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Rule(make)r and Judge: Minnesota Courts and the Supervisory Power

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RULE(MAKE)R AND JUDGE: MINNESOTA COURTS AND THE SUPERVISORY POWER

Gary E. O’Connor†

"Who made thee ruler and judge over us?"1

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1. Exodus 2:14 (Darby).
1. INTRODUCTION

The question put to Moses when he intervened in a dispute raises a fundamental question of jurisprudence: By what authority do judges have the power to make rules and decide cases? In the twentieth century, the answer almost always is that a constitutional or statutory provision gives them that power. Thus, it is often easy to forget that courts also possess powers that predate and are largely independent of state and federal constitutions and statutes.

One of these powers is the supervisory power. By supervisory power, this Article refers to the power exercised by courts, which sometimes is based on a constitutional or statutory provision granting such power, to establish rules and reverse cases in the interests of justice, judicial integrity, and notions of good policy. The su-
Supervisory power has been used with increasing frequency in both federal and state courts in the past few decades. Although the supervisory power of the federal courts has been a regular topic for commentators, very little has been written about the supervisory power of state courts. The federal court supervisory power decisions are not binding on the state courts, and the federal courts' supervisory power may be meeting its demise. This fact, coupled with the frequent exercise of supervisory power in recent years by the Minnesota Supreme Court, highlights the importance of the state court supervisory power. Because the supervisory power is

One federal court has defined supervisory powers as "common law powers to establish procedures for the courts' internal operations when statutes and rules are silent." United States v. Rodriguez, 888 F.2d 519, 527 (7th Cir. 1989). The same circuit has indicated that the supervisory power has two separate meanings: (1) "the authority to announce new rules that promote the administration of justice, even though neither constitution nor statute require such rules" and (2) the "power to reverse judgments without requiring a demonstration that the error in question affected the outcome." United States v. Widgery, 778 F.2d 325, 328-29 (7th Cir. 1985).

4. See infra Part II.C (discussing federal cases in which the court invoked its supervisory power).


7. One commentator noted, "I have been unable to find in the journals any discussion of the exercise by state courts of a supervisory power similar to that exercised by federal courts." Bennett L. Gersman, Supervisory Power of the New York Courts, 14 PACE L. REV. 41, 42 n.4 (1994).

8. See infra notes 42-45 and accompanying text.

9. This more frequent use may be part of a broader trend of state courts filling the void in the area of criminal law left by a more conservative federal judiciary. Cf. Stumpf, supra note 2, at xviii.

The growth of inherent powers law is part of the more general growth and development of state constitutional law. Political scientists Alan Tarr and Mary Cornelia Porter have argued that some of the most creative efforts in constitutional law are taking place in state courts, after decades of scholarly attention to federal developments. In the field of inherent powers, state courts have been far more active than federal courts.

Id.; see also Peter W. Gorman, Note, Rights of Criminal Defendants: The Emerging Independence of State Courts, 2 HAMLINE L. REV. 83, 85 (1979) (noting that state su-
largely independent of constitutional and statutory provisions, it is important to scrutinize closely its source, nature, and scope, lest it become merely a too-willing servant of judicial whim.

Part II of this Article examines the historical background of the supervisory power in the English common-law courts, the American colonies, and the federal courts. Part III discusses the cases in which the Minnesota Supreme Court has exercised the supervisory power. Part IV considers possible constitutional, statutory, and common-law sources for the Minnesota Supreme Court's supervisory power. Part V examines the scope of the power exercised by the Minnesota Supreme Court and the criteria the court has established for use of the power. Part VI considers whether the Minnesota Court of Appeals can exercise supervisory power. Finally, this Article concludes that the Minnesota Supreme Court has provided very little guidance or insight regarding the source, scope, nature, or extent of the supervisory power. Further, this Article argues that the reasons supporting the exercise of supervisory power by other intermediate appellate courts also support the exercise of supervisory power by the Minnesota Court of Appeals.

II. THE ORIGINS OF THE SUPERVISORY POWER

A. The Court of King's Bench

Commentators trace the origins of supervisory power back to the English Court of King's Bench. The state courts, as courts of general jurisdiction, are the lineal descendants of the English common-law courts. The English common-law courts were the prime courts have "rejected" Supreme Court rulings – i.e., extended to state court defendants protections broader than the federal Constitution, based on state constitutions, rules of evidence, rules of procedure, statutes, court rules, public policy considerations, and the supervisory power).

10. See Comment, Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of Federal Courts, 72 NW. U. L. REV. 595, 615 (1978) ("Commentators have recognized its similarity to the exercise of prerogative writs by the Court of the King's Bench.").

11. See Georgetown Note, supra note 6, at 1051-52 ("It must be remembered that state courts are common-law courts and that the courts of the original thirteen states exercised the full powers of such courts before our Constitution was adopted."); Michael S. Gilmore & Dale D. Goble, The Idaho Administrative Procedure Act: A Primer for the Practitioner, 30 IDAHO L. REV. 273, 351 n.421 (1993/1994) ("[T]he state courts – as courts of general jurisdiction – are the lineal descendants of the English common law courts.").
courts of Common Pleas, King's Bench, and Exchequer.\textsuperscript{12}

The Court of King's Bench itself had its origins in the \textit{aula regis} or "great council of the king," a constant court in the king's own hall.\textsuperscript{13} This court consisted of the king's great officers of state who resided in the palace; the court included the lord high constable, the lord high steward, the lord great chamberlain, the lord chancellor, and others.\textsuperscript{14} The court was called the King's Bench because the kings formerly sat there in person.\textsuperscript{15} Although it eventually became simply a common-law court, the court continued to retain powers of a quasi-political nature from the days when the court was both King's Bench and Council.\textsuperscript{16}

The Court of King's Bench was a court of appeals for the Court of Common Pleas and all inferior courts of record in England.\textsuperscript{17} It was not, however, the court of last resort. A party could remove a case by writ of error from the Court of King's Bench to the House of Lords, or the Court of Exchequer Chamber, depending on the nature of the suit and the manner in which it had been prosecuted.\textsuperscript{18}

Describing the jurisdiction of the Court of King's Bench, William Blackstone wrote:

> The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove the proceedings to be determined here, or prohibit their progress below . . . . It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition.\textsuperscript{19}

Lord Coke also described the court:

> [T]his court hath not only jurisdiction to correct errors in judicial proceedings, but other errors and misdemeanours extrajudiciall tending to the breach of the peace, or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so

\begin{thebibliography}{9}
\bibitem{12} See 1 \textsc{William Holdsworth}, \textit{A History of English Law} 195 (7th ed. rev. 1956).
\bibitem{13} 2 \textsc{William Blackstone}, \textit{Commentaries} *38.
\bibitem{14} See id.
\bibitem{15} See id. at *41.
\bibitem{16} See 1 \textsc{Holdsworth}, \textit{supra} note 12, at 211.
\bibitem{17} See 2 \textsc{Blackstone}, \textit{supra} note 13, at *43.
\bibitem{18} See id.
\bibitem{19} Id. at *42.
\end{thebibliography}
that no wrong or injury, either publick or private, can be
done, but that this shall be reformed or punished in one
court or other by due course of law. As if any person be
committed to prison, this court upon motion ought to
grant an habeas corpus, and upon returne of the cause do
justice and relieve the party wronged. And this may be
done though the party aggrieved hath no privilege in
court. It granteth prohibitions to courts temporall and
ecclesiasticall, to keep them within their proper jurisdic-

The Court of King's Bench had criminal jurisdiction, civil ju-
risdiction, as well as "a general superintendence over the due ob-
servance of the law by officials and others." This superintendence
was exercised "partly by its process of contempt, but chiefly by
means of the prerogative writs." The prerogative writs included
habeas corpus, certiorari, mandamus, and prohibition. Through
these writs, the court was able to exercise significant control over
inferior and rival courts.

