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

Benjamin H. Barton¹

A proper understanding of the nature of the inherent powers begins with separating whether the judiciary has any constitutional power to overrule Congress from the judiciary's power to act in the absence of congressional action, i.e. in the interstices of federal statutes and rules. Separating out these two very different types of powers helps clarify that the inherent powers of federal courts are actually both broader and shallower than have been previously thought: Congress has near plenary authority in this area, but the courts have a great deal of leeway to act when Congress has not.

An examination of the history and text of the Constitution, the ratification debates, and the earliest cases establishes that it is Article I's necessary and proper clause, not Article III's "judicial power" or "courts," which controls any inherent judicial authority. As such, Congress has near plenary authority over the structure and procedure of the federal courts.

With the power of Congress in mind, however, the judiciary has substantial authority to act when Congress has not. The Framers created a remarkably flexible judicial branch based upon the way common law courts operated in the late-18th century. Those courts regularly acted in the absence of legislative authority in a multitude of ways, bound by the common law and current practice, but not by legislative silence. Thus, as long as a federal court's use of the inherent power has not been foreclosed by an existing Act of Congress and is reflective of the judicial power – i.e. helpful to the deciding of cases – courts are empowered to act, as long as they understand that Congress can always fix what it does not like.

This analysis also best explains what courts have done since the framing. While the Supreme Court has repeatedly claimed an inherent power strong enough to invalidate a congressional act in dicta, it has never actually invalidated one, even in situations where Congress has substantially impinged upon traditional areas of inherent power like rule making or contempt. This understanding of congressional and judicial power thus offers an elegant solution to the thorny problem of inherent powers and squares the circle by fitting a unified theory to the history, language and structure of the Constitution and the more modern, pro-judiciary case law.

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The nature of the inherent powers of federal courts² – whether they are constitutional or not, whether Congress can curtail some or all of them, and how far they extend – have bedeviled courts and commentators for years. The Supreme Court, for example, has offered remarkably different versions of congressional authority in this area, occasionally in the same case.³ Sometimes the Court seems remarkably quiescent, suggesting that Congress’ authority is superior. In *Bank of Nova Scotia v. United States*,⁴ the Court held that a federal judge could not disregard an otherwise valid Rule of Criminal Procedure pursuant to its inherent powers: “[i]t 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

² Since *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) the Supreme Court has stated that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.” *Id.* at 34. *Hudson*’s 1812 list of these powers includes the powers to “fine for contempt – imprison for contumacy – [and] inforce [sic] the observance of order.” *Id.*

Chambers v. NASCO, 501 U.S. 32 (1991) has a more recent and complete list: 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”; “to fashion an appropriate sanction for conduct which abuses the judicial process”; and “to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties.” *Id.* at 43-45. Some other examples include the dismissal of a criminal appeal when the defendant became a fugitive, *Smith v. United States*, 94 U.S. 97, 97 (1876), or the power to appoint an auditor or other expert when necessary. *In re Peterson*, 253 U.S. 300, 310-13 (1920). The various “supervisory power” cases, *see, e.g.*, *McNabb v. United States*, 318 U.S. 332 (1943), are also best understood as inherent power cases. *See* 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, 1468-78 (1984); Judith A. McMorro, *The (F)utility of Rules: Regulating Attorney Conduct In Federal Court Practice*, 58 S.M.U. L. Rev. 3, 20 (2004) (“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.”).

³ *See, e.g.*, *Chambers*, 501 U.S. at 43-47 (stating both that the “exercise of the inherent power of lower federal courts can be limited by statute and rule, for these courts were created by act of Congress” and 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”).

⁴ 487 U.S. 250 (1988).

Rule's mandate than they do to disregard constitutional or statutory provisions.”⁵ The Court has been even more explicit in the various “supervisory power” cases:⁶ “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.”⁷

Elsewhere the Court has adopted a more muscular stance, noting that while the contempt power “may be regulated within limits not precisely defined,” it can “neither be abrogated nor rendered practically inoperative.”⁸ The Court has also held that it will not “lightly assume” that a congressional Act displaces a court's inherent power.⁹ These cases suggest that there are core constitutional inherent powers that Congress cannot abrogate and that Congress may face some sort of “plain statement” rule in order to legislate in the area of inherent powers.

Nor has the Court been clear about the exact boundaries of these powers. The Court has repeatedly suggested that courts should exercise “restraint and discretion”¹⁰ and that inherent powers are powers that are “necessary to the

⁵ *Id.* at 255. For other examples, see *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.”) and *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.”).

⁶ These cases are discussed at greater length *infra* notes __ 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).

⁷ *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

⁸ *Michaelson v. United States*, 266 U.S. 42, 66 (1924).

⁹ *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *see also 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.”).

¹⁰ *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (“Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”); *Degen*, 517 U.S. at 823-24 (“The extent of these powers must be delimited with care, for there is a danger of overreaching when

exercise of all others.”¹¹ Nevertheless, even a cursory review of the cases establishes that these powers clearly reach beyond what is strictly “necessary” into many applications that are merely helpful.¹²

The scholarship has likewise proven turbid. Some recent scholarship has argued that inherent powers should be limited to strict necessity and should be constitutionally based. For example, Robert Pushaw divided inherent powers into constitutionally based “implied indispensable” powers that Congress cannot impair or destroy and “beneficial” powers, which cannot be exercised without congressional approval.¹³ William Van Alstyne,¹⁴ Elizabeth Lear,¹⁵ Sara Beale¹⁶ and Amy Barrett¹⁷ have reached various, but similar conclusions.

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.”).

¹¹ *Chambers*, 501 U.S. at 43; *see also* *Young v. United States*, 481 U.S. 787, 819 (1987); *Cheff v. Schnackenberg*, 384 U.S. 373, 392 (1966).

¹² *See, e.g.*, Amy Cohen Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 879-82 (2008); Joseph J. Anclien, *The Broader the Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 44-51 (2008).

¹³ Robert J. Pushaw, *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 847-48 (2001). Beneficial inherent powers “are helpful, useful or convenient in implementing Article III.” While Pushaw considers the creation and exercise of these powers as 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, 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 William W. Van Alstyne, *The Role of Congress in Determining the 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 Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1162-63 (2006) (discussing inherent power and forum non conveniens and following Pushaw’s basic premise).

¹⁶ Beale, *supra* note __, at 1520-22 (arguing that a sub-species of inherent power, the “supervisory power” over federal criminal cases, has been applied over-broadly and should be limited to specific constitutional or statutory bases).

¹⁷ Barrett, *supra* note __, at 817-20 (arguing that courts have a common law power to make procedural law and that some of that power is constitutional and cannot be overridden by Congress).

In comparison, some commentators have argued for a much stronger version of constitutional inherent authority, in which the judiciary has substantially more power than Congress in the area. Linda Mullenix has argued that congressional involvement in judicial rule making is an unconstitutional incursion into judicial inherent power.¹⁸ David Engdahl has argued that Congress may not pass legislation “subverting” the judiciary and that the judiciary itself should make this determination: “the judicial branch must decide for itself whether any act of Congress regarding the judicial branch actually does help effectuate the judicial power” and if it does not, the court should overturn the law.¹⁹ In short, there is substantial scholarly consensus that a strong, constitutionally based inherent power exists as a potential check on congressional action.²⁰

A proper understanding of the nature of the inherent powers begins by distinguishing two questions: 1) whether the judiciary has any constitutional power to overrule Congress, and 2) can the judiciary act in the absence of congressional approval, i.e. in the interstices of federal statutes and rules. Separating these two very different types of powers helps clarify that the inherent powers of federal

¹⁸ Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1287-88 (1993). Similarly, Daniel Meador extrapolated an “inherent judicial authority [that] is broad indeed” from an understanding of English courts at the time of the framing of Article III. Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805-07 (1995). Michael Martin has argued that the judiciary has constitutional control over some rules of evidence under the inherent powers doctrine, see Michael M. Martin, *Inherent Judicial Power: Flexibility Congress did not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 179-80 (1979).

¹⁹ David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 164 (1999) (“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 that the necessary and proper clause of Article I is the correct constitutional control on Congress’ power in this area. *Id.* at 90-104. Nevertheless, he disagrees with this Article that courts must apply the traditional, and much looser, “reasonable basis” test under the necessary and proper clause and argues for more muscular and far reaching review. *Id.* at 164-75.

²⁰ See Barrett, *supra* note ___, at 833-35 (discussing the boundaries of this consensus).

courts are actually both broader and shallower than have been previously thought: Congress has near plenary authority in this area, but the courts have a great deal of leeway to act when Congress has not.

An examination of the history and text of the Constitution, the ratification debates, and the earliest cases establishes that it is Article I's necessary and proper clause, not Article III's "judicial power" or "courts," which controls any inherent judicial authority. As such, Congress has near plenary authority over the structure and procedure of the federal courts. This understanding is at odds with the existing scholarship, which has generally argued 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.²¹

With the power of Congress in mind, however, the judiciary has substantial authority to act when Congress has not. This Article establishes this authority by again examining the historical record and the nature and structure of courts and "judicial power" at the time of the framing. The Framers of the Constitution created a remarkably flexible judicial branch based upon the way common law courts operated in the late-18th century. Those courts regularly acted in the absence of legislative authority in a multitude of ways, bound by the common law and current practice, but not by legislative silence. Thus, as long as a federal court's use of the inherent power has not been foreclosed by an existing Act of Congress and is

²¹ See, e.g., Pushaw, *supra*, note __, at 847-48 (describing this constitutionally protected area as the "implied indispensable" powers); Barrett, *supra* note __, at 844-45 (2008) (arguing that "there are some – albeit few – procedural matters that are entirely beyond congressional regulation"); Lear, *supra* note __, at 1162-63 (discussing inherent power and forum non conveniens and describing a core inherent authority that cannot be abrogated by Congress).

reflective of the judicial power – i.e. helpful to the deciding of cases – courts are empowered to act, as long as they understand that Congress can always fix what it does not like. Again, the bulk of the scholarship in the area argues against such a broad reading of these powers.²²

Thus, the constitutional protections of the judicial inherent powers are narrow indeed, but the judiciary’s non-constitutional gap-filling power is quite broad. This understanding of the inherent powers of federal courts best fits the history and purpose of the Constitution. This analysis also best explains what courts have done since the framing. While the Supreme Court has repeatedly claimed an inherent power strong enough to invalidate a congressional act in dicta, it has *never* actually invalidated one, even in situations where Congress has substantially impinged upon traditional areas of inherent power like rule making or contempt.²³ As for the breadth of the interstitial powers, the Court has approved a dizzying array of uses of the inherent power in areas of congressional silence, frequently explicitly noting Congress’ power to overrule these decisions if Congress so chooses.²⁴

This understanding of congressional and judicial power 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

²² See, e.g., Van Alstyne, *supra* note __, at 122-29; Beale, *supra* note __, at 1520-22 (arguing that a sub-species of inherent power, the “supervisory power” over federal criminal cases, has been applied over-broadly and should be limited to specific constitutional or statutory bases); Barrett, *supra* note __, at 387 (arguing that the Supreme Court likely lacks constitutional authority to impose supervisory rules on lower courts because the Article III terms “supreme” and “inferior” were meant to bind Congress, not empower the Supreme Court).

