An Article I Theory of the Inherent Powers of the Federal Courts

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AN ARTICLE I THEORY OF THE INHERENT POWERS OF THE FEDERAL COURTS

Benjamin H. Barton

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The nature of the inherent powers of federal courts—whether they are constitutional or not, whether Congress can curtail some or all of them, and how far they extend—has bedeviled courts and commentators for years. The Supreme Court, for one, has offered remarkably different interpretations of congressional authority over the judiciary’s inherent powers, occasionally in the same opinion. 2 Sometimes the Court seems remarkably quiescent, suggesting that Congress’s authority is superior. For example, the Court held that a federal judge could not disregard an otherwise valid rule of criminal procedure pursuant to the court’s inherent powers. 3 The Court has been even

1. Since United States v. Hudson, the Supreme Court has stated that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.” 11 U.S. (7 Cranch) 32, 34 (1812). Hudson lists these implied powers, including the powers “[t]o fine for contempt—imprison for contumacy—[and] enforce [sic] the observance of order.” Id. Chambers v. NASCO, Inc. offers a more recent and complete list, which includes the powers to “impose silence, respect, and decorum in their presence, and submission to their lawful mandates”; to “control admission to its bar and to discipline attorneys”; to “punish for contempts”; to “vacate its own judgment upon proof that a fraud has been perpetrated upon the court”; to “dismiss an action on grounds of forum non conveniens”; to “act sua sponte to dismiss a suit for failure to prosecute”; and to “fashion an appropriate sanction for conduct which abuses the judicial process.” 501 U.S. 32, 43–45 (1991) (citations omitted). Link v. Wabash Railroad Co. also suggests that the ability “to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief” is an inherent judicial power. 370 U.S. 626, 630 (1962); see also Ex Parte Peterson, 253 U.S. 300, 310–13 (1920) (recognizing the court’s power to appoint an auditor or other expert when necessary as being inherent in the absence of legislation); Smith v. United States, 94 U.S. 97, 97 (1876) (identifying the dismissal of a fugitive defendant’s criminal appeal as within the court’s discretion). The various “supervisory power” cases are also best understood as inherent-power cases. See, e.g., McNabb v. United States, 318 U.S. 332, 340–41, 346–47 (1943), superseded by statute, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Sara Sun Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 COLUM. L. REV. 1433, 1468–69 (1984); Judith A. McMorrow, The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice, 58 SMU L. REV. 3, 20 (2005) (“The notion of ‘supervisory powers’—which functions as a special form or subset of inherent powers—appears to give courts greater latitude in imposing sanctions on attorneys who appear before the court.”).

2. See, e.g., Chambers, 501 U.S. at 43–47. The Court first states that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’” Id. at 43 (quoting Hudson, 11 U.S. (7 Cranch) at 34). The Court later states that the “exercise of the inherent power of lower federal courts can be limited by statute and rule, for ‘[t]hese courts were created by act of Congress.’” Id. at 47 (quoting Ex Parte Robinson, 86 U.S. (19 Wall.) 505, 511 (1874)).

3. Bank of N.S. v. United States, 487 U.S. 250, 255 (1988) (“It follows that [Federal] Rule [of Criminal Procedure] 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule’s mandate than they do to disregard constitutional or statutory provisions.”). Other Supreme Court opinions also suggest the superiority of Congress’s power. See Degen v. United States, 517 U.S. 820, 823–24 “(In many instances the inherent powers of the courts may be controlled or overridden by statute or rule.”), superseded by statute, Civil Asset Forefeiture Reform Act of 2000, Pub. L. No.
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more explicit in various “supervisory power” cases, stating that “Congress retains the ultimate authority to modify or set aside any judicially created rules.”

Elsewhere the Court has adopted a more muscular stance in favor of inherent judicial power, noting, for example, that although the contempt power “may be regulated within limits not precisely defined,” it “can neither be abrogated nor rendered practically inoperative.” The Court has also held that it will not “lightly assume” that a congressional act displaces a court’s inherent power. These assertions suggest that there are inherent judicial powers deriving from the Constitution that Congress cannot abrogate, and that Congress may be required to adhere to some variation of the “plain statement” rule when legislating in the area of inherent powers.

Furthermore, the Court has been vague about the exact boundaries of these powers by repeatedly suggesting that courts should exercise “restraint and discretion” and that inherent powers are “necessary to the exercise of all others.” Nevertheless, even a cursory review of the case law establishes that

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7. Chambers, 501 U.S. at 47 (“[W]e do not lightly assume that Congress has intended to depart from established principles’ such as the scope of a court’s inherent power.” (quoting Weinberger v. Romero Barcelo, 456 U.S. 305, 313 (1982))).


these powers clearly reach beyond the strictly necessary and are often applied when merely helpful.\textsuperscript{11}

Similar to the Supreme Court’s interpretations, scholarship in the field has also proven turbid. Some scholars argue that inherent powers should be limited to strict necessity and should be constitutionally based.\textsuperscript{12} For example, Professor Robert Pushaw divided inherent powers into constitutionally based, “implied indispensible” powers, which Congress cannot impair or destroy, and “beneficial” powers, which courts cannot exercise without congressional approval.\textsuperscript{13} Professors Amy Barrett, Sara Beale, Elizabeth Lear, and William Van Alstyne have reached similar conclusions.\textsuperscript{14}

In comparison, some commentators argue for a much stronger version of constitutional inherent authority, in which the judiciary has substantially more power than Congress.\textsuperscript{15} Professor Linda Mullenix argues that congressional involvement in judicial rulemaking is an unconstitutional incursion into inherent judicial power.\textsuperscript{16} Professor David Engdahl argues that Congress may

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\textsuperscript{12} See infra notes 13–17 and accompanying text.

\textsuperscript{13} Robert J. Pushaw, Jr., \textit{The Inherent Powers of Federal Courts and the Structural Constitution}, 86 IOWA L. REV. 735, 847–48 (2001). Although Pushaw considers the creation and exercise of beneficial powers to be unconstitutional, he recognizes that the “unilateral exercise of beneficial powers has become so entrenched” that it is “unrealistic to suggest repudiation.” Id. at 849. Nevertheless, Pushaw proposes that, at the very least, “federal judges should be required to state clearly when they are asserting a power that is merely beneficial and to recognize plenary congressional control in this area.” Id.

\textsuperscript{14} Barrett, supra note 11, at 817–19 (identifying federal courts’ inherent power to regulate their own proceedings and to formulate uniform rules in the absence of congressional action); Beale, supra note 1, at 1520–22 (arguing that a subspecies of inherent power, the “supervisory power” over federal criminal cases, has been applied too broadly and should be limited to specific constitutional or statutory bases); Lear, supra note 8, at 1162–63 (discussing inherent powers and forum non conveniens and adhering to Pushaw’s basic premise); William W. Van Alstyne, \textit{The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause}, 40 LAW & CONTEMP. PROBS. 102, 122–29 (1976) (arguing that any inherent power “broader than a power deemed indispensible to enable a court to proceed with a given case appears to require statutory support”).

\textsuperscript{15} See infra notes 16–17 and accompanying text.

not pass legislation subverting the judiciary, and that the judiciary itself should
determine whether such subversion has occurred. If a law impedes the
judiciary’s ability to carry out its function, the court should overturn the law. In short, there is substantial scholarly support for a strong, constitutionally
based inherent power as a check on congressional action.

A proper understanding of the judiciary’s inherent powers begins by
distinguishing two questions: 1) whether the judiciary has any constitutional
power to overrule Congress, and 2) whether the judiciary can act in the
absence of congressional approval (that is, in the interstices of federal statutes
and rules). The separation of these two very different powers helps to clarify
that the inherent powers of federal courts are actually both shallow and broad;
Congress has near plenary authority in this area, but the courts have a great
deal of leeway to act when Congress has not.

An examination of the Constitution’s history and text, the ratification
debates, and early case law establishes that Article I’s Necessary and Proper
Clause—not Article III’s usage of the words “judicial power” and
“courts”—controls any inherent judicial authority. Thus, this Article argues
that Congress has near plenary authority over the structure and procedure of
the federal courts.

Based on an examination of the historical record and the nature and structure
of courts and judicial power at the time of the Constitution’s framing, this
Article also argues that the judiciary has substantial authority to act when

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17. David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 BYU L. REV. 75, 164 (“[T]he judicial branch must decide for itself whether any act of Congress regarding the judicial branch actually does help effectuate the judicial power.”).

18. Id. (“Judiciary laws must not be disregarded simply because they are less useful than alternatives the judges might prefer; but when the judges find such a law detrimental to judicial potency, they may disregard it as beyond Congress’ power.”). Interestingly, Engdahl agrees with this Article’s argument that Article I’s Necessary and Proper Clause controls Congress’s power in this area. Id. at 94–104. Nevertheless, he disagrees with this Article’s proposition that courts must apply the traditional, and much looser, “reasonable basis” test under the Necessary and Proper Clause and instead argues for more muscular and far-reaching judicial review. See id. at 165–75.

19. See Barrett, supra note 11, at 833–35 (discussing the boundaries of this consensus).

20. See infra Parts I–II.A.

21. See infra Part I.

22. However, this understanding is at odds with existing scholarship. Many scholars argue that the words “judicial power” and “courts” in Article III grant federal courts a substantial and impenetrable set of core, inherent powers that Congress cannot disturb. See, e.g., Barrett, supra note 11, at 844–45 (discussing the effect of Article III and noting that “there are some—albeit few—procedural matters that are entirely beyond congressional regulation”); Pushaw, supra, note 13, at 847–48 (describing this constitutionally protected area as the “implied indispensable” powers).

23. See infra Part I.B.
Congress has not acted.24 The framers of the Constitution created a remarkably flexible judicial branch based upon the operation of common law courts in the late eighteenth century.25 Those courts regularly acted in the absence of legislative authority; they were bound by the common law and current practice, but not by legislative silence.26 Thus, as long as an inherent power has not been foreclosed by an existing act of Congress and is reflective of the judicial power (that is, helpful to the deciding of cases), federal courts are empowered to act; however, courts still must keep in mind that Congress can always fix what it does not like.27

Indeed, the constitutional protections of inherent judicial powers are narrow, but the judiciary’s non-constitutional, gap-filling power is quite broad.28 This understanding of the inherent powers of federal courts most properly coincides with the Constitution’s history and purpose.29 It also best explains courts’ actions since the framing. Although the Supreme Court has, in dicta, repeatedly claimed an inherent power strong enough to invalidate a congressional act, it has never actually invalidated one, even when Congress has substantially impinged upon traditional areas of inherent power, such as contempt.30 As for the breadth of the interstitial powers, the Court has approved a dizzying array of uses of the inherent power when Congress is silent, but has often explicitly noted Congress’s power to overrule these decisions if the legislature so chooses.31

This understanding of congressional and judicial power, therefore, offers an elegant solution to the thorny problem of inherent powers. There is no doubt that federal courts have claimed inherent and supervisory powers that are not strictly necessary to the courts’ existence.32 This logically means that any inherent-powers theory must either find a constitutional basis for judicial actions made pursuant to these powers or must conclude that such actions are unconstitutional judicial overreaching. Similarly, any inherent-powers theory claiming a strong constitutional inherent power that can overrule congressional action must explain away some critical constitutional language. Article I’s Necessary and Proper Clause and Article III’s Inferior Courts Clause—taken

24. Again, the bulk of related scholarship argues against such a broad reading of these powers. See e.g., Barrett, supra note 4, at 361, 387; Beale, supra note 1, at 1520–22; Van Alstyne, supra note 14, at 122–29.

25. See infra notes 227–33 and accompanying text.

26. See infra notes 219–25 and accompanying text.

27. See infra Parts I–II.

28. See Pushaw, supra note 13, at 822.

29. See id. at 822 & n.463.

30. See infra Part IV.A.1.

31. See infra text accompanying notes 349–53.

32. See infra notes 281–84 and accompanying text.
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This is not to say that Congress is utterly unbound. First, Congress is prohibited from impinging on “pure judicial power,” the power to render a final decision after applying the law to the facts. For example, in *Hayburn’s Case*, the Court struck down a federal statute that allowed the Secretary of War and Congress to review circuit judges’ decisions in pension cases for disabled veterans. The Court found the statute to be unconstitutional because it interfered with the finality of judicial decisions and granted what was essentially appellate jurisdiction to non-Article III courts.

Second, the Necessary and Proper Clause itself serves as a boundary for congressional power over the judiciary. Congress cannot pass a law that would make it impossible for the judiciary to do its work. Nevertheless, this limitation on congressional power is much narrower than that suggested by those arguing for a strong constitutional inherent-powers doctrine. As the Court’s long history of upholding congressional acts under the Necessary and Proper Clause shows, Congress has very broad authority over the judiciary in the area of court structure and procedure. This resolution thus squares the circle; under Article I, Congress has near plenary constitutional and legislative authority, but courts retain broad authority to act where Congress has not.

Part I of this Article canvasses the language and structure of the Constitution, the framing of the Constitution, the early statutory structure, and the early case law. Based on these sources, Part I argues that Congress has

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33. See infra Part I.A.

34. Pushaw, supra note 13, at 844. Professor James Liebman and then-Associate of Law William Ryan canvassed the drafting history of Article III and Supreme Court case law and identified “five crucial qualities constituting ‘[t]he judicial Power’: (1) independent decision of (2) every—and the entire—question affecting the normative scope of supreme law (3) based on the whole supreme law; (4) finality of decision, subject only to reversal by a superior court in the Article III hierarchy; and (5) a capacity to effectuate the court’s judgment in the case and in precedentially controlled cases.” James S. Liebman & William F. Ryan, “Some Effectual Power”: The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 COLUM. L. REV. 696, 884 (1998).


36. *Hayburn’s Case*, 2 U.S. (2 Dall.) at 410. Interestingly, the Court noted that the legislature “unquestionably possess[es]” the power to establish “courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the Judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.” Id. at 412.

37. See Pushaw, supra note 13, at 742 (explaining how the interplay of Articles I and III prevents Congress from stripping courts of their implied authority).

38. See Engdahl, supra note 17, at 94–100 (discussing the function of the Necessary and Proper Clause and detailing the perspective that the Clause permits Congress to legislate on matters pertaining to the judiciary).
near plenary power over court processes and procedures. Part II canvases the same sources and argues that federal courts retain the common law power to act in the interstices of congressional silence. Part III describes the limits to both congressional and judicial power over this area. Part IV argues that this dual understanding of inherent powers snugly fits the existing inherent-powers case law. The Article concludes by noting that courts should better recognize Congress’s superior power in this area and adjust their inherent-powers language accordingly.

I. CONGRESS’S PLENARY ARTICLE I POWER

The key to understanding the inherent power of the federal courts is to recognize that Article I’s Necessary and Proper Clause grants Congress near-plenary power over court process and structure. 39 Although not unequivocal, the language, structure, and history of the Constitution more clearly support the view that Congress has full power to create, design, and regulate the federal judiciary, especially the lower federal courts. 40 To confirm these arguments, this Part begins its analysis with the Constitution’s language and structure, and then turns to the framing of the Constitution, the ratification debates, the early statutory scheme, and the early case law.

A. The Language and Structure of the Constitution

The natural starting place for an examination of legislative and judicial powers is the language and structure of the Constitution itself. One of the Constitution’s principal innovations was the concept of a federal government with limited and enumerated powers. 41 If a branch of the federal government claims any power, that power must be rooted in the language of the Constitution; the federal government possesses no general or universal powers. 42 However, over the years, all three branches of the federal

39. See Pushaw, supra note 13, at 745–76 (detailing the expansive power Congress maintains over the size, structure, and regulation of the judiciary).
40. See infra Parts I.A–B. The Supreme Court is on a unique footing because it is the only federal court that the Constitution requires. See U.S. CONST. art. III, § 1 (vesting the judicial power in “one supreme Court”); Ex Parte Robinson, 86 U.S. (19 Wall.) 505, 510–11 (1873) (noting that Congress can unquestionably restrict lower courts’ contempt power because “[t]hese courts were created by act of Congress,” but that the power to “limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt”). Nevertheless, the Constitution’s language, structure, and history suggest substantial congressional control over the Supreme Court as well. See infra note 57.
42. United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) ("It has been truly said that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.")
government successfully have claimed various implied powers, but these powers had to be incidental to an enumerated power.43

Thus, for the federal courts to have any inherent powers, the Constitution must explicitly or implicitly grant the federal courts such powers in either Article I or Article III.44 Two clauses in Article I, Section 8 apply to the question of inherent powers. The Inferior-Tribunals Clause grants Congress the power “[t]o constitute Tribunals inferior to the supreme Court.”45 The Necessary and Proper Clause grants Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”46 The latter clause is explicit, granting Congress the authority to “make all laws” deemed necessary and proper.47

Article III discusses “the judicial Power” in regard to courts twice.48 Article III, Section 1 provides, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”49 In Article III, Section 2, the Constitution states,

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.50

George W. Carey eds., 1966) (“In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any.”); THE FEDERALIST NO. 45, supra, at 292 (James Madison) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the State governments are numerous and indefinite.”).