B. The Colonies

Before the adoption of the federal Constitution, the courts of
the original thirteen colonies exercised the full powers of the Eng-
lish common-law courts, including the powers of the Court of
King's Bench. The colonial courts kept their common-law rule-

20. 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 70 (1817). One his-
torian writes, "In 1789 Coke's Fourth Institute still remained the classical state-
ment of the King's Bench's powers of superintendence and their rationale." 1

21. JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES:
ANTECEDENTS AND BEGINNINGS TO 1801, at 784 (1971).

22. Id. at 226.

23. See id. at 226-29.


25. See Georgetown Note, supra note 6, at 1051-52. For example, on May 22,
1722, the General Assembly of Pennsylvania established the powers of a "Supreme
Court":

[The justices shall] exercise the jurisdictions and powers hereby granted
concerning all and singular the premises according to law, as fully and
amply, to all intents and purposes whatsoever, as the Justices of the
Court of King's Bench, Common Pleas, and Exchequer, at Westminster,
or any of them, may or can do.

Bernard F. Scherer, The Supreme Court of Pennsylvania and the Origins of King's Bench
Power, 32 DUQ. L. REV. 525, 525 (1994) (citing 1 Smith Laws 139 (1810)). At the
1968 constitutional convention in Pennsylvania, one delegate, a judge, asserted
that the Pennsylvania Supreme Court had an "inherent jurisdiction" – i.e., the
making power after the adoption of state constitutions, which gave state legislatures general rulemaking authority. This power passed to other states because of the rule that the courts of one state will presume the common law of a sister state to be the same as their own. Early in the twentieth century, various state courts explicitly recognized the powers of the King's Bench.

King's Bench powers - that could not be taken away without the court's own approval. Id. at 533 & n.55 (citing 2 PENNSYLVANIA CONSTITUTIONAL CONVENTION 1967-68 JOURNAL, at 841 (Feb. 15, 1968)).

For a thorough discussion of the early history of the colonial King's Bench power in the context of one of the prerogative writs, the writ of mandamus, see Leonard S. Goodman, Mandamus in the Colonies – The Rise of the Superintending Power of American Courts, 1 AM. J. LEGAL HIST. 308 (1957), 2 AM. J. LEGAL HIST. 1 (1958), 2 AM. J. LEGAL HIST. 129 (1958). Goodman concludes that some states were vested with broad King's Bench jurisdiction, but that this vesting was not taken seriously; others used it as a "make-way... to assert broad superintending authority"; others had the power but did not exercise it because of a strong assembly or executive; and "[t]hat express King's Bench powers are not necessary to the exercise of superintending jurisdiction is conclusively shown in those colonies whose courts were systematically deprived of King's Bench authority." Goodman, supra, 2 AM. J. LEGAL HIST. at 143-44.


28. See Brooks v. State ex rel. Richards, 79 A. 790, 795 (Del. 1911) (explaining the writ of quo warranto "was a part of that vast mass of remedies for wrongs which was brought over by the early English settlers, and which by statutory and constitutional enactments... was by the general adoption of the powers of the King's Bench, made a part of our civil judicature"); Lamb v. State, 107 So. 535, 537 (Fla. 1926) ("Common-law writs of procedure that have not been abrogated or superseded by the Constitution or by statutory regulations are available in this state... The circuit court, being a court of general jurisdiction analogous to the Court of King's Bench, has jurisdiction to issue writs of error coram nobis... ."); Specht v. Central Passenger Ry. Co., 68 A. 785, 788 (N.J. 1908), rev'd, 72 A. 356 (N.J. 1909) ("[The writ of certiorari] is a prerogative writ by which the Supreme Court exercises a jurisdiction derived by it from its prototype, the King's Bench of England, that of supervising the proceedings of inferior tribunals and governmental establishments... ."); In re Steinway, 53 N.E. 1103, 1105 (N.Y. 1899) ("Thus, we have the powers of the court of kings bench and the court of chancery as they existed when the first constitution was adopted [1777], blended and continued in the supreme court of this state, except as modified by constitution or statute.").

Some care is necessary when examining cases from the earliest years of this country's history because of the differences in the organization of the court system at that time. One historian explains:

The clear distinction between review and trial functions developed predominantly during the nineteenth century. In the eighteenth and earlier centuries, the English courts, after which American courts were gen-
C. The Federal Courts

Commentators agree that *McNabb v. United States* marks the beginning of the exercise of supervisory power by the federal courts. In *McNabb*, the Supreme Court considered the admissibility of statements made by criminal defendants. The defendants, who were charged with the murder of an officer of the Alcohol Tax Unit of the Bureau of Internal Revenue who was engaged in the performance of his official duties, were arrested in the middle of the night at their home. They were locked in a barren cell and held there for fourteen hours. Further, the defendants were "subjected to unremitting questioning by numerous officers" for two days. One defendant confessed after being questioned continuously for five or six hours. While in custody, the defendants were not allowed to see relatives or friends who attempted to visit them, and they were denied assistance of counsel.

In *McNabb*, the Supreme Court stated it was not necessary to reach the constitutional issue regarding the admissibility of statements because the "scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertain-
ment of Constitutional validity."\textsuperscript{36} The Court reasoned:

Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process by law" and below which we reach what is really trial by force.\textsuperscript{37}

The Court noted that the principles governing the admissibility of evidence had not been restricted "to those derived solely from the Constitution," but that "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," the Court had formulated rules of evidence to be applied in federal criminal prosecutions.\textsuperscript{38} In formulating those rules, the Court was guided by "considerations of justice not limited to the strict canons of evidentiary relevance."\textsuperscript{39} The Court concluded that "[q]uite apart from the Constitution," the defendants' statements must be excluded.\textsuperscript{40} The Court stated that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law."\textsuperscript{41}

After the Supreme Court commenced exercise of the supervisory power in \textit{McNabb}, the door opened for other federal courts to follow suit. Supervisory power was first exercised by a federal court of appeals in \textit{Helwig v. United States}.\textsuperscript{42} Initially, some federal courts of appeals claimed they did not have supervisory power over federal district courts.\textsuperscript{43} This initial reluctance did not last long. Since

\begin{itemize}
\item \textsuperscript{36} \textit{Id}. at 340.
\item \textsuperscript{37} \textit{McNabb}, 318 U.S. at 340.
\item \textsuperscript{38} \textit{Id}. at 341.
\item \textsuperscript{39} \textit{Id}.
\item \textsuperscript{40} \textit{Id}.
\item \textsuperscript{41} \textit{Id}. at 345. Justice Reed dissented from the majority opinion, stating, "I am opposed to broadening the possibilities of defendants escaping punishment by these more rigorous technical requirements in the administration of justice." \textit{Id}. at 349 (Reed, J., dissenting).
\item \textsuperscript{42} 162 F.2d 837, 840 (6th Cir. 1947).
\item \textsuperscript{43} \textit{See}, \textit{e.g.}, \textit{In re McNeil Bros.}, 259 F.2d 386, 387 (1st Cir. 1958). The First Circuit observed:
\end{itemize}

The proposed petition states that our "jurisdiction of this case arises from the general supervisory powers of the Courts of Appeals over the judges of the District Courts of the United States." We disclaim any such
McNabb, the federal courts of appeals have exercised supervisory power in many cases.44

Recently, however, the Supreme Court has restricted the use of supervisory power by the federal courts. One commentator noted that “the rise and fall of supervisory power resembles a parabolic arch, beginning with McNabb, reaching its crest during the tenure of Chief Justice Warren, and then descending precipitously during the Burger and Rehnquist Courts.”45

III. THE MINNESOTA SUPREME COURT’S USE OF THE SUPERVISORY POWER

The Minnesota Supreme Court first mentioned the supervisory power in the context of the federal court’s supervisory power.46 The Minnesota Supreme Court first explicitly exercised its own supervisory power in 1967 in State v. Borst.47 Since 1967, the Minnesota Supreme Court has exercised its supervisory power in twelve cases. The court has used this power more frequently in the past few years. In the last five years, the Minnesota Supreme Court has exercised its supervisory power in seven cases.48 In another case,

function. Our jurisdiction is purely statutory in accordance with the authority Congress has given us . . . . [W]e are given a limited power to issue writs in aid of our appellate or potential appellate jurisdiction, in 28 U.S.C. § 1651 . . . . “Contrary to the view which seems to have been occasionally taken, or at least sub silentio assumed, in other courts of appeals, we do not think that 28 U.S.C. § 1651 grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit . . . .”

