

2011

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

Benjamin H. Barton

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

## **Cover Page Footnote**

Professor of Law, University of Tennessee College of Law. B.A., 1991, Haverford College; J.D., 1996, University of Michigan. The author gives special thanks to Joseph Anclien, Wendy Bach, Amy Coney Barrett, Stephen Burbank, Brannon Denning, David Engdahl, Jennifer Hendricks, Jeff Hirsch, Indya Kincannon, Robert Pushaw, Glenn Reynolds, the University of Tennessee College of Law for generous research support, and the Honorable Diana Gribbon Motz.

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

*Benjamin H. Barton*<sup>+</sup>

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The nature of the inherent powers of federal courts<sup>1</sup>—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.<sup>2</sup> 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.<sup>3</sup> The Court has been even

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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] inforce [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 (1996) (“In many instances the inherent powers of the courts may be controlled or overridden by statute or rule.”), *superseded by statute*, Civil Asset Forfeiture Reform Act of 2000, Pub. L. No.

more explicit in various “supervisory power” cases,<sup>4</sup> stating that “Congress retains the ultimate authority to modify or set aside any judicially created rules.”<sup>5</sup>

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.”<sup>6</sup> The Court has also held that it will not “lightly assume” that a congressional act displaces a court’s inherent power.<sup>7</sup> 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.<sup>8</sup>

Furthermore, the Court has been vague about the exact boundaries of these powers by repeatedly suggesting that courts should exercise “restraint and discretion”<sup>9</sup> and that inherent powers are “necessary to the exercise of all others.”<sup>10</sup> Nevertheless, even a cursory review of the case law establishes that

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106-185, § 14(a), 114 Stat. 219; *Thomas v. Arn*, 474 U.S. 140, 148 (1985) (“Even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.”).

4. See *infra* notes 354–60 and accompanying text. For an excellent overview of the supervisory power, see Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 328–33 (2006).

5. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citing *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959)).

6. *Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry.*, 266 U.S. 42, 66 (1924).

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))).

8. See Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1163 (2006) (addressing the concept of inherent judicial power and noting modern jurisprudence’s imposition of the “clear statement rule” requirement for Congress).

9. *Degen v. United States*, 517 U.S. 820, 823–24 (1996) (“The extent of these 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 . . . . 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; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980), *superseded by statute*, Act of June 25, 1948, Pub. L. No. 106-185, 62 Stat. 127.

10. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); see also *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819–20 (1987) (Scalia, J., concurring) (discussing the Court’s prior holdings and questioning the majority’s reliance on the inherent judicial power to punish violators of court judgments with contempt); *Cheff v. Schnackenberg*, 384 U.S. 373, 392–93 (1966) (Douglas, J., dissenting) (advocating a narrow view of the contempt power), *abrogated by Baldwin v. New York*, 399 U.S. 66 (1966).

these powers clearly reach beyond the strictly necessary and are often applied when merely helpful.<sup>11</sup>

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.<sup>12</sup> For example, Professor Robert Pushaw divided inherent powers into constitutionally based, "implied indispensable" powers, which Congress cannot impair or destroy, and "beneficial" powers, which courts cannot exercise without congressional approval.<sup>13</sup> Professors Amy Barrett, Sara Beale, Elizabeth Lear, and William Van Alstyne have reached similar conclusions.<sup>14</sup>

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

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11. See, e.g., Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 49–51 (2008) (noting that the Court has not provided a uniform standard for the exercise of inherent powers); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 879–82 (2008) (eschewing the argument that inherent judicial authority may only be exercised in necessary circumstances).

12. See *infra* notes 13–17 and accompanying text.

13. Robert J. Pushaw, Jr., *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.*

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, *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 indispensable to enable a court to proceed with a given case appears to require statutory support").

15. See *infra* notes 16–17 and accompanying text.

16. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1287–88 (1993). Other scholars have made similar arguments. See Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 179 (1979) (arguing that the judiciary has constitutional control over some rules of evidence under the inherent-powers doctrine); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805–07 (1995) (extrapolating an "inherent judicial authority [that] is broad indeed" from an understanding of English courts at the time of the framing of Article III). *But see* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L.

not pass legislation subverting the judiciary, and that the judiciary itself should determine whether such subversion has occurred.<sup>17</sup> If a law impedes the judiciary's ability to carry out its function, the court should overturn the law.<sup>18</sup> In short, there is substantial scholarly support for a strong, constitutionally based inherent power as a check on congressional action.<sup>19</sup>

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.<sup>20</sup>

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.<sup>21</sup> Thus, this Article argues that Congress has near plenary authority over the structure and procedure of the federal courts.<sup>22</sup>

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,<sup>23</sup> this Article also argues that the judiciary has substantial authority to act when

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REV. 1677, 1686–87 & n.34 (2004) (offering a devastating rebuttal to Mullenix's thesis, predicated on the difference between courts' unquestioned power to act “in the absence of congressional authorization” and courts' narrow power “to proceed in the teeth of a statute”).

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.<sup>24</sup> The framers of the Constitution created a remarkably flexible judicial branch based upon the operation of common law courts in the late eighteenth century.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

Indeed, the constitutional protections of inherent judicial powers are narrow, but the judiciary's non-constitutional, gap-filling power is quite broad.<sup>28</sup> This understanding of the inherent powers of federal courts most properly coincides with the Constitution's history and purpose.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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

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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.



together with Congress's power over the structure and nature of the Supreme Court—leave little room for judicial hegemony over inherent authority.<sup>33</sup>

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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> 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).

35. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227–28 (1995).

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 canvasses 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> However, over the years, all three branches of the federal

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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.

41. See, e.g., Hon. J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 427 (2004) (“The American Constitution was unique in creating a federal government of limited and enumerated powers and retaining considerable authority for the states.”).

42. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) (“[I]t has been truly said that under a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.”); THE FEDERALIST NO. 14, at 102 (James Madison) (Willmore Kendall &

government successfully have claimed various implied powers, but these powers had to be incidental to an enumerated power.<sup>43</sup>

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.<sup>44</sup> 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.”<sup>45</sup> 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.”<sup>46</sup> The latter clause is explicit, granting Congress the authority to “make *all* laws” deemed necessary and proper.<sup>47</sup>

Article III discusses “the judicial Power” in regard to courts twice.<sup>48</sup> 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.”<sup>49</sup> 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.<sup>50</sup>

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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.”).

43. See William W. Van Alstyne, *Implied Powers*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 963 (Leonard W. Levy et al. eds., 1986).

