] New Mexico judges have demonstrated a similar willingness to blend formalism and functionalism in order to draw on the strengths and minimize the weaknesses of each approach.[82] The application of this "eclectic" approach draws "methodologically on rules and standards, as well as on the doctrinal supports of categorical separation and checks and balances."[83] Ultimately, the tendency for both federal and state courts to fluctuate between formalism and functionalism demonstrates that neither has determined definitively the appropriate methodology to employ when analyzing separation of powers issues.[84]

C. Rules of Practice and Procedure in New Mexico

New Mexico courts have demonstrated a hesitancy to adhere to either formalism or functionalism when faced with the issue of whether the legislature may share the authority to promulgate rules of practice and procedure with the New Mexico Supreme Court.[85] Originally, the New Mexico Legislature had the power to promulgate rules of practice and procedure.[86] The legislature, however, took a functional approach to the exercise of this power and shared it with the New Mexico

77. Tanielian, *supra* note 6, at 971–72.

78. *See* State *ex rel.* Taylor v. Johnson, 1998-NMSC-015, 961 P.2d 768. The court stated that "each branch of government maintains its independent and distinct function[s]" and noted that "absolute separation of powers is neither desirable nor realistic [as] the constitutional doctrine of separation of powers permits some overlap of governmental functions." *Id.* ¶¶ 21, 23, 961 P.2d at 774–75 (internal citations and quotation marks omitted); *see also* State v. Gonzales, 2002-NMCA-071, 49 P.3d 681 (employing both formalist and functionalist arguments in upholding the judiciary's discretion to dismiss criminal prosecutions).

79. Tanielian, *supra* note 6, at 996.

80. 17 U.S. (3 Wheat.) 316 (1819).

81. Eskridge, *supra* note 4, at 22.

82. *See infra* Part II.C; *see also* Tanielian, *supra* note 6, at 996.

83. Tanielian, *supra* note 6, at 996 (stating that this eclectic approach "parallels the Framers' decision to blend the political theories of separated powers and checks and balances").

84. *Compare* Bowsher v. Synar, 478 U.S. 714, 725 (1986) ("The fundamental necessity of maintaining each of the three general departments of government entirely free from the control of coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."), *with* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986) (noting that the Court "looked to a number of factors in evaluating the extent to which the congressional scheme endangers separation of powers principles").

85. *Compare* State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936) (applying primarily a functional approach to uphold the supreme court's authority to promulgate rules of practice and procedure), *with* State *ex rel.* Anaya v. McBride, 88 N.M. 244, 529 P.2d 1006 (1975) (applying a combination of formalism and functionalism when the court asserted that the power to promulgate rules of practice and procedure is vested exclusively in the supreme court but that the court did not object to a procedural statute that proved reasonable and workable). *See also* Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976) (applying a predominately formalistic approach to hold that the power to promulgate rules of practice and procedure is vested exclusively in the supreme court).

86. Michael B. Browde & M.E. Occhialino, *Separation of Powers and Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints*, 15 N.M. L. REV. 407, 411–12 (1985); *see also* Montgomery & Montgomery, *supra* note 15, at 224.

Supreme Court.[87] Pursuant to the original understanding of both the New Mexico Legislature and Supreme Court, if a conflict arose, with respect to rule making, the legislature would prevail.[88] In 1933, however, the New Mexico Legislature expressly conferred rule-making power on the supreme court.[89] The 1933 Act empowered the supreme court to promulgate rules of pleading, practice, and procedure.[90] Pursuant to this power, the supreme court held all existing procedural statutes to be rules of the court and made substantial changes to the pre-existing statutes.[91] Shortly after the 1933 Act transferred rule-making authority from the legislature to the supreme court, there was a constitutional challenge to the statute in *State v. Roy*.[92]

State v. Roy was the first case in New Mexico to challenge the judiciary's authority to promulgate rules of practice and procedure.[93] The court in *Roy* addressed three separation of powers issues. First, the court considered whether the 1933 Act was an unconstitutional delegation of power from the legislature to the judiciary.[94] Second, assuming the Act was constitutional, the court analyzed whether this power was vested exclusively in the judiciary.[95] Third, the court questioned whether it had superintending power over inferior courts to regulate rules affecting practice and procedure.[96]

The court in *Roy* held that the 1933 Act did not violate article III, section 1 of the New Mexico Constitution because it was not an unconstitutional delegation of power from the legislature to the judiciary.[97] The court advocated a functionalist argument, stating that the authority to form rules of pleading, practice, and procedure is not necessarily a legislative function.[98] Consequently, the 1933 Act did not result in the judiciary invading the province of the legislature.[99]

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87. Browde & Occhialino, *supra* note 86, at 412, 444 (stating that the legislature delegated a portion "of what it perceived to be...legislative power to the supreme court"). For a full historical analysis of the shared responsibility between the legislature and judiciary to promulgate rules of practice and procedure, see generally *id.* *See also* Montgomery & Montgomery, *supra* note 15.

88. Browde & Occhialino, *supra* note 86, at 412, 416–18 (stating that "the legislature was the dominant force in rule-making in territorial New Mexico"). For example, the Act of 1887 enabled the supreme court to prescribe rules regulating the practice in the supreme and district courts of the territory while stipulating that "such rules shall not conflict with any of the laws of the United States or of the Territory of New Mexico." *Id.* at 416. While the legislature allowed the judiciary to share in this authority, the legislature had superintending control. *Id.*

89. *Id.* at 426; *see* Act of Mar. 13, 1933, ch. 84, 1933 N.M. Laws 147; *see also* Montgomery & Montgomery, *supra* note 15, at 226.

90. Browde & Occhialino, *supra* note 86, at 426 (stating that this also included the authority to pass rules that served to overrule procedural statutes).

91. *Id.*

92. *Id.*; *see* State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

93. *Roy*, 40 N.M. 397, 60 P.2d 646.

94. *Id.* at 416, 60 P.2d at 658.

95. *Id.* at 420, 60 P.2d at 660.

96. *Id.* at 416–22, 60 P.2d at 658–62.

97. *Id.* at 416–20, 60 P.2d at 658–60.

98. *Id.* at 419, 60 P.2d at 660 ("[A]ssuming the right of the Legislature to make rules for the court, it does not follow that thus action is a legislative function....Not all acts performed by a Legislature are strictly legislative in character." (internal quotations omitted)).

99. *Id.* at 419, 60 P.2d at 659.

To support this pragmatic supposition, the court in *Roy* cited to the policies and standards of other jurisdictions.[100] The court relied, in part, on *State ex rel. Wisconsin Inspection Bureau v. Whitman*, which held that:

> there never was and never can be such a thing in the practical administration of the law as a complete, absolute, scientific separation of the so-called co-ordinate governmental powers...they are and always have been overlapping. Courts make rules of procedure which in many instances at least might be prescribed by the legislature.[101]

In addition, the court in *Roy* cited to Chief Justice Marshall, who noted that the legislature may confer certain powers on the judiciary without violating separation of powers.[102] The court inferred from case law that, while the legislature may prescribe rules of practice and procedure, such authority is not quintessentially legislative in nature.[103]

The court in *Roy* determined that, by enacting the 1933 Act, the legislature simply chose to abdicate itself from the rule-making field and therefore allowed the judiciary to take full control.[104] The court further buttressed its argument by noting that the New Mexico Territorial Legislature "recognized in the Supreme Court the power to make rules for itself and the district court."[105] Accordingly, there was historical support for the proposition that the supreme court and legislature legitimately could share the power to promulgate rules of practice and procedure.[106] *Roy* concluded that the 1933 Act was not a violation of article III, section 1[107] of the New Mexico Constitution because the legislature did not confer a function exclusively legislative on the judiciary.[108] In addition, the court in *Roy* determined the authority to promulgate rules of practice and procedure to be integral to the court's ability to function effectively and efficiently. Thus, it was a power inherent and essential to the judiciary as an independent branch of government.[109]

The New Mexico Attorney General requested that the court in *Roy* take its holding one step further and declare this power to be an "exclusive right...over which the legislature has no control."[110] The court declined to answer this formalistic

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100. *See Roy*, 40 N.M. at 418–20, 60 P.2d at 659–60.