Id.; see also Lewis v. United Gas Pipe Line Co., 194 F.2d 1005, 1006 (5th Cir. 1952) (“We have no general superintendence over district courts and cases in them, but may interfere only when and to the extent that the laws provide.”).

44. See Burton v. United States, 483 F.2d 1182, 1187 (9th Cir.) (citing 29 cases in which courts exercised supervisory power), aff’d on reh’g, 483 F.2d 1190 (9th Cir. 1973); Robert M. Bloom, Judicial Integrity: A Call for Its Re-emergence in the Adjudication of Criminal Cases, 84 J. CRIM. L. & CRIMINOLOGY 462, 474 n.76 (1993) (listing 27 cases in which courts exercised supervisory power); Schwartz, supra note 3, at 509-11 (listing 40 cases from a single circuit in which courts exercised supervisory power).

45. Gershaman, supra note 7, at 47.


47. 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967).

48. See State v. Porter, 526 N.W.2d 359, 366 (Minn. 1995); State v. Scales, 518 N.W.2d 587, 589 (Minn. 1994); State v. Shorter, 511 N.W.2d 743, 747 (Minn. 1994); State v. VanWagner, 504 N.W.2d 746, 750 (Minn. 1993); State v. Salitros,
the court expressed its intention to use the power in the future. The Minnesota Supreme Court has used its supervisory power in a variety of ways. The court has utilized the power to order a new trial and to allow a criminal defendant to have a trial by requiring the trial court to withdraw a guilty plea. The supreme court also has used its supervisory power to adopt rules.

Most frequently, the supreme court has used the power to require the provision of counsel in certain types of cases. In its first supervisory power case, *State v. Borst*, the court required counsel to be provided to an indigent defendant in any case that may lead to incarceration in a penal institution. In *Hepfel v. Bashaw*, the court required counsel to be provided to indigent defendants in paternity adjudications in which the county attorney represents the complainant. In *Cox v. Slama*, the court held that "counsel must be appointed for indigent defendants facing civil contempt for failure to pay child support." Finally, in *State v. Lefthand*, the court held that in-custody interrogation of a formally accused person who is represented by counsel should not proceed prior to notification of counsel or the presence of counsel.

The court also used its supervisory power to require certain kinds of proceedings in particular cases. For example, in *City of Duluth v. Sarette*, the court held that a criminal obscenity charge

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499 N.W.2d 815, 816, 820 (Minn. 1993); State v. Lefthand, 488 N.W.2d 799, 801 (Minn. 1992); State v. Kaiser, 486 N.W.2d 384, 386 (Minn. 1992).
49. See State v. Williams, 525 N.W.2d 558, 549 (Minn. 1994).
50. See, e.g., Porter, 526 N.W.2d at 366; VanWagner, 504 N.W.2d at 750; Salitros, 499 N.W.2d at 820; Kaiser, 486 N.W.2d at 387; State v. Caldwell, 322 N.W.2d 574, 586 n.9 (Minn. 1982).
51. See Shorter, 511 N.W.2d at 746-47.
52. Borst, 278 Minn. at 399, 154 N.W.2d at 893.
53. 279 N.W.2d 342, 348 (Minn. 1979); see also Note, *Use of Supervisory Power to Order Counsel for Indigent Paternity Defendants*: Hepfel v. Bashaw, 64 MINN. L. REV. 848, 861 (1980) (discussing the court's use of its supervisory power to "reconcile their desire to exercise reasoned self-restraint in constitutional interpretation with the need to correct serious flaws in the fair administration of justice").
54. 355 N.W.2d 401, 403 (Minn. 1984).
55. 488 N.W.2d 799, 801-02 (Minn. 1992). Two commentators observed: If the court's ruling in *Lefthand* is carried to its logical scope, law enforcement officers and prosecutors in Minnesota may find that very early in the criminal justice process they are precluded from obtaining waivers of the right to counsel from suspects in order to obtain a statement, unless the suspect's attorney is present or has been notified prior to any interrogation.

must be tried to a jury, and it remanded the case for a jury trial.\(^\text{56}\)

Also, in *State ex rel. Doe v. Madonna*, the court held that for the commitment statute constitutionally to operate prospectively, a preliminary probable cause hearing must be held within seventy-two hours after confinement, unless continued for a proper reason.\(^\text{57}\) The court noted that the rule was an "interim measure" that would be effective "until the legislature acts."\(^\text{58}\)

The supreme court's exercise of its supervisory power has not been limited to rules concerning lawyers and trial courts. For instance, in *State v. Scales*, the court required police officers to record electronically all custodial interrogations, including any information provided about rights and any waiver of those rights.\(^\text{59}\)

In addition, the supreme court has noted an intention to use its supervisory power in future cases.\(^\text{60}\) In *State v. Williams*, the court stated that it intended to use its supervisory power "to insure that the systems used are increasingly inclusive in the hope that the faces of the people in the jury room will soon mirror the faces of the people in the community at large" and "to closely monitor and scrutinize sentencing practices to insure that defendants of color are not given harsher sentences for drug offenses such as this than Caucasian defendants."\(^\text{61}\)

**IV. THE SOURCE OF THE MINNESOTA SUPREME COURT'S SUPERVISORY POWER**

If a court may exercise a power without clearly identifying its source, there is a danger that the court will invent powers to suit its will and whim. Because the Minnesota Supreme Court did not exercise the supervisory power before the late 1960s, it is important to inquire as to the source of this recent power. The Minnesota Constitution, state statutes, and the common law are potential sources of the supervisory power.

A. *The Minnesota Constitution*

A number of states have constitutional provisions granting the

\(^{56}\) 283 N.W.2d 538, 538 (Minn. 1979).

\(^{57}\) 295 N.W.2d 356, 365 (Minn. 1980).

\(^{58}\) *Id.* at 365-66 n.17.

\(^{59}\) 518 N.W.2d 587, 592-93 (Minn. 1994).

\(^{60}\) *See* State v. Williams, 525 N.W.2d 538, 544, 549 (Minn. 1994).

\(^{61}\) *Id.*
state's highest court "superintending" or "supervisory" powers. The Minnesota Constitution vests the "judicial power of the state" in a supreme court, the court of appeals, and the district courts. The supreme court has "original jurisdiction in such remedial cases as are prescribed by law." Remedial cases are the prerogative or

62. See, e.g., ARK. CONST. art. 7, § 4 ("[The supreme court] shall have a general superintending control over all inferior courts of law and equity . . ."); COLO. CONST. art. 6, § 2(1) ("[The supreme court] shall have a general superintending control over all inferior courts . . ."); IOWA CONST. art. 5, § 4 ("[The supreme court] shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state."); LA. CONST. art. 5, § 5(A) ("The supreme court has general supervisory jurisdiction over all other courts."); MICH. CONST. art. 6, § 4 ("The supreme court shall have a general superintending control over all courts . . ."); MO. CONST. art. 5, § 4(1) ("The supreme court shall have general superintending control over all courts and tribunals."); MONT. CONST. art. VII, § 2(2) ("[The supreme court] has general supervisory control over all other courts."); N.M. CONST. art. VI, § 3 ("[The supreme court] shall have a supervisory control over all inferior courts . . ."); N.C. CONST. art. IV, § 12(1) ("[The supreme court] may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts."); OKLA. CONST. art. 7, § 4 ("The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law."); PA. CONST. art. 5, § 10(a) ("The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace . . ."); S.D. CONST. art. V, § 12 ("The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts."); WIS. CONST. art. 7, § 3(1) ("The supreme court shall have superintending and administrative authority over all courts."); WYO. CONST. art. 5, § 2 ("The supreme court . . . shall have a general superintending control over all inferior courts . . .").