44. See *supra* notes 41–43 and accompanying text.

45. U.S. CONST. art. I, § 8, cl. 9.

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.<sup>51</sup> 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.<sup>52</sup> As long as congressional action passes the low “necessary and proper” bar, Congress has plenary Article I authority to pass the laws it pleases.<sup>53</sup> Looking only at the text of the Constitution, the idea of a strong inherent judicial power is rebutted by the Necessary and Proper Clause.<sup>54</sup>

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.<sup>55</sup> There is an explicit description of jurisdiction;<sup>56</sup> 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.<sup>57</sup>

Congress has particularly far-reaching power over the lower federal courts, which Congress may create or may choose not to create.<sup>58</sup> 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,<sup>59</sup> 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."<sup>60</sup> 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.<sup>61</sup> The "time to time" language also means that Congress has the power to dismantle the lower federal judiciary altogether.<sup>62</sup>

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.<sup>63</sup> 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.<sup>64</sup> 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."<sup>65</sup> This Article III-based argument involves two separate rationales. It can be true that courts "no doubt possess

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59. See *Federal Judgeships*, FED. JUD. CENTER, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Sept. 2, 2011) (noting that there are currently 874 federal judgeships).

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,”<sup>66</sup> 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.<sup>67</sup>

However, because strong, constitutionally based inherent judicial power necessarily means that the judiciary’s power over procedure and court structure outweighs congressional power,<sup>68</sup> this argument elides Congress’s Article I power to “make all Laws which shall be necessary and proper for carrying into Execution”<sup>69</sup> 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).<sup>70</sup> 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.<sup>71</sup> 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;<sup>72</sup> however, there is much in the periphery to support congressional control over court processes.<sup>73</sup> 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.”<sup>74</sup>

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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 in gaps in procedural and evidentiary law).

69. U.S. CONST. art. I, § 8, cl. 18.

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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> Among these defects was the lack of a unified federal judiciary.<sup>79</sup> The Articles of Confederation provided for courts of very limited jurisdiction and did not guarantee judicial salary or longevity.<sup>80</sup> 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.<sup>81</sup>

It was against this backdrop that the framers of the Constitution considered the creation of an independent federal judiciary.<sup>82</sup> All of the preliminary plans

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*to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 765–68 (1997) (“It is common ground that, at the Constitutional Convention, the Framers did not address the issue of whether the judicial power granted to the federal courts includes the power to establish court practices and procedures.”).

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.<sup>83</sup> None of these proposals included substantial details as to the size, nature, or procedures of these potential courts.<sup>84</sup> Rather, it may be inferred that Congress was to work out such details when it created these various inferior courts.<sup>85</sup>

Thus, the many drafts of the Constitution did not include any particular attention to procedure or inherent judicial powers,<sup>86</sup> but instead empowered Congress to create and design the new judiciary,<sup>87</sup> 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.<sup>88</sup> 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 *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.<sup>89</sup>

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

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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).

83. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21–22, 95, 104–05 (Max Farrand ed., 1911).

84. *See id.* (illustrating the lack of discussion concerning the size, nature, and procedure of these courts).

85. *Id.* at 21 (nothing that it was left to Congress to establish inferior tribunals).

86. Pushaw, *supra* note 13, at 822.

87. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 83, at 21–22, 95, 104–05.

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

89. *Id.* (emphasis added).



remedying “improper” or “biased” state verdicts with new trials at the Supreme Court.<sup>90</sup>

Nevertheless, the motion to strike the reference to inferior tribunals passed by a close vote.<sup>91</sup> 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.”<sup>92</sup> 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.”<sup>93</sup> 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.”<sup>94</sup> This change was accepted by a wide margin.<sup>95</sup>

The debate over inferior federal tribunals arose again on July 18, 1787 when the delegates met as a whole.<sup>96</sup> Opponents of inferior federal courts argued that existing state-court structures were sufficient and that inferior federal courts would “create jealousies” among state courts.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup>

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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,”<sup>100</sup> to “establish,”<sup>101</sup> and then to “constitute,”<sup>102</sup> and finally to “ordain and establish.”<sup>103</sup> 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.”<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> 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.”<sup>107</sup> Article I’s grant of legislative power to Congress maintained “constitute.”<sup>108</sup>

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.<sup>109</sup> 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.”<sup>110</sup>

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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)).

109. *See* JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 212 (1971).

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<sup>111</sup> and “established” from scratch an entirely new court of appeals for cases of capture.<sup>112</sup> 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.<sup>113</sup> At the time of the Constitutional Convention, one of the meanings of “constitute” was to establish an institution.<sup>114</sup> Thus, in the early years of the country, “establish” and “constitute” had similar meanings with regard to institutions.<sup>115</sup>

“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.<sup>116</sup> Professor Julius Goebel has referred to “ordain and establish” as “words of fiat.”<sup>117</sup>

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

111. GOEBEL, *supra* note 109, at 173.

112. *Id.* at 167–71.

113. *See id.* at 247 (commenting that the switch from “constitute” to the more forceful and imperative “ordain and establish” must have been a deliberate decision designed to direct Congress’s actions).

114. 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 488 (Lesley Brown ed., Oxford University Press 1993) (dating the origination of this meaning of “constitute” to the mid-sixteenth century); *see also* *Constitute*, WEBSTER’S REVISED UNABRIDGED DICTIONARY (1828), available at <http://machaut.uchicago.edu/?resource=Webster%27s&word=constitute&use1828=on> (last visited Sept. 9, 2011).

115. *See* *Constitute*, *supra* note 114; *Establish*, WEBSTER’S REVISED UNABRIDGED DICTIONARY (1828), available at <http://machaut.uchicago.edu/?resource=Webster%27s&word=establish&use1913=on&use1828=on> (last visited Sept. 9, 2011).

116. *See* MASS. CONST. of 1780 pmb. (“[D]evoutly imploring his direction in so interesting a design, DO agree upon, ordain, and establish, the following *Declaration of Rights, and Frame of Government*, as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS.”); N.Y. CONST. of 1777, arts. I–II, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS 2628 (Francis Newton Thorpe ed., 1993) [hereinafter STATE CONSTITUTIONS] (“ordain, determine, and declare”); PA. CONST. of 1776 pmb., *reprinted in* STATE CONSTITUTIONS, *supra* (recognizing the “Author of existence” and acting to “ordain, declare, and establish, the following *Declaration of Rights and Frame of Government*, to be the CONSTITUTION of this commonwealth”); VA. CONST. of 1776 pmb. (“ordain and declare”).

117. GOEBEL, *supra* note 109, at 247.

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.<sup>118</sup> 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.<sup>119</sup> On August 27, 1787, the delegates made several changes affecting the jurisdiction of the Supreme Court and the lower federal courts.<sup>120</sup> 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”<sup>121</sup>—would read, “In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct.”<sup>122</sup> This motion was defeated by a 6-2 vote.<sup>123</sup> Pointing to this motion, Professor Robert Clinton argues that “[a] clearer rejection of congressional authority over judicial powers is hard to

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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 McCordle*, 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.”<sup>124</sup> Anclien also views this rejection as support for strong constitutional inherent powers.<sup>125</sup>

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.<sup>126</sup> 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.”<sup>127</sup>

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.<sup>128</sup> 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,<sup>129</sup> 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. Anclien, *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).

127. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 83, at 424.

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).

129. *See* Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1460.

judiciary,<sup>130</sup> and the Constitution's description of the executive and the legislative branches contains much greater detail and clarity than its description of the judiciary.<sup>131</sup> 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, much less a branch of government with any inherent powers.<sup>132</sup>

When an issue of court structure mattered, such as the salary and tenure guarantees for federal judges, there was extensive debate<sup>133</sup> and an explicit guarantee in Article III.<sup>134</sup> The framers' silence on inherent authority permits the inference that no such authority was intended.<sup>135</sup>

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,<sup>136</sup> and the court was denied the power to enforce its own judgments.<sup>137</sup> 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

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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).

133. *See* Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 752–54 (2001) (explaining that the framers extensively debated the necessity of the inferior courts, judicial tenure, and salary due to Anti-Federalist concerns and fears of judicial dependence on Congress).

134. *See* U.S. CONST. art. III, § 1.

135. Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 45 (1998) (noting the lack of debate or concern over the judiciary and "implications of that regulatory authority for judicial independence").

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.<sup>138</sup> Anti-Federalists argued that ratifying the Constitution would impinge upon the civil right to a jury trial<sup>139</sup> and that the proposed jurisdiction of the Supreme Court granted it unbridled power.<sup>140</sup> 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.<sup>141</sup>

### I. *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.<sup>142</sup>

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.<sup>143</sup>

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

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

139. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295–97 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 723–24 n.246 (1973) (detailing the Anti-Federalists' arguments that Article III would deny the right to a jury trial).

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.<sup>144</sup> 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."<sup>145</sup>

## 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.<sup>146</sup> 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.<sup>147</sup>

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."<sup>148</sup>

In defense, supporters of the Constitution repeatedly turned to Congress's power over the judiciary, promising that Congress would guarantee civil jury trials.<sup>149</sup> 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.<sup>150</sup> 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).

146. See CONVENTION OF MASSACHUSETTS, *reprinted in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 109–12 (Johnathan Elliot ed., 1836) [hereinafter STATE DEBATES] (statement of Abraham Holmes).

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 . . . .”<sup>151</sup> 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.”<sup>152</sup>

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.”<sup>153</sup>

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.”<sup>154</sup> 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.”<sup>155</sup> 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.”<sup>156</sup>

#### *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.

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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 Archibold 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”).

154. CONVENTION OF VIRGINIA, *supra* note 148, at 534 (statement of James Madison).

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.

156. CONVENTION OF VIRGINIA, *supra* note 148, at 517 (statement of Edmund Pendleton).

Following the adoption of the Constitution, Congress passed three laws constituting the new federal judiciary—the Judiciary Act of 1789,<sup>157</sup> the Federal Process Act of 1789,<sup>158</sup> and the Crimes Act of 1790<sup>159</sup>—to establish the nature, structure, and jurisdiction of the new federal judiciary.<sup>160</sup>

These various Acts constitute powerful evidence of the framers' understanding of Articles I and III.<sup>161</sup> 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.<sup>162</sup> Ellsworth, the principal drafter of the Judiciary Act, was a particularly influential delegate and had previously served on the first Committee of Detail.<sup>163</sup> 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.”<sup>164</sup>

Congress took several different approaches in these Acts. In some cases, it granted the new federal courts broad discretion in how to structure procedure.<sup>165</sup> In others, it explicitly instructed courts to follow the current practices of the time.<sup>166</sup> Lastly, some sections were quite specific and innovative.<sup>167</sup> 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.<sup>168</sup>

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157. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

158. Process Act of 1789, ch. 21, 1 Stat. 93.

159. Crimes Act of 1790, ch. 9, 1 Stat. 112.

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.

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.”).

162. Holt, *supra* note 129, at 1478–79.

163. *See* Mark A. Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 637 (2003) (citing Ryan, *supra* note 74, at 770); James Leonard, *Ubi Remedium Ibi Jus, or, Where There's a Remedy, There's a Right: A Skeptic's Critique of Ex Parte Young*, 54 SYRACUSE L. REV. 215, 274–75 (2004). For an excellent discussion of Ellsworth's role, *see* Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 884–87 (2010).

164. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (citing *Ames v. Kansas*, 111 U.S. 449, 463, 464 (1884), *overruled in part by Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268 (1935)).

165. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

166. *See id.*

167. *See id.*

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.<sup>169</sup> In many areas, the Judiciary Act explicitly left federal courts to their own discretion.<sup>170</sup> 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.<sup>171</sup>

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.<sup>172</sup>

Although section 17 of the 1789 Judiciary Act left broad discretion to courts,<sup>173</sup> multiple other sections offered more specific grants of authority, including various procedural rules that altered the current practices.<sup>174</sup> Some of these changes included allowing litigants in actions at law to use the discovery techniques available in equity actions,<sup>175</sup> allowing for depositions *de bene esse*,<sup>176</sup> and allowing for the possibility of jury assessment of damages in certain default or demurrer cases.<sup>177</sup>

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

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in the Judiciary Act is inconsistent with the belief that the Constitution requires the entire judicial power to be vested in the Supreme Court and lower federal courts).

169. See Holt, *supra* note 129, at 1478–90 (providing an overview of the history of the Judiciary Act’s passage and a detailed account of the Act’s features).

170. See *infra* notes 171–73.

171. Judiciary Act of 1789 § 18.

172. See *id.* Although the last clause of section 17 seems to grant federal courts broad rulemaking authority, Congress passed the Process Act of 1789 just five days later and essentially instructed that in cases at law, federal courts were to follow the procedures of the state in which they were located. See Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93. Practically, this meant that courts’ rulemaking discretion was considerably curtailed despite the broad language in the Judiciary Act.

173. See *supra* notes 169–72 and accompanying text.

174. See Engdahl, *supra* note 17, at 86.

175. Judiciary Act of 1789 § 15.

176. *Id.* § 30. A deposition *de bene esse* was a procedure for the taking of a deposition of witnesses who would not be available to testify for trial. BLACK’S LAW DICTIONARY 505 (9th ed. 2009).

177. Judiciary Act of 1789 § 26.

law”<sup>178</sup>—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.<sup>179</sup>

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.<sup>180</sup> 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.<sup>181</sup> The congressional debates explicitly mentioned the possibility that the

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

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.

180. See Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1426 (2006) (detailing the judiciary crisis); Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 89–90 (2002).

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.<sup>182</sup>

In *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.”<sup>183</sup> 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.<sup>184</sup>

#### E. Early Case Law

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

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

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182. See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801–1805*, 33 WAKE FOREST L. REV. 219, 233–34 (1998); Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in AN INDEPENDENT JUDICIARY: REPORT OF THE A.B.A. COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE app. A at 67, 82 (1997).