101. 220 N.W. 929, 938 (Wis. 1928).

102. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) ("The Courts...may make rules [but] [i]t will not be contended, that these things might not be done by the legislature, without the intervention of the Courts; yet it is not alleged that the power may not be conferred on the judicial department.").

103. *Roy*, 40 N.M. at 418, 60 P.2d at 660.

104. *Id.* at 419, 60 P.2d at 660.

105. *Id.* at 420, 60 P.2d at 660 (citing numerous statutes).

106. *Id.* at 419–20, 60 P.2d at 660.

107. N.M. CONST. art. III, § 1. "The powers of the government of this state are divided into three distinct departments...and no person...charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly...permitted." *Id.*

108. *Roy*, 40 N.M. at 420, 60 P.2d at 660.

109. *Id. Compare id. with* Montgomery & Montgomery, *supra* note 15, at 227. Montgomery criticized the holding in *Roy* on the grounds that the court's decision to hold "that practice and procedure are creatures of court rule...was bound to collide" with preexisting case law, primarily with respect to appeals as they were traditionally "creatures of statute." *Id.*

110. *Roy*, 40 N.M. at 420, 60 P.2d at 660. *See also* Montgomery & Montgomery, *supra* note 15, at 230–31. The New Mexico Attorney General's assertion that the power be vested exclusively in the judiciary proved to be

contention. Instead, *Roy* asserted that the question of judicial exclusivity, with respect to rules of practice and procedure, would not be determined until there was a direct conflict between a rule of the court and a statute.[111]

Roy reviewed whether the court could provide rules of pleading, practice, and procedure for the lower courts.[112] The court, relying on article VI, section 3, of the New Mexico Constitution,[113] answered the issue in the affirmative.[114] The court reasoned that the supreme court's superintending control over lower courts empowered the supreme court to issue rules of practice and procedure in order to ensure the unity of the judicial body in New Mexico.[115]

The court in *Roy* articulated primarily a functionalist rationale to hold that the supreme court has the power to promulgate rules of practice and procedure.[116] The court deduced from federal and state case law, New Mexico territorial history, and its own practical experience that this authority was not necessarily legislative, was shared at times between the legislature and the supreme court, and that the legislature legitimately conferred it to the supreme court.[117] Stressing the notion that each branch may commingle with the other without violating article I, section 3, of the New Mexico Constitution or the basic premise of separation of powers, the court validated its own power to promulgate rules affecting practice and procedure.[118]

In *Roy*, the court noted that the issue touched on underlying values implicit in the separation of powers doctrine when it acknowledged that the authority to enact rules of practice and procedure is an inherent power of the judiciary.[119] *Roy*, relying on article VI, section 3 of the New Mexico Constitution, stressed that judicial efficacy and integrity depends on the supreme court's ability to regulate practice and procedure in New Mexico courts.[120] This authority allows for the supreme court to create a consistent and coherent body of rules to ensure that the judiciary functions capably as a separate and independent branch of government.[121] The court in *Roy* reasoned that to preclude the supreme court from managing how it and the lower courts functioned would diminish the independence and viability of the New Mexico

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prescient of an argument Justice Carmody would later issue in 1964 regarding court reform. *Id.* Justice Carmody argued for greater judicial control over practice and procedure, namely appellate jurisdiction because the "'Judicial Branch should operate as one separate unit.'" *Id.* (quoting Letter from Justice David W. Carmody to Edward E. Triviz, Chairman of the Const. Revision Comm'n, and Ellis L. Stout, Vice-Chairman of the Const. Revision Comm'n 1 (July 24, 1964) (on file with the New Mexico State Archives)).

111. *Roy*, 40 N.M. at 420, 60 P.2d at 460.

112. *Id.* This only addressed control over district courts as, at this time, there were no appellate courts. Montgomery & Montgomery, *supra* note 15, at 217.

113. N.M. CONST. art. VI, § 3 (recognizing that the supreme court has superintending control over inferior courts).

114. *Roy*, 40 N.M. at 420, 60 P.2d at 661.

115. *See id.* at 421, 60 P.2d at 661.

116. *See id.* at 418, 60 P.2d at 659.

117. *See id.* at 418–23, 60 P.2d 659–62.

118. *Id.* at 422, 60 P.2d at 662.

119. *Id.* at 420, 60 P.2d at 660; *see* Sw. Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

120. *See Roy*, 40 N.M. at 423, 60 P.2d at 662 ("It is at once manifest that such a power should be placed, and was placed, with the reviewing court, since we are always charged with the duty of determining whether the rulings of the trial court have been such as to operate to the disadvantage of the litigants.").

121. *See id.* at 421, 60 P.2d at 661; *see also* Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, ¶ 35, 120 P.2d 820, 829 (Bosson, C.J., dissenting).

judiciary.[122] By stressing that such power was inherent to the judiciary, the court in *Roy* recognized the fundamental separation of powers concerns at stake but deemed it unnecessary to vest this power exclusively in the judiciary in order to preserve it.[123]

When faced with similar challenges, New Mexico courts continued to assert that the supreme court possessed the inherent power to promulgate rules of practice and procedure.[124] Contention arose, however, when the court was confronted with the question *Roy* neglected to answer: whether the source of this authority was vested exclusively in the judiciary.[125] That is, whether the functionalist rationale drawn in *Roy* should evolve into a more formal conclusion to prevent the legislature from sharing the authority with the judiciary.[126] Thus, with regard to the promulgation of practice and procedure, courts had to determine whether judicial supremacy or judicial exclusivity properly maintained the integrity and independence of the judicial branch.[127]

At least two cases directly challenged the functionalist approach articulated in *Roy*; in *State ex rel. Anaya v. McBride*[128] and *Ammerman v. Hubbard Broadcasting, Inc.*,[129] the New Mexico Supreme Court concluded that the power to prescribe rules of practice and procedure is vested exclusively in the judiciary.[130] The court in *McBride* first began to develop the formalist proposition that the judiciary possessed exclusive rule-making authority.[131] In *McBride*, the New Mexico Attorney General filed a quo warranto[132] to challenge the constitutionality of the appointment of McBride to a judicial seat.[133] The primary issue was whether the quo warranto was

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122. *See Roy*, 40 N.M. at 422, 60 P.2d at 661.

123. Montgomery & Montgomery, *supra* note 15, at 226–27. The court's decision in *Roy* to hold that the power to prescribe rules of practice and procedure is an inherent power of the judiciary was one of many instances in which the judiciary enhanced its independence in New Mexico. *Id.* at 234. In fact, the holding in *Roy* was later seen on a broader scale in the Model Judicial Article, written by the American Bar Association between 1959 and 1962. The Model Judicial Article served to vest "extensive rule-making power in the judiciary." *Id.* at 229. Montgomery, however, took issue with the Model Judicial Article because, in the name of enhancing the judiciary's independence, the American Bar Association simultaneously expanded the power of the judiciary and thus implicated separation of powers issues. *Id.* at 254.