63. MINN. CONST. art. VI, § 1.

64. Id. § 2. The supreme court described the reasons for this limited original jurisdiction:

The Supreme Court of the state is a constitutional appellate court, with original jurisdiction only in the particular instances in which it is expressly authorized by the Constitution . . . . The organization and constitution of that court is adapted primarily to the work of review only. But under every system contingencies will arise which call for the peremptory and prompt relief which only a court of final resort can grant. Under the English system, these instances were provided for by the King's prerogative, by means of which relief was granted in cases where the ordinary courts were powerless, and no other adequate remedy was provided. In the course of time this great prerogative power came to be exercised by means of certain remedial writs, issuing in the King's name out of the court in which the King theoretically or in fact was always present. Recognizing the occasional necessity for such extraordinary proceedings, the framers of the Constitution provided that the Supreme Court "shall have original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases both in law and equity, but there shall be no trial by jury in said court." The Legislature is thus
extraordinary writs of the common law, such as quo warranto, mandamus, prohibition, and habeas corpus.  

The supreme court has "appellate jurisdiction in all cases" and the court of appeals has "appellate jurisdiction over all courts, except the supreme court, and other appellate jurisdiction as prescribed by law." Despite this seemingly vast grant of power, the constitution has no provision expressly granting supervisory power to the Minnesota Supreme Court.

B. Minnesota Statutes

Several states have statutes vesting the state's highest court with supervisory powers. Minnesota statutes give the supreme court the power to issue "writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes, whether especially provided for by statute or not, that are necessary to the execution of the laws and the furtherance of justice." The legislature enacted this statute to give effect to the provision in article 6, section 2 of the Minnesota Constitution, which gives the supreme court jurisdiction in remedial cases. Absent any legislation or

authorized to confer original jurisdiction upon the Supreme Court in remedial cases, subject to the limitation that there shall be no trial by jury. It can confer original jurisdiction in no other cases. In re Lauritsen, 99 Minn. 313, 321, 109 N.W. 404, 407-08 (1906) (citation omitted).


66. MINN. CONST. art. VI, § 2; see also CASE DISPOSITIONAL PROCEDURES OF THE SUPREME COURT (1993), reprinted in 51 MINN. STAT. ANN. 322, 323 (West 1993) ("The Minnesota Constitution, in Article VI, § 2, confers upon the Supreme Court original jurisdiction in remedial cases as prescribed by law, appellate jurisdiction in all cases and supervisory jurisdiction over all courts of the state."). Compare this with the constitutions of South Dakota, Iowa, and Wisconsin, all of which previously were part of the Wisconsin Territory. See supra note 62.

67. See, e.g., HAW. REV. STAT. § 602-4 (1995) ("The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."); MASS. GEN. LAWS ANN. ch. 211, § 3 (West 1988) ("The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided . . . ."); N.H. REV. STAT. ANN. § 490:4 (1983) ("The supreme court shall have general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses . . . .").

68. MINN. STAT. § 480.04 (1996).

69. See State ex rel. Young v. Village of Kent, 96 Minn. 255, 267, 104 N.W. 948, 953 (1905) (providing that "the Supreme Court has power to issue writs of error, certiorari, mandamus, prohibition, and quo warranto, . . . subject to such regula-
controlling considerations to the contrary, this statute is controlled by common-law rules.\textsuperscript{70} The King's Bench exercised its supervisory power through the power to issue such writs.\textsuperscript{71} In Minnesota, however, this provision has only been used to justify the use of traditional writs.\textsuperscript{72}

The supreme court also has the power to prescribe and modify the rules of practice,\textsuperscript{73} as well as the power to "regulate the pleadings, practice, procedure, and the forms thereof in criminal actions in all courts of this state, by rules promulgated by it from time to time."\textsuperscript{74} Some courts and commentators have discussed such rule-making power as a basis for the exercise of supervisory power.\textsuperscript{75} To promulgate a rule under this provision, however, the court must follow certain procedures. For example, it must appoint an advisory committee, distribute proposed rules, and hold hearings.\textsuperscript{76} To date, the supreme court has never used these procedures as a vehicle for exercising its supervisory power.

The supreme court also has "all the authority necessary for carrying into execution its judgments and determinations, and for

\textsuperscript{70} See id.

\textsuperscript{71} See supra notes 22-24 and accompanying text. The courts of other states previously a part of the Wisconsin Territory have held that the writs authorized by their states' constitutions and statutes were the high prerogative writs of the English common law. See Duluth Elevator Co. v. White, 90 N.W. 12, 14 (N.D. 1902); State \textit{ex rel.} Moore v. Archibald, 66 N.W. 234, 235 (N.D. 1896); Everitt v. Board of County Comm'rs, 47 N.W. 296, 297 (S.D. 1890); Attorney Gen. v. Chicago & N.W. Ry., 35 Wis. 425, 426 (1874); Attorney Gen. v. Blossom, 1 Wis. 277, 278-80 (1853).

Federal courts, however, have held that the writs authorized by the Judiciary Act of 1789 were not the prerogative writs of the King's Bench. See \textit{In re} Josephson, 218 F.2d 174, 177-79 (1st Cir. 1954); Schwartz, \textit{supra} note 3, at 516 (citing Kendall v. United States, 37 U.S. (12 Pet.) 364, 434 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 87, 106-07 (1803)).

\textsuperscript{72} See, e.g., \textit{In re} Welfare of C.W.S., 267 N.W.2d 496, 497 (Minn. 1978) (defining writ of prohibition).

\textsuperscript{73} See MINN. STAT. § 480.05 (1996).

\textsuperscript{74} MINN. STAT. § 480.059, subd. 1 (1996); \textit{see also} Maynard E. Pirsig & Randall E. Tietjen, \textit{Court Procedure and the Separation of Powers in Minnesota}, 15 WM MITCHELL L. REV. 141, 177-86 (1989) (discussing the sources and scope of the court's procedural rulemaking power).

\textsuperscript{75} See, e.g., Beale, \textit{supra} note 3, at 1466-68; Hill, \textit{supra} note 6, at 214; Office of Legal Policy, \textit{supra} note 6, at 788-91, 811-13; Georgetown Note, \textit{supra} note 6, at 1053-56.

\textsuperscript{76} See MINN. STAT. §§ 480.052, 480.054, 480.059, subds. 2, 4 (1996). Note also that the clause in the Pennsylvania Constitution giving the court rulemaking power is separate from the clause granting supervisory power. \textit{See} PA. CONST. art. V, § 10(a), (c).
the exercise of its jurisdiction as the supreme judicial tribunal of the state, agreeable to the usages and principles of law. 77 It is difficult to see how a rule adopted by a court pursuant to the supervisory powers would be necessary to execute a judgment or exercise jurisdiction. The mere fact that the supreme court was able to execute its judgments and exercise its jurisdiction before the adoption of a supervisory power rule undercuts any argument that the rule would be necessary for such a function. The supreme court has never used this clause as a basis for its exercise of supervisory power.