183. 5 U.S. (1 Cranch) 299, 309 (1803), *abrogated by* INS v. Chadha, 462 U.S. 919, 945 (1983).

184. Frankfurter & Landis, *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”).

185. 23 U.S. (10 Wheat.) 1, 11 (1825).

Congress over the subject. The only inquiry is, how far has this power been exercised?<sup>186</sup>

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.<sup>187</sup>

In a companion case from the same term, the Court again faced an issue of marshals executing a judgment in *Bank of the United States v. Halstead*.<sup>188</sup> In *Halstead*, the Court provides a similar analysis as in *Wayman* and reaffirms Congress's plenary Article I power over court process:

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.<sup>189</sup>

*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"<sup>190</sup> was an impermissible delegation of the legislative power.<sup>191</sup> Notably, the Court did not reject the characterization of the power to control process as legislative.<sup>192</sup> On the contrary, the Court explicitly stated "Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do,"<sup>193</sup> however, the Court did note that such "power is vested in the Courts."<sup>194</sup>

The Court reiterated this holding and reasoning in *Livingston v. Story*<sup>195</sup> and *Rhode Island v. Massachusetts*.<sup>196</sup> 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.

188. 23 U.S. (10 Wheat.) 51, 51–52 (1825).

189. *Id.* at 53–54.

190. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276; *Halstead*, 23 U.S. (10 Wheat.) at 55–58.

191. *Halstead*, 23 U.S. (10 Wheat.) at 52–53.

192. *Id.* at 61–62.

193. *Id.* at 61.

194. *Id.*

195. 34 U.S. (9 Pet.) 632, 656–57 (1835).

196. 37 U.S. (12 Pet.) 657, 620–21 (1838).

judiciary's operation.<sup>197</sup> Earlier cases from the inferior federal courts convey similar sentiments.<sup>198</sup> Former Supreme Court Justice Joseph Story's well-known *Commentaries on the Constitution of the United States* likewise supports plenary Article I control.<sup>199</sup>

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

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197. *Id.* at 720–21. The case addressed the question of whether the Supreme Court had jurisdiction over a dispute between two states and recognized the constitutionality of the Court's jurisdiction, stating:

It was necessarily left to the legislative power to organize the Supreme Court, to define its powers consistently with the constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the constitution, congress exercised their [sic] power, so far as they thought it necessary and proper . . . for carrying into execution the powers vested by the constitution in the judicial, as well as all other departments and officers of the government of the United States. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own. The distribution and appropriate exercise of the judicial power, must therefore be made by laws passed by congress.

*Id.* at 721 (internal citations omitted); *see also Livingston*, 34 U.S. (9 Pet.) at 632, 656. In response to the defendant's challenge to the use of equity jurisdiction in the newly created Louisiana, Justice Thompson declared:

That congress has the power to establish circuit and district courts in any and all the states, and confer on them equitable jurisdiction in cases coming within the constitution, cannot admit of a doubt. It falls within the express words of the constitution . . . . And that the power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt.

*Id.* at 656.

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. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1758 (3d ed. 1858) ("[I]n all cases where the judicial power of the United States is to be exercised, it is for congress alone to furnish the rules of proceeding, to direct the process, to declare the nature and effect of the process, and the mode in which the judgments, consequent thereon, shall be executed.").

procedure that is necessary to the operation of the courts.<sup>200</sup> 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.<sup>201</sup> 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.<sup>202</sup>

In *United States v. Hudson*, the Court rejected the federal courts' exercise of jurisdiction over common law crimes.<sup>203</sup> 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.<sup>204</sup> 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."<sup>205</sup>

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,<sup>206</sup> and contemporary lower courts,<sup>207</sup> 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.<sup>208</sup> 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

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200. See, e.g., Mullenix, *supra* note 16, at 13, 20–21.

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.*

206. See *infra* Part IV.A.1.

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.<sup>209</sup> *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.<sup>210</sup> Likewise, *Hudson* does not necessarily claim a power superior to Congress, but instead claims a power “not immediately derived from statute.”<sup>211</sup>

In addition, in *Anderson v. Dunn*, the Court upheld Congress’s non-statutory contempt power,<sup>212</sup> which provides support for this interpretation of *Bollman* and *Hudson*. The Court began by characterizing Congress’s contempt power as a power by “implication.”<sup>213</sup> 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.<sup>214</sup>

Although *Anderson* notes that federal courts would have had a non-statutory claim to a contempt power if Congress had not granted it,<sup>215</sup> 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,<sup>216</sup> 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.<sup>217</sup>

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."<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup>

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,<sup>222</sup> the power of courts to act in the absence of legislative authority in matters of procedure or supervision was not.<sup>223</sup> From the birth of common law

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217. See Pushaw, *supra* note 13, at 848–49; Van Alstyne, *supra* note 14, at 128–29.

218. See *infra* notes 221–33 and accompanying text.

219. Barrett, *supra* note 11, at 818–19.

220. See Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 473–74 (1994) (recognizing that in England and America at the time of the framing, "procedural rules underwent frequent adaptation").

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 PLEAS*, 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.<sup>224</sup>

Pushaw has noted four distinct categories of inherent power exercised by common law courts leading up to the time of the framing.<sup>225</sup> 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.<sup>226</sup> The colonial courts followed a similar path by continuing to independently make adjective law and impose sanctions for misconduct.<sup>227</sup>

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."<sup>228</sup> 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.<sup>229</sup>

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

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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.").

225. Pushaw, *supra* note 13 at 810–14.

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.

228. JAMES MADISON, *Observations on Jefferson's Draft of a Constitution for Virginia* (Oct. 15, 1788), reprinted in 11 PAPERS OF JAMES MADISON 281, 290 (Robert A. Rutland & Charles F. Hobson eds., 1977) (concerning the framing of the Virginia Constitution, but also reflecting Madison's views at the time of the framing of the U.S. Constitution).

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.<sup>231</sup> 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.<sup>232</sup> 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.<sup>233</sup> The framers said very little about court structure or process because they expected courts to behave as they had for years.<sup>234</sup> 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,<sup>235</sup> 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.

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231. See PETER CHARLES HOFFER, *THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 47 (1990) (describing American colonial courts' flexible use of equity); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 380–81 (2002) ("The Framers did not eliminate the ability of judges to respond to violations of law with flexible and broad equitable remedies but merely incorporated such equitable power into the normal judicial decisionmaking process.").

232. See, e.g., Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1235 (1985) (describing the various political parties' views of the common law and how it would affect the new government structure).