44. See supra notes 41–43 and accompanying text.
46. Id. art. I, § 8, cl. 18.
47. Id. (emphasis added).
48. See id. art. III, §§ 1–2.
49. Id. art. III, § 1.
50. Id. art. III, § 2.
Unlike Article I, Article III is thus silent on any inherent powers for the federal judiciary.

Although Article I, Section 8 leaves little room for the judiciary, or any other branch of the government, to claim any inherent authority that is superior to that of Congress, this does not mean that the courts cannot act in the absence of congressional approval.51 It does, however, mean that Congress has the power to make laws “necessary and proper” to the exercise of the judicial power, making it facially inconsistent with Article I to suggest that Article III grants any federal court an inherent power superior to that of Congress.52 As long as congressional action passes the low “necessary and proper” bar, Congress has plenary Article I authority to pass the laws it pleases.53 Looking only at the text of the Constitution, the idea of a strong inherent judicial power is rebutted by the Necessary and Proper Clause.54

This seems especially true given Article III’s description of judicial power. First, unlike the legislative or executive power, the judicial power is poorly described.55 There is an explicit description of jurisdiction;56 however, the parameters of the power itself—how it is to be exercised and by whom—are largely undefined. In light of the Necessary and Proper Clause’s broad grant of power to Congress, Article III’s silence strongly suggests that Congress has plenary Article I power over the nature, shape, and reach of the federal judiciary.57

Congress has particularly far-reaching power over the lower federal courts, which Congress may create or may choose not to create.58 From a modern perspective, there are several remarkable aspects of this power. Given the size

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51. See Anclien, supra note 11, at 38 (explaining that courts use their implied powers to take action in the absence of direct congressional approval).

52. See Pushaw, supra note 13, at 745–46 (noting that the Necessary and Proper Clause allows Congress to regulate the judiciary).

53. See id.

54. See Van Alstyne, supra note 14, at 107 (supporting the viewpoint that Congress “alone [has] the responsibility to say by law what additional authority” the other branches of government have beyond their “core powers”).

55. Compare U.S. CONST. art. III (establishing a Supreme Court and providing a list of controversies subject to judicial power), with id. art. I (providing detailed requirements for the election and operation of the legislative branch), and id. art. II (providing detailed requirements for the election and operation of the executive branch).

56. Id. art. III, § 2.

57. In addition to Article III’s silence on virtually all logistical aspects of the Court, the Judiciary Act of 1789 and the Process Act of 1789 also reflect Congress’s plenary power to create and shape the Supreme Court. See Judiciary Act of 1789, ch. 20, 1 Stat. 73, 76; Process Act of 1789, ch. 21, 1 Stat. 93, 93–94 (providing detailed procedures for the Supreme Court, as well as for circuit and district courts).

58. See U.S. CONST. art. III, § 1 (declaring that the judicial power is “vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish” (emphasis added)); see also Anclien, supra note 11, at 38–39 (providing a list of Congress’s substantive controls over the lower courts).
and nature of the federal judiciary, it is hard to conceptualize that Congress could have chosen to create only the Supreme Court, leaving all remaining jurisdiction to state courts.

Further, Congress’s power of creation does not contemplate that Congress will institute a federal judiciary and be finished; rather, Congress is explicitly empowered to “ordain and establish” inferior courts “from time to time.” The clear implication of this clause is that Congress is expected to alter the number of inferior courts over time and is allowed to explore or even experiment with the composition of the judiciary. The “time to time” language also means that Congress has the power to dismantle the lower federal judiciary altogether.

Based on this reading of Article I and Article III, the notion that federal courts enjoy strong, constitutionally based inherent power is somewhat puzzling. Nonetheless, courts and commentators have found such a power by appealing to the words “judicial power” or “courts” in Article III. From this perspective, the words “judicial power” and “courts” in Article III yield some idea of what a “court” vested with the “judicial power” looks like, and any such court must include certain powers necessary to the exercise of all others. In United States v. Hudson, the Court first expressed a version of this argument, stating that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . . [P]owers which cannot be dispensed with in a Court.” This Article III-based argument involves two separate rationales. It can be true that courts “no doubt possess

60. U.S. Const. art. I, § 1.
61. See Engdahl, supra note 17, at 104–05.
62. See Anclien, supra note 11, at 38 & n.4 (contending that Congress, pursuant to the language of the Constitution, may dismantle lower courts). If dismantled, Congress might be required to compensate displaced judges; however, such payment is not guaranteed. During a partisan struggle between the federalist and republican parties at the turn of the nineteenth century, Congress abolished some Article III courts and did not continue to employ the displaced judges, apparently on the theory that Article III tenure did not survive the disestablishment of the underlying court. See Richard E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 3–52, 76–82 (1971). In comparison, when Congress disbanded the ill-fated Article III Commerce Court, it found other court positions for the displaced judges. See William S. Carpenter, Judicial Tenure in the United States 78–100 (1918).
63. Professor Robert Pushaw has written the definitive version of this argument. See Pushaw, supra note 13, at 741–42 (focusing on the terms in Article III and asserting that congressional regulation is inapplicable with regard to courts’ exercise of “judicial power,” their adjudicatory function); see also Anclien, supra note 11, at 42–43 (arguing for an expansive use of inherent powers when the action relates to the exercise of judicial power).
64. See Barrett, supra note 4, at 325–26 (noting that Article III grants every federal court the power to regulate its own proceedings); Pushaw, supra note 13, at 741.
65. 11 U.S. (7 Cranch) 32, 34 (1812).
powers not immediately derived from statute,"66 but not true that those powers “cannot be dispensed with in a Court” or that such powers are constitutionally based and superior to Congress’s power.67

However, because strong, constitutionally based inherent judicial power necessarily means that the judiciary’s power over procedure and court structure outweighs congressional power,68 this argument elides Congress’s Article I power to “make all Laws which shall be necessary and proper for carrying into Execution”69 the judicial power, as well as Congress’s absolute right to create, disestablish, or alter the number of lower courts (and the power to design the Supreme Court).70 This argument also proceeds without the benefit of any constitutional plain statement of judicial power over procedure or contempt. Furthermore, any implied constitutional power must flow from a specific enumerated power and must not eviscerate any other enumerated power.71 Using the words “judicial power” and “courts” to imply a strong inherent judicial power runs contrary to Congress’s explicitly granted Article I power. Therefore, the language and structure of the Constitution do not suggest that a strong inherent judicial power exists.

B. The Framing of the Constitution

There is nothing in the history of Article I or Article III that explicitly addresses the nature, or even the existence, of inherent judicial powers;72 however, there is much in the periphery to support congressional control over court processes.73 Commentators who have looked at the inherent-powers question reach different conclusions, but generally agree that “[r]ecords of the Constitutional Convention and discussions at the time of ratification do not help define the judicial power of the federal courts.”74

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66. Id.
67. Id.
68. See Barrett, supra note 4, at 364–65 (arguing that the Court’s inherent power extends to judicial procedure); Pushaw, supra note 13, at 847–48 (arguing that courts have the power to fill gaps in procedural and evidentiary law).
70. See Ex Parte Robinson, 56 U.S. (19 Wall.) 505, 510–11 (1873) (noting that the powers and duties of lower courts depend on Congress’s actions).
71. See supra notes 41–44 and accompanying text.
72. See Pushaw, supra note 13, at 822 & n.463 (noting that the text of the Constitution neither authorizes nor forbids inherent judicial authority and that the Constitutional Convention did not debate the issue).
73. See infra Part I.B.1–4.
74. Martin, supra note 16, at 180; see also Felix Frankfurter & James M. Landis, Power of Congress over Procedure in Criminal Contempts in ‘Inferior’ Federal Courts—A Study in Separation of Powers, 37 HARV. L. REV. 1010, 1017–18 (1924) (“[T]he Constitution has prescribed very little in determining the content, and guiding the exercise, of judicial power.”); Pushaw, supra note 13, at 822 (“The Constitution’s text neither authorizes nor forbids inherent judicial authority. Moreover, the Convention delegates did not specifically discuss this issue. Similarly, the Ratification records do not mention inherent power . . . .”); William F. Ryan, Rush
Two theories may be drawn from the silence of the Constitution and the debates of the framers. One possibility is that the framers understood what a “court” was and also what the “judicial power” was without any need for particular discussion or clarification.\(^75\) Under this theory, the understanding of the framers at the time of ratification would have included some inherent authority in their concept of judicial power.\(^76\) Another, and more plausible, explanation is that the framers did not spend much time on the nature or structure of the federal courts because they expected Congress to address the issue.\(^77\) This latter explanation best fits the historical and textual materials.

The Constitutional Convention of 1787 was called to remedy perceived defects in the Articles of Confederation.\(^78\) Among these defects was the lack of a unified federal judiciary.\(^79\) The Articles of Confederation provided for courts of very limited jurisdiction and did not guarantee judicial salary or longevity.\(^80\) Moreover, even in the core area of adjudication, the federal judiciary—as it existed under the Articles of Confederation—was weak because the legislature, not the courts, had final appellate authority.\(^81\)

It was against this backdrop that the framers of the Constitution considered the creation of an independent federal judiciary.\(^82\) All of the preliminary plans

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75. See Pushaw, supra note 13, at 741 (noting that Article III’s conferral of judicial power “incorporated the English understanding” that the role of judges was to administer existing law to the facts in order to render a final judgment); see also Liebman & Ryan, supra note 34, at 773–74 (noting the context in which the framers discussed the judicial power at the Constitutional Convention).

76. See Anclien, supra note 11, at 53–54 (discussing the Federalists’ view that courts maintained implied powers that were “either naturally related or directly connected to the judicial power”). Anclien supports this conclusion by pointing to the specific grant of judicial power to federal courts, highlighting the Federalists’ perception that the Necessary and Proper Clause provides only the means necessary to carry out enumerated powers and the view that “necessary” was interpreted more broadly than “indispensable.” Id. at 53–62.

77. See, e.g., Pushaw, supra note 13, at 820 (observing that the United States was fearful of tyranny following the Revolutionary war and, therefore, established strong legislatures, with comparatively weak judiciaries, in an effort to avoid broad judicial discretion).

78. See Vincent J. Samar, Two Understandings of Supremacy: An Essay, 9 RICH. J. GLOBAL L. & BUS. 339, 358–59 (2010) (explaining that the Constitutional Convention’s original purpose was to amend the Articles of Confederation; however, the delegates realized that the Articles themselves did not provide a viable framework, which prompted the drafting of the Constitution).

79. See JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 275 (2003) (noting that the need to expand the power of the federal judiciary was a contributing reason for the Convention).

80. See ARTICLES OF CONFEDERATION of 1781, art. IX.

81. Id.

82. See Michael R. Dimino, Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians, 21 YALE L. & POL’Y REV. 301,
for the new government included a national judiciary, to be created by Congress, consisting of a supreme judicial body and one or more inferior courts.\textsuperscript{83} None of these proposals included substantial details as to the size, nature, or procedures of these potential courts.\textsuperscript{84} Rather, it may be inferred that Congress was to work out such details when it created these various inferior courts.\textsuperscript{85}

Thus, the many drafts of the Constitution did not include any particular attention to procedure or inherent judicial powers,\textsuperscript{86} but instead empowered Congress to create and design the new judiciary,\textsuperscript{87} which suggests that from the outset, Congress was to have substantial power over the federal judiciary. The final version of Article III supports this reading even more clearly.

1. Optional Inferior Courts

One of the first disagreements over the federal judiciary occurred in the Committee of the Whole and centered on whether inferior federal courts were necessary at all.\textsuperscript{88} James Madison’s notes from June 5, 1787 recount the following:

Mr. Rutledge hav\[ing\] obtained a rule for reconsideration of the clause for establishing \textit{inferior} tribunals under the national authority, now moved that that part of the clause . . . should be expunged: arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments: that it was making an unnecessary encroachment on the jurisdiction (of the States) and creating unnecessary obstacles to their adoption of the new system.\textsuperscript{89}

Madison responded that eliminating the requirement for inferior federal tribunals would create a number of logistical problems, including the prospect of appeals “multipl[ying] to a most oppressive degree” and the difficulty of

\textsuperscript{307–08} (2003) (noting that judicial independence was such a significant issue at the Constitutional Convention that life tenure and salary safeguards were overwhelmingly approved).

\textsuperscript{83} 1 \textsc{The Records of the Federal Convention of 1787}, at 21–22, 95, 104–05 (Max Farrand ed., 1911).

\textsuperscript{84} See id. (illustrating the lack of discussion concerning the size, nature, and procedure of these courts).

\textsuperscript{85} Id. at 21 (nothing that it was left to Congress to establish inferior tribunals).

\textsuperscript{86} Pushaw, \textit{supra} note 13, at 822.

\textsuperscript{87} See 1 \textsc{The Records of the Federal Convention of 1787}, \textit{supra} note 83, at 21–22, 95, 104–05.

\textsuperscript{88} Id. at 124 (detailing the debate among the delegates about whether it was necessary to establish inferior tribunals).

\textsuperscript{89} Id. (emphasis added).
remedying “improper” or “biased” state verdicts with new trials at the Supreme Court.90

Nevertheless, the motion to strike the reference to inferior tribunals passed by a close vote.91 During the earlier debate Delegate John Dickinson had “contended strongly that if there was to be a National Legislature, there ought to be a national Judiciary, and that the former ought to have authority to institute the latter.”92 When the motion to strike passed, Madison suggested that the stricken inferior-tribunals clause could be replaced with a motion “that the National Legislature be empowered to appoint inferior tribunals.”93 In support of this compromise, Madison and his supporters argued that “there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them.”94 This change was accepted by a wide margin.95

The debate over inferior federal tribunals arose again on July 18, 1787 when the delegates met as a whole.96 Opponents of inferior federal courts argued that existing state-court structures were sufficient and that inferior federal courts would “create jealousies” among state courts.97 Proponents argued that “the Courts of the States can not be trusted with the administration of the National laws” and that inferior federal courts were necessary to ensure uniform policy.98 Despite the debate, Madison’s notes indicate that the resolution allowing the national legislature to appoint, or not appoint, inferior tribunals passed “nemine contradicente,” or unanimously.99

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90. Id. Madison argued that “[a]n effective Judiciary establishment commensurate to the legislative authority, was essential” and that “a Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.” Id.
91. Id. at 125 (showing that Rutledge’s motion obtained five votes in favor of the motion, four against, and two divided).
92. Id.
93. Id. at 118, 127. Madison’s journal substitutes “institute” for “appoint,” see id. at 125, but the other records, including Madison’s notes from June 13, 1782, use “appoint,” see id. at 237. For a more detailed debate about inferior tribunals, see James E. Pfander, Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation, 101 NW. U. L. REV. 191, 209 & n.71 (2007).
94. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 83, at 125.
95. Id. (noting that eight voted in favor of the provision, whereas only two voted against it).
96. 2 id. at 45–46.
97. Id.
98. Id. at 46.
99. Id. Madison’s notes actually use the abbreviation “nem. con.” Id.; see also BLACK’S LAW DICTIONARY 1066 (8th ed. 2004) (defining “nemine contradicente” as “[w]ithout opposition or dissent”).
2. From “Appoint,” to “Establish,” to “Constitute,” to “Ordain and Establish”

The language allowing the creation of inferior federal courts first changed from “appoint,”100 to “establish,”101 and then to “constitute,”102 and finally to “ordain and establish.” 103 Each of these changes suggests increased congressional authority. The first few iterations of the Madisonian compromise stated “[t]hat the national legislature be empowered to appoint inferior Tribunals.”104 When the drafting was given over to the Committee of Detail, most of the early documents retained the word “appoint,” although “establish” also appeared for the first time.105

By the time the draft Constitution left the Committee of Detail, however, “appoint” had been replaced by “constitute,” and the language began to resemble the final draft.106 The addition of “time to time” and the change to “constitute” suggest a more robust congressional role in creating and managing the inferior courts. The Committee on Style later settled on the final text of Article III by changing “constitute” to “ordain and establish.”107 Article I’s grant of legislative power to Congress maintained “constitute.”108

The change from “appoint” to another verb is quite telling. “Appoint” does not suggest much power over formation or design, whereas “establish,” “constitute,” and “ordain” all suggest a much broader power. This is especially so because the word “appoint” may have reflected a congressional power to “appoint” state courts to hear federal matters, as had been common under the Articles of Confederation.109 The Articles of Confederation used the term “appoint[ ]” in reference to “courts for the trial of piracies and felonies committed on the high seas” and the term “establish[ ]” regarding “courts for receiving and determining finally appeals in all cases of captures.”110

100. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 83, at 133, 144.
101. Id. at 146 (using “establish” as well as “appoint”).
102. Id. at 186.
103. Id. at 600.
104. See 1 id. at 118, 127, 237; see also 2 id. at 38–39.
105. See 2 id. at 133, 144, 146.
106. Id. at 172 (“The Judicial Power of the United States shall be vested in one Supreme (National) Court, and in such (other) <inferior> Courts as shall, from Time to Time, be constituted by the Legislature of the United States.”).
107. Compare id. at 186 (using “constitute[ ]”), with id. at 600 (changing the language to “ordain and establish”).
108. U.S. CONST. art. I, § 8 (granting Congress the power to “constitute tribunals inferior to the Supreme Court” (emphasis added)).
110. See ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1 (declaring that Congress has the power of “appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures”).
Consistent with this distinction, the Continental Congress “appointed” state courts to hear the trial of piracy and felonies on the high seas \(^{111}\) and “established” from scratch an entirely new court of appeals for cases of capture. \(^{112}\) Thus, the framers may well have understood the power to “appoint” as quite narrow and may not have intended any independent lower federal judiciary at all. Therefore, the replacement of “appoint” with “constitute” or “establish” implies a significant change in congressional authority and the nature of the prospective inferior federal courts.