Minnesota statutes give general supervisory powers over state courts to the chief justice of the supreme court. 78 These powers include, but are not limited to:

(a) Supervision of the courts' financial affairs, programs of continuing education for judicial and nonjudicial personnel and planning and operations research;

(b) Serving as chief representative of the court system and as liaison with other governmental agencies for the public; and

(c) Supervision of the administrative operations of the courts. 79

The chief justice has the power to designate other judges or justices to assist in performing these duties. 80 It appears, however, that these powers are more administrative than judicial. Applying a canon of construction, noscitur a sociis, 81 one would expect the supervisory power granted by this statute to be similar to the powers enumerated in the statute, which are mainly housekeeping powers. Further, the powers are granted to the chief justice, not to the court as a whole. This is contrary to the statutory and constitutional provisions of other states that explicitly grant the power to the states' supreme courts. 82 The Minnesota Supreme Court never has cited this statute as a basis for its exercise of supervisory power;

77. MINN. STAT. § 480.05 (1996).
78. See MINN. STAT. § 2.724, subd. 4 (1996).
79. Id.
80. See id.
81. Noscitur a sociis means the definition of a word is or may be known from accompanying words. See BLACK'S LAW DICTIONARY 1060 (6th ed. 1990). Under the doctrine of noscitur a sociis, the meaning of a questionable word or phrase in a statute may be ascertained by reference to the meaning of other words or phrases associated with it. See id.
82. See supra notes 62, 67 and accompanying text.
the statute has been cited only in cases in which the power is used for so-called judicial housekeeping. The court of appeals statute provides that when the supreme court considers a petition for review, it should take into consideration whether the question presented is an important one upon which the court has not, but should rule, whether the court of appeals has held a statute to be unconstitutional, whether the court of appeals has decided a question in direct conflict with an applicable precedent of the supreme court, or whether the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the court's supervisory powers. This provision was not enacted until 1982, fifteen years after the supreme court's first exercise of supervisory power in Borst. Again, the court has never cited this provision as support for its exercise of supervisory power.

After surveying these provisions, one may conclude it is futile to look for a constitutional or statutory basis for the supervisory power in Minnesota. Case law confirms this idea, indicating that although supervisory power rules have constitutional overtones, they are not based on Minnesota's constitution or statutes.

C. The Inherent Power

Some courts and commentators have found the justification for the supervisory power in the concept of inherent power. Inherent power "governs that which is essential to the existence, dignity, and function of a court because it is a court." The Minnesota
The Supreme Court stated several decades ago that

\[ \text{[t]he judicial power of this court has its origin in the constitution, but when the court came into existence, it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice.}^{89} \]

The supreme court has stated that the following principles govern the exercise of inherent judicial power:

1. Inherent judicial power grows out of express and implied constitutional provisions mandating a separation of powers and a viable judicial branch of government. It comprehends all authority necessary to preserve and improve the fundamental judicial function of deciding cases.

2. Inherent judicial power is available to courts on all levels to be used consistent with respective jurisdictions and functions. Of course, review of an exercise of such inherent power by district courts and other inferior courts is available in this court in accordance with established procedures.

3. Inherent judicial power may not be asserted unless constitutional provisions are followed and established and reasonable legislative-administrative procedures are first exhausted. Intragovernmental cooperation remains the best means of resolving financial difficulties in the face of scarce societal resources and differences of opinion regarding judicial procedures.

4. When established and reasonable procedures have failed, an inferior court may assert its inherent judicial power by an independent judicial proceeding brought by the judges of such court or other parties aggrieved. Such a proceeding must include a full hearing on the merits in an adversary context before an impartial and disinterested district court. That court shall make findings of fact and conclusions of law in accordance with the standards set forth in this opinion and may grant appropriate relief.

5. The test to be applied in these cases is whether the relief requested by the court or aggrieved party is necessary to the performance of the judicial function as con-

89. Id. at 176, 241 N.W.2d at 784 (quoting In re Greathouse, 189 Minn. 51, 55, 248 N.W. 735, 737 (1933)).
templated in our state constitution. The test is not relative needs or judicial wants, but practical necessity in performing the judicial function. The test must be applied with due consideration for equally important executive and legislative functions. More recently, in State v. Krotzer, the supreme court held that a stay of adjudication of a defendant’s criminal charges before formal acceptance of that defendant’s guilty plea was within the district court’s inherent judicial authority. The supreme court has used inherent power as a basis for a supervisory power-type ruling in only one case. In State Department of Public Safety v. Ogg, the court established review procedures for implied consent cases. The court based its decision on its “considered construction of the implied-consent statute and the other statutes discussed herein, as well as the inherent power of this court to superintend the lower court system, control its appellate jurisdiction, and to ensure the efficient administration of justice throughout the judicial system.” The court noted these procedures “may not be the optimum solution,” but the legislature was “free to re-draft the implied-consent statute to achieve an optimum solution.” Other than the court’s use of the inherent power in Ogg, the inherent power primarily has been used to maintain control over the bar and the practice of law.

90. Id. at 180-82, 241 N.W.2d at 786 (footnotes omitted).
91. 548 N.W.2d 252, 252 (Minn. 1996).
92. 310 Minn. 433, 438-40, 246 N.W.2d 560, 563-64 (1976). The court established the following procedures:
First, a driver who is notified his license is to be revoked for unreasonable refusal to submit to chemical testing will have a right to obtain a hearing before a county or municipal court, which ever is appropriate. That court will proceed with a trial of the issues without a jury as set forth in [Minn. Stat.] § 169.123, subd. 6. Second, either party may appeal the adverse decision of the county or municipal court to district court as provided in [Minn. Stat.] § 169.123, subd. 7. Trial in the district court shall be de novo with right of jury trial if asserted by either party. Third, appeal from the district court to this court shall be available to either party only with leave of this court. There will be no direct appeal to this court from municipal or county courts in implied consent cases. Id. at 438-40, 246 N.W.2d at 563-64 (footnotes omitted).
93. Id. at 439-40, 246 N.W.2d at 564 (footnotes omitted) (citing MINN. CONST. art. 1, § 8; Lyon County, 308 Minn. at 177, 241 N.W.2d at 784; In re O’Rourke, 300 Minn. 158, 174-75, 220 N.W.2d 811, 821 (1974)).
94. Ogg, 310 Minn. at 439-40, 246 N.W.2d at 564.
95. See Pirsig & Tietjen, supra note 74, at 179 & n.156.
D. Other Common-Law Powers

Even if the supervisory power does not have a constitutional or statutory basis, and does not derive from the inherent power, it still may be based on some common-law power other than the inherent power. The common law came to be a part of Minnesota law through a series of steps. The geographic area that is presently Minnesota was once a part of the Michigan Territory, next a part of the Wisconsin Territory, and then finally became the Minnesota Territory. 96

In 1787, the Northwest Ordinance gave judges a common-law jurisdiction and provided that the Territory's inhabitants would be entitled to "judicial proceedings according to the course of the common law." 97 The question was posed as to which common law would apply. In 1795, the governor of the Northwest Territory and judges, acting as a legislature, adopted a statute providing that "[t]he common law of England . . . shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority, or disapproved of by congress." 98

The incorporation of the common law into Minnesota can be traced through a series of historical steps. First, the English common law became a part of the law of the Michigan Territory. 99 Next, the act that created the Wisconsin Territory out of Michigan incorporated by reference the provision of the Northwest Ordinance guaranteeing "judicial proceedings according to the course of the common law." 100 Finally, Minnesota's Organic Act provided that "the laws in force in the Territory of Wisconsin" at the time of Wisconsin's admission as a state would continue in force. 101

The Minnesota Constitution was adopted in 1857 and provided that "all laws now in force in the territory of Minnesota"
would remain in force.\textsuperscript{102} Twenty years after the adoption of the constitution, the Minnesota Supreme Court held that the common law of Wisconsin, which was the "common law as modified and amended by English statutes prior to our revolution," was part of the common law of Minnesota.\textsuperscript{103} As a part of the English common law, presumably the King's Bench powers were also a part of Minnesota's common law.\textsuperscript{104} For example, the supreme court has stated that the district courts have "succeeded historically to the ancient English Court of King's Bench."\textsuperscript{105} This statement obviously recognizes that the Court of King's Bench had both original and supervisory jurisdiction, and refers specifically to the former. This statement is significant to the extent that it provides an explicit recognition of the connection between the Court of King's Bench and the Minnesota court system.\\

\textbf{E. The Power to Supervise the Trial Courts}\\

The supreme court has stated that the power "to reverse prophylactically or in the interests of justice comes from our power to supervise the trial courts."\textsuperscript{106} This claim of power is problematic. First, it seems to be little more than a tautology - the supervisory power comes from the power to supervise. Further, the court cites no authority or basis for this power to supervise.\\