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,<sup>236</sup> granting clear discretion to the new courts in some areas,<sup>237</sup> and explicitly creating boundaries for the judicial power in other areas.<sup>238</sup> 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.<sup>239</sup> The Act lists a series of criminal violations and possible punishments,<sup>240</sup> but says almost nothing about the process for trying these cases, although it does refer, without elaboration, to procedural steps like "presentment or indictment."<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup>

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,<sup>245</sup> which allowed judges substantial leeway.<sup>246</sup>

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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.

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

246. See Theodore K. Cheng, *Invading an Article III Court's Inherent Equitable Powers: Separation of Powers and the Immediate Termination Provisions of the Prison Litigation Reform*

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.”<sup>247</sup>

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.<sup>248</sup> Nevertheless, it is more likely that section 17 merely restates powers that would have existed regardless of congressional approval.<sup>249</sup> Similarly, Section 13 of the Judiciary Act essentially restated the Supreme Court’s exclusive jurisdiction under Article III,<sup>250</sup> 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<sup>251</sup> and also changed some existing procedures.<sup>252</sup>

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.<sup>253</sup>

### 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”).

247. Judiciary Act of 1789 § 17.

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”).

250. *Cf.* U.S. CONST. art. III, § 2; Judiciary Act of 1789 § 13.

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.<sup>254</sup> Some district courts also made rules about acceptable and timely pleas and the scheduling of cases for trial.<sup>255</sup>

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.<sup>256</sup> 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.”<sup>257</sup> The Court then held that the decision to sever the trials was at the court’s discretion.<sup>258</sup>

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.<sup>259</sup> In the first cases on this issue, the Supreme Court acted according to its own discretion based on common law rules,<sup>260</sup> and it was not until *Chisholm v. Georgia* that the Supreme Court expressly addressed the question.<sup>261</sup>

In *Chisholm*, the State of Georgia objected to the service of process, among others.<sup>262</sup> 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.<sup>263</sup> Randolph admitted that the form of process was not prescribed by statute.<sup>264</sup>

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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 *Gilchrest 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).

255. See DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* 36 (1971).

256. 25 U.S. (12 Wheat.) 480, 480 (1827).

257. *Id.*

258. *Id.* at 485.

259. *Cf.* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81.

260. GOEBEL, *supra* note 109, at 725 (indicating that the Court relied on common law process in actions against states).

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.

262. *Id.* at 429.

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”); Glashauser, *supra* note 126, at 1407.

264. *Chisholm*, 2 U.S. (2 Dall.) at 426, 428 (recitation of the case).

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."<sup>265</sup> The Court adopted the Attorney General's argument with one dissent.<sup>266</sup>

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).<sup>267</sup> Supporters of a constitutional inherent-powers doctrine point to *Chisholm* as an early example of inherent powers at work.<sup>268</sup> 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.<sup>269</sup> 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.<sup>270</sup>

### 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.<sup>271</sup> Professors Leo Levin and Anthony

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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*.”<sup>272</sup> 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.<sup>273</sup>

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

The well-known test under the Necessary and Proper Clause originated in *McCulloch v. Maryland*.<sup>276</sup> “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.”<sup>277</sup> Later cases have explained that federal statutes need only be “rationally related” to the implementation of a constitutionally enumerated power.<sup>278</sup> 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.”<sup>279</sup>

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“the federal courts have very little inherent judicial power in the strong sense—power that prevails as against legislative prescription”).

272. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958).

273. See Burbank, *supra* note 16, at 1686 n.31 (noting that Robert Pushaw’s definition of “implied indispensable powers” can be characterized as “very broad indeed”).

274. U.S. CONST. art. I, § 8, cl. 18.

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.”).

276. 17 U.S. (4 Wheat.) 316, 421 (1819).

277. *Id.* at 421.

278. See, e.g., *Sabri v. United States*, 541 U.S. 600, 605 (2004) (describing the requirement of a “means-ends rationality” for legislation enacted under the Necessary and Proper Clause).

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.<sup>280</sup>

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).<sup>281</sup>

### B. Limits on Judicial Power

Just as strict necessity has been described as a check on congressional power over inherent authority,<sup>282</sup> 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."<sup>283</sup> Van Alstyne and Pushaw have likewise argued that absolute necessity is a requirement for the exercise of inherent powers.<sup>284</sup>

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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 ratchet," 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.

Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15 (1974).

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

283. See 11 U.S. (7 Cranch) 32, 34 (1812).

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 indispensable 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.<sup>285</sup> The Supreme Court has also regularly warned against overreaching in this area<sup>286</sup> and, at times, has suggested that inherent powers of “long unquestioned” vintage are favored,<sup>287</sup> 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.<sup>288</sup> 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.”<sup>289</sup> Nevertheless, as previously noted, the framers understood the grant of the judicial power to be flexible and expected courts to be mutable over time.<sup>290</sup> Thus, in cases where Congress has not acted, courts are empowered to act, provided that such action relates to the deciding of cases.<sup>291</sup> Courts can likewise exercise congressionally delegated powers, like rulemaking.<sup>292</sup>

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.<sup>293</sup> Although Congress can overrule these decisions with

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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.

287. *Carlisle v. United States*, 517 U.S. 416, 426–27 (1996), *superseded by* FED. R. CRIM. P. 45(b)(2).

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.

292. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (upholding Congress’s power to delegate rulemaking authority to the courts).

293. See *supra* notes 283–85 and accompanying text.

legislation as it sees fit,<sup>294</sup> 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.<sup>295</sup> 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.<sup>296</sup> The real danger is courts disregarding Congress, not courts acting when Congress has remained silent.

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294. See U.S. CONST. art. I, § 1 (vesting all legislative power in Congress).

295. See Anclien, *supra* note 11, at 44–48. Anclien provides the following list of inherent powers found by courts:

[1] the power to stay an action pending the completion of a related action in another court . . . . [2] ordering consolidation of cases during or before trial, [3] requiring defense counsel either to commit to a firm trial date or withdraw, [4] determining the order in which to hear and decide pending issues, [5] designating attorneys to handle pretrial activity, [6] limiting the length of pretrial hearings, [7] setting a time limit for parties to acquire a lawyer, [8] requiring counsel who entered a general appearance to serve in a standby capacity, [9] invoking *forum non conveniens* to dismiss an action, . . . . [10] requiring parties to have a representative with full settlement authority available during pretrial conferences[,] . . . [11] interrupting counsel and setting time limits, [12] limiting the number of expert witnesses who may testify, . . . . [13] declaring parties who were absent from docket call ready for trial, . . . [14] altering common law rules of procedure, [15] excluding evidence that would be unfair to admit, [16] permitting the taking and filing of post-trial depositions, [17] refusing to subpoena witnesses for indigent civil litigants who cannot tender fees, . . . [18] implementing discovery procedures in habeas cases, . . . [19] requiring the prosecution to produce the previously recorded statements of its witnesses[,] . . . [20] appoint[ing] *amici curiae* on their own motion, . . . [21] compell[ing] the government to submit a memorandum of law[,] . . . [22] ordering an attorney to pay the government the cost of empanelling a jury for one day[,] and [23] punishing an individual for the unauthorized practice of law.