²³ See Section IV.A.1 *infra*.

²⁴ See *infra* notes __ and accompanying text.

to the existence of the courts.²⁵ This means that any inherent powers theory must either find a constitutional basis for these actions or must conclude that they are all unconstitutional judicial overreaching. Likewise, any inherent powers theory that claims a strong constitutional inherent power that can overrule congressional action must explain away some critical constitutional language. Article I's necessary and proper clause explicitly grants Congress the power to "make all laws which shall be necessary and proper for carrying into execution" the powers vested in the Judiciary. Article III's inferior courts clause likewise grants Congress the power to establish (or not establish), design, add to, subtract from, or disestablish the lower federal judiciary. Taken together, these clauses (as well as Congress' great power over the structure and nature of the Supreme Court) leave little room for judicial hegemony over inherent authority.

This is not to say that Congress is utterly unbound. Two boundaries exist. First, there is a "pure judicial power" – the power to render a final decision after applying the law to the facts – which Congress cannot trample.²⁶ So neither Congress nor the executive can interfere with adjudication itself. For example, in *Hayburn's Case*²⁷ the Court struck down a federal statute that allowed the Secretary of War and Congress to review circuit judge decisions in pension cases for disabled

²⁵ See *infra* notes ___ and accompanying text.

²⁶ Pushaw, *supra* note ___, at 843-67; see also Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 415-27 (1996). James Liebman and William Ryan canvassed the drafting history of Article III and Supreme Court case law and stated the following "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).

²⁷ 2 U.S. (2 Dall.) 408 (1792).

veterans.²⁸ The statute's interference with the finality of judicial decision as well as the granting of essentially appellate jurisdiction to non-Article III courts was unconstitutional.²⁹

The necessary and proper clause itself is the second boundary to Congressional power. Thus, Congress could not pass a law that makes it impossible for the judiciary to do its work. Nevertheless, this boundary 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,³⁰ this boundary offers Congress very broad authority over the judiciary in the area of court structure and procedure.

This resolution thus squares the circle: under Article I Congress has near plenary constitutional and legislative authority, but courts retain broad authority to act where Congress has not. The Article proceeds as follows. Part I canvasses the language and structure of the Constitution, the framing of the Constitution, the early statutory structure and the early case law and argues that Congress has near plenary power over court processes and procedure. Part II canvasses the same sources to argue that federal courts retained 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

²⁸ *Id.* at 410 n. d. For a more recent example, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

²⁹ *Hayburn's Case*, 2 U.S. (2 Dall.) at 410 n. d. Interestingly, in *Hayburn* 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.* This quote echoes multiple other contemporary Supreme Court cases recognizing Congress' power in this area. See *infra* notes ___ and accompanying text.

³⁰ See *infra* notes ___ and accompanying text.

understanding of inherent powers snugly fits the existing inherent powers case law. The Article concludes by noting that courts should better recognize Congress' superior power in this area and adjust their inherent powers language accordingly.

I. CONGRESS' PLENARY ARTICLE I POWER

The key to understanding the inherent power of the courts is to recognize that Article I's "necessary and proper" clause grants Congress near plenary power over court process and structure. The language, structure and history of the Constitution, while not unequivocal, more clearly support the view that Congress has full power to create, design and regulate the federal judiciary, especially for the lower federal courts.³¹ This Part starts with the language and structure of the Constitution, and then turns to the framing, the ratification debates, the early statutory scheme and the early case law. These sources confirm Congress' near plenary power over the areas traditionally covered by the inherent powers doctrine.

A. *The Language and Structure of the Constitution*

The natural starting place is the language and structure of the Constitution itself. One of the principle constitutional innovations was the concept of a federal government of limited and enumerated powers.³² If a branch of the federal government claims any power, that power must be rooted in the language of the

³¹ The Supreme Court is on a somewhat different footing, because it is the only federal court required by the Constitution. See U.S. CONST. art. III, § 1; *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 510-11 (1873) (noting that Congress can unquestionably restrict the contempt power for lower courts because "[t]hese courts were created by act of Congress," but 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 language, structure and history of the Constitution suggest substantial congressional control over the Supreme Court as well. See *infra* Section I.A-I.E.

³² 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.").

Constitution itself; there are no general or universal powers in the federal government.³³ Over the years all three branches of the federal government have successfully claimed various “implied” powers, but these powers must be incidental to an enumerated power.³⁴

Thus, if the federal courts have any “inherent powers,” the Constitution must explicitly or implicitly grant the power in either Article I or Article III. Two clauses in Article I apply to the question of inherent powers. The necessary and proper clause grants Congress the power “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.”³⁵ The inferior tribunals clause grants Congress the power “To constitute tribunals inferior to the Supreme Court.”³⁶

Article III discusses “the judicial power” in regard to “courts” twice. In Article III, Section 1: “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”³⁷ and again in Section 2:

³³ THE FEDERALIST NO. 14, at 102 (James Madison) (Willmore Kendall and Geroge 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* note ___, 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.”); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) (Marshall, C.J.) (“[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.”).

³⁴ For an excellent and mercifully brief account of the implied powers doctrine, see William W. Van Alstyne, *Implied Powers*, in 2 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 964-65 (Leonard W. Levy et al. eds., 1986).

³⁵ U.S. CONST. art. I, § 8.

³⁶ *Id.*

³⁷ U.S. CONST. art. III, § 1.

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.³⁸

Article III is thus silent on any inherent powers for the federal judiciary.

Article I, however, is not silent. The necessary and proper clause explicitly grants Congress the authority to “make *all* laws which shall be necessary and proper for carrying into execution the foregoing powers.”³⁹ Article I, Section 8 leaves little room for the judiciary (or any other part of the government) to claim any inherent authority that is superior to Congress’. As we shall see below, this does not mean that the courts can never act in the absence of congressional approval. It does, however, mean that Congress has the power to make laws “necessary and proper” to the exercise of the judicial power and that it is facially inconsistent with Article I to suggest that Article III grants any federal court an inherent power superior to Congress’. As long as congressional action passes the low “necessary and proper” bar, Congress has plenary Article I authority to pass the laws it pleases. Without any examination of the statements of the Framers or the early case law, the idea of a strong constitutional judicial inherent power runs immediately aground of the necessary and proper clause.

This seems especially true given Article III’s description of the “judicial power.” First, unlike the legislative or executive power, the judicial power is thinly

³⁸ U.S. CONST. art. III, § 2.

³⁹ U.S. CONST. art. I, § 8 (emphasis added).

described.⁴⁰ There is a quite explicit description of jurisdiction, i.e. which cases are subject to the “judicial power,” but the parameters of the power itself, how it is to be exercised and by whom is largely undefined. In light of the necessary and proper clause’s broad grant of power to Congress, the silence in Article III strongly suggests that Congress has plenary Article I power over the nature, shape and reach of the federal judiciary. Article III does require the creation of a Supreme Court of some size, shape and nature, but outside of that Court’s mandatory jurisdiction the Constitution leaves everything else to Congress.⁴¹

Congress has particularly far reaching power over the lower federal courts, as Congress has an explicit power to create, or choose not to create, any inferior courts. 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*.”⁴² From a modern perspective there are several remarkable aspects of this power. It is hard to imagine now given the size and nature of the federal judiciary, but Congress could have chosen to create only the Supreme Court and could have left all federal jurisdiction (other than the Supreme Court’s original jurisdiction and possibly their appellate jurisdiction) to the state courts.

Further, this power of creation does not assume that Congress will institute a federal judiciary and be finished: Congress is explicitly empowered to “ordain and establish” inferior courts “from time to time.” The clear implication of this clause is

⁴⁰ Compare U.S. CONST. art. III with U.S. CONST. art I and U.S. CONST. art II.

⁴¹ U.S. CONST. art. III is silent on virtually all logistical aspects of the Court. The Judiciary Act of 1789, ch. 20, 1 Stat. 73 and the Process Act of 1789, ch. 21, 1 Stat. 93 certainly also reflect Congress’ plenary power to create and shape the Supreme Court.

⁴² U.S. CONST. art. III, § 1 (emphasis added).

that Congress is expected to add (and subtract) from the inferior courts over time and suggests a congressional power to explore and even experiment. The “time to time” language also means that Congress has the power to dismantle the lower federal judiciary altogether (although any displaced Article III judges might still need to be compensated).⁴³

Based on this reading of Article I and Article III the notion of a strong constitutional inherent power in the federal courts is somewhat puzzling. Courts and commentators have found such a power by appealing to the words “judicial power” or “courts” in Article III.⁴⁴ Under this argument the use of the words “judicial power” and “courts” in Article III naturally includes some idea of what a “court” vested with the “judicial power” looks like, and any such court must include those necessary to the exercise of all others. In *United States v. Hudson*, the Court first expressed a version of this argument: “Certain 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.”⁴⁵

This argument involves two separate steps and one does not necessarily require the other. It can be true that courts “no doubt possess powers not immediately derived from statute,” but not true that these powers “cannot be

⁴³ Of course, even paying the displaced judges is not guaranteed. At the turn of the nineteenth century in a partisan struggle between the federalist and republican parties, 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* 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).

⁴⁴ Robert Pushaw has written the definitive version of this argument. See Pushaw, *supra* note __, at 741; see also Barrett, *supra* note __, at 843-44; Anclien, *supra* note __, at 42-43.

⁴⁵ *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

dispensed with in a Court” or that such powers are constitutionally based and superior to Congress’ power. As argued below in Part II, it is hard to imagine that the Framers meant to limit the activities and powers of courts to only those explicitly enumerated by Congress.