124. *See* Sw. Cmty. Health Servs. v. Smith, 107 N.M. 196, 755 P.2d 40 (1988); State *ex. rel.* Att'y General v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981); *In re* Motion for a Subpeona Duces Tecum, 94 N.M. 1, 606 P.2d 539 (1980); Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976); State *ex rel.* Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947); Rupp v. Hurley, 2002-NMCA-023, 41 P.3d 914; State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978); Gonzales v. Atnip, 102 N.M. 194, 692 P.2d 1343 (Ct. App. 1984).

125. *See Ammerman*, 89 N.M. at 311, 551 P.2d at 1358.

126. *See supra* notes 109–110 and accompanying text.

127. *See supra* notes 109–110 and accompanying text.

128. 88 N.M. 244, 539 P.2d 1006 (1975).

129. 89 N.M. 307, 551 P.2d 1354 (1976).

130. Browde & Occhialino, *supra* note 86, at 437; *see also* Montgomery & Montgomery, *supra* note 15, at 254. Both *McBride* and *Ammerman* are illustrative of the influence the Model Judicial Articles may have on the New Mexico Supreme Court with its decision to hold that the right to promulgate rules of practice and procedure is vested exclusively in the legislature. *See* Montgomery & Montgomery, *supra* note 15, at 254.

131. Browde & Occhialino, *supra* note 86, at 437.

132. 88 N.M. 244, 247, 539 P.2d 1006, 1009 (stating that a quo warranto is to "'ascertain whether [the public officer] is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim'" (quoting Holloman v. Lieb, 17 N.M. 270, 273, 125 P. 601, 602 (1912))).

133. 88 N.M. at 245, 539 P.2d at 1007. The governor appointed Judge McBride to the judiciary after he was reelected to the New Mexico Senate. *Id.*; *see* N.M. CONST. art. VI, § 28 (restricting the appointment of members of the legislature to civil offices).

statutory or procedural in nature.[134] The court in *McBride* found the quo warranto to be procedural and emphasized that "the legislature lacks the power to prescribe by statute rules of practice and procedure [such as a quo warranto]. Certainly statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested *exclusively* in this court."[135]

At first glance, this conclusion appears formalistic; a power prescribed to one branch cannot be exercised simultaneously by another.[136] Despite the statement that the power is vested exclusively in the judiciary, the court in *McBride* tempered its conclusion by stating that it had "'no quarrel with the statutory arrangements which seem reasonable and workable.'"[137] Thus, the court melded formalism with functionalism to assert its exclusive constitutional authority to promulgate rules of practice and procedure and, at the same time, its willingness to accommodate legislative participation.[138]

The supreme court was less conciliatory, however, in *Ammerman*, a case in which the court categorically denied the legislature the right to create a rule affecting the practice and procedure of the court.[139] In *Ammerman*, the defendants were news journalists who appealed a district court order compelling them to disclose the names of their news sources.[140] They asserted that a New Mexico statute protected the information as privileged.[141] The court disagreed and held the statute to be constitutionally invalid.[142]

Relying on a number of cases,[143] the court articulated a bright-line rule:

> "Under the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so. Certainly statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested *exclusively* in this court."[144]

The court's assertion is significant in that the court categorically denied the legislature any authority to enact rules affecting practice and procedure.[145] The court relied specifically on the New Mexico Constitution.[146] According to the supreme

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134. *McBride*, 88 N.M. at 246, 539 P.2d at 1008 (noting that if the quo warranto was statutory, the court did not have jurisdiction over the matter).

135. *Id.* (emphasis added).

136. *See id.*

137. *Id.* (quoting Alexander v. Delgado, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973)).

138. *See id.*

139. 89 N.M. 307, 551 P.2d 1354 (1976).

140. *Id.* at 308, 551 P.2d at 1355. Five consolidated cases were on appeal in which the defendants were sued by the plaintiff for slanderous news broadcasts. *Id.* at 308, 551 P.2d at 1354.

141. *Id.* at 308, 551 P.2d at 1355. The statute provides that, "[u]nless disclosure be essential to prevent injustice, no journalist or newscaster...shall be required to disclose before any proceeding or authority...the source of any published or unpublished information." NMSA 1953, § 20-1-12.1 (1969).

142. *Ammerman*, 89 N.M. at 312, 551 P.2d at 1359.

143. *McBride*, 88 N.M. 244, 539 P.2d 1006; Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973); Sitta v. Zin, 77 N.M. 146, 420 P.2d 131 (1966); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947); City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936).

144. *Ammerman*, 89 N.M. at 311, 551 P.2d at 1358 (emphasis added) (quoting *McBride*, 88 N.M. at 246, 539 P.2d at 1008).

145. *Id.* at 312, 551 P.2d at 1358–59.

146. *Id.* at 311–13, 551 P.2d at 1358–59.

court, its power under article III, section 1, and its superintending power over all inferior courts under article VI, section 3, "carries with it the inherent power to regulate all pleading, practice and procedure."[147] The court in *Ammerman* held that to allow the legislature simultaneously to exercise such authority would undermine the integrity and independence of the judiciary as a co-equal branch of government.[148]

The court in *Ammerman* then examined whether the statutory privilege asserted by the defendants conflicted with any court rule.[149] Citing to New Mexico Rule of Evidence 11-501,[150] the court held the statute to be unconstitutional because rule 11-501 enumerates that "no person has a privilege to refuse to disclose information, except as provided by constitution or rule of the New Mexico supreme court [sic]."[151] Accordingly, the statutory privilege was void.[152]

Although the rationale in *Ammerman* may be interpreted to be predominately formalistic, there are also functional elements.[153] On the surface, *Ammerman* stands for the formal proposition that the legislature lacks any rule-making power since the court held that this power is vested exclusively in the court.[154] Alternatively, the case may be interpreted more pragmatically to suggest that the legislature may enact rules affecting practice and procedure until the supreme court exercises "its inherent and superseding power to revoke or amend the statutory provisions."[155] The court's decision in *Ammerman* to evaluate whether the statute conflicted with a court rule illustrates that the court was willing to look at other factors to ascertain when the legislature may act, although it affirmatively denied this branch the authority to supersede the court's own rules.[156] *Ammerman* is ultimately symbolic of the difficulty the supreme court historically has had in properly defining the scope of the judiciary's inherent power over practice and procedure.[157] The court has been caught between two competing strains: judicial exclusivity and judicial supremacy over such rules.[158] The issue is extraordinarily complex because it affects a fundamental value underlying separation of powers: the judiciary's ability to maintain its independence and integrity as a co-equal branch of government.[159]

Despite any ambiguities in the opinion, *Ammerman* signaled that the court was intent on analyzing this issue in a more formalistic manner.[160] The court relied on constitutional provisions,[161] abided by the bright-line rule articulated in rule 11-501,

147. *See id.*
148. *Id.*
149. *Id.* at 311, 551 P.2d at 1359 (noting that prior cases declined to assert that the court's rule-making power was exclusive because there was no conflict between a law promulgated by the court and a statute).
150. Rule 11-501 NMRA.
151. *Ammerman*, 89 N.M. at 311, 551 P.2d at 1358.
152. *Id.* at 311, 551 P.2d at 1358. The supreme court later enacted a news media confidential source privilege that mirrored the statute invalidated in *Ammerman*. Rule 11-514 NMRA.
153. Browde & Occhialino, *supra* note 86, at 443.
154. *Id.*
155. *Id.*
156. *See Ammerman*, 89 N.M. at 311–12, 551 P.2d at 1358–59.
157. *See supra* Part II.C.
158. *See supra* Part II.C.
159. *See supra* Part II.C.
160. *See Ammerman*, 89 N.M. 307, 551 P.2d 1354.
161. *See* N.M. CONST. arts. III, § 1, VI, § 3.