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

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.<sup>297</sup> 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;<sup>298</sup> 2) cases allowing the usage of inherent powers in areas of congressional silence;<sup>299</sup> 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.<sup>300</sup> 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.<sup>301</sup>

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.<sup>302</sup> Instead, the Court has always found that Congress did not foreclose the inherent power at issue.<sup>303</sup> 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.<sup>304</sup>

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297. See, e.g., *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819 (1987) (Scalia, J., concurring) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32–34 (1812)).

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.<sup>305</sup> *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.<sup>306</sup>

The Court has repeated this language and sentiment throughout the past hundred years.<sup>307</sup> 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.<sup>308</sup>

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.”<sup>309</sup> 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.<sup>310</sup> Peck “imprisoned and disbarred” a lawyer who critiqued Peck’s opinion while it was on appeal.<sup>311</sup> To defend his actions, Peck argued that the common law allowed contempt in exactly this circumstance and that if Congress disapproved, it had

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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.

306. 266 U.S. 42, 65–66 (1924).

307. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 799 (1987) (citing *Michaelson*, 266 U.S. at 66). For an argument that the contempt power is not strictly necessary to court operations despite the Court’s proclamations to the contrary, see Richard C. Brautigam, *Constitutional Challenges to the Contempt Power*, 60 GEO. L.J. 1513, 1514–18 (1972).

308. Cf. *Robinson*, 86 U.S. (19 Wall.) at 510–11 (upholding the Contempt Act of 1831).

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.<sup>312</sup> Blackstone and other contemporary authorities supported Peck's defense.<sup>313</sup> Peck was acquitted,<sup>314</sup> 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.<sup>315</sup>

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.<sup>316</sup> The third edition of Chancellor James Kent's famous *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."<sup>317</sup> Kent nevertheless expressed no doubt that Congress had the power to constrict the contempt power.<sup>318</sup> Contemporary lower federal courts applied the statute faithfully and recognized Congress's power to pass the law.<sup>319</sup>

In 1873, the constitutionality of the Act reached the Supreme Court in *Ex Parte Robinson*.<sup>320</sup> The forty-three-year gap between the Act's passage and *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

312. Elbert P. Tuttle & Dean W. Russell, *Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending" of Powers*, 37 EMORY L.J. 587, 594 n.37 (1988) (citing Frankfurter & Landis, *supra* note 74, at 1024–27).

313. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 282 (4th ed. 1770).

314. See William F. Chinnock & Mark F. Painter, *The Law of Contempt of Court in Ohio*, 34 U. TOL. L. REV. 309, 313 (2003) (noting that Peck avoided impeachment by one vote).

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:

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.

*Id.*

316. See Chinnock & Painter, *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).

317. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 300 (New York, E. B. Clayton & James Van Norden, 3d ed. 1836).

318. *Id.*

319. See, e.g., *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.").

320. 86 U.S. (19 Wall.) 505, 512 (1873).

United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.”<sup>321</sup> 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.<sup>322</sup>

There was no doubt that the Act of 1831 significantly restricted the common law contempt power.<sup>323</sup> Nevertheless, the Court recognized Congress’s ability to regulate the contempt power.<sup>324</sup> 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.<sup>325</sup> Like the change upheld in *Robinson*, contemporary commentators were quite critical of requiring juries in some contempt actions.<sup>326</sup> Nevertheless, the Supreme Court approved of the restriction.<sup>327</sup> The power of contempt is now well defined and heavily regulated by Congress.<sup>328</sup>

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.”<sup>329</sup> This power has been included among the inherent powers ever since.<sup>330</sup> This is

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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.

324. *Ex Parte Robinson*, 86 U.S. (19 Wall.) at 510–11.

325. *Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry.*, 266 U.S. 42, 65–67 (1924).

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).

329. *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 529, 531 (1824).

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.<sup>331</sup>

Nevertheless, the Court has expressed a willingness to allow legislative control in this area as well. In *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.<sup>332</sup> 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.”<sup>333</sup>

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.<sup>334</sup> These cases use the rationale from *Thomas v. Arn*,<sup>335</sup> which asserted that “[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.”<sup>336</sup>

In *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.<sup>337</sup> The Court held that a federal court could not simply choose to disregard an otherwise valid Rule of Criminal Procedure under its inherent powers:

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.”<sup>338</sup>

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331. See 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 *In Re Day*, 54 N.E. 646, 648 (Ill. 1899))).

332. 71 U.S. (4 Wall.) 333, 374–77 (1866).

333. *Id.* at 379, 381; cf. *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).

334. See *Carlisle v. United States*, 517 U.S. 416, 425–28 (1996), *superseded by* FED. R. CRIM. P. 45(b)(2); *Bank of N.S. v. United States*, 487 U.S. 250, 254–55 (1988); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14–16 (1941).

335. See *Carlisle*, 517 U.S. at 424; *Bank of N.S.*, 487 U.S. at 254; *Sibbach*, 312 U.S. at 9–10.

336. 474 U.S. 140, 148 (1985).

337. 487 U.S. at 254.

338. *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.<sup>339</sup>

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.<sup>340</sup> 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.”<sup>341</sup>

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,<sup>342</sup> 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.”<sup>343</sup>

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,<sup>344</sup> and exercised it by making substantial changes to the rules governing civil court procedure,<sup>345</sup>

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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,<sup>346</sup> criminal procedure,<sup>347</sup> and evidence.<sup>348</sup>

## 2. Cases of Congressional Silence

The seminal case dealing with judicial action in the face of congressional silence is *Ex Parte Peterson*, which allowed a federal court to appoint an auditor to help decide the case at the expense of the parties.<sup>349</sup> One of the questions before the Court was whether this appointment was allowable in the absence of express congressional authority.<sup>350</sup> 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.”<sup>351</sup>

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 *Peterson* forward, however, federal courts have acted regularly—some might say too regularly—without congressional authority.<sup>352</sup> Second, even in stating this power, the Court in *Peterson* was at pains to note that Congress retained plenary power to pass a statute regulating or eliminating the judicial power at issue.<sup>353</sup>

The various “supervisory authority” cases generally fit under this category as well. Decided in 1943, *McNabb v. United States* was the first supervisory power case.<sup>354</sup> 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

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Act have now expired. See Carl Tobias, *The Expiration of the Civil Justice Reform Act of 1990*, 59 WASH. & LEE L. REV. 541, 543 (2002).

346. See, e.g., The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 802, 110 Stat. 1321 (codified at 18 U.S.C. § 3626 (2006)) (providing guidelines for prospective and injunctive relief).