Nevertheless, that interstitial power need not be constitutionally superior to Congress’. Remember that a strong constitutional inherent power necessarily means that the judiciary’s power over procedure and court structure outweighs congressional power. This argument either ignores or elides the Article I power to “make all laws which shall be necessary and proper for carrying into execution” the judicial power, and Congress’ absolute right to create, disestablish, add or subtract from the lower judiciary (and the power to design the Supreme Court). This argument also proceeds without the benefit of any plain statement of judicial power over procedure or contempt in either Article I or III.

Any implied constitutional power must piggyback on an enumerated power without eviscerating any other enumerated power. The difficulty with implying a strong inherent power is that the words “judicial power” and “courts” cannot imply a power superior to Congress’ explicitly granted Article I power. Moreover, in addition to the language of the Constitution itself, the words of the Framers, the early case law and the first acts of Congress all support the opposite conclusion.

B. *The Framing of the Constitution*

There is nothing in the history of Article I and Article III that explicitly answers the question of the nature (or even the existence) of federal court inherent powers, but there is much in the periphery to support congressional control over

court processes. The various commentators who have looked at the question of inherent powers have reached different conclusions, but generally agree on one point: “Records of the Constitutional Convention and discussions at the time of ratification do not help define the judicial power of the federal courts.”⁴⁶ Inherent powers are never mentioned or discussed. As per usual, there are two narratives to draw from the silence of the Constitution and the debates of the Framers.

One possibility is that the Framers knew what a “court” was and also what the “judicial power” was without any need for particular discussion or clarification. Thus, whatever they had in mind at that time is what controls and the best description of a “court” utilizing the “judicial power” in 1787 would have included some inherent authority.⁴⁷

The more plausible explanation, however, is that the Framers did not spend much time on the nature or structure of the federal courts because they fully expected Congress to handle it. This explanation best fits the historical and textual materials. If there is a single notable feature of the debates over Article III it is how little time was spent thinking about the nuts and bolts of court procedure or structure and how clearly Congress was left with the authority to answer these questions. Perhaps the best example was the decision to leave it fully within

⁴⁶ Martin, *supra* note __, at 180; see also Felix Frankfurter & James M. Landis, *Power of Congress Over Criminal Procedure in Criminal Contempts in ‘Inferior’ Federal Courts – A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1017-18 (noting that “the Constitution has prescribed very little in determining the content, and guiding the exercise, of judicial power”); Pushaw, *supra* note __, 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 to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 765-67 (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.”).

⁴⁷ See Anclien, *supra* note __, at 53-59.

Congress' power to choose whether or not to create a federal judiciary outside of the Supreme Court at all.

The constitutional convention of 1787 was called to remedy perceived defects in the Articles of Confederation. Among these defects was the lack of a unified federal judiciary.⁴⁸ The Articles of Confederation provided for courts of very limited jurisdiction and did not guarantee judicial salary or longevity.⁴⁹ The legislature, not the courts, had final appellate authority in all of these cases,⁵⁰ so what federal judiciary existed was weak and subject to plenary legislative control, even in the core judicial area of deciding cases.

It was against this backdrop that the Framers of the Constitution considered the creation of an independent federal judiciary. All of the preliminary plans for the structure of the new government included a national judiciary, to be created by Congress, consisting of a supreme tribunal and one or more inferior tribunals.⁵¹ None of these proposals included substantial details as to the size, nature, or procedures of these potential courts. These details were to be worked out by Congress when it created these various courts.⁵²

The fact that none of the various drafts of the Constitution included any particular attention to procedure or inherent powers, but all empowered Congress to create and design the new judiciary, alone suggests an answer to the question of inherent authority. From the outset, Congress was to be the creator and designer of

⁴⁸ See JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 275 (2003).

⁴⁹ ARTICLES OF CONFEDERATION OF 1781, art. IX.

⁵⁰ *Id.*

⁵¹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21-22, 95, 104-05 (Max Farrand ed., 1911) (hereinafter FARRAND).

⁵² *Id.*

the federal judiciary. The development of the eventual, final language 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. The delegates disagreed over whether inferior federal courts were necessary at all. James Madison's notes from June 5, 1787 include the following:

Mr. Rutledge having 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.⁵³

Madison responded that eliminating the requirement for inferior federal tribunals would have a number of logistical problems, including appeals "multiplied to a most oppressive degree" and the difficulty of remedying "improper" or "biased" state verdicts with new trials at the Supreme Court.⁵⁴ He argued that an "effective judiciary establishment commensurate to the legislative authority was essential" and that a "Government without a proper Executive and Judiciary would be the mere trunk of a body without arms or legs to act or move."⁵⁵

Nevertheless, the motion to strike out the reference to inferior tribunals carried by a very close vote.⁵⁶ Madison then sought a compromise. During the

⁵³ *Id.* at 124.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ The vote was 5 for the motion, 4 against and 2 state delegations divided. *Id.* at 125.

earlier debate 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.”⁵⁷ Madison suggested that the stricken inferior tribunals clause could be replaced with a motion that “the National Legislature be empowered to appoint inferior tribunals.”⁵⁸ 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.”⁵⁹ This change was accepted by a wide margin.⁶⁰

The debate over inferior federal tribunals arose again on July 18, 1787 while the delegates met as a whole. Opponents of inferior federal courts argued that the state courts could handle these cases in the first instance and that inferior federal courts would “create jealousies” with state courts.⁶¹ 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 uniformity.⁶² Despite the debate, Madison’s notes show that the resolution allowing the national legislature to

⁵⁷ *Id.*

⁵⁸ *Id.* at 118. Yates’ journal for June 5th states the same. *Id.* at 127. Madison’s journal substitutes “institute” for “appoint,” *id.* at 125, but the other records, including Madison’s own journal notes from June 13th use “appoint.” *Id.* at 237. For more details, 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).

⁵⁹ 1 FARRAND, *supra* note ___, at 125.

⁶⁰ *Id.*

⁶¹ 2 *Id.* at 45-46.

⁶² 2 *Id.* at 46.

appoint (or not appoint) inferior tribunals passed “nemine contradicente,” or unanimously.⁶³

2. From “Appoint” to “Establish,” to “Constitute,” and Finally to “Ordain and Establish”

Later word changes to Article III further support this reading. The language allowing the creation of inferior federal courts first changed from “appoint,” to “establish,” and then to “constitute,” and finally to “ordain and establish.” Each of these word changes suggests increased congressional power. The first few iterations of the Madisonian compromise stated that the “national legislature be empowered to appoint inferior tribunals.”⁶⁴ When the drafting was moved to the Committee of Detail most of the early documents again use the word “appoint,” although the word “establish” appears for the first time.⁶⁵

By the time the draft Constitution left the Committee of Detail, however, “appoint” had been replaced by “constitute” and the language begins to closely resemble the final draft: “The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as shall, from time to time, be constituted by the legislature of the United States.”⁶⁶ The addition of “time to time” and the change to “constitute” suggests a more robust congressional role in creating and managing the inferior courts.

⁶³ *Id.* Madison’s notes actually use the contraction, “nem. con.” For a definition of nem. con., see *infra* note __ and accompanying text.

⁶⁴ 1 FARRAND, *supra* note __, at 118, 127, 237; 2 *Id.* 38-39,

⁶⁵ 2 *Id.* at 133, 144 (“appoint”); 2 *Id.* at 146 (“appoint” scratched out and replaced by “establish”).

⁶⁶ 2 *Id.* at 172.

The Committee on Style later settled on the final text of Article III by changing “constitute” to “ordain and establish.”⁶⁷ Article I’s grant of legislative power remained “constitute.” Article I, Section 8 states that Congress has the power to “*constitute* tribunals inferior to the Supreme Court.”⁶⁸

The change from “appoint” to another verb is quite telling. “Appoint” does not suggest much power over formation or design, whereas “establish,” “constitute,” or “ordain” all suggest a much broader power. This is especially so because the word “appoint” may have suggested a congressional power to “appoint” state courts to hear federal matters, as had been common under the Articles of Confederation.⁶⁹ The Articles of Confederation used the term “appoint” for “courts for the trial of piracies and felonies committed on the high seas” and the term “establish” for “courts for receiving and determining finally appeals in all cases of captures.”⁷⁰

Consistent with these different terms, the Continental Congress “appointed” state courts to hear the trial of piracy and felonies on the high seas⁷¹ and “established”/designed a new court of appeals for cases of capture from scratch.⁷² Thus, the Framers may well have understood the power to “appoint” as quite narrow and may not have suggested any independent lower federal judiciary at all. Thus, the replacement of “appoint” with “constitute” or “establish” describes a

⁶⁷ Compare 2 *Id.* at 186 (using “constitute”) with 2 *Id.* at 600 (“ordain and establish”).

⁶⁸ U.S. CONST. art. I, § 8 (emphasis added).

⁶⁹ See GOEBEL, *supra* note __, at 212.

⁷⁰ See ARTICLES OF CONFEDERATION OF 1781, art. IX (Congress has 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”).

⁷¹ GOEBEL, *supra* note __, at 173.

⁷² *Id.* at 167-78.

significant change in congressional authority and the nature of the potential inferior federal courts.

There is no discussion of the change in the text from “constitute” to “ordain and establish,” but that change likewise signals significant congressional power over the inferior courts. The use of two words instead of one and the use of “ordain” in conjunction with “establish” are quite telling. At the time of the Constitutional Convention one of the meanings of “constitute” was to establish an institution.⁷³ Thus, in 1787 establish and constitute had similar meanings when it came to institutions.

“Ordain,” however, suggests a much broader power and purpose. Four contemporary state constitutions used “ordain” in conjunction with the creation of the state constitution or the state itself, often with explicitly religious language.⁷⁴ In describing the meaning of the change from “constitute” to “ordain and establish,” Julius Goebel has called the latter phrase “words of fiat.”⁷⁵

There are four likely implications of this word change. First, the Committee on Style presumably changed one word to two in an effort to expand upon what the Constitution means when it describes the potential creation of inferior federal courts. Second, these two words were meant to express something different than “constitute” alone would have (or does in Article I). Third, “ordain,” suggests an

⁷³ 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY 488 (Oxford University Press 1993). The OED dates the origination of this meaning of “constitute” to the mid-sixteenth century and later.

⁷⁴ See Ma. Const. preamble (1780) (“devoutly 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”); Pa. Const. preamble (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. preamble (1776) (“ordain and declare”); N.Y. Const. art. I & II (1777) (“ordain, determine, and declare”).