and acknowledged the clear delineation of power between the legislature and the judiciary in holding that the power to promulgate rules of practice and procedure is vested exclusively in the supreme court.[162] The importance of judicial exclusivity for the court in *Ammerman* outweighed any functional desire to defer to legislative prerogative because the testimonial privilege at issue, as a rule of procedure, touched upon a core function of the judicial branch.[163]

Despite the bright-line rule posited in *Ammerman*[164] and *McBride*,[165] New Mexico courts continued to shift between formalism and functionalism in analyzing whether the legislature may enact a rule of practice or procedure.[166] When a statute encroached on an "essential function" of the court or involved a "testimonial privilege," the court tended to defer to the formal rule of *Ammerman*.[167] In more ambiguous cases, however, New Mexico courts have construed *Ammerman* narrowly, allowing for instances in which exceptions to the rule can be made.[168] Consequently, New Mexico courts analyze the supreme court's scope of power to promulgate rules of practice and procedure with an eye toward both functionalism and formalism, depending on the type of issue presented to the court.[169]

An example of a New Mexico court balancing out the formalism posited in *Ammerman* may be seen in *State v. Herrera*.[170] The holding in *Herrera*, arguably the theoretical antithesis of *Ammerman*, reflects the judicial desire to resolve the issue of whether the legislature may enact rules of practice and procedure practically and with greater deference to legislative decision making.[171] The appellate court in *Herrera* upheld a statute that limited the discovery and cross-examination of a

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162. Browde & Occhialino, *supra* note 86, at 443.

163. *See Ammerman*, 89 N.M. 307, 551 P.2d 1354.

164. *Id.*

165. 88 N.M. 244, 539 P.2d 1006 (1975).

166. *See* State v. Herrera, 92 N.M. 7, 582 P.2d 384 (1978); *Ammerman*, 89 N.M. 307, 551 P.2d 1358; *McBride*, 88 N.M. 244, 539 P.2d 1006; *see also*, Montgomery & Montgomery, *supra* note 15, at 253–54. Montgomery criticized *Ammerman* and *McBride* on the grounds that the court "read too much into the separation-of-powers principle. The constitutional mandate of separate powers does not assign particular powers...but merely prohibits each branch from assuming powers 'properly belonging' to another." *Id.* at 254. In essence, the constitution does not prescribe the power to promulgate rules of practice and procedure to either the judiciary or the legislature, so for the judiciary to determine it has exclusive control is too far reaching, for "the validity of acts...is to be measured 'solely by the yardstick of the constitution.'" *Id.* at 255 (quoting State *ex rel.* Clark v. Johnson, 120 N.M. 562, 570, 904 P.2d 11, 19 (1995)).

167. Browde & Occhialino, *supra* note 86, at 449, 457. Both "essential function" and "testimonial privilege" cases trigger a formal application of the rule because the legislature is deemed to have encroached upon or aggrandized the power of the judiciary. *Id.* at 449, 457; *see* State *ex rel.* Att'y General v. First Judicial Dist. Court, 96 N.M. 254, 629 P.2d 330 (1981). The court held the public interest privilege and federal confidentiality privilege asserted by the New Mexico Attorney General to be unconstitutional because neither was enumerated in the New Mexico Constitution or New Mexico Rule of Evidence 11-501. The court did, however, recognize the executive privilege asserted by the Attorney General because it was specified in the constitution. The court's rationale was purely formalistic, as evidenced by its textual interpretation of rule 11-501 and its determination that rules of evidence are integral to the effective functioning of the court as an independent branch of government. *Id.* at 237, 629 P.2d at 333; *see also* Maestas v. Allen, 97 N.M. 230, 231, 638 P.2d 1075, 1076 (1982) (stating that if the legislature enacts an "evidentiary privilege, the statute must fall because it is in conflict with New Mexico's Rules of Evidence").

168. Browde & Occhialino, *supra* note 86, at 447; *see also* State v. Herrera, 92 N.M. 7, 12, 582 P.2d 384, 389 (Ct. App. 1978).

169. *See Herrera*, 92 N.M. at 11–12, 582 P.2d at 388–89.

170. 92 N.M. 7, 582 P.2d 384.

171. *See id.* at 15, 582 P.2d at 392.

victim's past sexual history.[172] Although the court recognized the assertion posited in *Ammerman* that the power to enact rules of practice and procedure is an exclusive power of the judiciary, the court in *Herrera* asserted a functional rationale to conclude that the real issue was whether the statute *conflicted* with a rule of the court.[173]

Herrera interpreted the bright-line rule in *Ammerman* not to preclude the legislature from enacting such statutes but only to ensure judicial supremacy when determining the statute's validity.[174] Rather than categorically prohibiting the legislature from enacting such statutes, the court made the functional determination that the "court has no quarrel with the statutory arrangements which seem reasonable and workable."[175]

Following *Herrera*, the argument over the scope of the supreme court's authority to prescribe rules of practice and procedure continued to surface, resonating the tension between the formal-judicial exclusivity and the functional-judicial supremacy approaches.[176] This contentious theoretical debate recently divided the court in *Albuquerque Rape Crisis Center v. Blackmer*.[177]

III. DISCOVERY DISPUTE TO THE NEW MEXICO SUPREME COURT

Albuquerque Rape Crisis Center v. Blackmer arose from a discovery dispute in the criminal prosecution of Marco Antonio Brizuela, who was accused of criminal sexual penetration.[178] After the alleged rape, the victim went to the Albuquerque Rape Crisis Center (ARCC) and met with the center's counselors.[179] Brizuela filed a motion to compel the ARCC to take part in the pretrial interviews with the defense and to provide the defense access to any communications the center personnel had with the alleged victim.[180]

The ARCC entered a special appearance in district court and asserted that its communications with the alleged victim were protected under the victim-counselor privilege set forth in the Victim Counselor Confidentiality Act (Confidentiality Act).[181] The district court rejected the ARCC's argument because it considered itself

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172. *Id.* at 11, 582 P.2d at 388.

173. *Id.* at 12, 582 P.2d at 389.

174. *See id.*

175. *Id.*

176. *See, e.g.*, State *ex rel.* Att'y General v. First Judicial Dist. Court, 94 N.M. 254, 629 P.2d 330 (1981). *Contra* Sw. Cmty. Heath Servs. v. Harrell, 107 N.M. 196, 755 P.2d 40 (1988).

177. 2005-NMSC-032, 120 P.3d 820.

178. *Id.* ¶ 2, 120 P.3d at 821.

179. *Id.*

180. *Id.* (stating that the defendant sought to compel the "ARCC counselors to participate in pretrial interviews with defense counsel and to provide statements concerning their contact with the alleged victim" (internal quotations omitted)).