347. See H.R. REP. No. 99-422, at 4–5, 38–39 (1985) (addressing rulemaking procedures in conjunction with the Federal Rules of Evidence and Federal Rules of Criminal Procedure).

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

349. See 253 U.S. 300, 314, 317 (1920).

350. *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.”).

351. *Id.*

352. 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).

353. *Ex Parte Peterson*, 253 U.S. at 312.

354. See 318 U.S. 332 (1943), *superseded by statute*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (codified at 18 U.S.C. § 3501(c) (2006 & Supp. IV 2010)); Barrett, *supra* note 4, at 371–72.

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

A break in past practice like *McNabb* does not occur in a vacuum. *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,<sup>360</sup> and statutes did not allow for appeals to the Supreme Court until 1889.<sup>361</sup> However, with the introduction of prohibition and other expansions of federal criminal acts, the number of federal criminal cases quintupled between 1901 and 1932.<sup>362</sup> 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.<sup>363</sup> Justice Louis Brandeis famously opposed these tactics in a series of dissents during the 1920s.<sup>364</sup>

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355. *McNabb*, 318 U.S. at 341, 346–47.

356. See, e.g., *Nardone v. United States*, 302 U.S. 379, 382 (1937) (suppressing evidence gathered in violation of a federal telecommunications law).

357. See Barrett, *supra* note 4, at 371.

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).

359. See 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. *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, *Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513, 1515–16 (2000), and James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1451–59 (2000).

360. See Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf"*, 50 SYRACUSE L. REV. 1317, 1319–20 (2011).

361. Lester B. Orfield, *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).

362. Beale, *supra* note 1, at 1441–42.

363. *Id.* at 1442.

364. See, e.g., *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); *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"),

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*.<sup>365</sup> *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.<sup>366</sup>

In 1934, Congress granted the Court the power to create the Federal Rules of Civil Procedure,<sup>367</sup> which were adopted in 1938.<sup>368</sup> 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.<sup>369</sup> 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,<sup>370</sup> 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.”<sup>371</sup> The last paragraph of the opinion notes that the decision arises out of “respect [for] the policy which underlies Congressional legislation.”<sup>372</sup> *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<sup>373</sup>—which it had just recognized could be changed by Congress in *Funk*<sup>374</sup>—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”).

365. 290 U.S. 371, 381–82 (1933).

366. *Id.* at 381–82.

367. Act of June 19, 1934, ch. 651, 48 Stat. 1064, 1064.

368. Arthur R. Miller, *From Conley to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3 (2010).

369. See George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 694–95 n.3 (1946).

370. 318 U.S. 332, 341 (1943) (stating that “[q]uite apart from the Constitution . . . we are constrained to hold that the evidence elicited from the petitioners . . . here must be excluded”), *superseded by statute*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (codified at 18 U.S.C. § 3501(c) (2006 & Supp. IV 2010)).

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*,<sup>375</sup> which required the government to provide the defendant with written materials from government informants.<sup>376</sup>

In *Palermo v. United States*, the Court upheld the provisions of the Jencks Act.<sup>377</sup> 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.”<sup>378</sup> The Court then described the passage of the Act and briskly affirmed Congress’s power to change the non-constitutional result in *Jencks*.<sup>379</sup> 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.<sup>380</sup> 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.<sup>381</sup> Congress also intended the same section to reverse or substantially limit the decisions in *Miranda v. Arizona*<sup>382</sup> and *Escobedo v. Illinois*.<sup>383</sup>

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.<sup>384</sup> The Court does not even discuss whether

375. 353 U.S. 657 (1957), *superseded by statute*, Jencks Act, Pub. L. No. 85-269, 71 Stat. 595 (codified at 18 U.S.C. § 3500 (2006)).

376. *Jencks*, 353 U.S. at 670–72.

377. 360 U.S. 343, 355 (1959).

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.”).

380. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (codified at 18 U.S.C. § 3501(c) (2006 & Supp. IV 2010)).

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*).

383. 378 U.S. 478, 490–91 (1964), *overruled by* *Stansbury v. California*, 511 U.S. 318, 324–25 (1999); see S. REP. NO. 1097, at 40–52 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2123–38.

384. 129 S. Ct. 1558, 1562 (2009).

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.<sup>385</sup>

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.<sup>386</sup> 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.<sup>387</sup>

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 untrammelled by Congress or that congressional intent to displace inherent authority is unclear.<sup>388</sup>

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.<sup>389</sup> 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.<sup>390</sup> 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.<sup>391</sup>

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385. *Id.* at 1566–67.

386. 530 U.S. 428, 436–38, 433 (2000).

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.<sup>392</sup> 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.”<sup>393</sup>

This decision is ironic for several reasons. First, *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.<sup>394</sup> Thus, in assessing the intent behind Rule 41(b), the Court was actually assessing its own intent.<sup>395</sup> 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.<sup>396</sup> 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.

*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.<sup>397</sup> 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 *Hudson* and *Bollman*, which focused on a constitutionally protected core inherent contempt power,<sup>398</sup> it is *Link* and its progeny that suggest a special constitutional status for inherent powers.

In *Chambers v. NASCO, Inc.*, the Court expanded on *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.”<sup>399</sup> In *Chambers*, a district court sanctioned a party for bad-faith litigation conduct.<sup>400</sup> The court imposed sanctions under its inherent powers, rather than under Rule 11 of the Federal Rules of Civil Procedure or

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392. *Id.* at 630–31.

393. *Id.* at 631–32.

394. See Leslie M. Kelleher, *Taking Substantive Rights (in the Rules Enabling Act) More Seriously*, 74 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); see *supra* note 368 and accompanying text.

395. See *Link*, 370 U.S. at 630 (rejecting the petitioner’s interpretation of the Rule’s purpose).

396. See *supra* note 368 and accompanying text.

397. *Link*, 370 U.S. at 631–32.

398. See *supra* notes 201–05 and accompanying text.

399. 501 U.S. 32, 47 (1991) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)).

400. *Id.* at 35.



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.<sup>401</sup>

The Supreme Court affirmed, finding that neither Rule 11 nor § 1927 was intended to displace the court's traditional inherent powers to sanction.<sup>402</sup> 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.<sup>403</sup>

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.<sup>404</sup>

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

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401. *Id.* at 41–42.

402. *Id.* at 47–49.

403. *Id.* at 50.

404. *Id.*

405. See *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 138–39, 142 (W.D. La. 1989), *aff'd*, 894 F.3d 696 (5th Cir. 1990), *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.<sup>406</sup> The Court augments this holding by finding, as it did in *Link* and other cases, that the rules and statutes were not intended to displace the existing inherent powers of courts, but to supplement them.<sup>407</sup>

In *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.<sup>408</sup> *Gulf Oil* is also an inherent-powers case that resulted in congressional action.<sup>409</sup> Months after the case, Congress passed 28 U.S.C. § 1404, which explicitly allowed transfers between federal districts.<sup>410</sup>

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.<sup>411</sup>

### 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

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).