⁷⁵ GOEBEL, *supra* note ___, at 247.

additional, weightier power. In light of its contemporary use in various state constitutions and its religious overtones, “ordain” implies that Congress has a far-reaching design power.⁷⁶ Last, the change of wording in Article III, but not in Article I, may suggest a desire to especially emphasize Congress’ power, by stating a broader version of it in Article III than appears in Article I.

3. The Debate Over the Exceptions Clause

Some commentators have reached an opposite conclusion based upon the debate over the exceptions clause.⁷⁷ On August 27, 1787 the delegates made several changes affecting the jurisdiction of the Supreme Court and the lower federal courts.⁷⁸ 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” – be amended to read “In all the other cases before

⁷⁶ Note that Julius Goebel has argued that the use of the words “ordain and establish” meant that the creation of inferior federal courts was actually mandatory. *See Id.* at 246-47. This argument ignores the clearly applicable conditional “may” earlier in the sentence and is thus untenable.

⁷⁷ The exceptions clause follows the brief list of the Supreme Court’s original jurisdiction and states: “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.” U.S. CONST. art. III, § 2. Despite the facial clarity of the language there has been an ongoing debate about whether the exceptions clause actually allows Congress to except some jurisdiction from the Supreme Court or the lower federal courts. *Compare* 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, 780 (1984) (arguing that the exceptions power was “designed to facilitate the creation of inferior federal courts”); 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, 1006 (2007) (same) *with* William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 268 (1973) (describing Congress’ power to make jurisdictional exceptions “as plenary as the power to regulate commerce”); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 113, 149 (1982) (arguing that the exceptions power is “clear”); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004-5 (1965) (same).

⁷⁸ 2 FARRAND, *supra* note __ at 421-32.

mentioned the judicial power shall be exercised in such manner as the legislature shall direct.”⁷⁹ This motion was defeated by a 6-2 vote.⁸⁰

Robert Clinton has pointed to this motion and argued that a “clearer rejection of congressional authority over judicial powers is hard to imagine.”⁸¹ Joseph Anclien has utilized this rejection as support for strong constitutional inherent powers.⁸²

There are several reasons not to read the rejection of the words “the judicial power shall be exercised in such manner as the legislature shall direct” 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.⁸³

Further, there is no description of the debate over this amendment or why it was proposed and failed. It may have failed because it did not, in fact, change or add anything to the congressional power already expressed in the Exceptions Clause, which was facially quite broad in draft form – it allowed “such exceptions and [] such regulations as the legislature shall make.”

Last, the proposed language may actually have expanded congressional control from jurisdiction to the actual decision-making authority of courts, and while the Framers were seemingly unconcerned about court procedure, they were quite concerned about legislative interference with the actual process of deciding

⁷⁹ 2 *Id.* at 425, 431.

⁸⁰ *Id.*

⁸¹ Clinton, *supra* note __, 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).

⁸² Anclien, *supra* note __, at 55 n. 95.

⁸³ *See* Alex Glashausser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383, 1431-35 (2010) (describing context of the comment).

cases.⁸⁴ The vote could have simply been against allowing Congress the power to interfere with core decision-making, not a rejection of congressional control of the Supreme Court’s non-original jurisdiction, let alone any power over procedure or contempt. Thus, it is a stretch to take this one vote on jurisdiction, under ambiguous circumstances with no recorded debate, 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 judiciary,⁸⁵ and the Constitution itself describes the executive and the legislative branches with much greater detail and clarity. Further, the fact that the bulk of the discussion over inferior federal courts consisted of whether any inferior federal courts were necessary at all hardly suggests concern amongst the Framers about any inherent powers of the judiciary.

The Framers’ debate and adoption of the various Article III guarantees of life tenure and salary likewise supports a negative inference from the Framers’ silence

⁸⁴ See Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 732-33 (1997); Liebman & Ryan, *supra* note __, at 754 & n.271 (1998) (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) (same).

⁸⁵ 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 (“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.”); 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.”).

on inherent authority.⁸⁶ When an issue of court structure mattered, like the salary and tenure guarantees for federal judges, there was extensive debate and an explicit guarantee in Article III.

Moreover, it should not have been inconceivable to the Framers that leaving the design of the courts to Congress might result in unfamiliar procedures and court structures. To the contrary, when the Continental Congress designed a court of appeals under the Articles of Confederacy it declined to grant that court the powers of contempt.⁸⁷ Nor did the court have the power to enforce its own judgments.⁸⁸ This recent experience should certainly have raised the salience of the inherent powers of courts and if the Framers deemed these powers indispensable they would have likely included them in Article III.

C. *The Ratification Debates*

While the constitutional convention spent comparatively limited time on the judiciary, the state ratification debates focused quite squarely Article III. The Antifederalists argued that ratifying the Constitution would impinge upon the civil right to a jury trial⁸⁹ and that the jurisdiction of the Supreme Court granted it unbridled power.⁹⁰ Contemporary records from the ratification debates and the Federalist Papers (written in support of ratification) make clear that the primary

⁸⁶ For a brief description of these debates, see Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745, 750-54 (2001).

⁸⁷ The first draft legislation intended to create the court did include “all the powers of courts of record to impose fines or imprison for contempts or disobedience.” GOEBEL, *supra* note __, at 169. The final version eliminated these powers. *Id.* at 171.

⁸⁸ *Id.* at 172.

⁸⁹ See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292, 295 (1966) (discussing the antifederalist jury objections); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 723 n. 246 (1973) (same).

⁹⁰ *Essays of Brutus*, in 2 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 431-32 (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.”).

answer to each of these concerns was Congress' tremendous power over the courts.⁹¹

1. The Federalist Papers

The most famous of these defenses is Alexander Hamilton's "least dangerous branch" argument from Federalist 78:

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.⁹²

Madison thus strongly suggests that the constitutional silence on inherent powers meant that Congress "not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."

There are multiple other examples. Federalist No. 83 argues that the Constitution's silence on civil jury trials does not mean that civil jury trials were barred. Instead, that question is explicitly left to Congress: "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

⁹¹ For a recent overview of this portion of the debate, see PAULINE MAIER, RATIFICATION 286-91, 417-19 (2010).

⁹² THE FEDERALIST NO. 78, *supra* note ___, at 465 (Alexander Hamilton).

either to adopt that institution or to let it alone.”⁹³ In Federalist No. 80, Alexander Hamilton attempted to assuage worries over federal court power by noting that if there were “partial inconveniences” with the judiciary “it ought to be recalled 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.”⁹⁴

2. State Ratification Conventions

The records from the state ratification conventions also reflect this understanding of Congress’ 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. In arguing 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’ Article I power over criminal procedure: “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.”⁹⁵

In arguing against the breadth of federal jurisdiction during the Virginia ratification debates George Mason asked: “What is there left to the state courts? Will any gentleman be pleased, candidly, fairly, and without sophistry, to show us

⁹³ THE FEDERALIST NO. 83, *supra* note ___, at 496 (Alexander Hamilton).

⁹⁴ THE FEDERALIST NO. 81, *supra* note ___, at 481 (Alexander Hamilton).

⁹⁵ 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110 (1836) (hereinafter ELLIOTT, DEBATES).

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.”⁹⁶

In defense, the Constitution’s supporters repeatedly turned to Congress’ power over the judiciary. Supporters promised that Congress would guarantee civil jury trials. James Wilson, a member of the Constitutional Convention’s Committee of Detail, noted that the jury and court procedures were quite different from state to state and that the constitutional convention could not have gone “into a particular detail of the manner that would have suited each state.” Better to give Congress “the power of making regulations with respect to the mode of trial” and leave the courts “to be particularly organized by the legislature – the representatives of the United States – from time to time, as should be most eligible and proper.”⁹⁷ 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.”⁹⁸

In North Carolina James Iredell stated a similar explanation for constitutional silence on civil juries: “It is impossible to make every (judicial) regulation at once. Congress, who are our own representatives, will undoubtedly make such regulations as will suit the convenience and secure the liberty of the people.”⁹⁹

⁹⁶ 3 ELLIOT, DEBATES, *supra* note __ at 521.

⁹⁷ 2 *Id.* at 488.

⁹⁸ 3 FARRAND, *supra* note __, at 101.

⁹⁹ 4 *Id.* at 152. *See also id.* at 145 (Iredell stating that “It is not to be presumed that the Congress would dare to deprive the people of this valuable privilege.”); *id.* at 151 (Archibold McClaine of North Carolina addressing the civil jury trial and noting that “It 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.”).

James Madison argued 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.”¹⁰⁰ The concern over the destruction of the civil jury trial was overblown, because “it is in the power of Congress to prevent it, or prescribe such a mode as will secure the privilege of jury trial.”¹⁰¹ In arguing for the Constitution, Judge Edmund Pendleton, president of the Virginia ratifying convention, noted Congress’ freedom to design and redesign the federal judiciary and the wisdom of leaving the details of the judiciary to Congress, who “may find reasons to change and vary them as experience shall dictate.”¹⁰²

D. *The Judiciary and Process Acts of 1789*

The earliest congressional acts establishing the federal judiciary further support this understanding. Following adoption of the new Constitution, Congress passed three laws constituting the new federal judiciary and setting some of the procedures for their operation, while leaving others to the discretion of the courts. The Judiciary Act of 1789,¹⁰³ The Federal Process Act of 1789,¹⁰⁴ and the Crimes Act

¹⁰⁰ 3 ELLIOT, DEBATES, *supra* note ___, at 534.

¹⁰¹ *Id.* See also *id.* at 558, 560-61 (John Marshall of Virginia stating that Congress will “not give a trial by jury where it is not necessary, but . . . wherever it is thought expedient”); *id.* at 572-73 (Edmund Randolph of Virginia stating no 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 will”). Patrick Henry likewise expressed confidence that Congress would decide the fate of the civil jury trial. *Id.* at 544-45, 577-78. There are a few additional examples listed in William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 768-69 (1997).

¹⁰² 3 *Id.* at 517.

¹⁰³ Judiciary Act of 1789, ch. 20, 1 Stat. 73.