\textbf{F. Summary}\\

Minnesota courts have stated explicitly that the supervisory power is not based on a constitutional\textsuperscript{107} or statutory provision.\textsuperscript{108} Thus, if the power has a source other than the supreme court's will

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102. MINN. CONST. sched. § 2 (1857); see also Blume & Brown, \textit{supra} note 96, at 500.\\
103. Dutcher v. Culver, 24 Minn. 584, 591 (Minn. 1877) (holding that an English statute, passed long before the revolution, which gave right to sell a distress, thus changing the common law, was part of the Wisconsin common law and hence part of the Minnesota common law); see also Blume & Brown, \textit{supra} note 96, at 500.\\
104. \textit{Cf.} State \textit{ex rel.} Boldt v. Saint Cloud Milk Producers' Ass'n, 200 Minn. 1, 6, 273 N.W. 603, 606 (1937) ("This right of inspection was recognized by the courts of King's Bench and Chancery from an early date and was enforced by motion or mandamus. The common-law right of inspection is part of the common law and has been enforced by all the courts in this country.").\\
105. \textit{In re} Lauritsen, 99 Minn. 313, 321, 109 N.W. 404, 407 (1906).\\
106. State v. Salitros, 499 N.W.2d 815, 820 (Minn. 1993).\\
107. \textit{See supra} Part IV.A.\\
108. \textit{See supra} Part IV.B.
\end{flushright}
or whim, it must come from some inherent\textsuperscript{109} or common-law power.\textsuperscript{110} The inherent power, as described by the Minnesota Supreme Court, is a different creature than the supervisory power. Thus, perhaps the best justification for the supervisory power is that the supreme court inherited a type of King's Bench power when the English common law passed to Minnesota. It may be, however, that the supervisory power is based not on some constitutional, statutory, or common-law power, but simply on the court's notions of what constitutes good policy. If this is the case, the Minnesota Supreme Court should explicitly clarify this principle.

V. THE SCOPE OF THE MINNESOTA SUPREME COURT'S SUPERVISORY POWER

In discussing or analyzing any power that a court possesses, it is important to know not only the source of the power, but also when and how a court will exercise that power. Without such knowledge, a danger exists that the power will become a too-willing servant of the court's caprice or whim; a servant with no fixed duties, boundaries, or standards of propriety.

A. When Is It Appropriate to Exercise Supervisory Power?

In some of its opinions, the supreme court has indicated why it was exercising the supervisory power. Some of these statements are broad and abstract. For instance, in State v. VanWagner, the supreme court stated that it uses its supervisory power to protect the "integrity of the factfinding process itself," because "as Queen Elizabeth put it centuries ago, the prosecutor is 'not so much retained pro Domina Regina [For Our Lady the Queen] as pro Domina Veritate [For Our Lady Truth]."\textsuperscript{111}

In State v. Fuller, the court also emphasized that, as the state's highest court, "we are independently responsible for safeguarding the rights of our citizens."\textsuperscript{112} Similarly, in State v. Caldwell, the court stated, "[T]he denial of a new trial in this case is inconsistent with the correct administration of criminal justice... which it is our duty as an appellate court to supervise."\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{109} See supra Part IV.C.
\item \textsuperscript{110} See supra Part IV.D.
\item \textsuperscript{111} 504 N.W.2d 746, 750 (Minn. 1993) (citation omitted).
\item \textsuperscript{112} 374 N.W.2d 722, 726 (Minn. 1985) (internal quotation omitted).
\item \textsuperscript{113} 322 N.W.2d 574, 586 n.9 (Minn. 1982) (internal quotation omitted).
\end{itemize}

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The supreme court also has given more practical guidance. In a dissenting opinion in *Caldwell*, Justice Peterson wrote, "[T]his court's supervisory power properly is invoked only where the procedures followed in reaching the adjudication below are amenable to improvement."\(^{114}\)

In prosecutorial misconduct cases, the court has cited factors that led to its exercise of its supervisory power. The court noted, in *State v. Freeman*, that prophylactic reversals based on a prosecutor's failure to comply with discovery rules were limited to cases in which the failure to comply with the rules was clear.\(^{115}\) In *State v. Porter*, the court indicated that the misconduct "was directed at the very heart of the jury system"\(^ {116}\) and stated that "a prosecutor may not seek a conviction at any price."\(^ {117}\) Further, the court in *State v. Salitros* stated:

[In the exercise of our supervisory power over the trial courts, in the interests of justice, and in the interests of underscoring the fact that our rules, in providing for complete disclosure to the defense, are broader than the rules one may extract from the applicable line of federal cases relied upon by the court of appeals, we have concluded that defendant should receive a new trial.]\(^ {118}\)

The next year, in *Shorter v. State*, the court stated it exercised its power because of "the number of procedural irregularities present in this matter."\(^ {119}\)

At other times, the court seems to indicate that it exercised its supervisory power because it thought it would lead to the optimal result. For example, in *City of Duluth v. Sarette*, the court stated it was clear that a jury trial was not constitutionally mandated, but the court chose to exercise its supervisory power because "we believe that the contemporary-community-standards test can best be applied by a jury and therefore hold, under the supervisory powers of this court, that a criminal obscenity charge must be tried to a jury."\(^ {120}\) Similarly, in *Hepfel v. Bashaw*, the court stated, "We hold that counsel is required, not because we are constitutionally compelled to do so, but because, given the present adversary nature of

\(^{114}\) Id. at 596 n.5 (Peterson, J., dissenting).
\(^{115}\) 531 N.W.2d 190, 199 (Minn. 1995).
\(^{116}\) 526 N.W.2d 359, 366 (Minn. 1995).
\(^{117}\) Id. (quoting State v. Salitros, 499 N.W.2d 815, 817 (Minn. 1993)).
\(^{118}\) Salitros, 499 N.W.2d at 820.
\(^{119}\) 511 N.W.2d 743, 747 (Minn. 1994).
\(^{120}\) 283 N.W.2d 533, 538 (Minn. 1979).
paternity adjudications, there is no better method available to us to protect the important interests involved." 121

In State v. Borst, the lack of definitive guidance from the United States Supreme Court was a factor in the court's use of its supervisory power. 122 The court stated:

Until we have a definitive decision by the Supreme Court of the United States as to whether Gideon requires appointment of counsel for an indigent charged with a misdemeanor as defined by our laws, as a Sixth-Amendment right, we choose not to guess at what it may eventually hold by basing our decision on the Federal Constitution or even on our state Constitution. 123

As a result, the court based its decision on its supervisory power.

The court also has discussed considerations for the future exercise of its supervisory power. In State v. Williams, the court stated that it intends to use the power in future cases "to insure that the systems used are increasingly inclusive in the hope that the faces of the people in the jury room will soon mirror the faces of the people in the community at large," as well as to "closely monitor and scrutinize sentencing practices to insure that defendants of color are not given harsher sentences for drug offenses such as this than Caucasian defendants." 124

B. How Has the Minnesota Supreme Court Exercised Supervisory Power?

When the supreme court has exercised its supervisory power to make a rule, it sometimes has indicated how the rule is to be applied. For example, in Cox v. Slama, the court discussed very specific conditions under which provision of counsel was necessary. 125

121. 279 N.W.2d 342, 348 (Minn. 1979).
122. 278 Minn. 388, 389-90, 154 N.W.2d 888, 889 (Minn. 1967).
123. Id. at 397, 154 N.W.2d at 894.
124. 525 N.W.2d 538, 544, 549 (Minn. 1994).
125. 355 N.W.2d 401, 403-04 (Minn. 1984). The court decreed the following conditions for provision of counsel:

1. Where the court has either a custodial or a non-custodial parent before it, whether the parent is represented by either the county attorney or private counsel, pursuant to an order to show cause or a contempt citation, and the court reaches a point in the proceedings after the taking of testimony that incarceration is a real possibility, the court shall immediately suspend the hearing.