181. *Id.*; *see* NMSA 1978, §§ 31-25-1 to -6 (1987). The act states:

> A victim, a victim counselor without the consent of the victim or a minor or incapacitated victim without the consent of a custodial guardian or a guardian ad litem appointed upon application of either party shall not be compelled to provide testimony or to produce records concerning confidential communications for any purpose in any criminal action or other judicial, legislative or administrative proceeding....A victim counselor or a victim shall not be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location or telephone number of a safe house, abuse shelter or other facility that provided temporary

bound by New Mexico Supreme Court Rule of Evidence 11-501.[182] Rule 11-501 states that no person may assert a privilege unless so required by the constitution or supreme court rule, and, thus, the district court did not recognize the statutory privilege.[183] The ARCC then filed petitions with the New Mexico Supreme Court to review the district court's order.[184]

The supreme court, in an opinion authored by Justice Chavez, reversed the trial court's order and determined that the Confidentiality Act created a valid evidentiary privilege.[185] The majority, in a four to one vote, articulated that, while a statutory privilege such as the victim-counselor privilege was not binding on the court, the statute would be recognized if it were consistent with a court rule, thus exercising judicial supremacy over rules of practice and procedure.[186]

Chief Justice Bosson, writing in the dissent, took issue with the majority's decision[187] and asserted the victim-counselor privilege to be unconstitutional.[188] The dissent's analysis rested on the assertion that New Mexico case law states unequivocally that the legislature does not have the authority to create a rule of practice and procedure, such as an evidentiary privilege, because the power to do so is vested exclusively in the supreme court.[189] The decision to create an evidentiary privilege, according to the dissent, is a "core function of the judiciary as a separate and equal branch of government" and, therefore, cannot be exercised simultaneously by the legislature.[190]

IV. DIVERGENCE BETWEEN THE MAJORITY'S AND DISSENT'S RATIONALE IN *BLACKMER*

The majority and dissent in *Albuquerque Rape Crisis Center v. Blackmer* diverged in their opinions of whether the legislature may enact an evidentiary privilege because they employed a different theoretical approach.[191] The court in *Blackmer* faced the contention that *State v. Roy*[192] declined to answer, one that *Ammerman v. Hubbard Broadcasting, Inc.*[193] answered in the affirmative and that

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emergency shelter to the victim of the offense or occurrence that is the subject of a judicial, legislative or administrative proceeding unless the facility is a party to the proceeding.

Id. § 31-25-3.

182. Rule 11-501 NMRA.

183. *Blackmer*, 2005-NMSC-032, ¶ 2, 120 P.3d at 821 (agreeing to Brizuela's motion to compel production of the motion).

184. *Id.* ¶ 4, 120 P.3d at 821 ("ARCC filed a Petition for Emergency Writ of Prohibition or Alternatively for Writ of Superintending Control and Request for Stay of Order.").

185. *Id.* ¶ 1, 120 P.3d at 821.

186. *Id.* (finding that the victim privilege was consistent with the purpose of the psychotherapist-patient privilege enumerated in Rule 11-504 NMRA).

187. *Id.* ¶ 23, 120 P.3d at 827. (Bosson, C.J., dissenting) ("With reluctance, I respectfully dissent. In my mind, the majority opinion is wrong on the law, wrong on policy, and grossly unfair to this criminal Defendant.").

188. *Id.* ¶ 28, 120 P.3d at 828.

189. *Id.* ¶ 25, 120 P.3d at 827.

190. *Id.* ¶ 24, 120 P.3d at 827 (citing Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976)).

191. *Id.*

192. 40 N.M. 397, 60 P.2d 646 (1936).

193. 89 N.M. 307, 551 P.2d 1354 (1976).

State v. Herrera[194] pragmatically qualified: whether the authority to promulgate rules of practice and procedure is vested exclusively within the supreme court.[195]

The majority in *Blackmer* employed a functionalist argument to uphold the validity of the Confidentiality Act by adopting an exception to the *Ammerman* rule, evoking policy arguments, and deferring to the legislature's right to pass such statutes.[196] The dissent, however, adhered to a formalistic analysis relying on the bright-line rule of *Ammerman* and a strict reading of New Mexico Rule of Evidence 11-501 to assert that the legislature overstepped its constitutional boundaries by passing the Confidentiality Act.[197] The friction between the majority and the dissent symbolizes the doctrinal strain between formalism and functionalism in New Mexico, with respect to interpreting the scope of the judiciary's power to enact rules of practice and procedure: the conflict between judicial supremacy and judicial exclusivity.[198]

A. The Majority and Functionalism

The majority employed a functionalist rationale to uphold the Confidentiality Act.[199] Rather than subscribing to the bright-line rule that the power to promulgate rules of practice and procedure is vested exclusively in the court, it applied a practical framework to allow the legislature to share this authority with the judiciary.[200] The majority ultimately relied on a workable and pragmatic interpretation of article I, section 3[201] and article III, section 1[202] of the New Mexico Constitution, New Mexico case law, and policy arguments.[203]

The majority quickly rejected the argument that the authority to form rules of practice and procedure is vested exclusively in the supreme court.[204] To support this, the majority reasoned that New Mexico case law did not intend to "exclude the legislature from the rule-making process but only intended to assure judicial *supremacy* in any clash between legislative and judicial rules of procedure."[205] This assertion immediately placed the majority's analysis in a functionalist framework because it allowed the judiciary to accommodate legislative action and only preclude such action in situations where the legislature threatened to encroach upon an inherent power of the judiciary.[206] The majority, by rejecting the contention that the

194. 92 N.M. 7, 582 P.2d 384 (1978).
195. *Blackmer*, 2005-NMSC-032, ¶ 5, 120 P.3d 820, 821–22.
196. *Id.* ¶¶ 1–22, 120 P.3d at 821–27.
197. *Id.* ¶¶ 23–39, 120 P.3d at 827–30 (Bosson, C.J., dissenting).
198. *See, e.g., id.* ¶¶ 23–39, 120 P.3d at 827–30.
199. *See id.* ¶ 5, 120 P.3d at 822 (majority).
200. *See id.*
201. N.M. CONST. art. I, § 3.
202. N.M. CONST. art. III, § 1.
203. *See Blackmer*, 2005-NMSC-032, ¶ 19, 120 P.3d at 826–27.
204. *Id.* ¶ 5, 120 P.3d at 822.
205. *Id.* (emphasis added) (quoting Browde & Occhialino, *supra* note 86, at 437).
206. *See id.* The majority took note of the fact that the court and the legislature historically had shared this power at times. *Id.* To shift that power exclusively to the judiciary was deemed unnecessary by the majority and perhaps would create an imbalance between the judicial and legislative branch. *See* Brown, *supra* note 5, at 1527 (stating that "[t]he sharing of powers, in itself is not repugnant to the functionalist, nor is the formation of alliances among the branches repugnant, as long as the basic principles of separated powers are not impaired"); Montgomery & Montgomery, *supra* note 15, at 254 (stating that "to shift a power traditionally exercised" by one branch to the other "is to alter the balance of powers"); Tanielian, *supra* note 6, at 967.

authority vests solely in the judiciary, removed the court from the formalistic judicial exclusivity rationale articulated in *Ammerman v. Hubbard Broadcasting, Inc.* without overruling it outright.[207]

To buttress its argument that the legislature may share in this authority, the majority cited to article VI, section 1,[208] of the New Mexico Constitution, asserting that the court may exercise its superintending control if a statute conflicts with a rule of the court.[209] The majority's assertion served to enhance the scope of the judiciary's power since superintending control typically is defined as the supreme court's power to regulate lower courts, not the court's supremacy in determining the validity of statutes.[210] Regardless, judicial supremacy over rules of practice and procedure allowed for the power to be shared simultaneously between the two branches. Therefore, the focus of the majority's analysis was whether the legislature interfered with a core function of the supreme court.[211]

The majority in *Blackmer* acknowledged instances in which the court previously allowed the legislature to enact rules of practice and procedure.[212] Despite the conclusions in *Ammerman*[213] and its progeny, the majority insisted that none of these cases "categorically prohibited the Legislature from enacting legislation affecting practice and procedure."[214] Instead, the majority inferred that the legislature was only precluded from promulgating a statute in certain cases, such as *Ammerman*, because the statute at issue conflicted with a rule of the court.[215] As a result, the majority promoted a great deal of flexibility between the court and the legislature to enact rules, so long as the legislature did not encroach upon the essential functions of the judiciary.[216]

The majority laid out a three-part analysis for courts to employ when faced with legislation affecting court practice and procedure and, specific to the Confidentiality Act, a testimonial privilege.[217] First, the court held that the legislature may not enact a privilege not recognized or required either by the New Mexico Constitution or court rule because to do so would conflict with New Mexico Rule of Evidence 11-

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207. *Blackmer*, 2005-NMSC-032, ¶¶ 5–6, 120 P.3d at 822 (stating that the holding of *Ammerman* was actually narrow due to the specific facts of the case). *Ammerman* is factually very similar to *Blackmer* because both involved a statutory testimonial privilege. The majority, unlike *Ammerman*, did not view that it was necessary to vest the power to prescribe testimonial privileges exclusively within the judiciary if the supreme court could have the final word. Thus, judicial supremacy was enough to protect the judicial branch from any threat of encroachment by the legislature.