¹⁰⁴ Process Act of 1789, ch. 21, 1 Stat. 93.

of 1790¹⁰⁵ basically established the nature, structure, and jurisdiction of the new federal judiciary.¹⁰⁶

These various Acts are powerful evidence of the Framers' understanding of Articles I and III.¹⁰⁷ A Senate subcommittee consisting of three former delegates to the constitutional convention – Oliver Ellsworth, William Paterson and Caleb Strong – drafted the Judiciary Act of 1789.¹⁰⁸ Ellsworth was a particularly influential delegate and served on the first Committee of Detail; he was also the principal drafter of the Judiciary Act.¹⁰⁹ 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.”¹¹⁰

An examination of these foundational laws strongly suggests that the first Congress thought it had plenary power under Article I over any issues of inherent power, as it addressed procedure and jurisdiction in a manner inconsistent with any superior judicial power in this area. Congress took several different approaches in these Acts. In some cases it granted the new federal courts broad discretion in how

¹⁰⁵ The Crimes Act of 1790, ch. 9, 1 Stat. 112.

¹⁰⁶ Congress passed amendments to the Process Act in 1792, see Process Act of 1792, ch. 36, 1 Stat. 275, and the Judiciary Act in 1793. Judiciary Act of 1793, ch. 22, 1 Stat. 333.

¹⁰⁷ 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.”).

¹⁰⁸ Holt, *supra* note __, at 1478-79.

¹⁰⁹ See Mark A. Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 637 (2003); 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).

¹¹⁰ *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); see also RICHARD H. FALLON, ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28 (4th ed. 1996) (stating that “the first Judiciary Act is widely viewed as an indicator of the original understanding of Article III”).

to structure procedure. In others it explicitly instructed courts to follow the practices at the time. Lastly some sections were quite specific and innovative. 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.

The 1789 Judiciary Act is the longest and most comprehensive of the initial Acts.¹¹¹ In many areas the Judiciary Act explicitly left federal courts to their own discretion. Section 17 described three areas of discretion:

That all 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 of said courts, provided such rules are not repugnant to the laws of the United States.¹¹²

These three grants are contiguous in a single section of the Act and each grants discretion in a different manner: new trials are governed by current practice, contempt is explicitly discretionary, and the creation of necessary rules is allowed, as long as they do not violate the laws of the United States.¹¹³

While Section 17 of the Judiciary Act of 1789 left broad discretion to courts, multiple other sections offered many more specifics, including various procedural rules that were alterations to the current practices. David Engdahl points out three

¹¹¹ Wythe Holt's history of the passage of the Judiciary Act of 1789 offers a tremendous overview of the Act's features, Holt, *supra* note ___, at 1485-90, as well as a detailed and most interesting history of its passage. *Id.* at 1478-85.

¹¹² Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

¹¹³ Although the last clause of Section 17 seems to grant Federal Courts broad rule-making authority, it is worth noting that the Process Act of 1789 was passed just five days later and basically instructed that in cases at law, Federal courts were to follow the procedures of the state where they were located. *See* Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94. Realistically, this meant that court discretion in cases at law was considerably curtailed despite the broad language.

such innovations:¹¹⁴ allowing litigants in actions at law to utilize the discovery techniques available in equity actions,¹¹⁵ allowing for depositions *de bene esse*,¹¹⁶ and allowing for the possibility of jury assessment of damages in certain default or demurrer cases.¹¹⁷

The Process Act of 1789 covered the procedures in equity, admiralty and maritime, which were to “be according to the course of civil law,”¹¹⁸ i.e. 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.¹¹⁹

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 current procedures, with the grant of almost unfettered discretion in other areas well establishes Congress’ broad vision of its own power. The combination also makes it virtually impossible that the first Congress considered there to be a core judicial inherent power that outweighed Congress’ own power.

¹¹⁴ Engdahl, *supra* note __, at 86.

¹¹⁵ Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 73, 82.

¹¹⁶ Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88-89. Depositions *de bene esse* were a procedure for the taking of depositions in alternative court forums for witnesses residing more than 100 miles from the home courthouse. Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88-89.

¹¹⁷ Judiciary Act of 1789, ch. 20, § 26, 1 Stat. 73, 87.

¹¹⁸ Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94.

¹¹⁹ Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94. The first draft version of the Process Act actually included many more procedural specifics, including the manner and time of filing and answering in civil suits, the form of summonses and service, defaults and executions. See Ryan, *supra* note __, at 771-72; WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 51 (1995). A “*capias ad satisfaciendum*” was a writ of execution that allowed the Sheriff to take custody of a judgment debtor pending a court date. See BLACK’S LAW DICTIONARY 208 (6th ed. 1990).

Congress' expansive vision of its power over the federal courts remained for a significant period following 1789. For example, in 1801 and 1802 there was a "judiciary crisis," where a lame duck Federalist Congress passed one judiciary act in 1801, only to see that act repealed the next year by a new Republican Congress.¹²⁰ 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.¹²¹ The congressional debates explicitly mentioned the possibility that the Supreme Court would overturn the law, but the Court never reached that question.¹²²

In *Stuart v. Laird*,¹²³ the Court did hold that Congress could transfer a case from one court to another after eliminating the original court: "Congress have 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

¹²⁰ See Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1426 (2006); Jed H. Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 89-84 (2002).

¹²¹ See Charles F. Hobson, *John Marshall, The Mandamus Case, and the Judiciary Crisis, 1801-1803*, 72 GEO. WASH. L. REV. 289, 291-99 (2003); 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 222-24 (1926). As part of this debate Senator Stevens Mason 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: "are 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." 4 ELLIOTT, *DEBATES*, *supra* note ___, at 443.

¹²² See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 234 (1998); Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in A.B.A. COMM'N ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, *AN INDEPENDENT JUDICIARY* app. A at 67, 82 (1997).

¹²³ 5 U.S. (1 Cranch) 299 (1803).

exercise of legislative power.”¹²⁴ Thus, Congress’ actions (and the Court’s tacit acquiescence) certainly evince a congressional understanding of near plenary Article I power over the federal judiciary.¹²⁵

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*¹²⁶ the Defendant argued that Congress lacked the authority to regulate the execution of federal court judgments by U.S. Marshals.¹²⁷ Chief Justice Marshall made quick work of this argument and stated Congress’ 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 Congress over the subject. The only inquiry is, how far has this power been exercised?¹²⁸

¹²⁴ *Id.* at 309.

¹²⁵ Frankfurter and Landis offer further support in a classic 1924 article noting congressional power over criminal contempt, where they collect a lengthy list of congressional Acts controlling the practice and procedures of the federal courts. Frankfurter and Landis refer to this list as “the authentic, if not succulent, testimony of the Acts of Congress.” Frankfurter & Landis, *supra* note __, at 1018-1020.

¹²⁶ 23 U.S. (10 Wheat.) 1 (1825).

¹²⁷ *Wayman*, 23 U.S. (10 Wheat) at 2.

¹²⁸ *Wayman*, 23 U.S. (10 Wheat) at 22.

In a later section of the opinion Marshall notes that Congress may delegate some of this power to the judiciary and specifically notes Section 17 of the Judiciary Act as such a permissible delegation.¹²⁹

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*.¹³⁰ In

Halstead the Court reaffirms Congress' 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.¹³¹

Later in the same case the Court addressed whether the Process Act of 1792's instruction that federal courts were to follow state court procedures for "the forms of writs, executions and other process"¹³² was an impermissible delegation of the legislative power.¹³³ Notably, the Court did not reject the characterization of the power to control process as legislative. On the contrary, the Court explicitly stated "Congress might regulate the whole practice of the Courts, if it was deemed expedient so to do."¹³⁴ Instead, Congress "vested [the power of execution] in the Courts."¹³⁵

¹²⁹ *Id.* at 43.

¹³⁰ 23 U.S. (10 Wheat) 51 (1825).

¹³¹ *Halstead*, 23 U.S. (10 Wheat) at 53-54.

¹³² Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275-76.

¹³³ *Halstead*, 23 U.S. (10 Wheat) at 61-62.

¹³⁴ *Id.* at 61.

¹³⁵ *Id.*

The Court reiterated this holding and reasoning in *Livingston v. Story*¹³⁶ and *Rhode Island v. Massachusetts*.¹³⁷ All of these cases are quite clear that Congress has plenary Article I authority over court procedures because of the power to establish the judiciary and pass laws necessary and proper to its operation. Earlier cases from the inferior federal courts are similar.¹³⁸ Joseph Story's well known

¹³⁶ 34 U.S. (9 Pet.) 632 (1835). In *Livingston* the defendant challenged the use of equity jurisdiction in the newly created federal courts in the new state of 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. '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.' Article 3. 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.

¹³⁷ 37 U.S. (12 Pet.) 657 (1838). There was a question whether the Supreme Court had jurisdiction over a dispute between two states. In recognizing the constitutionality of their jurisdiction the Court again addressed congressional power in this regard:

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 power, so far as they thought it necessary and proper, under the seventeenth clause of the eighth section, first article, 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.

¹³⁸ For some further examples from lower federal courts, consider *Livingston v. Van Ingen*, 1 Paine 45, 15 F. Cas. 697, 698 (C.C.N.Y. 1811) ("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."); *Ex parte Cabrera*, 4 F. Cas. 964, 965 (C.C.Pa. 1805) ("[T]he residuum of the judicial power is vested in such inferior courts, as congress may, from time to time, ordain and establish. Now, if 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."); *The Little Ann*, 15 F.Cas. 622, 623 (C.C.N.Y. 1810) ("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

Commentaries on the Constitution of the United States likewise supports plenary Article I control.¹³⁹

Nevertheless, proponents of a constitutional inherent authority maintain judicial superiority over Congress for any court procedure that is necessary to the operation of the courts. They point to dicta in two early Supreme Court cases.

In *Ex Parte Bollman*,¹⁴⁰ 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.¹⁴¹ 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.”¹⁴²

In *United States v. Hudson*,¹⁴³ the Court rejected common law crimes. Because the Constitution created a federal government of enumerated powers, “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence” in

one of the inferior courts, recourse must be had to the laws creating the tribunal, and designating its jurisdiction.”).

¹³⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1752 (Boston, Hilliard, Gray & Company 1833) (“[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.”).

¹⁴⁰ 8 U.S. (4 Cranch) 75 (1807).

¹⁴¹ *Id.* at 93-94.

¹⁴² *Id.* at 94.

¹⁴³ 11 U.S. (7 Cranch) 32 (1812).

order for a federal court to act.¹⁴⁴ Nevertheless, similar to *Bollman*, the Court followed up this recognition of congressional power with a caveat in dicta:

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt – imprison for contumacy – enforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute.¹⁴⁵

The easiest, but least satisfying, answer to these quotes is to simply deride them as dicta. Given that roughly contemporary and later Supreme Courts upheld substantial congressional control over the courts¹⁴⁶ – and that contemporary lower courts held the opposite¹⁴⁷ – that may actually be a fair reading of these cases.