In the text there is no discussion of the change from “constitute” to “ordain and establish,” but that change likewise signals significant congressional power over the inferior courts. \(^{113}\) At the time of the Constitutional Convention, one of the meanings of “constitute” was to establish an institution. \(^{114}\) Thus, in the early years of the country, “establish” and “constitute” had similar meanings with regard to institutions. \(^{115}\)

“Ordain,” however, suggests a much broader power and purpose. Four state constitutions use “ordain” in conjunction with the creation of the state constitution or the state itself—often with explicitly religious language. \(^{116}\) Professor Julius Goebel has referred to “ordain and establish” as “words of fiat.” \(^{117}\)

There are four likely implications of this word change. First, the Committee on Style presumably changed one word to three in an effort to expand on what the Constitution means when it describes the potential creation of inferior federal courts. Second, these three words were meant to express something...
different than the use of “constitute” alone. Third, in light of its use in various state constitutions and its religious overtones, “ordain” implies that Congress has a far-reaching design power.118 Fourth, the change of wording in Article III, but not in Article I, suggests a specific desire to emphasize Congress’s power, by stating a broader version of it in Article III.

3. The Debate over the Exceptions Clause

Some commentators have reached an opposite conclusion based on the debate over the Exceptions Clause.119 On August 27, 1787, the delegates made several changes affecting the jurisdiction of the Supreme Court and the lower federal courts.120 During these edits, there was a motion to amend the Exceptions Clause so that the sentence—“In all the other cases before mentioned it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make”121—would read, “In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct.”122 This motion was defeated by a 6-2 vote.123 Pointing to this motion, Professor Robert Clinton argues that “[a] clearer rejection of congressional authority over judicial powers is hard to

118. See id. at 246–47 (arguing that the use of the words “ordain and establish” indicated that the creation of inferior federal courts was mandatory, not discretionary). This argument ignores the clearly applicable conditional “may” earlier in Article III, Section I and is thus untenable. See U.S. CONST. art. III, § 1.

119. See U.S. CONST. art. III, § 2, cl. 2 (providing the scope of the Supreme Court’s jurisdiction and stating, “In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make”). Despite the facial clarity of the language, there has been an ongoing debate about whether the Exceptions Clause actually permits Congress to except some jurisdiction from the Supreme Court or the lower federal courts. See Steven G. Calabresi & Gary Lawson, The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia, 107 COLUM. L. REV. 1002, 1008 (2007) (arguing that the Exceptions Clause permits Congress to transfer classes of cases between the Court’s original and appellate jurisdiction, but does not allow Congress to wholly deprive the Court of jurisdiction); Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. PA. L. REV. 741, 753 (1984) (arguing that the exceptions power was “designed to facilitate the creation of inferior federal courts”); Martin H. Redish, Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager, 77 NW. U. L. REV. 143, 149 (1982) (arguing that the legislature’s authority to make exceptions affecting the Court’s jurisdiction is “clear”); William W. Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 ARIZ. L. REV. 229, 268 (1973) (regarding Congress’s power to make jurisdictional exceptions “as plenary as the power to regulate commerce”); Herbert Wechsler, The Courts and the Constitution, 65 COLUM. L. REV. 1001, 1004-05 (1965) (“Congress has the power . . . to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court’s appellate jurisdiction.”).

120. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 83, at 424-25, 431–33.

121. Id. at 424.

122. Id. at 425, 431.

123. Id.
imagine." 124 Ancien also views this rejection as support for strong constitutional inherent powers.125

However, there are several reasons not to interpret the rejection of amended language as a statement against congressional power over judicial inherent powers. The motion was made in the context of questions of jurisdiction, not court process or inherent powers.126 Additionally, the proposed change may have failed because it did not, in fact, change the congressional power already expressed in the Exceptions Clause, which was facially quite broad in draft form, allowing “such exceptions and . . . such regulations as the Legislature shall make.”127

Finally, the proposed language may have expanded congressional control from jurisdiction to the actual decision-making authority of courts. Although the framers were seemingly unconcerned about court procedure, they were quite concerned about legislative interference with the actual process of deciding cases.128 The Committee simply may have rejected the provision out of concern over allowing Congress the power to interfere with core decision making, rather than out of concern over Congress’s control of jurisdiction, procedure, or contempt. Thus, given the likely rationales for rejecting the language, it is a stretch to regard this single vote, under ambiguous circumstances with no recorded debate,129 as support for a strong theory of inherent judicial authority.

4. The Framers’ Indifference to the Details of the Federal Judiciary

Beyond the words of the Constitution and the records of the debate, the lack of explicit discussion of the nature and shape of the courts is worth noting. The framers spent comparatively little time discussing or debating the

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124. Clinton, supra note 119, at 791; see also Leonard G. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. PA. L. REV. 157, 173 (1960) (rationalizing that if the Convention intended to give Congress such power, the delegates would have adopted the amendment).

125. Ancien, supra note 11, at 55 & n.95.

126. See Alex Glashausser, A Return to Form for the Exceptions Clause, 51 B.C. L. REV. 1383, 1431–34 (2010) (asserting that the proposal’s purpose was to delineate jurisdiction, not to subject the Court’s very existence to legislative control).


128. See Liebman & Ryan, supra note 34, at 754 & n.271 (arguing that the new language would have allowed Congress to determine outcomes in cases, not just jurisdiction); Ralph A. Rossum, Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause, 24 WM. & MARY L. REV. 385, 393 n.44 (1983) (distinguishing between the amendment’s effect on the power to hear cases and the power to determine the outcome of cases); Julian Velasco, Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View, 46 CATH. U. L. REV. 671, 733 (1997).

judiciary, and the Constitution’s description of the executive and the legislative branches contains much greater detail and clarity than its description of the judiciary. Further, the fact that the bulk of the discussion on the inferior federal courts consisted of whether any such courts were necessary at all hardly suggests that the framers did not view the federal judiciary as an expansive body, must less a branch of government with any inherent powers.

When an issue of court structure mattered, such as the salary and tenure guarantees for federal judges, there was extensive debate and an explicit guarantee in Article III. The framers’ silence on inherent authority permits the inference that no such authority was intended.

Moreover, the framers likely understood that leaving the design of the courts to Congress could result in unfamiliar procedures and court structures. After all, under the Articles of Confederation, the Continental Congress declined to grant the court of appeals the power of contempt, and the court was denied the power to enforce its own judgments. Thus, questions of which powers should be allocated to the judiciary were not unknown to the framers, who almost certainly would have included any judicial powers considered indispensable, such as the inherent powers, in Article III.

C. The Ratification Debates

Although the Constitutional Convention spent comparatively limited time on the judiciary, the state ratification debates focused quite squarely on Article

130. MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 154 (1913) (“To one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention.”); Holt, supra note 129, at 1460 (“Little space in members’ sparse notes of the Convention’s debates—especially the notes assiduously taken by James Madison—is devoted to the judiciary branch . . . .”).

131. See U.S. CONST. arts. I–II.

132. See FARRAND, supra note 130, at 79–80 (highlighting the narrow perceived function of the federal judiciary by explaining that the delegates were most concerned about whether the inferior federal courts would encroach on the state courts, with some feeling that a national supreme court would be able to handle any appeals from state courts).


134. See U.S. CONST. art. III, § 1.


136. See GOEBEL, supra note 109, at 169, 171 (stating that although the first draft of the legislation gave “all the powers of courts of record to impose fines or imprison for contempts or disobedience[,]” the final version eliminated these powers).

137. Id. at 172.
III.138 Anti-Federalists argued that ratifying the Constitution would impinge upon the civil right to a jury trial and that the proposed jurisdiction of the Supreme Court granted it unbridled power. Contemporary records from the ratification debates and the Federalist Papers, which were written in support of ratification, illustrate that the perceived remedy to each of these concerns was for Congress to exercise tremendous power over the courts.141

1. The Federalist Papers

Alexander Hamilton’s “least dangerous branch” argument from Federalist No. 78 provides the most famous defense of Article III:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.142

In Hamilton’s view, the powers of Congress far outweigh the limited role of the judiciary, which has “neither FORCE nor WILL” to justify the use of any inherent powers.143

Likewise, Federalist No. 83 argues that the Constitution’s silence on civil jury trials does not mean that civil jury trials were barred, but rather that the

138. See Geyh & Van Tassel, supra note 135, at 48–53 (describing the variety of issues raised under Article III at the ratification debates).


140. See, e.g., Essays of Brutus, in 2 The Complete Anti-Federalist 358, 431–32 (Herbert J. Storing ed., 1981) (“The appellate jurisdiction granted to the supreme court, in [Article III], has justly been considered as one of the most objectionable parts of the constitution . . . .”)

141. For a recent overview of this portion of the debate, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 287–89, 417–19 (2010).

142. The Federalist No. 78, supra note 42, at 465 (Alexander Hamilton).

143. See id.
issue is explicitly left to Congress. 144 In Federalist No. 80, Hamilton attempted to assuage worries about federal courts’ power by noting that if there were “partial inconveniences” with the judiciary, “it ought to be recollected that the national legislature will have ample authority to make such exceptions and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.”145

2. State Ratification Conventions

The records from the state ratification conventions also reflect a broad understanding of Congress’s Article I power. Both critics and supporters of the new Constitution recognized Article I’s reach and plainly stated that Congress, for good or for ill, would have plenary power over the shape and nature of a possible new federal judiciary. 146 In his argument against ratification in Massachusetts, Abraham Holmes noted that although the right to a jury in a criminal trial was guaranteed, this protection was circumscribed by Congress’s Article I power over criminal procedure.147

Arguing in opposition to the breadth of federal jurisdiction during the Virginia ratification debates, Delegate George Mason asked, “What is there left to the state courts? Will any gentleman be pleased, candidly, fairly, and without sophistry, to show us what remains? There is no limitation . . . . The inferior courts are to be as numerous as Congress may think proper. They are to be of whatever nature they please.”148

In defense, supporters of the Constitution repeatedly turned to Congress’s power over the judiciary, promising that Congress would guarantee civil jury trials.149 Delegate James Wilson, a member of the Constitutional Convention’s Committee of Detail and later a Supreme Court Justice, noted that the jury and court procedures were quite different from state to state and that the Constitutional Convention could not have drafted a provision sufficiently tailored to each state’s preferred procedures. 150 Rather, it was better to give

144. THE FEDERALIST NO. 83, supra note 42, at 496 (Alexander Hamilton) (“A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone.”).

145. THE FEDERALIST NO. 80, supra note 40, at 481 (Alexander Hamilton).


147. Id. at 110 (“But what makes the matter still more alarming is, that the mode of criminal process is to be pointed out by Congress, and they have no constitutional check on them.”).

148. See CONVENTION OF VIRGINIA, reprinted in 3 STATE DEBATES, supra note 146, at 1, 531 (statement of George Mason).

149. See CONVENTION OF PENNSYLVANIA, reprinted in 2 STATE DEBATES, supra note 146, at 415, 488 (statement of James Wilson) (expressing confidence in congressional maintenance of jury trials).

150. Id.
Congress “the power of making regulations with respect to the mode of trial,” leaving the courts “to be particularly organized by the legislature—the representatives of the United States—from time to time . . . .” In a speech in Philadelphia, Wilson again expressed confidence over the civil jury, arguing “that no danger could possibly ensue, since the proceedings of the supreme court are to be regulated by the congress, which is a faithful representation of the people.”

In North Carolina, another future Supreme Court Justice, James Iredell, gave a similar explanation for the constitutional silence on civil juries, arguing that silence does not prevent the enactment of such a provision, but merely provides a more flexible means to create laws that “will suit the convenience and secure the liberty of the people.”

James Madison contended that the federal judiciary would be “safe and convenient for the states and the people at large” because of the “power given to the general legislature to establish such courts as [may] be judged necessary and expedient.” The concern over the destruction of the civil jury trial was overblown, because Congress, not the judiciary, has the power “to prevent it, or prescribe such a mode as will secure the privilege of jury trial.” In arguing for the ratification of the Constitution, Judge Edmund Pendleton, president of the Virginia ratifying convention, noted Congress’s freedom to design and redesign the federal judiciary and the wisdom of leaving the details of the judiciary to Congress, which “may find reasons to change and vary them [sic] as experience shall dictate.”

D. The Judiciary and Process Acts of 1789

The earliest congressional acts establishing the federal judiciary further support the understanding of Congress’s plenary power under Article I.

151. Id.
152. 3 The Records of the Federal Convention, supra note 83, at app. A. at 101.
153. Convention of North Carolina, reprinted in 4 State Debates, supra note 146, at 1, 144–45 (statement of James Iredell); see also id. at 145 (recording Iredell as stating that there is no reason to think “that the Congress would dare to deprive the people of th[e] valuable privilege of a jury trial, as members of Congress could find themselves on trial, too”); id. at 151 (statement of Archibald McClaine) (addressing the civil jury trial and noting that “[i]t is impossible to lay down any constitutional rule for the government of all the different states in each particular. But it will be easy for the legislature to make laws to accommodate the people in every part of the Union, as circumstances may arise”).
155. Id.; see also id. at 561 (statement of John Marshall) (stating that Congress, like the Virginia legislature, will “not give a trial by jury where it is not necessary, but . . . wherever it is thought expedient”); id. at 572–73 (statement of Edmund Randolph) (urging fellow delegates not to worry over the potential for the Supreme Court to reverse findings of fact, because “Congress can regulate it properly, and I have no doubt they [sic] will”). For additional examples, see Ryan, supra note 74, at 768–69.
Following the adoption of the Constitution, Congress passed three laws constituting the new federal judiciary—the Judiciary Act of 1789,\textsuperscript{157} the Federal Process Act of 1789,\textsuperscript{158} and the Crimes Act of 1790\textsuperscript{159}—to establish the nature, structure, and jurisdiction of the new federal judiciary.\textsuperscript{160}

These various Acts constitute powerful evidence of the framers’ understanding of Articles I and III.\textsuperscript{161} A Senate subcommittee consisting of three former delegates to the Constitutional Convention—Oliver Ellsworth, William Paterson, and Caleb Strong—drafted the Judiciary Act of 1789.\textsuperscript{162} Ellsworth, the principal drafter of the Judiciary Act, was a particularly influential delegate and had previously served on the first Committee of Detail.\textsuperscript{163} The Supreme Court has noted that the Judiciary Act of 1789 “was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.”\textsuperscript{164}

Congress took several different approaches in these Acts. In some cases, it granted the new federal courts broad discretion in how to structure procedure.\textsuperscript{165} In others, it explicitly instructed courts to follow the current practices of the time.\textsuperscript{166} Lastly, some sections were quite specific and innovative.\textsuperscript{167} Between these three approaches, there can be little doubt that Congress thought it had full authority to design and alter federal court processes and procedures.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{157} Judiciary Act of 1789, ch. 20, 1 Stat. 73.
\item \textsuperscript{158} Process Act of 1789, ch. 21, 1 Stat. 93.
\item \textsuperscript{159} Crimes Act of 1790, ch. 9, 1 Stat. 112.
\item \textsuperscript{160} Congress passed amendments to the Process Act in 1792, see Process Act of 1792, ch. 36, 1 Stat. 275, and amendments to the Judiciary Act in 1793, see Judiciary Act of 1793, ch. 22, 1 Stat. 333.
\item \textsuperscript{161} See, e.g., RICHARD H. FALLON ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28 (4th ed. 1996) (“[T]he first Judiciary Act is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress’ constitutional obligations concerning the vesting of federal jurisdiction.”).
\item \textsuperscript{162} Holt, supra note 129, at 1478–79.
\item \textsuperscript{165} See, e.g., Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.
\item \textsuperscript{166} See id.
\item \textsuperscript{167} See id.
\item \textsuperscript{168} See William R. Castro, First Congress’s Understanding of Its Authority over the Federal Courts’ Jurisdiction, 26 B.C. L. REV. 1101, 1120–22 (1985) (arguing that the allocation
The Judiciary Act of 1789 is the longest and most comprehensive of the three initial Acts. In many areas, the Judiciary Act explicitly left federal courts to their own discretion. Section 17 described three areas of this discretion:

[A]ll the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; (a) and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; (b) and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.