2. The court shall then determine whether the parent charged with contempt desires counsel and give that parent an opportunity to obtain private counsel or if the parent claims that he cannot afford counsel, the
Ten years later, in *State v. Scales*, the court indicated that the rule regarding provision of counsel applied prospectively from the date of the filing of the opinion. The court also stated, "[T]he Advisory Committee on Criminal Rules may further consider the issue of the proper scope of the exclusionary rule in this context." Because the rule adopted in *Scales* was not a constitutional rule, it did not have to be applied to criminal cases pending on direct review. The court also has stated that the rule it adopted was "meant to function as [an] interim measure[] until the Minnesota Legislature acts."

VI. THE MINNESOTA COURT OF APPEALS AND THE SUPERVISORY POWER

The Minnesota Supreme Court has indicated in a number of opinions that it possesses supervisory power. The supreme court, however, never has indicated whether the Minnesota Court of Appeals also holds such power. Despite the supreme court's silence, the court of appeals has spoken on this issue.

A. Statements by the Court of Appeals Regarding Whether It Has Supervisory Power

Since 1993, the Minnesota Court of Appeals has discussed or mentioned the supervisory power in at least nineteen cases. In

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126. 518 N.W.2d 587, 593 (Minn. 1994).
127. Id.
128. See *Williams*, 525 N.W.2d at 289.
the majority of appellate cases addressing this issue, the Minnesota Court of Appeals has stated that it does not possess supervisory power. In a few recent cases, however, some judges have suggested that the court of appeals may have this power.

In two unpublished decisions, judges have commented on the court of appeal’s supervisory power. In *Shorter v. State*, Judge Norton, concurring in part and dissenting in part, stated, “I believe that the state’s violation of the discovery rules is serious enough to warrant this court’s exercise of its supervisory powers and order a trial on the merits.” One year later, in *State v. Spiegler*, the court noted: “We decline to exercise this supervisory role where there is no showing of prejudice and where the record also gives no indication that the prosecutor’s performance of his public duty was affected by his law partner’s representation of appellant.” Both of these statements were made in unpublished opinions and thus

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have no precedential value.\textsuperscript{134} The statements, however, may indicate a willingness on the part of some court of appeals judges to exercise supervisory power.

The most significant commentary regarding the court of appeals' supervisory power appeared in a concurrence in a published opinion directly discussing the issue of "the supervisory power of the Minnesota Court of Appeals over the administration of justice."\textsuperscript{135} In \textit{State v. Lopez}, Judge Randall noted, "I do not argue with the Gilmartin and Umphlett panels, but only suggest that our court should not be so quick to suffer the soft impeachment."\textsuperscript{136} Randall argued, in characteristically colorful language, that:

Thus, if trial courts have the express benefit of [Minnesota Statutes] section 631.21 (I note that the statute is not limited to trial or district courts, but merely states "the court" and we are "a court") and the supreme court has supervisory power, it requires no stretch of the imagination to assume that panels of the Minnesota Intermediate Court of Appeals can dip their toes in the supervisory waters if and when needed.\textsuperscript{137}

Judge Randall concluded, "Thus, any discussion of 'supervisory powers' has to be limited to 'which supervisory power'? Restrictions on our supervisory powers are rare. The Minnesota Court of Appeals does not get involved in attorney discipline, but we have far more areas of supervisory power than we do not."\textsuperscript{138} In response to Judge Randall's concurrence, the other members of the panel stated: "We decline to address the issue of what supervisory power this court may have, but see the concurrence, which is compelling on this point."\textsuperscript{139}

\textbf{B. Comparisons to Other Courts That Have Exercised Supervisory Power}

In examining whether the Minnesota Court of Appeals has supervisory power, a comparison to other courts that have exercised supervisory power is useful. This Part compares the Minnesota Court of Appeals to the Court of King's Bench and to the federal
courts of appeals.

1. Comparison to the Court of King's Bench

The first analogy that can be drawn is between the Minnesota Court of Appeals and the Court of King's Bench. Like the Minnesota Court of Appeals, the Court of King's Bench was not a court of last resort. The court of last resort in that jurisdiction was the House of Lords. In addition, the Court of King's Bench exercised its supervisory power through the prerogative writs, such as habeas corpus, certiorari, prohibition, and mandamus. The Minnesota Court of Appeals similarly has the power to issue writs of certiorari, prohibition, and mandamus. The supreme court has explicitly recognized this authority:

The Supreme Court has supervisory authority over all actions in the trial courts and the Court of Appeals. It does not normally issue supervisory writs concerning matters pending in the trial courts, as the Court of Appeals also has supervisory authority over those proceedings.

Thus, to the extent the exercise of supervisory power is akin to the exercise of the King's Bench power, the court of appeals may be a

140. See supra notes 17-18 and accompanying text.
141. See supra note 17-18 and accompanying text.
142. See supra notes 22-23 and accompanying text.
143. See MINN. STAT. § 480A.06, subd. 5 (1996) ("The court of appeals shall have jurisdiction to issue all writs and orders necessary in aid of its jurisdiction with respect to cases pending before it and for the enforcement of its judgments or orders."); MINN. R. CIV. APP. P. 120.01 ("Application for a writ of mandamus or of prohibition or for any other extraordinary writ in the Supreme Court directed to the Court of Appeals or in the Court of Appeals directed to a lower court shall be made by petition."). Some commentators claim that "the court [of appeals] clearly possesses inherent power to grant or refuse extraordinary writs." 4 DOUGLAS D. McFARLAND & WILLIAM J. KEPPEL, MINNESOTA CIVIL PRACTICE § 2801, at 336 n.2 (2d ed. 1990).
144. CASE DISPOSITIONAL PROCEDURES OF THE SUPREME COURT (1993), reprinted in 51 MINN. STAT. ANN. 322, 325 (West 1993) (emphasis added); see also 3 ERIC J. MAGNUSON & DAVID F. HERR, MINNESOTA PRACTICE: APPELLATE RULES ANNOTATED § 120.3 (3d ed. 1996) ("[A]s a result of the judicial restructuring occasioned by the creation of the court of appeals, the supreme court no longer entertains applications to review actions of the trial courts. All such applications [for extraordinary writs] are made to the court of appeals."); Stefan A. Riesenfeld et al., Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota (Pts. I, V, VI), 33 MINN. L. REV. 569, 571-73 (1949), 36 MINN. L. REV. 435, 435-38 (1952), 37 MINN. L. REV. 1, 4-5 (1952) (discussing the early history of the extraordinary writs in Minnesota).
closer analogy to the Court of King’s Bench than is the supreme court, because the court of appeals is the court issuing writs to the trial court.\textsuperscript{145}

Other state supreme courts have drawn a connection between the supervisory power, the powers of the Court of King’s Bench, and the state courts’ power to issue writs. Early in this century, the Colorado Supreme Court, in \textit{People ex rel. Graves v. District Court of Second Judicial District}, considered whether a district court had jurisdiction to issue a writ of prohibition.\textsuperscript{146} The Colorado court relied on cases from Wisconsin, of which Minnesota was once a part, in arguing that the writs the Colorado Supreme Court had the power to issue were the “prerogative writs of the old common law.”\textsuperscript{147} The court cited a Supreme Court case for the proposition that the writs are not “incident to any court which did not possess the general superintending power of the Court of King’s Bench.”\textsuperscript{148} The court indicated that “the same theory prevails in our state governments, where the common law is adopted and governs in the administration of justice.”\textsuperscript{149} Thus, if the prerogative writs are incident to courts that possess supervisory power, would not supervisory power be incident to those courts empowered to issue the prerogative writs? Even if it is not the case, this reasoning at least establishes a link between the supervisory power and the power to issue the prerogative writs.