There is an alternate reading of these cases, however. The holdings and reasoning in *Bollman* and *Hudson* – that the Constitution’s grant of law making power to Congress eliminates any common law crimes – actually support plenary congressional Article I power and it is possible to read these dicta as protecting the Courts ability to act in the absence of congressional authorization, not necessarily in contradiction of congressional action.

Bollman and *Hudson* are congressional silence cases: in both cases the Court was being asked to act in an area where Congress had not spoken. In both cases the Court refused this invitation, requiring an explicit grant of power. By analogy, the Court’s dicta could be asserting a power to continue to act in the absence of

¹⁴⁴ *Id.* at 34.

¹⁴⁵ *Id.*

¹⁴⁶ See *infra* notes __ and accompanying text.

¹⁴⁷ See *supra* notes __ and accompanying text.

congressional authority, not necessarily in opposition to congressional authority.¹⁴⁸

Bollman makes no claim to any strong constitutional inherent power at all; it simply states that courts retain power over decorum and their officers even without explicit congressional approval. Likewise, *Hudson* does not necessarily claim a power superior to Congress. Instead, it claims a power “not immediately derived from statute.”¹⁴⁹

Anderson v. Dunn,¹⁵⁰ upheld a non-statutory contempt power for Congress and supports this reading of *Bollman* and *Hudson*. The Court began by deriving Congress’ contempt power by “implication.”¹⁵¹ 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.¹⁵²

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

Thus, the history, text, ratification, and aftermath of the Constitution do not support a strong constitutional inherent authority. While it was likely understood

¹⁴⁸ One difficulty with this reading is that the Judiciary Act of 1789 did expressly allow for contempt and enforcement of judgments, so this statement may imply a power beyond that already granted by Congress. Again, that does not necessarily mean that *Bollman* or *Hudson* claimed a judicial power superior to Congress in this area.

¹⁴⁹ *Hudson*, 11 U.S. (7 Cranch) at 34.

¹⁵⁰ 19 U.S. (6 Wheat) 204 (1821).

¹⁵¹ *Id.* at 225-26.

¹⁵² *Id.* at 227.

that Congress could not interfere with the core judicial power of deciding cases,¹⁵³ it seems highly unlikely that these constitutional powers stretched to questions of court procedure, rules or structure.

II. THE JUDICIARY'S INTERSTITIAL POWER

In light of Congress' broad Article I powers, it is worth asking whether courts have any power to act without explicit congressional approval. Both Robert Pushaw and William Van Alstyne have argued that they cannot.¹⁵⁴

This argument ignores the nature of the "judicial power" and "courts" in the late-18th century, as well as Article III's reference to "law and equity." While it is unlikely that the Framers' use of these terms meant 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 these new courts.

A. *The Nature of Courts in 1787*

From before the time of the framing until today, courts have always had interstitial authority to fill gaps left in congressional acts.¹⁵⁵ 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.¹⁵⁶ There was certainly no contemporary Anglo-American court that had had a set of legislatively or judicially created rules that

¹⁵³ See *supra* notes __ and accompanying text.

¹⁵⁴ See Van Alstyne, *supra* note __, at 128-29; Pushaw, *supra* note __, at 848-49.

¹⁵⁵ Barrett, *supra* note __, at 818-19.

¹⁵⁶ 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 (1994) (arguing that in England and America at the time of the framing "procedural rules underwent frequent adaptation").

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.

A brief review of the nature of the courts in England and the colonies in the eighteenth century supports this view. While the nature and extent of judicial power to reject legislative control was unclear in the colonies and England,¹⁵⁷ the power of courts to act in the absence of legislative authority in matters of procedure or supervision was crystal clear.¹⁵⁸ From the birth of common law courts up to the late nineteenth century, courts regularly acted on their own on various procedural matters. “[T]he superior courts of common law have exercised [inherent] power . . . from the earliest times [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.”¹⁵⁹

Robert Pushaw has noted four distinct categories of inherent power exercised by common law courts leading up to the time of the framing. These courts

¹⁵⁷ 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* ix, xxiii-xxxvi (1807). Nevertheless, Parliament rarely acted on procedure itself, see Pushaw, *supra* note __, at 814-16, and there are at least some examples of courts overruling Parliament under the “Law of the Land.” See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WISC. L. REV. 941, 948-73 (1990).

¹⁵⁸ Consider the following from Daniel Meador:

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.

Meador, *supra* note __, at 1805-6 (1995).

¹⁵⁹ I.H. Jacob, *The Inherent Jurisdiction of the Court*, CURRENT LEGAL PROBLEMS 1970, at 23, 25.

acted on their own 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.¹⁶⁰ The colonial courts followed a similar path and even the post-revolution, pre-Constitution cases from 1776-1787 show that courts continued to independently make adjective law and impose sanctions for misconduct.¹⁶¹

The words and actions of the Founders show that they likewise favored a flexible court system. Madison noted “[m]uch 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.”¹⁶² The addition 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,¹⁶³ likewise suggests flexibility.

The decision to include federal jurisdiction “both in law and equity”¹⁶⁴ also belies the view that courts could only act following approval by Congress. Equity jurisdiction itself was immensely flexible and unbound from legislative control as of 1787.¹⁶⁵ The addition of equity jurisdiction is thus fundamentally at odds with a requirement of congressional pre-approval on matters of procedure or process.

¹⁶⁰ Pushaw, *supra* note __ at 810-14.

¹⁶¹ *Id.* at 816-22. For a general overview of the transplantation of the English common law to the colonial courts, see GOEBEL, *supra* note __ at 1-95.

¹⁶² James Madison, *Observations on the “Draught of a Constitution for Virginia”* (Oct. 15, 1788), in 2 PAPERS OF JAMES MADISON 290 (Robert A. Rutland & Charles F. Hobson eds., 1977). This letter concerns the framing of the Virginia Constitution, but reflects Madison’s views at the time of the framing of the United States Constitution as well.

¹⁶³ 2 FARRAND, *supra* note __, at 186.

¹⁶⁴ Added, over objections, on August 27, 1789 to Article III. See 2 FARRAND, *supra* note __, at 428.

¹⁶⁵ See PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE* 47 (1990) (describing the flexible use of equity by American colonial courts); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the*

The Framers also spent time wrestling with the interaction between the common law and the new federal legislature and judiciary.¹⁶⁶ The role of the common law as a source of criminal or civil law under the new Constitution was unclear, but its role in process and procedure was very likely *status quo*. The Framers said very little about court structure or process because they expected courts to behave as they had for years.¹⁶⁷ Thus, the Framers granted Congress the power to act as it saw fit, but their silence on the details also suggested a continuation of courts' ability to fill legislative gaps when necessary.

Reflection on the nature of the courts of the time makes this result necessary. In the late-eighteenth century it was unimaginable to have a court system run entirely based upon legislative commands. 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*

Looking Glass of Bush v. Gore, 11 WM. & MARY BILL RTS. J. 343, 380-81 (2002) (noting that “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”).

¹⁶⁶ See, e.g., Stewart Jay, *Origins of Federal Common Law, Part Two*, 133 U. PA. L. REV. 1231, 1231-62 (1985).

¹⁶⁷ Consider Stewart Jay’s description:

Delegates to the Convention 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 “the judicial power of the United States.” They probably anticipated that federal courts would act in the way courts were accustomed to operating, exercising all functions and powers which Courts were at that time in the judicial habit of exercising. Congress could control the extent of lower court jurisdiction, and accordingly “that general sense of justice pervading the Union . . . would depend upon the wisdom of the legislatures who are to organize it”

Id. at 1262 (quoting 4 ELLIOT’S DEBATES, *supra* note ___, at 258 (Charles Pinckney, South Carolina Ratification Convention)).

While these Acts do establish legislative control over the form and processes of the federal judiciary, they also establish that Congress expected the new federal judiciary to behave as Anglo-American courts had for years: they had the flexibility to fill in the inevitable gaps in the new statutory framework. In some places this flexibility was explicitly granted by Congress and in others it was implied. The combination of the express and implied grants of flexibility support this Article's thesis that Congress had plenary power over the shape and processes of the courts, but that courts had interstitial power, subject to congressional overrule.

As noted above, a trio of early statutes defined the nature and structure of the federal judiciary.¹⁶⁸ Congress took three quite distinct approaches to procedure in these laws. In some cases Congress was quite explicit and offered clear boundaries to the federal courts. In other areas Congress granted clear discretion to the new courts. Lastly, in criminal procedure Congress was almost completely silent. The silence on criminal procedure is especially important. Congress' 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 was substantially shorter than the first Judiciary Act and offered very limited explicit procedural guidance.¹⁶⁹ The Act lists a series of criminal violations and possible punishments, but says almost nothing about the process for trying these cases, although it does refer (without elaboration) to procedural steps like "presentment or indictment." These

¹⁶⁸ See *supra* notes __ and accompanying text.

¹⁶⁹ The Crimes Act of 1790, ch. 9, 1 Stat. 112.

references suggest that Congress expected the federal courts to try these cases according to contemporary common law procedures, but the Act does not say so explicitly.¹⁷⁰ 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.¹⁷¹ Thus, at least for 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. Courts naturally filled in the details afterwards.¹⁷²

Congress explicitly granted substantial discretion in other areas. In cases at equity Congress required the courts to proceed according to the existing law,¹⁷³ which allowed judges substantial leeway.¹⁷⁴ Section 17 of the Judiciary Act also explicitly 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.”¹⁷⁵

The broad grants of rulemaking and contempt powers in Section 17 may lend credence to the idea that federal courts would not have had any such powers without an explicit congressional grant of authority.¹⁷⁶ Nevertheless, Section 17 likely merely restates powers that would have existed regardless of congressional

¹⁷⁰ *Id.* at §§ 19-20, 1 Stat. 112, 116-17 (describing the prosecution of perjury).

¹⁷¹ Similarly, Section 13 of the Judiciary Act of 1789 described the Supreme Court’s original jurisdiction, but stated no procedures for those cases. *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81. The Supreme Court created their own processes in those cases and upheld their power to do so in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

¹⁷² GOEBEL, *supra* note ___, at 608-613.

¹⁷³ Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94.

¹⁷⁴ 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 Act*, 56 WASH. & LEE L. REV. 969, 1007-10 (1999).