208. N.M. CONST. art. VI, § 1.

209. *Blackmer*, 2005-NMSC-032, ¶ 5, 120 P.3d at 822.

210. *See* State v. Roy, 40 N.M. 397, 420, 60 P.2d 646, 660 (1936); Montgomery & Montgomery, *supra* note 15, at 255 (stating that the power of superintending authority is limited in scope and applies only to the "judiciary's internal operations rather than its external relations with other branches of government").

211. *See* Brown, *supra* note 5, at 1527 (citing State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978)).

212. *Blackmer*, 2005-NMSC-032, ¶ 12, 120 P.3d at 823.

213. 89 N.M. 307, 551 P.2d 1354 (1976).

214. *Blackmer*, 2005-NMSC-032, ¶ 9, 551 P.3d at 823.

215. *Id.* ¶¶ 6–10, 120 P.3d at 822–23. The issue of conflict triggered judicial supremacy because the court in *Ammerman* viewed the statute at issue specifically to encroach upon the court's inherent authority to regulate practice and procedure and thus jeopardized independence. *Id.*

216. *See* Strauss, *supra* note 47, at 489 (stating that functionalism "stresses core function and relationship, and permits a good deal of flexibility when these [separation of powers] attributes are not threatened"); *see also* Alexander v. Delgado, 84 N.M. 717, 718, 507 P.2d 778, 779 (1973).

217. *Blackmer*, 2005-NMSC-032, ¶ 11, 120 P.3d at 824.

501.[218] Second, the court noted that if the legislature creates a privilege that "affects arguably the same subject matter" as a privilege enumerated in rule 11-501, the court will determine whether the statutory privilege is consistent with the rule.[219] Third, the court stated that if the statutory privilege is consistent with rule 11-501, then the court will give it effect.[220] Conversely, the court indicated that, if the statute is not consistent, then the court rule prevails.[221] The result of this three-part test promotes judicial supremacy with respect to rules affecting court practice and procedure, greater collaboration between the judiciary and the legislature in New Mexico, and allows for both branches to respond to contemporary needs of society.[222]

The majority applied this functional framework to the victim-counselor privilege and gave it effect because the majority deemed it to be consistent with New Mexico Rule of Evidence 11-504, a rule affording a psychotherapist-patient privilege.[223] The majority analogized the victim-counselor privilege enumerated in the Confidentiality Act to the psychotherapist-patient privilege because both serve to protect confidential communications and are justified by similar private and public concerns.[224] Additionally, the majority emphasized the dual policy concerns behind the statutory privilege and the rule 11-504 privilege[225] and provided an exhaustive list of how the Confidentiality Act will further the private rights of the victims it seeks to protect and public interests as a whole.[226] In summation, the majority upheld the victim-counselor privilege because it worked in harmony with a court rule, was grounded in sound public policy, and did not pose a danger of unduly encroaching upon the power of the court to promulgate rules of practice and procedure.[227]

B. The Dissent and Formalism

Chief Justice Bosson, writing in dissent, employed a formalistic rationale to critique the majority's decision.[228] He premised his argument on the plain language of both *Ammerman v. Hubbard Broadcasting, Inc.* and rule 11-501.[229] According to Chief Justice Bosson's rationale, *Ammerman* and rule 11-501 conclusively preclude

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218. *Id.*; *see* Rule 11-501 NMRA (stating that, "[e]xcept as otherwise required by constitution, and except as provided in these rules or in other rules adopted by the supreme court, no person has a privilege to...refuse to disclose any matter").

219. *Blackmer*, 2005-NMSC-032, ¶ 11, 120 P.3d at 824.

220. *Id.*

221. *Id.*

222. *See* Tanielian, *supra* note 6, at 986.

223. *Blackmer*, 2005-NMSC-032, ¶ 13, 120 P.3d at 824; *see* Rule 11-504 NMRA (enumerating the psychotherapist-patient privilege).

224. *Blackmer*, 2005-NMSC-032, ¶ 14, 120 P.3d at 825.

225. Rule 11-504 NMRA.

226. *Blackmer*, 2005-NMSC-032, ¶¶ 15–17, 120 P.3d at 825–26. The court stated that rape crisis centers provide specialized services for victims and are unique places of refuge and support for victims. In order for the rape crisis center to function effectively, the court deemed it essential that the victim be able to confide with complete confidentiality, for the privilege is "rooted in the imperative need for confidence and trust." *Id.* ¶ 15, 120 P.3d at 825 (internal quotations omitted). The guarantee of confidentiality would encourage the reporting of such crimes, thus enabling the police to prevent further crimes of sexual assault. *Id.* ¶¶ 15–17, 120 P.3d at 825–26.

227. *Id.* ¶ 17, 120 P.3d at 826 (Bosson, C.J., dissenting).

228. *Id.* ¶ 23, 120 P.3d at 827.

229. *Id.* ¶¶ 24–25, 120 P.3d at 827.

the legislature from creating an evidentiary privilege.[230] As a result, any statute that constituted a rule of practice or procedure (and in this case an evidentiary privilege) is "an unconstitutional incursion upon the doctrine of separation of powers."[231]

Unlike the majority, Chief Justice Bosson expressly articulated that the issue was based on an understanding of the separation of powers doctrine.[232] He noted that it is the supreme court, not the legislature, that has the constitutional authority to promulgate rules of practice and procedure.[233] The power to effectuate an evidentiary privilege, therefore, "remains a core function of the judiciary as a separate and equal branch of the government."[234] Chief Justice Bosson criticized the majority's decision to disregard the clear language set forth in *Ammerman* and rule 11-501 because to do so invited the legislature to invade the province of the judiciary.[235] Chief Justice Bosson reasoned that the consequence of the majority's holding melded the legislature with the judiciary and encouraged the legislature to control, either directly or indirectly, rules of practice and procedure.[236]

Chief Justice Bosson focused on the court's use of the word "exclusive" in *Ammerman*.[237] Chief Justice Bosson emphasized that a constitutional power vested exclusively in one branch cannot reside simultaneously within two distinct and separate branches.[238] He reasoned that the court in *Ammerman* held the statutory privilege to be unconstitutional not because the court found it to be inconsistent with a court rule, but because the legislature had overstepped its constitutional boundaries.[239] Consequently, Chief Justice Bosson relied on *Ammerman* not only to assert that the power to enact an evidentiary privilege is vested exclusively within the court, but also to affirm that the power could not, in any situation, be shared between the two branches.[240]

Chief Justice Bosson also focused on the plain language of rule 11-501, which enumerated that no person may assert a privilege unless it is recognized by court rule or the New Mexico Constitution.[241] As a result, he concluded that the majority's

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230. *Id.*; *see* Ammerman v. Hubbard Broad., Inc., 89 N.M. 307, 551 P.2d 1354 (1976) (asserting that the power to promulgate rules of practice and procedure is vested exclusively in the judiciary); Rule 11-501 NMRA (stating that no person may assert a privilege not recognized by court rule or enumerated in the constitution).