Under this section, new trials are governed by current judicial practice, contempt actions by the court are explicitly discretionary, and the creation of necessary rules is permitted, as long as they do not violate the laws of the United States.

Although section 17 of the 1789 Judiciary Act left broad discretion to courts, multiple other sections offered more specific grants of authority, including various procedural rules that altered the current practices. Some of these changes included allowing litigants in actions at law to use the discovery techniques available in equity actions, allowing for depositions de bene esse, and allowing for the possibility of jury assessment of damages in certain default or demurrer cases.

The Process Act of 1789 addressed the procedures in equity, admiralty, and maritime cases, which were to be adjudicated “according to the course of civil
law.” 178—in other words, they were to follow the contemporary court procedures. The Process Act again slightly changed the traditional procedure by allowing a plaintiff to take out a capias ad satisfaciendum in the first instance. 179

Thus, the Judiciary and Process Acts make clear that the first Congress considered its Article I power over court process and procedure to be plenary. The combination of changes to some current procedures, explicit ratification of other procedures, and the grant of almost unfettered discretion in other areas illustrate Congress’s broad vision of its own power. These Acts also make it virtually impossible that the first Congress considered there to be a superior, core, inherent judicial power.

Congress’s expansive vision of its power over the federal courts continued for a significant period following 1789. For example, a “judiciary crisis” occurred when a lame-duck Federalist Congress passed a judiciary act in 1801, only to see that act repealed the next year by a new Republican Congress. 180 As part of this crisis, Congress dispossessed a number of federal judgeships, changed the structure of the federal judiciary, and postponed Supreme Court review of these moves by changing the next date the Court would convene. 181 The congressional debates explicitly mentioned the possibility that the


179. Id. A capias ad satisfaciendum was a writ of execution that allowed a sheriff to take custody of a debtor pending satisfaction of his or her judgment. See BLACK’S LAW DICTIONARY 236 (9th ed. 2009). The first version of the Process Act actually included many more specific procedural details, including the manner and time of filing and answering in civil suits, and the form of summonses, service, defaults, and executions. See WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 51 (1995); Ryan, supra note 74, at 771.


181. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 222–24 (1926) (discussing the concern that arose over the precedent Congress was setting about its power over the court’s function); Charles F. Hobson, John Marshall, the Mandamus Case, and the Judiciary Crisis, 1801–1803, 72 GEO. WASH. L. REV. 289, 295–96 (2003) (explaining the change in court structure and postponing judicial review). As part of this debate, Senator Stevens Stone of Virginia well stated the continuing understanding that the Inferior-Tribunals Clause granted Congress plenary authority in the establishment, design, and redesign of the lower federal courts:

“[A]re we not equally justified in considering their establishment as dependent upon the legislature, who may, from time to time, ordain them, as the public good requires? Can any other meaning be applied to the words ‘from time to time?’ And nothing can be more important on this subject than that the legislature should have power, from time to time, to create, to annul, or to modify, the courts, as the public good may require—not merely to-day, but forever, and whenever a change of circumstances may suggest the propriety of a different organization.”

OPINIONS, SELECTED FROM DEBATES IN CONGRESS, FROM 1789 TO 1836, INVOLVING CONSTITUTIONAL PRINCIPLES, reprinted in 4 STATE DEBATES, supra note 146., at 343, 443 (statement of Stevens Stone).
Supreme Court would overturn the law, but the Court never reached that question.\textsuperscript{182} In \textit{Stuart v. Laird}, the Court held that Congress could transfer a case from one court to another after eliminating the original court: “Congress have [sic] constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.”\textsuperscript{183} Thus, Congress’s actions, and the Court’s tacit acquiescence, certainly evince a congressional understanding of near-plenary Article I power over the federal judiciary.\textsuperscript{184}

\textbf{E. Early Case Law}

Other early federal cases follow the original understanding of a near plenary Article I power. For example, in \textit{Wayman v. Southard}, the defendant argued that Congress lacked the authority to regulate the execution of federal court judgments in cases between individuals.\textsuperscript{185} Chief Justice John Marshall articulated the basis for Congress’s plenary power over the federal judiciary under Article I’s Necessary and Proper Clause:

\begin{quote}
The constitution concludes its enumeration of granted powers, with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause, neither require nor admit of elucidation. The Court, therefore, will only say, that no doubt whatever is entertained on the power of
\end{quote}

\begin{footnotesize}


\textsuperscript{184} Frankfurter & Landis, \textit{supra} note 74, at 1018–20 (collecting a lengthy list of congressional acts controlling the practice and procedures of the federal courts and referring to the compilation as “the authentic, if not succulent, testimony of the Acts of Congress”).

\textsuperscript{185} 23 U.S. (10 Wheat.) 1, 11 (1825).
\end{footnotesize}
Congress over the subject. The only inquiry is, how far has this power been exercised?\textsuperscript{186} Later in the opinion, Marshall notes that Congress may delegate some of this power to the judiciary and specifically identifies section 17 of the Judiciary Act as such a permissible delegation.\textsuperscript{187}

In a companion case from the same term, the Court again faced an issue of marshals executing a judgment in \textit{Bank of the United States v. Halstead}.\textsuperscript{188} In \textit{Halstead}, the Court provides a similar analysis as in \textit{Wayman} and reaffirms Congress’s plenary Article I power over court process:

\begin{quote}
  It cannot certainly be contended, with the least colour of plausibility, that Congress does not possess the uncontrolled power to legislate with respect both to the form and effect of executions issued upon judgments recovered in the Courts of the United States . . . . The authority to carry into complete effect the judgments of the Courts, necessarily results, by implication, from the power to ordain and establish such Courts. But it does not rest altogether upon such implication; for express authority is given to Congress to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof.\textsuperscript{189}
\end{quote}

\textit{Halstead} also addressed whether the Process Act of 1792’s instruction that federal courts follow state-court procedures for “the forms of writs, executions and other process”\textsuperscript{190} was an impermissible delegation of the legislative power.\textsuperscript{191} Notably, the Court did not reject the characterization of the power to control process as legislative.\textsuperscript{192} On the contrary, the Court explicitly stated “Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do;”\textsuperscript{193} however, the Court did note that such “power is vested in the Courts.”\textsuperscript{194}

The Court reiterated this holding and reasoning in \textit{Livingston v. Story}\textsuperscript{195} and \textit{Rhode Island v. Massachusetts}.\textsuperscript{196} These cases quite clearly suggest that Congress has plenary Article I authority over court procedures stemming from the power to establish the judiciary and pass laws necessary and proper to the

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186. Id. at 22.
187. Id. at 43.
189. Id. at 53–54.
192. Id. at 61–62.
193. Id. at 61.
194. Id.
\end{flushleft}
judiciary’s operation.197 Earlier cases from the inferior federal courts convey similar sentiments. 198 Former Supreme Court Justice Joseph Story’s well-known Commentaries on the Constitution of the United States likewise supports plenary Article I control.199

Nevertheless, proponents of the judiciary’s inherent constitutional authority maintain the existence of judicial superiority over Congress for any court

197. See, e.g., Livingston v. Van Ingen, 15 F. Cas. 697, 698 (C.C.D.N.Y. 1811) (No. 8420) (“It is as certain, that they are indebted to congress, under the constitution, for their creation, and that instead of extending their powers as the exigencies of suitors may require, or may by themselves be thought reasonable, they have hitherto been regarded as dependent on that body for all the powers they possess.”); The Little Ann, 15 F. Cas. 622, 623 (C.C.D. N.Y. 1810) (No. 8397) (“In ascertaining what portion of the general powers delegated by the constitution of the United States to the federal judiciary, is to be exercised by any one of the inferior courts, recourse must be had to the laws creating the tribunal, and designating its jurisdiction.”); Ex Parte Cabrera, 4 F. Cas. 964, 965 (C.C.D. Pa. 1805) (No. 2278) (“[T]he residuum of the judicial power is vested in such inferior courts, as congress may, from time to time, ordain and establish. Now, it follows, that when congress has established such inferior courts, it lies with that body, to parcel out the judicial powers amongst them, in such manner, as may seem to them most proper.”).

198. See, e.g., Livingston v. Van Ingen, 15 F. Cas. 697, 698 (C.C.D.N.Y. 1811) (No. 8420) (“It is as certain, that they are indebted to congress, under the constitution, for their creation, and that instead of extending their powers as the exigencies of suitors may require, or may by themselves be thought reasonable, they have hitherto been regarded as dependent on that body for all the powers they possess.”); The Little Ann, 15 F. Cas. 622, 623 (C.C.D. N.Y. 1810) (No. 8397) (“In ascertaining what portion of the general powers delegated by the constitution of the United States to the federal judiciary, is to be exercised by any one of the inferior courts, recourse must be had to the laws creating the tribunal, and designating its jurisdiction.”); Ex Parte Cabrera, 4 F. Cas. 964, 965 (C.C.D. Pa. 1805) (No. 2278) (“[T]he residuum of the judicial power is vested in such inferior courts, as congress may, from time to time, ordain and establish. Now, it follows, that when congress has established such inferior courts, it lies with that body, to parcel out the judicial powers amongst them, in such manner, as may seem to them most proper.”).

199. See, e.g., Livingston v. Van Ingen, 15 F. Cas. 697, 698 (C.C.D.N.Y. 1811) (No. 8420) (“It is as certain, that they are indebted to congress, under the constitution, for their creation, and that instead of extending their powers as the exigencies of suitors may require, or may by themselves be thought reasonable, they have hitherto been regarded as dependent on that body for all the powers they possess.”); The Little Ann, 15 F. Cas. 622, 623 (C.C.D. N.Y. 1810) (No. 8397) (“In ascertaining what portion of the general powers delegated by the constitution of the United States to the federal judiciary, is to be exercised by any one of the inferior courts, recourse must be had to the laws creating the tribunal, and designating its jurisdiction.”); Ex Parte Cabrera, 4 F. Cas. 964, 965 (C.C.D. Pa. 1805) (No. 2278) (“[T]he residuum of the judicial power is vested in such inferior courts, as congress may, from time to time, ordain and establish. Now, it follows, that when congress has established such inferior courts, it lies with that body, to parcel out the judicial powers amongst them, in such manner, as may seem to them most proper.”).
procedure that is necessary to the operation of the courts. Support for this argument appears in two early Supreme Court cases.

In *Ex Parte Bollman*, the Court held that it lacked common law power to issue a writ of habeas corpus, and that any ability to do so must be explicitly granted by Congress. Immediately following that holding, the Court added in dicta,

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.

In *United States v. Hudson*, the Court rejected the federal courts’ exercise of jurisdiction over common law crimes. Because the Constitution created a federal government of enumerated powers, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence” in order for a federal court to act. Nevertheless, the Court provided a caveat to this recognition of congressional power in dicta, by noting that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . . and so far our Courts no doubt possess powers not immediately derived from the statute.”

The easiest, but least satisfying, analysis of these statements is to simply deride them as dicta. Given the contrary rulings by roughly contemporary and later Supreme Courts, and contemporary lower courts, which all upheld substantial congressional control over the courts, the classification of these rulings as dicta may actually be a fair reading of these cases. The holdings and reasoning in *Bollman* and *Hudson* could also be interpreted as supporting plenary congressional Article I power while still protecting the Court’s ability to act in the absence of, but not necessarily in contradiction with, congressional authorization.

In both *Bollman* and *Hudson*, the Court refused to act in an area upon which Congress had not yet spoken, absent an explicit grant of power invitation, requiring an explicit grant of power. By analogy, the Court’s dicta could be asserting the judiciary’s power to continue to act with regard to court procedures in the absence of congressional authority, not necessarily in

201. 8 U.S. (4 Cranch) 75, 93–94 (1807).
202. *Id.* at 94.
203. 11 U.S. (7 Cranch) 32, 32 (1812).
204. *Id.* at 34.
205. *Id.*
207. *See supra* note 198 and accompanying text.
208. *See Hudson*, 11 U.S. (7 Cranch) at 34; *Ex Parte Bollman*, 8 U.S. (4 Cranch) at 93.
opposition to congressional authority. Bollman makes no claim to any strong constitutional inherent power at all; it simply states that courts retain power over decorum and their officers even without explicit congressional approval. Likewise, Hudson does not necessarily claim a power superior to Congress, but instead claims a power “not immediately derived from statute.”

In addition, in Anderson v. Dunn, the Court upheld Congress’s non-statutory contempt power, which provides support for this interpretation of Bollman and Hudson. The Court began by characterizing Congress’s contempt power as a power by “implication.” The Court then analogized this power to the implied judicial power over contempt:

> It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend.

Although Anderson notes that federal courts would have had a non-statutory claim to a contempt power if Congress had not granted it, there is nothing in Anderson to suggest that the implied contempt power is not subject to congressional control or even elimination.

Thus, an analysis of the history, text, ratification, and aftermath of the Constitution do not support a strong constitutional inherent authority. Although it was likely understood that Congress could not interfere with the core judicial power of deciding cases, it seems highly unlikely that these constitutional powers stretched to questions of court procedure, rules, or structure.

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209. One difficulty with this reading is that the Judiciary Act of 1789 expressly allowed for federal courts to engage in contempt proceedings and enforce judgments, so Bollman and Hudson may imply the existence of a power beyond that which Congress already granted. Again, that does not necessarily mean that Bollman or Hudson represent that the judicial power is superior to Congress in this area.

210. Bollman, 8 U.S. (4 Cranch) at 94.

211. Hudson, 11 U.S. (7 Cranch) at 34.

212. See 19 U.S. (6 Wheat.) 204, 225–26 (1821).

213. Id. at 225.

214. Id. at 227.

215. Id. at 227–28.

216. See supra note 128 and accompanying text.
II. THE JUDICIARY’S INTERSTITIAL POWER

In light of Congress’s broad Article I powers, it is worth asking whether courts have any power to act without explicit congressional approval. Both Pushaw and Van Alstyne have argued that such power does not exist.217

This argument ignores the nature of the “judicial power” and “courts” in the late-eighteenth century, as well as Article III’s reference to “law and equity.”218 Although it is unlikely that the framers’ use of these terms intended to place the judiciary in a superior position to Congress, it is also unlikely that the framers meant to cripple the new judiciary by requiring Congress to approve each and every activity of each new court.

A. The Nature of Courts in 1787

From before the time of the Constitution’s framing until today, courts have had interstitial authority to fill gaps left in congressional acts.219 In the late-eighteenth century, Anglo-American courts were particularly malleable and regularly addressed process and procedure on a case-by-case basis, bound by previous practice and the common law.220 There was certainly no contemporary Anglo-American court that had a set of legislatively or judicially created rules that governed every step of court operations. Courts in 1787 would have been at a loss without the power to act in the absence of legislative authority.221

A brief review of the nature of the courts in England and the colonies in the eighteenth century supports this view. Although the nature and extent of judicial authority to reject legislative control was unclear in the colonies and England,222 the power of courts to act in the absence of legislative authority in matters of procedure or supervision was not.223 From the birth of common law

218. See infra notes 221–33 and accompanying text.
221. See Pushaw, supra note 13, at 817–18 (noting the uniqueness of the Virginia Assembly’s decision to enact a code of judicial procedure, given that most courts addressed such issues as they arose).
222. Some contemporary sources suggest that after the Glorious Revolution, Parliament had plenary control when it chose to act. See William Tidd, Practice of the Court of King’s Bench in Personal Actions with Reference to Cases of Practice in the Court of Common Plead, at ix–xv (1807) (noting that acts of Parliament regulated the practice of the court); Pushaw, supra note 13, at 814–16 (commenting that after the Glorious Revolution, Parliament retained plenary power to enact laws, but it avoided intrusion into the judiciary’s ability to establish procedure).
223. See Meador, supra note 16, at 1805–06. Meador looks to English common law and chancery court procedures as background, stating:
courts until the late-nineteenth century, courts regularly acted on their own on various procedural matters. 224

Pushaw has noted four distinct categories of inherent power exercised by common law courts leading up to the time of the framing. 225 These courts acted pursuant to their own inherent power to create rules of adjective law, to control the administration and process of their internal business, to punish misconduct, and to exercise supervisory power over inferior courts. 226 The colonial courts followed a similar path by continuing to independently make adjective law and impose sanctions for misconduct. 227

The founders’ words and actions show that they likewise favored a flexible court system. Madison noted, “Much detail ought to be avoided in the constitutional regulation of this department, that there may be room for changes which may be demanded by the progressive changes in the state of our population.” 228 Similarly, the introduction of the words “from time to time” to the clause allowing Congress to create inferior tribunals—first reported on August 6, 1787 with no comment—suggests flexibility in the judicial system. 229

The decision to include federal jurisdiction “both in law and equity” 230 also belies the view that courts could only act following approval by Congress. Equity jurisdiction was immensely flexible and unbound from legislative

Long before the American Revolution, English courts assumed the authority to prevent abuses of their processes and procedures and to control the conduct of persons appearing before them or interfering with their business. The courts’ control over process often took the form of dismissals of actions for failure to prosecute or dismissals on grounds of frivolousness or vexatiousness. Courts asserted control over various kinds of disruptive conduct through contempt proceedings in which detention and fines could be imposed—sanctions deemed to be attributes of judicial power and thus requiring no specific authorization. It has also long been recognized in England that a court has inherent authority to prescribe general rules of practice and procedure to govern the conduct of cases over which it has jurisdiction.