¹⁷⁵ Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

¹⁷⁶ *See* Barrett, *supra* note ___, at 855-58.

approval. Congress' approach to criminal procedure certainly supports this reading. Likewise, Section 13 of the Judiciary Act outlined the Supreme Court's exclusive jurisdiction under Article III.¹⁷⁷ Much of Section 13 is simply a restatement of Article III, so the Judiciary Act included other restatements of existing powers.

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 law¹⁷⁸ and also changed some existing procedures.¹⁷⁹

Thus Congress' three approaches to procedure well track this Article's theory of inherent powers. In some areas Congress explicitly limited court discretion in ways fundamentally inconsistent to a claim of constitutional judicial control over procedure. In other areas Congress explicitly allowed broad court discretion. These grants suggest a congressional comfort with common law process and flexible courts. Lastly, in criminal cases, Congress left the courts largely to their own devices and did not explicitly state how courts should proceed at all. In the face of congressional silence, courts filled in the blanks.

C. *Early Case Law*

Federal courts certainly behaved as if they had interstitial power to act when Congress had not in the earliest cases involving court procedures. Courts answered questions as they arose in individual cases.¹⁸⁰ Some district courts also made rules

¹⁷⁷ Compare Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 83 with U.S. CONST. art. III, § 2.

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

¹⁷⁹ See *supra* notes ____ and accompanying text.

¹⁸⁰ David Engdahl canvasses some contemporary cases to reach the same conclusion:

About many matters, however, no standing rules were made, and when such matters arose, the earliest federal judges simply proceeded like judges traditionally had. For example, no statute addressed how many persons should be summoned as a panel from which trial jurors should be

about what pleas would be allowed, the time limit for pleas, and the order cases would be called for trial.¹⁸¹

The Supreme Court did the same in its early cases. For example, in *United States v. Marchant*, two capital defendants asked to be tried separately. 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.”¹⁸² The Court then held that the decision to sever the trials was at the court’s discretion.¹⁸³

Section 13 of the Judiciary Act of 1789, did not deal with process or service when the Supreme Court exercised its original jurisdiction.¹⁸⁴ In the first cases the Supreme Court acted according to its own discretion without comment,¹⁸⁵ and it was not until *Chisolm v. Georgia*¹⁸⁶ that the Supreme Court expressly addressed the question.

chosen; Justice Paterson at Circuit concluded that the number was discretionary with the court as it was at the common law. No statutory authorization was deemed requisite for the composition and use of grand juries, or for committing accused persons and taking bail. The Justices at Circuit never hesitated for lack of statutory authorization to grant continuances in their discretion. Likewise, the right to inquire by what authority an attorney acted on his purported client's behalf was regarded as “inherent in all courts,” as was the prerogative to enforce courtroom decorum and to punish contumacy and contempt.

Engdahl, *supra* note ___, at 86-88 (citing *United States v. Insurgents*, 26 F. Cas. 499, 500 (C.C.D. Pa. 1795) (No. 15,443); *United States v. Hill*, 26 F. Cas. 315 (C.C.D. Va. 1809) (No. 15,364); *Hurst v. Hurst*, 12 F. Cas. 1028 (C.C.D. Pa. 1799) (No. 6,929); *King of Spain v. Oliver*, 14 F. Cas. 577, 578 (C.C.D. Pa. 1810) (No. 7,814)); *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).

¹⁸¹ See DWIGHT F. HENDERSON, *COURTS FOR A NEW NATION* 36 (1971).

¹⁸² *United States v. Marchant*, 25 U.S. (12 Wheat) 480, 480 (1827).

¹⁸³ *Id.*

¹⁸⁴ *Cf.* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 83.

¹⁸⁵ GOEBEL, *supra* note ___, at 725.

¹⁸⁶ 2 U.S. (2 Dall.) 419 (1793).

The State of Georgia objected to the service of process. Attorney General Randolph (the former governor of Virginia and the influential founder who had presented the Virginia plan and served on the Committee of Detail) argued the case in his private capacity.¹⁸⁷ Randolph admitted that the form of process was not prescribed by statute. 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."¹⁸⁸ The Court adopted this argument with one dissent.¹⁸⁹

Note how Randolph's description of the Court's discretion in this case tracks the inherent power described by this Article: the court has discretion, unless "otherwise prescribed by law," *i.e.* unless Congress has spoken in the area. Supporters of a constitutional inherent powers doctrine point to *Chisolm* as an early example of inherent powers at work.¹⁹⁰ Nevertheless, *Chisolm* shows an interstitial power at best, the power to fill a gap left by Congress, and *Chisolm* explicitly recognizes Congress' power to act to the contrary if Congress so chose.¹⁹¹ Joseph Story's *Commentaries* also support the concept that although Congress has plenary Article I power over the judiciary, courts retain "certain incidental powers," without any Act of Congress, *i.e.* interstitial power.¹⁹²

¹⁸⁷ Apparently Randolph's "official emoluments [as Attorney General] were so meager that his living depended upon the effectiveness with which he represented private clients." GOEBEL, *supra* note __, at 726.

¹⁸⁸ *Chisolm*, 2 U.S. (2 Dall.) at 428.

¹⁸⁹ *Id.* at 479.

¹⁹⁰ See Pushaw, *supra* note __, at 840;

¹⁹¹ *Chisolm*, 2 U.S. (2 Dall.) at 428-29.

¹⁹² STORY, *supra* note __, at § 1768. These incidental powers are not superior to Congress' authority in the area. See *id.* at § 1752. St. George Tucker's American version of Blackstone's *Commentaries* similarly noted that courts should apply the common law "whenever the written law is silent." 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL

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' Power*

So far this Article has described Congress' authority in this area as "near plenary," which means that Congress is much more powerful than recent scholarship and case law suggest. There are still limits on Congress' authority. Most previous scholars have looked to the words "judicial power" and "courts" in Article III and found in those terms a limitation on Congress' power to destroy or impair any power deemed necessary to the exercise of all other powers.¹⁹³ Leo Levin and Anthony 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."¹⁹⁴ While this sounds like a relatively modest limit on congressional action, the list of "necessary" and

GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 429 (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803). Amy Barrett has gathered similar contemporary federal case law. See Barrett, *supra* note __, at 163 & n.67.

¹⁹³ Robert Pushaw calls these constitutional inherent powers "implied indispensable powers," granted under Article III's use of the terms "judicial power" and "courts" and asserts that because "the Constitution grants federal judges implied indispensable powers, it surely does not authorize Congress to destroy or impair them." Pushaw, *supra* note __, at 847-48. Likewise William Ryan expressed that the words "the judicial power" grant federal courts the right to decide cases unmolested by "undue interference." Ryan, *supra* note __, at 785-95.

¹⁹⁴ A. Leo Levin & Anthony Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958).

“inherent” powers inevitably grows until it seems that Courts have a substantial power over Congress.¹⁹⁵

The appropriate limit on any congressional act is whether it is “necessary and proper for carrying into execution”¹⁹⁶ the judicial power.¹⁹⁷ Thus Article I, and not Article III, is the check on congressional power over court procedure or sanctions.

The test under the necessary and proper clause is well known and originated in *McCulloch v. Maryland*:¹⁹⁸ “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.”¹⁹⁹ Later cases have explained that federal statutes need only be “rationally related” to the implementation of a constitutionally enumerated power.²⁰⁰ The Constitution explicitly grants Congress the power over the “choice of means” and “[i]f it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they

¹⁹⁵ For example, Stephen Burbank has correctly noted that Robert Pushaw’s definition of “implied indispensable powers [is] very broad indeed.” Stephen B. Burbank, *Procedure, Politics and Power*, 79 NOTRE DAME L. REV. 1677, 1686 n.31 (2004).

¹⁹⁶ U.S. CONST. art. I, § 8.

¹⁹⁷ David Engdahl agrees with this Article 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. Engdahl, *supra* note ___, at 90-133. Nevertheless, Engdahl argues that the limit provided by the Necessary and Proper Clause in the inherent powers area should be substantially greater than in other areas and that in assessing the constitutionality of congressional acts in this area courts should not apply the traditional rational basis review. Instead, “it seems highly appropriate for the judiciary to make its own judgment whether [the judicial power] is actually facilitated, or instead impeded, by any congressional act purporting to help.” *Id.* at 162.

¹⁹⁸ 17 U.S. (4 Wheat) 316 (1819).

¹⁹⁹ *Id.* at 421.

²⁰⁰ *See, e.g., Sabri v. United States*, 541 U.S. 600, 605 (2004) (using the term “means-ends rationality” to describe the necessary relationship).

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.”²⁰¹

Recognizing the Necessary and Proper Clause as the limit on Congress’ power grants Congress much, much greater liberty in the area of inherent power than has been previously thought. In short, unless a congressional act is demonstrably disconnected to, or runs against the Article III judicial power, Congress has the power to choose amongst the best means for achieving the “carrying into execution” of the judicial power.

This understanding does provide a real limit on Congress and answers the objection that if the words “judicial power” or “courts” do not constrain Congress, Congress could wreak havoc upon the judiciary. That said, concerns over whether Congress might eliminate the contempt power or destabilize procedure to punish the judiciary seem somewhat overblown. Congress would not need to search very hard for constitutional ways to cripple the federal judiciary if it so chose to do so, as Congress unquestionably has the power to disestablish the entire lower federal judiciary or to defund the Supreme Court (except for the fixed judicial salaries).²⁰²

²⁰¹ *Burroughs v. United States*, 290 U.S. 534, 547-548 (1934). A Justice Kennedy concurrence in *United States v. Comstock*, 130 S.Ct. 1949, 1965-67 (2010) (Kennedy, J., concurring) argues for a more muscular version of this test in the context of the Necessary and Proper Clause: “The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration.”

²⁰² 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

B. *Limits on Judicial Power*

Just as strict necessity has been described as a check on congressional power over inherent authority, necessity has also been suggested as a limit on judicial power. The Court has occasionally quoted *United States v. Hudson*²⁰³ to the effect that the inherent powers are those powers “necessary to the exercise of all others.”²⁰⁴ William Van Alstyne and Robert Pushaw have likewise argued that absolute necessity is a requirement for the exercise of inherent powers.²⁰⁵

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.²⁰⁶ The Supreme Court has also regularly warned against “overreaching” in this area²⁰⁷ and has at times suggested that inherent powers of “long unquestioned” vintage are favored,²⁰⁸ but has been relatively silent on any hard boundaries.

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 Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L. Q. 13, 15-16 (1974).

²⁰³ 11 U.S. (7 Cranch) 32 (1812).

²⁰⁴ *Id.* at 34.