*Chambers*, 501 U.S. at 62 (Kennedy, J., dissenting).

406. *See id.* at 50 (majority opinion).

407. *See id.* at 47–49; *see also* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 758, 767 (1980) (upholding a court's inherent power to assess attorneys' fees against opposing counsel in cases of bad faith, despite the existence of 28 U.S.C. § 1927), *superseded by statute*, Antitrust Procedural Improvement Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156.

408. 330 U.S. 501, 506–07 (1947), *superseded by statute*, Act of June 25, 1938, ch. 646, 62 Stat. 869, 937 (codified as amended at 28 U.S.C. § 1404(a) (2006)), *as recognized in* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721–22 (1996).

409. *See Lear*, *supra* note 8, at 1148–49 (explaining the court's use of inherent power regarding venue in *Gulf Oil* and Congress's quick response to amend the statute only months later).

410. *See* Act of June 25, 1938, ch. 646.

411. *See* Samuel P. Jordan, *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).

courts in this area is notable.<sup>412</sup> Some state supreme courts have applied a much more muscular inherent-powers doctrine.<sup>413</sup> State supreme courts have used this power to repeatedly overturn legislative acts, especially if such acts affect the regulation of lawyers.<sup>414</sup> 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 *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>415</sup> 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.<sup>416</sup>

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."<sup>417</sup> 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."<sup>418</sup> In these interstices, presidential authority can derive support from "congressional inertia, indifference or quiescence."<sup>419</sup> 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

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412. See Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. 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).

413. See *id.*

414. See Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 361–62 (1998).

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

416. See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

417. *Id.* at 635.

418. *Id.* at 637.

419. *Id.*

executive action “only by disabling the Congress from acting upon the subject.”<sup>420</sup>

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.<sup>421</sup> 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.”<sup>422</sup> However, when the President acts in the face of congressional authority, he has only a limited set of powers,<sup>423</sup> analogous to the pure judicial power of deciding cases.<sup>424</sup>

#### 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.”<sup>425</sup> 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.”<sup>426</sup>

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420. *Id.* at 637–38.

421. *See, e.g.*, *Medellin v. Texas*, 128 S. Ct. 1346, 1367–698 (2008) (applying the Jackson test); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (applying the Jackson test), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36.

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.

425. *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 390–91 (7th Cir. 2002).

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),<sup>427</sup> which explicitly stripped federal courts of the power to remand cases to the Bureau of Immigration Appeals for the taking of additional evidence.<sup>428</sup> In *Lin*, the Second Circuit did exactly what § 1252(a) barred: it remanded an immigration appeal.<sup>429</sup> 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).<sup>430</sup> In dicta, 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.<sup>431</sup>

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does not license it to ignore an otherwise valid existing jury plan or to bypass the mechanism provided by statute to alter such plan.”); *Atchison, Topeka & Santa Fe Ry. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998) (rejecting a district court’s dismissal of an action as inconsistent with the Federal Rules and “join[ing] other circuits in holding that district courts have inherent power to control their dockets, but not when its exercise would nullify the procedural choices reserved to parties under the federal rules”); *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991) (“The supervisory power simply does not give the courts the authority to make up the rules as they go, imposing limits on the executive according to whim or will.”).

427. 473 F.3d 48, 52 (2d Cir. 2007).

428. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 306, 8 U.S.C. § 1252(a)(1) (2006).

429. *Lin*, 473 F.3d at 54–55.

430. See 8 U.S.C. § 1252(a)(1).

431. *Lin*, 473 F.3d at 53. Asserting a broad power, the court stated:

We do not necessarily construe Congress’s decision to deprive parties of the § 2347(c) mechanism as indication that Congress also intended to take away our inherent power to remand. If Congress had intended to prohibit us from remanding for consideration of new evidence in all instances, it could have done so much more clearly. Instead, IIRIRA by its terms foreclosed only the use of the § 2347(c) procedural mechanism under which we could remand on motion of a party. As we have recently stated, “we do not lightly assume that Congress has intended to depart from established principles such as the scope of a court’s inherent power.” *Armstrong v. Guccione*, 470 F.3d 89, 102 (2d Cir.2006) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991)). Rather, before we will conclude that Congress intended to deprive us of our inherent powers, we require “something akin to a clear indication of legislative intent.” *Id.* Moreover, when Congress establishes a procedure to limit or cabin our power to take an action in one context that we previously could perform in the exercise of our inherent powers, we do not presume that Congress intended to eliminate our inherent power to accomplish that result.

*Id.* The Second Circuit has since cast doubt upon this discussion, and other circuits have likewise declined to follow it. See *Ni v. Gonzales*, 494 F.3d 260, 261–62 (2d Cir. 2007); see also *Jiang v.*

*Sahyers v. Prugh, Holliday & Karatinos, P.L.* echoed the reasoning in *Lin*.<sup>432</sup> Plaintiff Sahyers, a paralegal, claimed unpaid overtime and other violations of the Fair Labor Standards Act (FLSA) of 1938.<sup>433</sup> After a somewhat contentious discovery period, the defendants offered the plaintiff a \$3500 judgment under Federal Rule of Civil Procedure 68.<sup>434</sup> After accepting the judgment, the plaintiff filed for attorney's fees under the FLSA's mandatory fee provision.<sup>435</sup>

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.<sup>436</sup> Like *Lin*, *Sahyers* involved a federal court disregarding statutory language and rendering its decision based on inherent powers.<sup>437</sup> The FLSA's fee provision is mandatory and contains no exception for lawyer collegiality.<sup>438</sup> The *Sahyers* court evaded the statutory language, stating,

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.<sup>439</sup>

*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.<sup>440</sup> *Lin* and *Sahyers*

Att'y Gen. of U.S., 324 F. App'x. 196, 198 n.4 (3d Cir. 2009); *Lin v. Mukasey*, 303 F. App'x. 465, 468 (9th Cir. 2008).

432. *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1244–45 (11th Cir. 2009). Please note that I advised plaintiff's counsel in this case on a pro bono basis and also helped pro bono on the petition for certiorari to the U.S. Supreme Court.

433. *Id.* at 1243.

434. *Id.*

435. *Id.*

436. *Id.* at 1244.

437. *Id.* at 1245.

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 FLSA, among other statutes, employs mandatory, rather than permissive, language with regard to awards of attorney fees).

439. *Sahyers*, 560 F.3d at 1245 n.6.

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.<sup>441</sup>

#### 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.<sup>442</sup>

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.<sup>443</sup> 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 *Lin*<sup>444</sup> should not be followed. Any generally applicable statute or rule should trump a court’s inherent powers.

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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.