Id.

224. I.H. Jacob, The Inherent Jurisdiction of the Court, 23 Current Legal Problems 23, 25–26 (1970) (“[T]he superior courts of common law have exercised [inherent] power . . . from the earliest times, and . . . . [T]he exercise of such power developed along two paths, namely, by way of punishing contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of process.”).


226. Id.

227. Id. at 817–22. For a general overview of the implementation of the English common law in the colonial courts, see Goebel, supra note 109, at 1–95.


229. See 2 Farrand, supra note 130, at 186.

230. See id. at 428 (stating that this language was added to Article III—albeit over objections—on August 27, 1789).
control as of 1787. Thus, the addition of broad equity jurisdiction is fundamentally at odds with a requirement of congressional approval on matters of procedure or process.

The framers also wrestled with the interaction between the common law and the new federal legislature and judiciary. The role of the common law as a source of criminal or civil law under the new Constitution was unclear, but it is likely that its role in process and procedure was intended to remain the status quo. The framers said very little about court structure or process because they expected courts to behave as they had for years. The framers granted Congress the power to act as it saw fit, but they failed to detail this power, which also suggested a continuation of courts’ ability to fill the resulting legislative gaps when necessary.

Thus, the nature of contemporary courts, the framers’ own flexible approach to courts, and the explicit inclusion of federal courts of law and equity suggest that the new federal judiciary retained the power to act as contemporary courts did when confronted with legislative gaps.

B. The Judiciary, Process, and Crimes Acts

Although the Judiciary Act of 1789, the Process Act of 1789, and the Crimes Act of 1790 establish legislative control over the form and processes of the federal judiciary, they also establish that Congress expected the new federal judiciary to behave as Anglo-American courts had for years by giving courts the flexibility to fill in the inevitable gaps in the new statutory framework.


233. Id. at 1262, 1276.

234. Id. Professor Stewart Jay provided a fitting description. Jay suggested that the Convention’s delegates “had addressed the specific grants of jurisdiction, not the form of their exercise. Much as state constitutional conventions had left the duties of courts undefined, in the expectation that they would continue operating as always, the Framers referred only to ‘[t]he judicial power of the United States,’” Id. at 1262 (alteration in original) (quoting U.S. CONST. art. III, § 1). Jay further asserted that “[t]hey probably anticipated that federal courts would act in the way courts were accustomed to operating, ‘exercis[ing] all functions and powers which Courts were at that time in the judicial habit of exercising.’” Id. (alteration in original) (quoting SOUTH CAROLINA (IN LEGISLATURE), reprinted in 4 STATE DEBATES, supra note 146, at 253, 258 (statement of Charles Pinckney)).

235. See supra Part I.D.
This flexibility indicates that Congress had plenary power over the shape and processes of the courts, but courts had interstitial power.

Congress took three quite distinct approaches to procedure in these laws by remaining silent on the subject of criminal procedure, granting clear discretion to the new courts in some areas, and explicitly creating boundaries for the judicial power in other areas. The silence on criminal procedure is especially important. Congress’s silence strongly suggests that there was no requirement of an explicit grant of rulemaking power across the board to federal courts. To argue otherwise suggests that Congress created new criminal laws without any way to prosecute them.

The first criminal law of the United States, the Crimes Act of 1790, was substantially shorter than the first Judiciary Act and offered limited, explicit procedural guidance. The Act lists a series of criminal violations and possible punishments, but says almost nothing about the process for trying these cases, although it does refer, without elaboration, to procedural steps like “presentment or indictment.” Although the Act does not say so explicitly, these bare references suggest that Congress expected the federal courts to try these cases according to contemporary common law procedures. In short, Congress did not prescribe the great bulk of criminal procedure, nor did Congress explicitly grant federal courts discretion to create this procedure or to follow existing law. Thus, at least in the context of criminal law, it cannot be true that Congress thought that courts could only exercise procedural power explicitly granted by Congress, because no such explicit grant existed, and courts naturally filled in the details afterwards.

Congress explicitly granted substantial discretion to the federal courts in other areas. In cases at equity, Congress required the courts to proceed according to the existing law, which allowed judges substantial leeway.

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236. See infra notes 241–46 and accompanying text.
237. See infra notes 247–49 and accompanying text.
238. See infra notes 253–54 and accompanying text (explaining how the Judiciary Act and Process Act included specific procedural rules).
239. See Crimes Act of 1790, ch. 9, 1 Stat. 112.
240. See, e.g., id. §§ 1–18.
241. Id. §§ 16–21.
242. See GOEBEL, supra note 109, at 609.
243. Similarly, section 13 of the Judiciary Act of 1789 described the Supreme Court’s original jurisdiction, but provided no procedures for those cases within its purview. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81. In such cases, the Supreme Court created its own processes and later upheld its power to do so. See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 469–79 (1793) (opinion of Jay, C.J.), superseded by constitutional amendment, U.S. CONST. amend. XI.
244. GOEBEL, supra note 109, at 610.
Additionally, section 17 of the Judiciary Act granted federal courts broad discretion “to make and establish all necessary rules for the orderly conducting business [of] said courts, provided such rules are not repugnant to the laws of the United States.”

Section 17’s broad grant of rulemaking and contempt powers may lend credence to the idea that federal courts would not have had any such powers without an explicit congressional grant of authority. Nevertheless, it is more likely that section 17 merely restates powers that would have existed regardless of congressional approval. Similarly, Section 13 of the Judiciary Act essentially restated the Supreme Court’s exclusive jurisdiction under Article III, adding support to the argument that courts would possess certain powers regardless of whether these early acts of Congress provided them.

Congress also explicitly limited federal court discretion in several procedural categories. Most notably, Congress explicitly instructed the courts to follow state procedure in cases at law and also changed some existing procedures.

Thus Congress’s three approaches to procedure track this Article’s theory of inherent powers. These grants, and limitations, of judicial control provided in these Acts suggest a congressional comfort with common law process and recognized the need for flexible courts, but at the same time, Congress explicitly limited court discretion in ways that are fundamentally inconsistent with a claim of constitutional judicial control over procedure.

C. Early Case Law

In the earliest cases, federal courts behaved as if they had interstitial power to act when it came to court procedures. In the absence of congressional

Act, 56 WASH. & LEE L. REV. 969, 1009–10 (1999) (discussing the English roots of equity jurisprudence in the United States and noting “equity jurisdiction was rooted essentially in the decisionmaker’s discretion”).


248. See Barrett, supra note 11, at 855–57 (observing that the lack of discussion regarding the rulemaking power granted by section 17 at the time of enactment makes it unclear whether Congress was affirming an existing power or creating a new one, but that the other powers granted in section 17, such as the power to punish contempt, were treated as inherent judicial powers).

249. Cf. id. at 858 (suggesting that the grant of rulemaking authority is an inherent power). But see id. (arguing that the Judiciary Act as a whole reflects an understanding of congressional control and “a lack of concern with any inherent judicial authority to adopt procedures in areas the legislature left open”).


251. See Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94.

252. See supra notes 166–67 and accompanying text.

253. See supra notes 173–79 and accompanying text (describing specific procedural rules implemented by Congress, which is inconsistent with the belief that the court has control over procedure).
action, courts simply made rules to answer questions as they arose in individual cases.\footnote{254} Some district courts also made rules about acceptable and timely pleas and the scheduling of cases for trial.\footnote{255}

The Supreme Court took a similar approach in its early cases. For example, in United States v. Marchant, two capital defendants claimed that they had a right to be tried separately.\footnote{256} The Court declared that such a procedure was "not provided for by any act of Congress; and, therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the Courts of the United States are bound to recognize and enforce."\footnote{257} The Court then held that the decision to sever the trials was at the court’s discretion.\footnote{258}

Section 13 of the Judiciary Act of 1789 did not provide rules regarding process or service to govern the Supreme Court’s exercise of its original jurisdiction.\footnote{259} In the first cases on this issue, the Supreme Court acted according to its own discretion based on common law rules,\footnote{260} and it was not until Chisholm v. Georgia that the Supreme Court expressly addressed the question.\footnote{261}

In Chisholm, the State of Georgia objected to the service of process, among others.\footnote{262} Attorney General Edmund Randolph, the former governor of Virginia and the influential founder who presented the Virginia plan and served on the Committee of Detail, argued the case in his private capacity.\footnote{263} Randolph admitted that the form of process was not prescribed by statute.\footnote{264}

\begin{footnotes}
\footnotetext[254]{See Engdahl, supra note 17, at 86–88 ("About many matters, however, no standing rules were made, and when such matters arose, the earliest federal judges simply proceeded like judges traditionally had . . . . [and] readily concluded they had ample power to deal with [procedural] matters, notwithstanding the lack of any statutory authorization."). Engdahl canvases contemporary cases that come to the same conclusion. Id. (citing King of Spain v. Oliver, 14 F. Cas. 577, 578 (C.C.D. Pa. 1810) (No. 7814); United States v. Hill, 26 F. Cas. 315, 317 (C.C.D. Va. 1809) (No. 15,364); Hurst v. Hurst, 12 F. Cas. 1028, 1028 (C.C.D. Pa. 1799) (No. 6929); United States v. Insurgents, 26 F. Cas. 499, 514 (C.C.D. Pa. 1795) (No. 15,443)); see also Gilchrist v. Collector of Charleston, 10 F. Cas. 355, 362 (C.C.D.S.C. 1808) (No. 5420) (stating that the power to grant a writ of mandamus exists even in the absence of an explicit statutory grant of power).}
\footnotetext[255]{See Dwight F. Henderson, Courts for a New Nation 36 (1971).}
\footnotetext[256]{25 U.S. (12 Wheat.) 480, 480 (1827).}
\footnotetext[257]{Id. at 485.}
\footnotetext[258]{Id. at 485.}
\footnotetext[259]{Cf. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81.}
\footnotetext[260]{Goebel, supra note 109, at 725 (indicating that the Court relied on common law process in actions against states).}
\footnotetext[261]{See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 432–34 (1793) (opinion of Iredell, J.), superseded by constitutional amendment, U.S. Const. amend. XI.}
\footnotetext[262]{Id. at 429.}
\footnotetext[263]{See Goebel, supra note 109, at 204, 726 (explaining that even as Attorney General, Randolph’s “official emoluments were so meager that his living depended upon the effectiveness with which he represented private clients”); Glashausser, supra note 126, at 1407.}
\footnotetext[264]{Chisholm, 2 U.S. (2 Dall.) at 426, 428 (recitation of the case).}
\end{footnotes}
Nevertheless, Randolph defended the Court’s procedure: “The mode, if it be not otherwise prescribed by law, or long usage, is in the discretion of the Court; and here that discretion must operate.”

Randolph’s description of the Court’s discretion in this case follows this Article’s characterization of the inherent power: the court has discretion, unless “otherwise prescribed by law” (that is, unless Congress has spoken in the area).267 Supporters of a constitutional inherent-powers doctrine point to Chisholm as an early example of inherent powers at work.268 Yet, at best, Chisholm shows that the courts possess interstitial powers, and even proponents of this power recognized that Congress was free to legislate on the issue, which would then obviate any judicial discretion.269 Story’s Commentaries on the Constitution of the United States also support the concept that, although Congress has plenary Article I power over the judiciary, courts retain “certain incidental powers” in the absence of any act of Congress.270

III. THE LIMITS OF CONGRESSIONAL AND JUDICIAL POWER

With this understanding of the nature and source of congressional and judicial power in this area, we turn to the constitutional limits on those powers.

A. Limits on Congress’s Power

Despite Congress’s near plenary authority described in this Article, there are still limits on its power. Previous scholars have looked to the words “judicial power” and “courts” in Article III and found a limitation in those terms on Congress’s power to destroy or impair any power deemed necessary to the competent functioning of the judiciary.271 Professors Leo Levin and Anthony

265. Id. at 428.
266. Id. at 432–33 (opinion of Iredell, J.).
267. Chisholm, 2 U.S. (2 Dall.) at 428 (recitation of the case) (indicating that Attorney General Randolph argued the Court could act in its discretion unless Congress has already promulgated laws on the topic).
268. See Barrett, supra note 11, at 872.
269. Chisholm, 2 U.S. (2 Dall.) at 428.
270. 3 Story, supra note 199, § 1768. These incidental powers are not superior to Congress’s authority in the area. See id. § 1773; see also 1 Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 429 (St. George Tucker ed., 1803) (noting that courts should apply the common law “whenever the written law is silent”).
271. See Pushaw, supra note 13, at 847–48 (calling these constitutional inherent powers “implied indispensable powers,” granted under Article III’s use of the terms “judicial power” and “courts,” and asserting that because “the Constitution grants federal judges implied indispensable powers, it surely does not authorize Congress to destroy or impair them”); Ryan, supra note 74, at 789 (expressing that the words “the judicial power” grant federal courts the right to decide cases unmolested by “undue interference”). But see Burbank, supra note 16, at 1686 (emphasizing that
Amsterdam made perhaps the classic statement of this approach: “There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase judicial power.”272 Although this may sound like a relatively modest limit on congressional action, the list of necessary and inherent powers inevitably grows until it seems that courts have a substantial power over Congress.273

The appropriate limit on any congressional act over the judiciary is whether it is “necessary and proper for carrying into Execution”274 the judicial power. Thus, Article I, and not Article III, provides the check on congressional power over court procedure or sanctions.275

The well-known test under the Necessary and Proper Clause originated in McCulloch v. Maryland:276 “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”277 Later cases have explained that federal statutes need only be “rationally related” to the implementation of a constitutionally enumerated power.278 The Constitution grants Congress power over the “choice of means,” and “[i]f . . . the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.”279

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273. See Burbank, supra note 16, at 1686 n.31 (noting that Robert Pushaw’s definition of “implied indispensible powers” can be characterized as “very broad indeed”).
275. See Engdahl, supra note 17, at 97–101 (agreeing that the Necessary and Proper Clause, and not anything in Article III, is the source of, and the limit to, congressional power in this area). Nevertheless, Engdahl argues that the use of the Necessary and Proper Clause with regard to inherent powers should be more limited than in other areas, and in assessing the constitutionality of congressional acts in this area, courts should not apply the traditional rational-basis review. See id. at 162 (“[I]t seems highly appropriate for the judiciary to make its own judgment whether [the judicial power] contemplated by the Constitution is actually facilitated, or instead impeded, by any congressional act purporting to help.”).
277. Id. at 421.
279. Burroughs v. United States, 290 U.S. 534, 547–48 (1934). Justice Anthony Kennedy’s concurrence in United States v. Comstock argues for a more muscular version of this test in the context of the Necessary and Proper Clause, suggesting that it “should be at least as exacting as it has been in the Commerce Clause cases, if not more so.” 130 S. Ct. 1949, 1965–66 (2010) (Kennedy, J., concurring).
Recognizing the Necessary and Proper Clause as the limit on Congress’s power enlarges the scope of Congress’s authority in the area of inherent power more than has been previously thought. In short, unless a congressional act is demonstrably disconnected from, or runs against, the Article III judicial power, Congress has the power to choose amongst the best means for “carrying into execution” the judicial power. \(^{280}\)

This understanding places a real limit on Congress and assuages those concerned that Congress cannot wreak havoc upon the judiciary. Despite this limitation, however, Congress would not need to search very hard for constitutional ways to cripple the federal judiciary—such as eliminating the contempt power or destabilizing procedure—because Congress unquestionably has the power to disestablish the entire lower federal judiciary or to defund the Supreme Court (except for the fixed judicial salaries). \(^{281}\)

### B. Limits on Judicial Power

Just as strict necessity has been described as a check on congressional power over inherent authority, \(^{282}\) necessity is also a possible limitation on judicial power. The Court has occasionally quoted *United States v. Hudson* for the proposition that the inherent powers are those powers “necessary to the exercise of all others.” \(^{283}\) Van Alstyne and Pushaw have likewise argued that absolute necessity is a requirement for the exercise of inherent powers. \(^{284}\)

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280. See Engdahl, *supra* note 17, at 102–03 (characterizing Congress’s power under the Necessary and Proper Clause as “a one-way rachet,” which permits Congress to assist other branches in the execution of their powers, but limits Congress from governing how the other branches carry out their constitutional powers).