\section*{2. \textit{Comparison to the Federal Courts of Appeals}}

A second analogy, this one between the Minnesota Court of Appeals and the federal courts of appeals, can be drawn. First, like the Minnesota Court of Appeals, the federal courts of appeals are aligned between the trial courts and the court of last resort. Sec-
ond, similar to the Minnesota Court of Appeals, the federal courts of appeals were a statutory creation coming long after the creation of the court of last resort. The federal courts of appeals were created in 1891, 102 years after the creation of the United States Supreme Court. Similarly, the Minnesota Court of Appeals was created in 1983, 134 years after the creation of the Minnesota Territorial Supreme Court. Third, the federal courts of appeals were created for the same purpose as the Minnesota Court of Appeals – to alleviate the burdens on the Supreme Court. Fourth, and perhaps most important, the justifications given for the exercise of supervisory power by the federal courts of appeals are equally applicable to a state intermediate appellate court like the Minnesota Court of Appeals.

The reason most commonly given for a federal intermediate appellate court's exercise of supervisory power is a bare assertion that the supervisory power is inherent in the powers of federal appellate courts. This should not be confused with inherent power, because that term has been given a very specific meaning by the Minnesota Supreme Court. If such a power is not unique to the federal courts but is inherent in the nature of a court, then the power should be inherent in state courts as well. If, however, there is something unique about federal courts that gives rise to this inherent power, those courts have never said what that unique feature is or might be.

150. See Schwartz, supra note 3, at 517; Jack B. Weinstein, The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge, 120 F.R.D. 267, 274 (1988). Before the courts of appeals were created, the federal court system consisted of the district courts, the circuit courts, and the Supreme Court. See Schwartz, supra note 3, at 517 n.49. The circuit courts had significant original jurisdiction and the authority to review on a writ of error the final decisions of district courts in most civil cases. See id. The circuit courts were abolished in 1911. See id.


152. See Weinstein, supra note 150, at 274.


154. See supra notes 88-90 and accompanying text.
Another frequently cited reason for the use of supervisory power by the federal courts of appeals is that the exercise of the power is justified as a means to implement a remedy for a violation of recognized rights, to preserve judicial integrity, and to deter illegal conduct. This argument tends to confuse the source of the power with the scope of the power. It would be an exceptional proposition indeed to claim that federal courts need to implement remedies for recognized rights, preserve judicial integrity, and deter illegal conduct, but that state appellate courts do not.

In a handful of opinions, the United States Supreme Court has explicitly or implicitly approved of federal intermediate appellate supervisory power. Federal appellate courts often cite these opin-
ions as the basis for their own exercise of supervisory power.\textsuperscript{157} As one commentator has noted, however, the fact that the Supreme Court has approved of such a power does not, by itself, clarify the source of the power:

Unfortunately, although Supreme Court statements may establish the existence of intermediate appellate supervisory power, they do not advance the inquiry as to whether any particular exercise of supervisory power is legitimate. This difficulty is compounded by the fact that the Supreme Court has never explained the basis for its assertion that the courts of appeals have supervisory power.\textsuperscript{158}

Several other justifications for federal appellate court supervisory power are cited less frequently. One such justification is that the supervisory power is based on the structure of the federal court system, i.e., that it derives from Article III of the Constitution, the Court of Appeals Act, or is implicit in the concept of the separation of powers.\textsuperscript{159} Such structural arguments do not distinguish federal court supervisory power from state court supervisory power because the federal appellate system was modeled after state court systems.\textsuperscript{160} A second, less common justification is that the supervisory power is a form of the federal common law.\textsuperscript{161} If the common law is the basis for the supervisory power, state intermediate appellate courts would have a better claim to such a power than the federal intermediate appellate courts, because state courts are common-law courts, whereas federal courts are not.\textsuperscript{162} Finally, an even stronger case for the Minnesota Court of Appeals' exercise of supervisory powers may be made because, unlike the federal courts of appeals, the Minnesota Court of Appeals' decisions are effective statewide, whereas the decisions of federal courts of appeals are

\textsuperscript{157} See, e.g., United States v. Leslie, 759 F.2d 366, 370 n.2 (5th Cir. 1985).
\textsuperscript{158} Schwartz, supra note 3, at 524-25.
\textsuperscript{159} See, e.g., United States v. Horn, 29 F.3d 754, 759-60 (1st Cir. 1994); United States v. Rubio-Villereal, 967 F.2d 294, 301 (9th Cir. 1992); Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 (3d Cir. 1985); United States v. Bazzano, 712 F.2d 826, 852 (3d Cir. 1983); United States v. Gonsalves, 691 F.2d 1310, 1318-19 (9th Cir. 1982).
\textsuperscript{160} See Weinstein, supra note 150, at 275. An intermediate federal court "simplifies the whole judicial establishment by modeling the system largely after the systems in the [state courts]." \textit{Id.} (citing H.R. Rep. No. 50-942, at 4 (1888)).
\textsuperscript{161} See, e.g., United States v. Schwartz, 787 F.2d 257, 267 (7th Cir. 1986); United States v. Widgery, 778 F.2d 325, 328-29 (7th Cir. 1985); United States v. Gatto, 763 F.2d 1040, 1045 (9th Cir. 1985).
\textsuperscript{162} See supra notes 25-28 and accompanying text.
controlling only in their respective circuits. 163

C. Summary

It is seldom disputed that courts of last resort have supervisory power. However, some intermediate courts of appeals also have exercised supervisory powers. The reasons that justify the use of supervisory power by those intermediate appellate courts also should apply to the Minnesota Court of Appeals.

VII. CONCLUSION

To date, the Minnesota Supreme Court's supervisory power cases have given little guidance or insight regarding the source, nature, and scope of that power. Commentators often have criticized the Supreme Court, the federal courts of appeals, and other state courts regarding their supervisory power jurisprudence. 164 Similar charges have been leveled at the use of inherent powers. 165

163. Cf. Schwartz, supra note 3, at 524 ("Moreover, given the structure of the federal court system, it is by no means self-evident that the existence of such a power in the Supreme Court, which is capable of imposing uniform, systemwide standards, implies the existence of analogous powers in regional intermediate appellate courts."). In addition, as noted above, state courts have held that the writs are the high prerogative writs of the common law, while federal courts have not. See supra note 71.

164. See, e.g., Georgetown Note, supra note 6, at 1050 ("In invoking this asserted supervisory authority, the federal courts have been notably reticent about its source and nature."). Schwartz writes:

The nature of supervisory power is amorphous and its doctrinal limitations are ill-defined .... A brief examination of Third Circuit cases reveals the virtually unlimited scope of the doctrine .... These concerns may explain ... the Third Circuit's willingness to employ what seems to be a nearly limitless power .... The Third Circuit rarely sets forth the source of its authority to exercise supervisory power.

Schwartz, supra note 3, at 507, 509, 512, 514.

165. See, e.g., STUMPF, supra note 2, at xiii, 1. Stumpf observes:

Often these words [inherent powers] simply appear in a statement that assumes the existence of an inherent power without any analysis or rationalization of its use, almost en passant .... Despite its extensive exercise, learned writers have described the concept as 'shadowy' and 'nebulous,' or as a 'problem of definition that has eluded or bedeviled many courts and commentators for years ....' The rhetoric of appellate courts when speaking of inherent powers has a tendency to be fulsome and talismanic so that the mere statement of the concept becomes a substitute for any analysis of whether its use is appropriate or justified. Its indiscriminate employment in differing contexts also can yield to confusion and ambiguity.

Id.
If the Minnesota Court of Appeals is to exercise supervisory power, the best argument in its favor simply may be that such an exercise would be no less legitimate than the exercise of supervisory power by the federal intermediate appellate courts or the Court of King's Bench. This is not a ringing endorsement, but at least it acknowledges the consistent criticism of the exercise of supervisory power by federal intermediate appellate courts and the weak defense of such a power, in those small number of cases when any explicit defense is even offered. Regardless of the ultimate resolution of this issue, however, it at a minimum deserves careful consideration by, and a thoughtful, detailed, and specific answer from, the Minnesota Supreme Court and the Minnesota Court of Appeals.

When Moses' authority to be a ruler and judge was challenged, he did not answer the question, and instead fled. When the Minnesota Supreme Court is presented with the challenge regarding the source and scope of its supervisory authority to make rules and judge, it should not emulate Moses.

166. See supra note 1 and accompanying text.