231. *Blackmer*, 2005-NMSC-032, ¶ 26, 120 P.3d at 828 (Bosson, C.J., dissenting).

232. *Id.*

233. *Id.*; *see* N.M. CONST. arts. III, § 1, VI, § 1. *Contra* Montgomery & Montgomery, *supra* note 15, at 254.

234. *Blackmer*, 2005-NMSC-032, ¶ 24, 120 P.3d at 827 (Bosson, C.J., dissenting); *see* Montgomery & Montgomery, *supra* note 15, at 231, 254. Chief Justice Bosson's reasoning echoed that of Justice Carmody in 1963 when Justice Carmody criticized Judge Donnelly's proposal to the New Mexico Constitutional Revision Commission that appellate jurisdiction be provided by the legislature instead of by court rule. Justice Carmody argued for the court's extensive regulation of practice and procedure, especially with respect to appellate jurisdiction. Justice Carmody wrote that "the Court is in a much superior position to determine what may be necessary" in regard to the judiciary's operations and that the "Judicial Branch should operate as one separate unit." *See* Montgomery & Montgomery, *supra* note 15, at 231 (quoting Letter from Justice David W. Carmody to Edward E. Triviz & Ellis L. Stout, *supra* note 110).

235. *Blackmer*, 2005-NMSC-032, ¶ 35, 120 P.3d at 829 (Bosson, C.J., dissenting).

236. *See id.*

237. *Id.* ¶ 27, 120 P.3d at 828.

238. *Id.*

239. *Id.*

240. *See id.*

241. *See id.* ¶ 34, 120 P.3d at 829. Although rule 11-501 is not enumerated in the constitution and is a creation of the supreme court, Chief Justice Bosson still applied a formalistic analysis presumably because rule 11-501 serves as a reminder that the legislature may not enact a statutory privilege.

determination to allow the legislature to create a privilege when it is consistent with a court rule negates the clear language of rule 11-501.[242] Rule 11-501 comports with the premise in *Ammerman* that the legislature cannot pass rules of practice and procedure; the majority's functional interpretation of the plain reading of each, according to Chief Justice Bosson, serves to undermine the independence of the judicial branch.[243] If the New Mexico Supreme Court does not have the exclusive authority to promulgate rules of practice and procedure, Chief Justice Bosson reasoned, then "by what right can [the court] claim to be an equal and independent branch of government?"[244] He emphasized that the very issue touched on core values of the judiciary: "The decision to allow someone not to give testimony...goes to the heart of judicial authority. Courts are all about seeking the truth, and towards that end everyone, rich and poor, the most powerful and the most humble, can be compelled to give testimony."[245] Consequently, Chief Justice Bosson determined that, to preserve such values, judicial exclusivity over rules of practice and procedure was essential.[246]

Chief Justice Bosson stressed that the bright-line rules articulated in *Ammerman* and rule 11-501 better serve the interests of the judiciary and the legislature.[247] He noted that bright-line rules foster predictability, transparency, and continuity in the law because the division of authority between the court and the legislature is clearly delineated.[248] He suggested that such a result would help litigants recognize that only the court may create privileges, confirm for the legislature its constitutional limitations, and affirm for the judiciary its independence as a co-equal branch of government.[249] In view of Chief Justice Bosson's rationale, the permissive rule adopted by the majority would only encourage the legislature to act and, consequently, provided no protection for the judiciary.[250]

The issue of the constitutionality of the Confidentiality Act and the statutory privilege it created was simple for Chief Justice Bosson. His analysis was void of policy arguments, creative interpretation of the law, or deference to legislative

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242. *Id.* ¶ 30, 120 P.3d at 828.

243. *See id.* ¶ 34, 120 P.3d at 829.

244. *See id. Contra* Montgomery & Montgomery, *supra* note 15, at 256. Montgomery argues that the notion of inherent powers, as articulated in *Ammerman*, is now more restrained. *Id.* Arguably, if the supreme court and the legislature have historically been able to share this authority without compromising the integrity of the judicial branch, it is difficult to reason that the majority's decision will serve to undermine the court's independence. *See id.* ("[A] court's use of inherent powers is justified when necessary to protect 'the court's ability to perform its essential judicial functions'" (quoting N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 27. 986 P.2d 450, 458) and "'to protect itself from indignities'" (quoting State *ex rel.* Bliss v. Greenwood, 63 N.M. 156, 162, 315 P.2d 223, 227 (1995)).).

245. *Blackmer*, 2005-NMSC-032, ¶ 34, 120 P.3d. at 829 (Bosson, C.J., dissenting). The majority addressed this argument, noting that they were "mindful that adopting evidentiary privileges may increase the risk of interfering with the truth-seeking process of litigation" and that "the public...has a right to every man's evidence." *Id.* ¶ 18, 120 P.3d at 826 (majority) (citing United States v. Nixon, 418 U.S. 683 (1974)). The majority reasoned, however, that judicial supremacy over the legislature with regard to rules of practice and procedure was sufficient enough to protect judicial values.

246. *Id.* ¶ 34, 120 P.3d at 829 (Bosson, C.J., dissenting).

247. *See id.* ¶ 35, 120 P.3d at 829.

248. *See id.*; *see also* Eskridge, *supra* note 4, at 21 (stating that "[f]ormalism might be understood as giving priority to rule of law values such as transparency, predictability, and continuity in law").

249. *See Blackmer*, 2005-NMSC-032, ¶ 35, 120 P.3d at 829 (Bosson, C.J., dissenting).

250. *See id.*

decision making because, for him, the issue rested on a formalistic theory of separation of powers.[251] Chief Justice Bosson reiterated that the court in *Ammerman* interpreted article I, section 3 and article VI, section 1 of the New Mexico Constitution to vest the authority to promulgate rules of practice and procedure exclusively in the supreme court.[252] As a result, this power could not reside simultaneously with the legislature.[253]

More specifically, Chief Justice Bosson interpreted rule 11-501 to reinforce the bright line rule enumerated in *Ammerman* with respect to testimonial privileges.[254] He emphasized that rule 11-501, by expressly precluding the legislature from enacting a statutory privilege, advocated exclusive judicial control of the courts, especially with respect to who may or may not give testimony.[255] Chief Justice Bosson reasoned that the enactment and regulation of evidentiary privileges "goes to the heart of judicial authority" because these privileges directly affect the truth seeking process.[256] Because the Chief Justice considered the core function of the judiciary to be the pursuit of the truth, he concluded that to allow the legislature to influence this process would effectively abrogate the independence and autonomy of the judicial branch.[257]

V. THE VIRTUE OF FUNCTIONALISM IN NEW MEXICO

Although the majority and dissent diverged regarding the constitutionality of the Confidentiality Act, both opinions equally reflect New Mexico case law with respect to the court's scope of power to promulgate rules of practice and procedure. The majority's reasoning appears consistent with the functionalist approach of *Roy* and its progeny—that is, when the New Mexico Legislature enacts a rule of practice and procedure that proves reasonable and workable, the court will defer to such legislation.[258] This may be particularly true with respect to the victim-counselor privilege, as the court has recognized it to be within the "domain of the legislature, as the voice of the people, to make public policy."[259] The Confidentiality Act, in part, was motivated by public policy in order to protect the rights of rape victims, encourage victims to report sexual assault crimes, and preserve the efficacy of rape crisis centers, which serve as "a unique and essential place of refuge for a rape

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251. *See id.* ¶ 24, 120 P.3d at 827.