281. See U.S. Const. art. I, § 8; id. art. I, § 9, cl.7; id. art. III, § 1. Consider a similar point from Professor Charles Black about congressional control over the executive branch:

The powers of Congress are adequate to the control of every national interest of any importance, including all those with which the president might, by piling inference on inference, be thought to be entrusted. And underlying all the powers of Congress is the appropriations power, the power that brought the kings of England to heel. My classes think I am trying to be funny when I say that, by simple majorities, Congress could at the start of any fiscal biennium reduce the president’s staff to one secretary for answering social correspondence, and that, by two-thirds majorities, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true, and the illustrations are useful for marking the limits—or the practical lack of limits—on the power of Congress over the power of the president.


282. See *supra* notes 12–14 and accompanying text.


284. See Pushaw, *supra* note 13, at 847–48 (asserting that “the Constitution limits implied authority to cases of genuine necessity”); Van Alstyne, *supra* note 14, at 128–29 (arguing that any claimed inherent power “broader than a power deemed indispensible to enable a court to proceed with a given case appears to require statutory support”).
Nevertheless, the Supreme Court has never required strict necessity, and the list of approved inherent and supervisory powers clearly includes activities not strictly necessary to court survival. The Supreme Court has also regularly warned against overreaching in this area and, at times, has suggested that inherent powers of “long unquestioned” vintage are favored, but has been relatively silent on any hard boundaries.

There are several limitations on these judicial powers. First, constitutionally speaking, the single best check on the judiciary is Congress’s power to change or overrule any use of the inherent power under the Necessary and Proper Clause. The judiciary should recognize Congress’s superior power and act accordingly.

Second, federal courts cannot use any power not encapsulated in the term “judicial power.” Nevertheless, as previously noted, the framers understood the grant of the judicial power to be flexible and expected courts to be mutable over time. Thus, in cases where Congress has not acted, courts are empowered to act, provided that such action relates to the deciding of cases. Courts can likewise exercise congressionally delegated powers, like rulemaking.

Third, and finally, the Court’s repeated admonition to step lightly in forming new supervisory or inherent-power rules is likewise helpful advice, albeit not a firm limitation. Although Congress can overrule these decisions with

285. See infra note 295 and accompanying text.
286. See Degen v. United States, 517 U.S. 820, 823–24 (1996) (“The extent of these [inherent] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority. In many instances the inherent powers of the courts may be controlled or overridden by statute or rule. Principles of deference counsel restraint in resorting to inherent power and require its use to be a reasonable response to the problems and needs that provoke it.” (citations omitted)), superseded by statute, Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 14(a), 114 Stat. 219.
288. See supra notes 274–80 and accompanying text.
289. See supra notes 41–44, 48–50 and accompanying text.
290. See supra Part II.A.
291. See supra notes 24–27 and accompanying text. Alternatively, one could require courts to establish that their proposed action is consistent with the inherent powers of common law courts circa the late-eighteenth century. See supra notes 222–38 and accompanying text. This approach would best satisfy originalists and would offer a firmer check on judicial behavior. However, the difficulty with this approach is the uncertainty of ascertaining exactly what inherent powers courts had at the time of the framing. See supra note 222 and accompanying text. Such courts reacted to new procedural hurdles by filling in the blanks on a discretionary basis. See supra notes 222–28 and accompanying text. Modern Article III courts exercising the judicial power should likewise be allowed flexibility.
293. See supra notes 283–85 and accompanying text.
legislation as it sees fit,\textsuperscript{294} one should not count on Congress, or the public, to notice or act in a relatively obscure area; thus, reticence by courts in this area is certainly preferable.

It may strike foes of judicial overreaching as worrisome to allow courts such broad latitude in this area. However, the real danger with inherent powers is the assertion of a broad area of constitutionally protected judicial power. If, and when, the Court decides to invalidate an act of Congress pursuant to such a supposed constitutional power, there will be no way to reverse that decision short of a constitutional amendment. Thus, it is critical that the Court understands the breadth of congressional power in this area and not overrule a valid congressional act in an essentially irreversible manner.

Furthermore, even a cursory review of the decisions in this area establishes that courts are cognizant of few, if any, limits on their power.\textsuperscript{295} If courts did limit their forays to interstitial areas where Congress has not spoken, then the power would be functionally contained, given the opposing breadth of the federal rules and statutes that govern the federal judiciary.\textsuperscript{296} The real danger is courts disregarding Congress, not courts acting when Congress has remained silent.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{294} See U.S. CONST. art. I, § 1 (vesting all legislative power in Congress).
\item \textsuperscript{295} See Anclien, supra note 11, at 44–48. Anclien provides the following list of inherent powers found by courts:
\begin{itemize}
\item [1] the power to stay an action pending the completion of a related action in another court . . . .
\item [2] ordering consolidation of cases during or before trial,
\item [3] requiring defense counsel either to commit to a firm trial date or withdraw,
\item [4] determining the order in which to hear and decide pending issues,
\item [5] designating attorneys to handle pretrial activity,
\item [6] limiting the length of pretrial hearings,
\item [7] setting a time limit for parties to acquire a lawyer,
\item [8] requiring counsel who entered a general appearance to serve in a standby capacity,
\item [9] invoking forum non conveniens to dismiss an action,
\item [10] requiring parties to have a representative with full settlement authority available during pretrial conferences,
\item [11] interrupting counsel and setting time limits,
\item [12] limiting the number of expert witnesses who may testify,
\item [13] declaring parties who were absent from docket call ready for trial,
\item [14] altering common law rules of procedure,
\item [15] excluding evidence that would be unfair to admit,
\item [16] permitting the taking and filing of post-trial depositions,
\item [17] refusing to subpoena witnesses for indigent civil litigants who cannot tender fees,
\item [18] implementing discovery procedures in habeas cases,
\item [19] requiring the prosecution to produce the previously recorded statements of its witnesses,
\item [20] appointing amici curiae on their own motion,
\item [21] compelling the government to submit a memorandum of law,
\item [22] ordering an attorney to pay the government the cost of empanelling a jury for one day,
\item [23] punishing an individual for the unauthorized practice of law.
\end{itemize}
\end{itemize}
\end{footnotesize}

\textit{Id.} (footnotes omitted); \textit{see also} Beale, supra note 1, at 1456–61 (offering a similarly fulsome list of supervisory authority powers).

\textsuperscript{296} See, e.g., FED. R. CIV. P.; FED. R. EVID.
IV. This Dual Understanding Best Explains the Court’s Inherent-Powers Jurisprudence

One of the primary advantages of this theory of inherent powers is that it better explains the Court’s own jurisprudence than do theories reliant on strong constitutional inherent powers. From *Hudson* and *Bollman* forward, the Supreme Court has referred to necessary inherent powers that cannot be trampled by Congress.Nevertheless, an examination of the cases themselves establishes that the Court has never actually overruled an act of Congress under this inherent-powers scheme, despite significant congressional incursions.

A. The Three Categories of Inherent-Powers Cases

The existing Supreme Court cases can be divided into three categories: 1) cases recognizing that existing federal statutes, rules, or decisional law foreclose the exercise of inherent authority, such as cases explicitly recognizing congressional authority; 2) cases allowing the usage of inherent powers in areas of congressional silence; and 3) cases acknowledging that Congress has arguably spoken in the area, but in which the Court finds flexibility to uphold the use of the inherent power. Notably absent from this list is a potential fourth category of cases in which the Court has overruled a congressional act; however, some recent lower court opinions suggest that federal courts may be approaching this territory.

The third category of cases, in which the Court has found inherent authority to act in an area where Congress has spoken, are the most difficult to reconcile. Nevertheless, even in these cases, the Court has never explicitly claimed a power superior to that of Congress. Instead, the Court has always found that Congress did not foreclose the inherent power at issue. In other words, the Court’s decisions on inherent power can be categorized into two groups: cases in which the Court has followed congressional direction, and cases in which Congress was silent and the Court found that the federal judiciary was empowered to act in the interstices.

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298. See infra Part IV.A.1.
299. See infra Part IV.A.2.
300. See infra Part IV.A.3.
301. See infra Part IV.A.3.
302. See infra Part IV.A.3.
303. See infra Part IV.A.3.
304. See, e.g., Funk v. United States, 290 U.S. 371, 381–82 (1933) (illustrating how the Court may act when Congress has not); *Ex Parte* Robinson, 86 U.S. (19 Wall.) 505, 510–01 (1873) (upholding the Contempt Act as the law to be followed by lower federal courts, despite any inherent authority in the area). Note that grouping the cases in this manner perfectly
1. Cases Where the Court Recognizes Congressional Authority

The best examples of this category involve the oldest claimed inherent power—contempt. Since Hudson was decided, the Supreme Court has repeatedly announced a core constitutional inherent contempt power and has warned Congress that the Court could overturn a congressional act. 305 Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Railway provides an excellent example:

That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress . . . but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.306

The Court has repeated this language and sentiment throughout the past hundred years. 307 Nevertheless, the cases themselves do not actually demonstrate inherent and essential power in practice. To the contrary, the Court has never invalidated a congressional act limiting the contempt power as a violation of federal-court inherent authority.308

Section 17 of the Judiciary Act of 1789 explicitly grants federal courts the power “to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority.”309 This relatively unfettered grant of the contempt power lasted until 1831, when the House and Senate brought impeachment proceedings against Judge James Peck, of the U.S. District Court for the District of Missouri, for an alleged abuse of the contempt power.310 Peck “imprisoned and disbarred” a lawyer who critiqued Peck’s opinion while it was on appeal.311 To defend his actions, Peck argued that the common law allowed contempt in exactly this circumstance and that if Congress disapproved, it had
describes the dual nature of the inherent powers; Congress has near plenary power to control, but the courts have broad powers to act in the absence of a congressional mandate. 305. See infra notes 306, 321 and accompanying text.
309. Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.
310. Frankfurter & Landis, supra note 74, at 1024–27.
311. Id. at 1025.
the power to change the law.\textsuperscript{312} Blackstone and other contemporary authorities supported Peck’s defense.\textsuperscript{313} Peck was acquitted,\textsuperscript{314} but the outcry over such a broad use of the contempt power led Congress to pass an act in 1831 curtailing discretionary contempt and limiting the application of the power to actions within or very near the court.\textsuperscript{315}

By limiting the contempt power to misbehavior in court, Congress substantially curtailed both the unfettered contempt power it granted in the Judiciary Act of 1789 and the practice of contempt in contemporary courts.\textsuperscript{316} The third edition of Chancellor James Kent’s famous \textit{Commentaries on American Law} decried the 1831 Act as “a very considerable, if not injudicious abridgement of the immemorially exercised discretion of the courts in respect to contempts.”\textsuperscript{317} Kent nevertheless expressed no doubt that Congress had the power to constrict the contempt power.\textsuperscript{318} Contemporary lower federal courts applied the statute faithfully and recognized Congress’s power to pass the law.\textsuperscript{319}

In 1873, the constitutionality of the Act reached the Supreme Court in \textit{Ex Parte Robinson}.\textsuperscript{320} The forty-three-year gap between the Act’s passage and \textit{Robinson} alone suggests that contemporary courts had no doubt of Congress’s power in this area. The Court begins by noting that the “power to punish for contempts is inherent in all courts [and that] . . . [t]he moment the courts of the

\begin{itemize}
\item \textsuperscript{313} See, e.g., 4 WILLIAM BLACKSTONE, \textit{COMMENTARIES ON THE LAWS OF ENGLAND} 282 (4th ed. 1770).
\item \textsuperscript{315} See Act of Mar. 2, 1831, ch. 99, § 1, 4 Stat. 487, 487–88. On March 2, 1831 Congress passed “[a]n act declaratory of the law concerning contempts of court,” providing that the contempt power only applied to:
\begin{itemize}
\item misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.
\end{itemize}
\textit{Id.}
\item \textsuperscript{316} See Chinnock & Painter, \textit{supra} note 314, at 314; see also id. (highlighting the Act’s elimination of punishment for indirect contempt and acts of contempt outside the presence of the court).
\item \textsuperscript{317} 1 JAMES KENT, \textit{COMMENTARIES ON AMERICAN LAW} 300 (New York, E. B. Clayton & James Van Norden, 3d ed. 1836).
\item \textsuperscript{318} \textit{Id.}
\item \textsuperscript{319} See, e.g., \textit{Ex Parte} Poulson, 19 F. Cas. 1205, 1207 (C.C.E.D. Pa. 1835) (No. 11,350) (“[T]his is an inferior court within the provision of the constitution, it is created by the laws, with such powers only as congress has deemed it proper to confer . . . . There can be no doubt of the constitutional power of congress to act upon this subject, as far as respects our courts.”).
\item \textsuperscript{320} 86 U.S. (19 Wall.) 505, 512 (1873).
\end{itemize}
United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. Nevertheless, the Court did not hesitate to uphold the Act and Congress’s power to restrict the contempt power of the lower federal courts, noting that there was “no question” that the Act applied to the lower courts.

There was no doubt that the Act of 1831 significantly restricted the common law contempt power. Nevertheless, the Court recognized Congress’s ability to regulate the contempt power. Every congressional impingement on the contempt power has likewise been upheld. In Michaelson, the Court upheld an act that required courts to try any contempt of court that was also an independent violation of a criminal law before a jury. Like the change upheld in Robinson, contemporary commentators were quite critical of requiring juries in some contempt actions. Nevertheless, the Supreme Court approved of the restriction. The power of contempt is now well defined and heavily regulated by Congress.

Another example is the Court’s decision to allow some congressional authority in the area of lawyer admission. As early as 1824, the Supreme Court has treated the power to suspend or disbar attorneys as an inherent power on the same level as the contempt power, one that “ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession.” This power has been included among the inherent powers ever since.

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321. Id. at 510.
322. Id. at 510–11 (“These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction.”).
323. See KENT, supra note 317, at 300.
326. See Robert A. Leflar, Equitable Prevention of Public Wrongs, 14 TEX. L. REV. 427, 447 n.45 (1936) (noting that requiring juries has generally “been disapproved”).
327. Michaelson, 266 U.S. at 66–67; see RONALD L. GOLDFARB, THE CONTEMPT POWER 164–66 (1963) (detailing the history of the various congressional limitations of the contempt power from the nineteenth and early- to mid-twentieth century).
328. See, e.g., 18 U.S.C. § 401 (2006 & Supp. IV 2010) (providing a specific list of misconduct to which federal courts may apply the contempt process); 18 U.S.C. §§ 3691–3692 (addressing criminal contempt in jury trials); FED. R. CRIM. P. 42(a) (providing the procedure for criminal contempt).
330. Chambers v. NASCO, Inc., 501 U.S. 32, 43–46 (1991) (providing a helpful exposition of what the Supreme Court recognized as the inherent powers of the federal courts and citing Ex Parte Burr for the proposition that courts have “the power to control admission to its bar and to discipline attorneys who appear before it”).
also the inherent power that state supreme courts guard most jealously and aggressively from their respective state legislatures.\footnote{See \textit{Benjamin H. Barton, The Lawyer-Judge Bias in the American Legal System} 115–21 (2011) (detailing the Illinois Supreme Court’s assertion of exclusive control over admission of lawyers to the Illinois bar (citing \textit{In Re Day}, 54 N.E. 646, 648 (Ill. 1899))).}

Nevertheless, the Court has expressed a willingness to allow legislative control in this area as well. In \textit{Ex Parte Garland}, the Court allowed a former lawyer, who had served on the side of the Confederacy but received a presidential pardon, to avoid a constitutional oath meant to bar former Confederate sympathizers from practicing in the federal courts.\footnote{71 U.S. (4 Wall.) 333, 374–77 (1866).} The Court held that the pardon obviated the need for the oath, but noted that “[t]he legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.”\footnote{Id. at 379, 381; cf. \textit{Goldsmith v. U.S. Bd. of Tax Appeals}, 270 U.S. 117, 121–22 (1926) (allowing the Board of Tax Appeals, a non-Article III court, to limit admission to practice before it because of an implied grant of the power over granting admission from Congress).}

In three recent cases, the Court has barred lower court usage of inherent authority when the claim of inherent power disregarded an applicable federal statute, rule, or judicial decision.\footnote{See \textit{Carlisle v. United States}, 517 U.S. 416, 425–28 (1996), \textit{superseded by Fed. R. Crim. P. 45(b)(2)}; \textit{Bank of N.S. v. United States}, 487 U.S. 250, 254–55 (1988); \textit{Sibbach v. Wilson & Co.}, 312 U.S. 1, 14–16 (1941).} These cases use the rationale from \textit{Thomas v. Arn},\footnote{See \textit{Carlisle}, 517 U.S. at 424; \textit{Bank of N.S.}, 487 U.S. at 254; \textit{Sibbach}, 312 U.S. at 9–10.} which asserted that “[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.”\footnote{474 U.S. 140, 148 (1985).}

In \textit{Bank of Nova Scotia v. United States}, the district court sought to avoid the requirements of Federal Rule of Criminal Procedure 52(a) by invoking its inherent powers.\footnote{487 U.S. at 254.} The Court held that a federal court could not simply choose to disregard an otherwise valid Rule of Criminal Procedure under its inherent powers:

\begin{quote}
It follows that Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule’s mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked “because a court has elected to analyze the question under the supervisory power.”
\end{quote}

\footnote{Id. at 255 (quoting United States v. Payner, 447 U.S. 727, 736 (1980)).}
Thus, a federal court does not have the power to disregard a clearly applicable federal rule, especially because such a rule carries the same binding effect as a “statutory” provision. 339

In Carlisle v. United States, the district court granted a defendant’s untimely motion for a post-verdict judgment of acquittal in violation of the express terms of Rule 29 of the Federal Rules of Criminal Procedure. 340 The Court recognized that pursuant to their inherent powers, federal courts “‘may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.’” Whatever the scope of this ‘inherent power,’ however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.341

The Court has likewise upheld congressional impingements upon areas frequently claimed as areas of inherent authority. For example, in Sibbach v. Wilson & Co., the Court upheld the new Rules Enabling Act,342 which granted federal courts considerable power in drafting uniform rules of procedure, by explicitly stating Congress’s authority in the rulemaking area: “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or [C]onstitution of the United States.”343

The reasoning in Sibbach has only become more salient as Congress has taken a heavier hand in federal court rules. Stephen Burbank argues that Congress has substantial authority in rulemaking,344 and exercised it by making substantial changes to the rules governing civil court procedure,345

339. Id. at 254–55.
340. 517 U.S. at 418–19. But see United States v. Maricle, No. 6:09-16-S-DCR, 2010 WL 3927570, at *2 (E.D. Ky. Oct. 4, 2010) (noting that the Carlisle decision was based on an outdated version of Rule 45 that “expressly excluded motions for judgment of acquittal from the excusable-neglect standard” and that Rule 45 currently does not include Rule 29 exception (citing FED. R. CRIM. P. 45 (b)(2))). 341. Carlisle, 517 U.S. at 426 (quoting United States v. Hastings, 461 U.S. 499, 505 (1983)). In United States v. Payner, a similar case, a federal district court suppressed evidence that was gathered as the result of an “illegal search[;]” however, the search did not violate the Fourth Amendment. 447 U.S. at 729, 730–31. The district court, nonetheless, granted the suppression motion under its inherent authority. Id. at 731–32. The Supreme Court refused to allow this end run around its Fourth Amendment suppression cases via an inherent authority rationale. Id. at 737. The Court stated, “Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing. We hold that the supervisory power does not extend so far.” Id. 342. Rules Enabling Act, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064, 1064 (1934). 343. 312 U.S. 1, 9–10 (1941) (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 21–22 (1825)). 344. See Burbank, supra note 16, at 1694. 345. See, e.g., Civil Justice Reform Act (CJRA) of 1990, Pub. L. No. 101-650, 104 Stat. 5089. The CJRA affected multiple areas of federal civil procedure, although many portions of the
habeas procedure,\textsuperscript{346} criminal procedure,\textsuperscript{347} and evidence.\textsuperscript{348}

2. Cases of Congressional Silence

The seminal case dealing with judicial action in the face of congressional silence is \textit{Ex Parte Peterson}, which allowed a federal court to appoint an auditor to help decide the case at the expense of the parties.\textsuperscript{349} One of the questions before the Court was whether this appointment was allowable in the absence of express congressional authority.\textsuperscript{350} Under these circumstances, the Court recognized that “[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.”\textsuperscript{351}

This decision is notable for two reasons. First, it is telling that, as of 1920, a federal court’s power to merely appoint an auditor at the parties’ expense in the absence of express constitutional authorization remained unclear. The uncertainty surrounding the lower court’s action speaks volumes about the relative weakness of the inherent-power doctrine during the early years of the federal judiciary. From \textit{Peterson} forward, however, federal courts have acted regularly—some might say too regularly—without congressional authority.\textsuperscript{352} Second, even in stating this power, the Court in \textit{Peterson} was at pains to note that Congress retained plenary power to pass a statute regulating or eliminating the judicial power at issue.\textsuperscript{353}

The various “supervisory authority” cases generally fit under this category as well. Decided in 1943, \textit{McNabb v. United States} was the first supervisory power case.\textsuperscript{354} The Supreme Court claimed a “supervisory authority over the administration of criminal justice in the federal courts” and held that confessions gained as a result of prolonged detention in violation of various


\textsuperscript{348} Burbank, supra note 16, at 1694–1701 (describing Congress’s aggressive mentality in creating bills that affect the Federal Rules).

\textsuperscript{349} See 253 U.S. 300, 314, 317 (1920).

\textsuperscript{350} \textit{Id.} at 312 (“There is here . . . no legislation of Congress which directly or by implication forbids the court to provide for such preliminary hearing and report. But, on the other hand, there is no statute which expressly authorizes it.”).

\textsuperscript{351} \textit{Id.}

\textsuperscript{352} \textit{See} Funk v. United States, 290 U.S. 371, 382 (1933) (noting that the Court does not need to wait for Congress to act if it wants to decide an issue).

\textsuperscript{353} \textit{Ex Parte Peterson}, 253 U.S. at 312.

federal statutes must be suppressed under this power.\textsuperscript{355} This was not the first time that the Court had suppressed evidence gained in violation of a federal statute,\textsuperscript{356} but it was the first time it announced a supervisory power over federal criminal procedure or the investigation of federal crimes.\textsuperscript{357} Thus, \textit{McNabb} and its companion case, \textit{Mallory v. United States},\textsuperscript{358} indicate a substantial change in the Court’s relationship with federal criminal law and investigations.\textsuperscript{359}

A break in past practice like \textit{McNabb} does not occur in a vacuum. \textit{McNabb} was a culmination of years of concern about federal law-enforcement tactics and the suddenly burgeoning role of federal criminal law. During the first hundred years following the establishment of the United States federal criminal prosecutions were few,\textsuperscript{360} and statutes did not allow for appeals to the Supreme Court until 1889.\textsuperscript{361} However, with the introduction of prohibition and other expansions of federal criminal acts, the number of federal criminal cases quintupled between 1901 and 1932.\textsuperscript{362} In addition to the growing number of prosecutions, there was also a growing concern over intrusive law-enforcement tactics, such as electronic surveillance and coercive interrogations.\textsuperscript{363} Justice Louis Brandeis famously opposed these tactics in a series of dissents during the 1920s.\textsuperscript{364}

\begin{itemize}
\item \textsuperscript{355} \textit{McNabb}, 318 U.S. at 341, 346–47.
\item \textsuperscript{356} See, e.g., \textit{Nardone v. United States}, 302 U.S. 379, 382 (1937) (suppressing evidence gathered in violation of a federal telecommunications law).
\item \textsuperscript{357} See \textit{Barrett}, supra note 4, at 371.
\item \textsuperscript{358} 354 U.S. 449, 453 (1957) (finding the defendant’s incriminating statements inadmissible because he had been unlawfully detained without an arraignment), superseded by statute, Omnibus Crime Control and Safe Streets Act of 1968 § 701(a).
\item \textsuperscript{359} See \textit{Barrett}, supra note 4, at 371–72. The supervisory-power cases (and some inherent-power cases) also raise possible intra-judiciary issues, as they grant the Supreme Court and other appellate courts power over lower court activities. \textit{Id.} at 327–28 (arguing that cases in which the Supreme Court controls lower court procedures or processes are likely unconstitutional). For further discussion of this hierarchical question, see Evan Caminker, \textit{Allocating the Judicial Power in a “Unified Judiciary”}, 78 TEx. L. Rev. 1513, 1515–16 (2000), and James E. Pfander, \textit{Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals}, 78 TEx. L. Rev. 1433, 1451–59 (2000).
\item \textsuperscript{361} Lester B. Orfield, \textit{Federal Criminal Appeals}, 45 YALE L.J. 1223, 1224–25 (1936) (noting the creation of a circuit court appeal in criminal cases in 1879 and from circuit courts to the Supreme Court in 1889).
\item \textsuperscript{362} Beale, \textit{ supra} note 1, at 1441–42.
\item \textsuperscript{363} Id. at 1442.
\item \textsuperscript{364} See, e.g., \textit{Casey v. United States}, 276 U.S. 413, 423–25 (1928) (Brandeis, J., dissenting) (arguing that the prosecution’s position must fail because the government had committed entrapment); \textit{Olmstead v. United States}, 277 U.S. 438, 471, 484–85 (1928) (Brandeis, J., dissenting) (asserting that the Court should have excluded evidence obtained through illegal wiretapping “in order to maintain respect for law; in order to promote confidence in the administration of justice; [and] in order to preserve the judicial process from contamination”),
\end{itemize}
Moreover, the Court was in the very early stages of its new role as the central authority on federal rules and procedures. In 1933, the Court claimed the authority to centralize and modernize the federal common law rules of evidence in *Funk v. United States*.\(^{365}\) *Funk* was quite explicit that “Congress has that power [to change the rules of evidence]; but if Congress fail [sic] to act[,]” the Court could act on its own to modernize the rules of evidence.\(^{366}\)

In 1934, Congress granted the Court the power to create the Federal Rules of Civil Procedure,\(^{367}\) which were adopted in 1938.\(^{368}\) The Rules of Civil Procedure were viewed as a success, and in 1940, Congress authorized the Court to create uniform rules of criminal procedure as well.\(^{369}\) Thus, the Court’s conception of a “supervisory authority” appears to be at least partially based on congressional grants of power and a shifting view of the Supreme Court’s role atop the federal judiciary.

Moreover, the *McNabb* Court quite explicitly states that it is not rendering a constitutional decision, which would be beyond the purview of Congress,\(^{370}\) and goes to great lengths to argue that the case is necessitated by federal laws requiring federal law enforcement officers to take arrestees “immediately . . . before a committing officer.”\(^{371}\) The last paragraph of the opinion notes that the decision arises out of “respect [for] the policy which underlies Congressional legislation.”\(^{372}\) *McNabb* does not explicitly state that Congress could overrule the decision. Its reference to its role in defining the federal common law rules of evidence—which it had just recognized could be changed by Congress in *Funk*\(^{373}\)—strongly suggests that *McNabb* falls into the camp of cases not proscribed by congressional action, which are subject to congressional review and overruling.

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overruled by *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967); *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting) (arguing against allowing the introduction of illegally obtained evidence because “[r]espect for law will not be advanced by resort, in its enforcement, to means which shock the common man’s sense of decency and fair play”).

366. Id. at 381–82.
371. Id. at 341–44.
372. Id. at 347.
373. Id. at 341.
374. See supra text accompanying note 367.
On two occasions, however, Congress has acted to correct supervisory-power decisions. In 1957, Congress passed a law narrowing and clarifying the holding in *Jencks v. United States*,375 which required the government to provide the defendant with written materials from government informants.376

In *Palermo v. United States*, the Court upheld the provisions of the Jencks Act.377 The Court recognized that *Jencks* was a supervisory-power case because the *Jencks* Court was “[e]xercising [the Supreme Court’s] power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts.”378 The Court then described the passage of the Act and briskly affirmed Congress’s power to change the non-constitutional result in *Jencks*.379 Thus, the Jencks Act, *Jencks*, and *Palermo* well establish that Congress is free to change or alter supervisory-authority cases that are not constitutionally based.

In 1968, Congress passed a second law aimed at limiting a supervisory-power case.380 Congress intended section 701 of the Omnibus Crime Control and Safe Streets to overturn the *McNabb-Mallory* rule on lengthy detentions; the section stated that delay in bringing a suspect before a magistrate was a factor to be considered in determining the voluntariness of any confession, but not the sole criterion.381 Congress also intended the same section to reverse or substantially limit the decisions in *Miranda v. Arizona*382 and *Escobedo v. Illinois*.383

The different fates of section 701’s two provisions demonstrate Congress’s plenary Article I power to alter non-constitutionally based supervisory-power cases. In *Corley v. United States*, the Court upheld the congressional changes to the *McNabb-Mallory* rule.384 The Court does not even discuss whether

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378. *Id.* at 345.
379. *Id.* at 347–48 (“Congress had determined to exercise its power to define the rules that should govern in this particular area in the trial of criminal cases instead of leaving the matter to the lawmaking of the courts.”).
381. *Id.*
382. 384 U.S. 436 (1966), *superseded in part by statute*, Omnibus Crime Control and Safe Streets Act of 1968 § 701(a); *see also* United States v. Dickerson, 166 F.3d 667, 686 (4th Cir. 1999) (discussing Congress’s intent to overrule *Miranda*).
Congress has the power to adjust *McNabb-Mallory*; it takes that power as a given and immediately proceeds to analyze the meaning of the statute.\(^{385}\)

In comparison, the Court held in *Dickerson v. United States* that the portions of the statute that sought to restrict the constitutionally based *Miranda* rule were unconstitutional.\(^{386}\) The *Dickerson* Court quite plainly explained the difference between the supervisory-authority and constitutional cases:

> The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals. However, the power to judicially create and enforce nonconstitutional “rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.” Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.\(^{387}\)

Thus, the supervisory authority is an interstitial power to act when Congress has not spoken, and it is subject to being overruled by Congress.

### 3. Cases in Which the Court Elided Congress

The third group of cases is the most problematic for this Article’s vision of weak constitutional inherent authority: cases in which a congressional act may apply, and the Court nonetheless allows an exercise of inherent authority. Notably, the Supreme Court has never stated that it was attempting to elude congressional intent in these cases; rather, the Court is always careful to note that the decision either occupies space untrammeled by Congress or that congressional intent to displace inherent authority is unclear.\(^{388}\)

The first of these cases, *Link v. Wabash Railroad Co.*, a 1962 case, held that federal courts retained the right to dismiss a case sua sponte for failure to prosecute, despite the fact that Federal Rule of Civil Procedure 41(b) did not provide that power.\(^{389}\) Rule 41(b) allowed involuntary dismissal for failure to prosecute upon motion of the defendant, with no mention of a court’s power to act sua sponte.\(^{390}\) The petitioner argued that “by negative implication,” Rule 41(b)’s explicit mention of a motion by a defendant, combined with its silence on sua sponte judicial dismissal, meant that involuntary dismissals could only be initiated by the defendant.\(^{391}\)

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\(^{385}\) Id. at 1566–67.


\(^{387}\) Id. at 437 (citations omitted).

\(^{388}\) See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626, 631–32 (1962) (declaring that there needed to be a “much clearer expression of purpose” in Federal Rule of Civil Procedure 41(b) to prevent the court from dismissing the case).

\(^{389}\) Id. at 629–31.

\(^{390}\) Id. at 630 (quoting FED. R. CIV. P. 41(b)).

\(^{391}\) Id.
In rejecting this argument, the Court relied upon the fact that sua sponte dismissals have “generally been considered an ‘inherent power’ governed not by rule or statute” and that state and federal courts regularly used the power.\textsuperscript{392} In light of the historical and current use of the power, the Court concluded that “[i]t would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.”\textsuperscript{393}

This decision is ironic for several reasons. First, \textit{Link} was decided during the period in which the Court itself had a major and largely unfettered role in drafting the Federal Rules of Civil Procedure.\textsuperscript{394} Thus, in assessing the intent behind Rule 41(b), the Court was actually assessing its own intent.\textsuperscript{395} Second, although the Court brushed off the petitioner’s argument, it is curious that an inherent power, like the one claimed in this case, should survive after the creation of the Federal Rules of Civil Procedure, which were largely drafted by the federal courts themselves.\textsuperscript{396} If the Rules were legislatively drafted, the argument to act in the interstices would be much more persuasive than relying on inherent powers, despite a set of rules drafted largely by the courts themselves.

\textit{Link} is the first time the Court stated that Congress needed to make a “much clearer expression” of intent to displace an existing inherent power.\textsuperscript{397} The relative lateness of this declaration again suggests that earlier Supreme Courts were much less protective of judicial inherent powers. Even more than the dicta in \textit{Hudson} and \textit{Bollman}, which focused on a constitutionally protected core inherent contempt power,\textsuperscript{398} it is \textit{Link} and its progeny that suggest a special constitutional status for inherent powers.