252. *See id.* ¶ 27, 120 P.3d at 828.

253. *Id.*

254. *See id.* ¶ 30, 120 P.3d at 828.

255. *Id.* ¶ 34, 120 P.3d at 829. *Cf.* Strauss, *supra* note 47, at 508 (citing Commodity Futures Trading Comm'n. v. Shor, 478 U.S. 833 (1986) (Brennan, J., dissenting)). In *Shor*, Justice Brennan, joined by Justice Marshall, argued that the "important functions of Article III are too central to our constitutional scheme to risk their incremental erosion." *Shor*, 478 U.S. at 861. Any "dilution of judicial power operates to impair the protections of Article III regardless of whether Congress acted with the 'good intention' of providing a more efficient dispute resolution system or with the 'bad intention' of strengthening the Legislative Branch at the expense of the Judiciary. *Id.* at 866. Thus, "it is necessary to endure the inconvenience of separated powers in order to 'secure liberty.'" *Id.* at 865.

256. *Blackmer*, 2005-NMSC-032, ¶ 34, 120 P.3d at 829 (Bosson, C.J., dissenting).

257. *Id.*

258. *State v. Herrera*, 92 N.M. 7, 12, 582 P.2d 384, 389 (Ct. App. 1978) (citing Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973)).

259. State *ex rel.* N.M. Judicial Stds. Comm'n v. Espinosa, 2003-NMSC-017, ¶ 13, 73 P.3d 197, 206 (Serna, J., specially concurring); *see* Kimberly Parmer-Bannerman, Note, State *ex rel.* New Mexico Judicial Standards Commission v. Espinosa: *Can Judicial Integrity Survive Executive Control?*, 34 N.M. L. REV. 489 (2004).

victim."[260] Furthermore, the victim-counselor privilege advances the same public and private concerns as the psychotherapist-patient privilege.[261] The legislation is workable in that it comports with a pre-existing rule of the court and is particularly reasonable as it was enacted in response to fundamental policy concerns.[262]

The majority's determination to interpret *Ammerman* narrowly and focus on whether the statute conflicted with rule 11-501 demonstrates the court's deference to the legislature, its restraint in asserting the scope of its inherent power, and the court's functional approach to the issue.[263] Had the majority invalidated the Confidentiality Act, the majority would have "frustrate[d] the popular will" because the legislature passed the act in an effort to address the rights of sexual assault victims.[264] By creating an exception to the *Ammerman* rule, without disposing of it completely, the majority clung to its inherent authority to prescribe rules of practice and procedure by attempting to maintain a balance of power between the judiciary and the legislature.[265] The supreme court retains its essential power of review over such statutes and the legislature may effectuate necessary public policy; thus, the holding allows each branch to function independently and interdependently with respect to one another.[266]

While Chief Justice Bosson faithfully adhered to *Ammerman*, his formalist approach may "straightjacket the government's ability to respond to new needs in creative ways, even if those ways pose no threat to whatever might be posited as the basic purposes of the constitutional structure."[267] The supreme court's authority to regulate rules of practice and procedure originated out of the court's willingness to evaluate separation of powers issues pragmatically. New Mexico courts have often argued that a functionalist approach be taken and that "[i]t is unrealistic...to assume that the functions performed by the three branches do not—and should not—blend and overlap."[268] The majority's advocacy for judicial supremacy, allowing the legislature to share in the power to promulgate rules of practice and procedure, will provide for greater flexibility and efficacy in the law.[269] In addition, because the

260. *Blackmer*, 2005-NMSC-032, ¶ 17, 120 P.3d at 826.

261. *Id.*

262. *Id.*

263. Montgomery & Montgomery, *supra* note 15, at 253 ("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 power.").

264. *See id.* ("To review and invalidate an act of a co-equal government branch is surely among the most far-reaching of judicial powers.").

265. *See id.* ("The courts' legitimacy is vulnerable to attack when their actions impede the efforts of the government's political branches.").

266. *Id.* at 255–57 (discussing essential powers of the legislature and judiciary).

267. *See* Brown, *supra* note 5, at 1526.

268. Bd. of Educ. v. Harrell, 118 N.M. 470, 483, 882 P.2d 511, 524 (1994).

269. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976). "[T]he constitution by no means contemplates total separation of each of these three essential branches of Government....The men who met in Philadelphia...were practical statesman who...saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Id.*; *see* Brown, *supra* note 5, at 1525 ("'To insist upon the maintenance of an absolute separation merely for the sake of doctrinal purity could severely hinder the quest for a workable government with no appreciable gain for the cause of liberty or efficiency.'" (quoting Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990))); *see also* Browde & Occhialino, *supra* note 86, at 411.

supreme court still retains the power to review such legislative statutes, the court preserves its integrity and autonomy.[270]

For the sake of analytical clarity, it may have been advantageous for the majority and dissent to have acknowledged the arguments of each other, thereby employing both formalism and functionalism in their rationales.[271] The majority could have chosen, as was suggested by the dissent, to overrule *Ammerman v. Hubbard Broadcasting, Inc.* and amend rule 11-501 to allow the legislature to create evidentiary privileges.[272] Additionally, the court, in order to retain its superintending authority over testimonial statutes, could have asserted the authority to invalidate statutes that it deems to be unreasonable or unworkable with a court rule.[273] In this sense, the majority could have provided a clear rule that the legislature may promulgate rules of practice and procedure. Such clarity and concreteness would demonstrate that this power may be shared between the two branches but would still reserve to the supreme court superintending control over these core functions.[274] Since the Framers did not argue for a "profound gulf between form and function," perhaps neither should New Mexico.[275] Government may be construed as "an amalgam of rule-following—formalism...and political efficacy—functionalism," both of which allow for deference to separation of powers principles.[276] In many instances, New Mexico courts have acknowledged that the legislature shares this authority with the supreme court.[277] To allow the legislature to partake in prescribing rules affecting practice and procedure with the provision that the supreme court will have the final word allows both entities "to breathe and evolve in response to new times, new problems, and new circumstances."[278]

VI. CONCLUSION

Albuquerque Rape Crisis Center v. Blackmer illustrates that the debate between formal-judicial exclusivity and functional-judicial supremacy with respect to the promulgation of rules of practice and procedure is far from settled in New Mexico. The majority prevailed in its functionalist approach, perhaps because the New Mexico judiciary has demonstrated an ability and willingness to share the authority to promulgate rules of practice and procedure. While each of the three governmental branches must remain separate from the others in order to prevent one branch from accumulating too much power, it is evident from New Mexico case law that the supreme court can effectively and efficiently share the authority to create rules of practice and procedure with the legislature. Although *Blackmer* signaled the court's explicit departure from the assertion that this power is vested exclusively in the supreme court, the majority's refusal to overrule *Ammerman* or amend rule 11-501 signifies that this issue is still open for debate. As a result, the tension between

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270. *See Blackmer*, 2005-NMSC-032, ¶ 11, 120 P.3d at 824.
271. *See supra* note 82.
272. *Blackmer*, 2005-NMSC-032, ¶¶ 32–33,120 P.3d at 829 (Bosson, C.J., dissenting).
273. *See* State *ex rel.* Anaya v. McBride, 88 N.M. 244, 246, 539 P.2d, 1006, 1008 (1975).
274. *See Blackmer*, 2005-NMSC-032, ¶ 11, 120 P.3d at 824.
275. Eskridge, *supra* note 4, at 27–28.
276. *Id.* at 28.
277. *See, e.g.*, State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978).
278. Eskridge, *supra* note 4, at 29.

functionalism and formalism, with respect to the right to prescribe rules of practice and procedure, will continue in New Mexico courts for the time being.