In \textit{Chambers v. NASCO, Inc.}, the Court expanded on \textit{Link}’s “clearer expression” language by stating that it does “not lightly assume that Congress has intended to depart from established principles such as the scope of a court’s inherent power.”\textsuperscript{399} In \textit{Chambers}, a district court sanctioned a party for bad-faith litigation conduct.\textsuperscript{400} The court imposed sanctions under its inherent powers, rather than under Rule 11 of the Federal Rules of Civil Procedure or

\begin{itemize}
  \item \textsuperscript{392} \textit{Id.} at 630–31.
  \item \textsuperscript{393} \textit{Id.} at 631–32.
  \item \textsuperscript{394} \textit{See} Leslie M. Kelleher, \textit{Taking Substantive Rights (in the Rules Enabling Act) More Seriously}, 74 \textit{Notre Dame L. Rev.} 47, 55–56 (1998) (noting that Congress did not increase its involvement and oversight of the Court’s rulemaking process until 1973); \textit{see supra} note 368 and accompanying text.
  \item \textsuperscript{395} \textit{See} \textit{Link}, 370 U.S. at 630 (rejecting the petitioner’s interpretation of the Rule’s purpose).
  \item \textsuperscript{396} \textit{See supra} note 368 and accompanying text.
  \item \textsuperscript{397} \textit{Link}, 370 U.S. at 631–32.
  \item \textsuperscript{398} \textit{See supra} notes 201–05 and accompanying text.
  \item \textsuperscript{399} 501 U.S. 32, 47 (1991) (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)).
  \item \textsuperscript{400} \textit{Id.} at 35.
\end{itemize}
28 U.S.C. § 1927, because it found that neither Rule 11 nor § 1927 was sufficient to reach the behavior at issue in the case.\textsuperscript{401} The Supreme Court affirmed, finding that neither Rule 11 nor § 1927 was intended to displace the court’s traditional inherent powers to sanction.\textsuperscript{402} However, the Court did suggest that:

when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.\textsuperscript{403}

The Court is hardly crystal clear on this point; it also states that a federal court is not “forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules[,]” assuming the court follows the other due process and factual requirements.\textsuperscript{404}

These relatively contradictory statements were necessary because the Court could not uphold the sanction rendered by the lower court in \textit{Chambers} if courts were required to exhaust remedies under existing rules and statutes before relying on inherent powers, because the lower court in \textit{Chambers} did no such thing.\textsuperscript{405}

\begin{itemize}
  \item \textsuperscript{401} \textit{Id.} at 41–42.
  \item \textsuperscript{402} \textit{Id.} at 47–49.
  \item \textsuperscript{403} \textit{Id.} at 50.
  \item \textsuperscript{404} \textit{Id.}
  \item \textsuperscript{405} See NASCO, Inc. v. Calcasiew Television & Radio, Inc., 124 F.R.D. 120, 138–39, 142 (W.D. La. 1989), \textit{aff’d}, 894 F.3d 696 (5th Cir. 1990), \textit{aff’d sub nom. Chambers}, 501 U.S. Once the case reached the Supreme Court, Justice Kennedy, in dissent, listed multiple options:

By direct action and delegation, Congress has exercised this constitutional prerogative to provide district courts with a comprehensive arsenal of Federal Rules and statutes to protect themselves from abuse. A district court can punish contempt of its authority, including disobedience of its process, by fine or imprisonment, 18 U. S. C. § 401; award costs, expenses, and attorney’s fees against attorneys who multiply proceedings vexatiously, 28 U. S. C. § 1927; sanction a party and/or the party’s attorney for filing groundless pleadings, motions, or other papers, Fed. Rule Civ. Proc. 11; sanction a party and/or his attorney for failure to abide by a pretrial order, Fed. Rule Civ. Proc. 16(f); sanction a party and/or his attorney for baseless discovery requests or objections, Fed. Rule Civ. Proc. 26(g); award expenses caused by a failure to attend a deposition or to serve a subpoena on a party to be deposed, Fed. Rule Civ. Proc. 30(g); award expenses when a party fails to respond to discovery requests or fails to participate in the framing of a discovery plan, Fed. Rules Civ. Proc. 37(d) and (g); dismiss an action or claim of a party that fails to prosecute, to comply with the Federal Rules, or to obey an order of the court, Fed. Rule Civ. Proc. 41(b); punish any person who fails to obey a subpoena, Fed. Rule Civ. Proc. 45(f); award expenses and/or contempt damages when a party presents an affidavit in a summary judgment motion in bad faith or for the purpose of delay, Fed. Rule Civ. Proc. 56(g); and make rules governing local practice that are not inconsistent with the Federal Rules, Fed. Rule Civ. Proc. 81. See also 28 U.
Nevertheless, in an effort to avoid holding that a court’s inherent powers could be used as a vehicle to disregard applicable rules and statutes, the Court struck a compromise: for cases in which some of the behavior would not be reached by the existing statutes and rules, a court could use its inherent powers to reach all of the behavior at once.\textsuperscript{406} The Court augments this holding by finding, as it did in \textit{Link} and other cases, that the rules and statutes were not intended to displace the existing inherent powers of courts, but to supplement them.\textsuperscript{407}

In \textit{Gulf Oil Corp. v. Gilbert}, the first modern forum-non-conviens case, the Court allowed a district court to avoid a seemingly applicable jurisdictional statute in favor of an inherent power to dismiss because another forum would be more convenient.\textsuperscript{408} \textit{Gulf Oil} is also an inherent-powers case that resulted in congressional action.\textsuperscript{409} Months after the case, Congress passed 28 U.S.C. § 1404, which explicitly allowed transfers between federal districts.\textsuperscript{410}

Although these cases come close to applying inherent powers in the face of existing congressional actions, the Court never admits so. To the contrary, in each of these cases, the Court goes to great lengths to reassure that Congress did not intend to dislodge the existing inherent power and that the exercise of the inherent power does not violate the statute or rule at issue. Thus, even if these cases show a worrisome disregard for congressional authority in their outcomes, the words themselves are consistent with congressional power to shape federal court rules and processes.\textsuperscript{411}

\textbf{B. A Brief Word on State-Court Inherent Power}

Given that the Supreme Court has never invalidated a congressional act under the inherent-powers doctrine, the comparative behavior of state supreme

\begin{footnotes}
\item S. C. § 1912 (power to award just damages and costs on affirmance); Fed. Rule App. Proc. 38 (power to award damages and costs for frivolous appeal).
\item \textit{Chambers}, 501 U.S. at 62 (Kennedy, J., dissenting).
\item \textsuperscript{406} See \textit{id.} at 50 (majority opinion).
\item \textsuperscript{409} See \textit{Lear}, supra note 8, at 1148–49 (explaining the court’s use of inherent power regarding venue in \textit{Gulf Oil} and Congress’s quick response to amend the statute only months later).
\item \textsuperscript{410} See Act of June 25, 1938, ch. 646.
\item \textsuperscript{411} See \textsuperscript{Samuel P. Jordan, \textit{Situating Inherent Power Within a Rules Regime}, 87 DENV. U. L. REV. 311, 315–19 (2010)} (describing these types of cases as troublesome “escape valve” cases that affect constitutional structure, fairness, and rulemaking authority).
\end{footnotes}
courts in this area is notable.\textsuperscript{412} Some state supreme courts have applied a much more muscular inherent-powers doctrine.\textsuperscript{413} State supreme courts have used this power to repeatedly overturn legislative acts, especially if such acts affect the regulation of lawyers.\textsuperscript{414} Given the comparative example of state courts, the reticence of federal courts in this area is particularly marked. If the Court needed a model for overturning congressional acts, it had many state-court models from which to choose.

C. Youngstown’s Taxonomy of Presidential Power

The powers of the President closely parallel the inherent power of federal courts, and the Court’s treatment of presidential power has followed this Article’s theory of judicial power quite closely. The most famous statement in this area is Justice Robert Jackson’s concurrence in \textit{Youngstown Sheet \& Tube Co. v. Sawyer}.\textsuperscript{415} Jackson divided exercises of presidential power into three categories: actions authorized by Congress, actions neither authorized nor prohibited by Congress, and actions prohibited by Congress.\textsuperscript{416}

Each of these three categories suggests a different level of presidential authority. First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”\textsuperscript{417} When the President acts in absence of congressional authority, “he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”\textsuperscript{418} In these interstices, presidential authority can derive support from “congressional inertia, indifference or quiescence.”\textsuperscript{419} Finally, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,” and the Court can uphold

\textsuperscript{412} See Benjamin H. Barton, \textit{Do Judges Systematically Favor the Interests of the Legal Profession?}, 59 A. LA. L. REV. 453, 462 (2008) (detailing state supreme courts’ assertion of inherent authority to regulate lawyers as a way to bar state legislators from rulemaking in this area).

\textsuperscript{413} See id.


\textsuperscript{415} 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring). In \textit{Youngstown}, the Court overruled President Harry Truman’s decision to seize steel mills without congressional approval during the Korean War. \textit{Id.} at 582–83, 587–89 (Black, J., delivering the opinion of the Court). \textit{Youngstown} is one of the most famous separation-of-powers cases. See, e.g., Symposium, \textit{Youngstown at Fifty}, 19 CONST. COMMENT. 1 (2002); Joshua L. Sohn, \textit{The Case for Prudential Standing}, 39 U. MEM. L. REV. 727, 747 (2009).

\textsuperscript{416} See \textit{Youngstown}, 343 U.S. at 635–38 (Jackson, J., concurring).

\textsuperscript{417} \textit{Id.} at 635.

\textsuperscript{418} \textit{Id.} at 637.

\textsuperscript{419} \textit{Id.}
executive action “only by disabling the Congress from acting upon the subject.”420

The Court has since adopted Jackson’s Youngstown concurrence in multiple majority opinions, and his framework is the accepted rubric for measuring the constitutionality of questionable presidential assertions of power.421 The Court’s treatment of presidential authority thus parallels this Article’s theory of judicial inherent authority; there are areas where the President can act in the absence of congressional authority, especially if Congress has displayed “inertia, indifference or quiescence.”422 However, when the President acts in the face of congressional authority, he has only a limited set of powers,423 analogous to the pure judicial power of deciding cases.424

D. Two Different Appellate Court Approaches

Confusion at the Supreme Court level has led to some outlier cases in the courts of appeals. At one extreme, there are judges who follow the thesis of this Article and hold that inherent powers are prudential in nature and can only be used in the absence of another federal rule or law. Judge Richard Posner, for example, has described inherent authority as “a residual authority, to be exercised sparingly” and only to address issues “not adequately dealt with by other rules.”425 Judge Frank Easterbook has likewise noted that “[t]he supervisory power is part of the common law, and no court has a common law power to disregard a rule or statute that was within the authority of Congress to enact.”426

420. Id. at 637–38.
422. Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
423. See, e.g., G. Sidney Buchanan, A Proposed Model for Determining the Validity of the Use of Force Against Foreign Adversaries Under the United States Constitution, 29 Hous. L. Rev. 379, 398 n.96 (1992) (stating that the President has authority to use force to repel an invasion); Bradford R. Clark, Domesticating Sole Executive Agreements, 93 Va. L. Rev. 1573, 1635 (2007) (declaring that the President has the power to recognize foreign governments).
424. A comprehensive discussion of Youngstown, Hamdan, and Medellin is beyond the scope of this paper. In a future project, I will propose a unified theory of inherent powers using the implied powers of the President, Congress itself, and the judiciary as a launching point.
426. United States v. Widgery, 778 F.2d 325, 329 (7th Cir. 1985); see also United States v. Washington, 549 F.3d 905, 914–16 (3d Cir. 2008) (rejecting the argument that a district court has an inherent power to vacate its own criminal judgments, when procured by fraud, because 18 U.S.C. § 3582(c) and Federal Rule of Criminal Procedure 35 circumscribe such a power); United States v. Thorpe, 471 F.3d 652, 665 (6th Cir. 2006) (rejecting the district court’s grant of discovery based on a claim of inherent power that disregarded contrary statutory and Supreme Court law); In re United States, 426 F.3d 1, 9 (1st Cir. 2005) (“The court’s supervisory power
At the other extreme, two recent cases have required a clear statement of congressional intent to abrogate inherent powers and have disregarded the underlying law in the absence of such a statement. Although these cases do not explicitly overrule an act of Congress, they do suggest that a federal court can disregard an applicable federal law under its inherent powers.

In *Lin v. U.S. Department of Justice*, the Second Circuit addressed a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, codified at 8 U.S.C. § 1252(a), which explicitly stripped federal courts of the power to remand cases to the Bureau of Immigration Appeals for the taking of additional evidence. In *Lin*, the Second Circuit did exactly what § 1252(a) barred: it remanded an immigration appeal. The Second Circuit acted based on the agreement of the parties; however, that does not appear to be an exception to the strictures of § 1252(a). In *Lin*, the court opined that regardless of the agreement to remand and despite clear congressional intent to bar remand, a court could, in fact, remand under its inherent authority.
Sahyers v. Prugh, Holliday & Karatinos, P.L. echoed the reasoning in Lin.\textsuperscript{432} Plaintiff Sahyers, a paralegal, claimed unpaid overtime and other violations of the Fair Labor Standards Act (FLSA) of 1938.\textsuperscript{433} After a somewhat contentious discovery period, the defendants offered the plaintiff a $3500 judgment under Federal Rule of Civil Procedure 68.\textsuperscript{434} After accepting the judgment, the plaintiff filed for attorney’s fees under the FLSA’s mandatory fee provision.\textsuperscript{435}

Citing the lawyer’s lack of collegiality in suing a law firm without calling to settle the case first, the district court refused to grant any award of attorney’s fees.\textsuperscript{436} Like Lin, Sahyers involved a federal court disregarding statutory language and rendering its decision based on inherent powers.\textsuperscript{437} The FLSA’s fee provision is mandatory and contains no exception for lawyer collegiality.\textsuperscript{438} The Sahyers court evaded the statutory language, stating,

\begin{quote}
Congress was aware of the inherent powers of a federal court when enacting the FLSA. And at least in the absence of very clear words from Congress, we do not presume that a statute supersedes the customary powers of a court to govern the practice of lawyers in litigation before it.\textsuperscript{439}
\end{quote}

Sahyers and Lin thus show a quite muscular vision of federal court inherent power. Unless Congress has explicitly expressed a desire to abrogate a traditional inherent power, a court may disregard the congressional act. A review of the United States Code shows that Congress has rarely, if ever, explicitly displaced the inherent powers of federal courts.\textsuperscript{440} Lin and Sahyers

\textsuperscript{432} Sahyers v. Prugh, Holliday & Karatinos, P.L., 560 F.3d 1241, 1244–45 (11th Cir. 2009).
\textsuperscript{433} Id.
\textsuperscript{434} Id.
\textsuperscript{435} Id.
\textsuperscript{436} Id.
\textsuperscript{437} Id.
\textsuperscript{438} See Fair Labor Standards Act of 1938 § 16(a), 29 U.S.C. § 216(b) (2006); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415–16 & n.5 (1978) (stating that the FSLA, among other statutes, employs mandatory, rather than permissive, language with regard to awards of attorney fees).
\textsuperscript{439} Sahyers, 560 F.3d at 1245 n.6.
\textsuperscript{440} A Westlaw search string consisting of the relevant terms (“inherent power” /s “court”) located twenty-eight documents in the U.S.C. database; many are from the Federal Rules of Civil or Criminal Procedure, and none explicitly abrogate inherent authority in the manner suggested by Lin and Sahyers. See WESTLAW, www.westlaw.com (search “inherent power” /s “court”) (last visited Sept. 2, 2011). In essence, these various cases present two different tests when an exercise of inherent power conflicts with a rule or statute. Some courts ask whether an exercise of inherent authority would conflict with a federal statute. If so, the statute controls. See, e.g., Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 390–91 (7th Cir.
make the danger of Supreme Court overreaching in this area clear: federal courts can disregard virtually any congressional act or rule by finding “the absence of very clear words” to displace an existing inherent power.441

V. CONCLUSION

The ramifications of this understanding of inherent powers are quite straightforward. Federal courts should more clearly recognize Congress’s superior Article I power in this area. The regular sabre rattling of the federal courts, starting with the dicta in Bollman and Hudson, suggesting that there is an indeterminate core constitutional inherent power, of which Congress should beware when legislating in the area, should be repudiated. This dicta encourages broader uses of the inherent powers by lower federal courts and discourages Congress from acting in the area.442

Similarly, the Court should consider overruling the portion of Chambers v. NASCO, Inc. that allows a court to exercise its inherent powers despite potentially applicable statutes or rules.443 Given Congress’s superior constitutional power, courts should not act in an area where Congress has already spoken. Courts can, of course, work in the interstices among the various statutes and rules, but it cannot choose to exercise an inherent power when an applicable statute or rule is dispositive.

Nor should federal courts require any plain statement of congressional intent before finding that a congressional act has displaced an existing inherent power. Congress has the superior claim in this area, and insofar as Congress has acted, its laws should have precedence over any claim of inherent authority. At a minimum, cases like Sahyers and Lin444 should not be followed. Any generally applicable statute or rule should trump a court’s inherent powers.

2002). Sahyers and Lin ask whether the statute at issue clearly abrogates the claimed inherent authority. Sahyers, 560 F.3d at 1245 n.6.; Lin v. U.S. Dep’t of Justice, 473 F.3d 48, 53 (2d Cir. 2007). On the surface, these tests sound similar. In many cases, Sahyers and Lin included, the choice of test is outcome determinative, and the tests are markedly distinct in what they require of Congress.

441. See Sahyers, 560 F.3d at 1245 n.6.
442. See supra notes 204–17 and accompanying text.
443. See supra notes 404–13 and accompanying text.
444. See supra notes 432–46 and accompanying text.