²⁰⁵ See Van Alstyne, *supra* note __, 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”); Pushaw, *supra* note __, at 847 (asserting that “the Constitution limits implied authority to cases of genuine necessity”).

²⁰⁶ See *infra* note __ and accompanying text.

²⁰⁷ *Degen v. United States*, 517 U.S. 820, 823-24 (1996) is typical:

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.

²⁰⁸ *Carlisle v. United States*, 517 U.S. 416, 426-27 (1996).

There are several limitations on these judicial powers. First and foremost, it is critical that the judiciary recognizes Congress' superior power in this area and act accordingly. Constitutionally speaking the single best check on the judiciary is Congress' power to change or overrule any use of the inherent power under the necessary and proper clause.

Second, federal courts may not utilize any power outside of that power granted in the term "judicial power." Nevertheless, as noted above, the Framers understood the grant of the judicial power to courts to be a flexible one and expected courts to be mutable over time. Thus, as long as the inherent power granted has not been foreclosed by an existing act of Congress and is reflective of the judicial power – i.e. helpful to the deciding of cases – courts are empowered to act, as long as they understand that Congress can always fix what it does not like.²⁰⁹

Last, the Court's repeated admonition to step lightly in forming new supervisory or inherent power rules is likewise helpful advice, if not any firm limitation. It is true that Congress can overrule these decisions as it sees fit, but one should not count on Congress (or the public) to notice or act in a relatively obscure area, so reticence is certainly preferable.

It may strike foes of judicial overreaching as worrisome to allow courts such broad latitude in this area. I have two responses to that objection. First, the real danger with inherent powers is the assertion of a broad area of constitutionally

²⁰⁹ 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. This approach would best satisfy originalists and would offer a firmer check on judicial behavior. The difficulty with this approach is the uncertainty of ascertaining exactly what inherent powers courts had at the time of the framing with any certainty. Better to recognize the general, flexible approach of common law courts at the time. Such courts reacted to new procedural hurdles by filling in the blanks on a discretionary basis. Modern Article III courts exercising the judicial power should likewise be allowed flexibility.

protected judicial power. If and when the Court decides to invalidate an Act of Congress under 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.

Second, even a cursory review of the decisions in this area establishes that courts feel few, if any, limits on their power.²¹⁰ 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. The real danger is courts disregarding Congress, not courts acting when Congress has remained silent.

IV. THIS DUAL UNDERSTANDING BEST EXPLAINS THE COURT'S INHERENT POWERS JURISPRUDENCE

²¹⁰ Here is a partial list of inherent powers drawn from Anclien, *supra* note ___, at 44-48: 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; 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) appointing *amici curiae* on their own motion; 21) compel the government to submit a memorandum of law; 22) dismissing a case for missing a pretrial conference; 23) ordering an attorney to pay the government the cost of empanelling a jury for one day; and 24) punishing an individual for the unauthorized practice of law.

A similarly fulsome list of supervisory authority powers can be found in Beale, *supra* note ___, at 1456-61.

A main advantage of this theory of inherent powers is that it does a better job of explaining the Court's own jurisprudence than theories reliant on strong constitutional inherent powers. From *Hudson* and *Bollman* forward the Supreme Court has regularly referred to necessary inherent powers that cannot be trampled by Congress. Nevertheless, an examination of the cases themselves establishes that the Court has never actually overruled an act of Congress under this inherent powers scheme, despite significant congressional incursions.

A. *The Three Categories of Inherent Power Cases*

The Court's inherent power cases could theoretically be grouped into four categories. One of the potential categories – cases where the Court has overruled a congressional act – is notably absent, although some recent lower court opinion suggest some federal courts may be verging into this territory, as discussed in Section IV.B.5 below. 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, i.e. cases explicitly recognizing congressional authority; 2) cases allowing uses of inherent powers in areas of congressional silence; and 3) cases where Congress has arguably spoken in the area, but the Court finds wiggle room to uphold the use of the inherent power.

The hardest cases to square are category three cases where the Court has found inherent authority to act in an area where Congress has arguably spoken. Nevertheless, even in these cases the Court has never explicitly claimed a power superior to Congress. Instead, the Court has always found that Congress has not foreclosed the inherent power at issue. In other words, the Court itself thinks there

are only two categories of inherent powers decisions: cases where the Court has followed congressional direction and cases where Congress has been silent and the federal judiciary was empowered to act in the interstices.²¹¹

1. Cases Where the Court Recognizes Congressional Authority

The best examples of this category involve the oldest claimed inherent power – contempt. From *Hudson* forward the Supreme Court has repeatedly announced a core constitutional inherent contempt power and warned Congress that the Court could overturn a congressional act. *Michaelson v. United States*,²¹² is 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 and 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.²¹³

This language and sentiment has been repeated throughout the last hundred years.²¹⁴

Nevertheless, the cases themselves do not actually demonstrate this 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.

²¹¹ Note that grouping the cases in this manner perfectly 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.

²¹² 266 U.S. 42 (1924).

²¹³ *Michaelson*, 266 U.S. at 65-66.

²¹⁴ See, e.g., *Young v. United States*, 481 U.S. 787, 799 (1987); *Chambers v. NASCO*, 501 U.S. 32, 43 (1991). For an argument that the contempt power is not strictly necessary to court operations despite the the Court's proclamations to the contrary, see Richard C. Brautigam, *Constitutional Challenges to the Contempt Power*, 60 GEORGETOWN L.J. 1513, 1514-22 (1972).

Section 17 of the Judiciary Act of 1789 explicitly granted federal courts the power “to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority.”²¹⁵ This relatively unfettered grant of the contempt power lasted until 1831, when the House and Senate brought impeachment proceedings against federal judge James Peck for an alleged abuse of the contempt power.²¹⁶ Peck had imprisoned and disbarred a lawyer who had published a critique of a Peck judicial opinion while the case was on appeal.²¹⁷ Peck’s defense was that the common law allowed contempt in exactly this circumstance and that if Congress disapproved, Congress had the power to change the law.²¹⁸ Blackstone and other contemporary authorities supported Peck’s defense.²¹⁹

Judge Peck was acquitted,²²⁰ but the outcry over the broad use of the contempt power led Congress to significantly limit the contempt power in federal courts. Congress passed an Act curtailing the discretion over contempt and limiting the power to actions in or very near the court itself.²²¹

By limiting the contempt power to misbehavior in court “or so near thereto as to obstruct the administration of justice,” Congress actually substantially curtailed both the previous, basically unfettered grant of contempt power in the

²¹⁵ Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83

²¹⁶ Frankfurter & Landis, *supra* note ___, at 1024-28.

²¹⁷ *Id.* at 1024.

²¹⁸ 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).

²¹⁹ See William F. Chinnock & Mark F. Painter, *The Law of Contempt of Court in Ohio*, 34 U. TOL. L. REV. 309, 313-14 (2003).

²²⁰ *Id.* at 313.

²²¹ On March 2, 1831 Congress passed “An 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.” Contempt Act of 1831, Ch. 49, § 1, 4 Stat. 487, 487-88.

Judiciary Act of 1789, and the practice of contemporary courts. The Third Edition of Chancellor James Kent's famous *Commentaries on American Law* decried the Act as "a very considerable, if not injudicious abridgement of the immemorially exercised discretion of the courts in respect to contempts."²²² Kent nevertheless expressed no doubt that Congress had the power to so constrict the contempt power.²²³

Contemporary lower federal courts applied the statute faithfully and recognized Congress' power to pass the law: "this 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" and thus "[t]here can be no doubt of the constitutional power of congress to act upon this subject, as far as respects our courts."²²⁴

In 1873 the constitutionality of the Act reached the Supreme Court in *Ex Parte Robinson*.²²⁵ The gap in time between the Act's passage and *Robinson* alone establishes that contemporary courts had no doubt of Congress' power in this area. *Robinson* begins by noting that the "power to punish for contempts is inherent in all courts [and that the] moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."²²⁶

Nevertheless, the Court did not hesitate to uphold the Act and Congress' power to restrict the contempt power, at least as to the lower federal courts, noting

²²² 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 300-1 (3rd ed. 1836).

²²³ *Id.*

²²⁴ *Ex Parte Poulson*, 19 F. Cas. 1205, 1207 (C.C.Pa. 1835).

²²⁵ 86 U.S. (19 Wall) 505 (1873).

²²⁶ *Id.* at 510.

that as to whether the Act “applies to the Circuit and District Courts there can be no question. 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.”²²⁷

There was no doubt that the Act of 1832 significantly restricted the common law contempt power.²²⁸ Nevertheless, the Court recognized Congress’ Article I power over the contempt power. Every congressional impingement on the contempt power has likewise been upheld. *United States v. Michaelson*²²⁹ 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.²³⁰ Like the change upheld in *Robinson*, contemporary commentators were quite critical of requiring juries in some contempt actions.²³¹ Nevertheless, the Supreme Court approved of the restriction.²³² The power of contempt is now well defined and heavily regulated by Congress.²³³

Another example is the Court’s decision to allow some congressional authority in the area of lawyer admission. As early as the 1824 case of *Ex Parte Burr*,²³⁴ 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

²²⁷ *Id.* at 510-11.

²²⁸ *See supra* notes ___ and accompanying text.

²²⁹ 266 U.S. 42 (1924).

²³⁰ *Id.* at 65-67.

²³¹ *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”).

²³² *See* RONALD L. GOLDFARB, *THE CONTEMPT POWER* 164-67 (1963) for a fuller history of the various congressional limitations of the contempt power from the 19th and early and middle 20th century.

²³³ *See, e.g.*, 18 U.S.C. § 401 (2000); Fed. R. Crim. P. 42(a); 18 U.S.C. §§ 3691-3692.

²³⁴ 22 U.S. (9 Wheat) 529 (1824).

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.”²³⁵ This power has been regularly listed among the inherent powers ever since.²³⁶ This is also the inherent power enforced most jealously and aggressively by state supreme courts over their respective state legislatures.²³⁷

Nevertheless, the Court has expressed a willingness to allow legislative control in this area as well. In *Ex Parte Garland*²³⁸ 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.²³⁹ 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.”²⁴⁰

In three recent cases the Court has barred lower court uses of inherent authority when the claimed inherent power was used to disregard an applicable federal statute, rule, or judicial decision. The rationale in these cases comes from

²³⁵ *Id.* at 531.

²³⁶ *Chambers v. NASCO*, 501 U.S. 32, 43-46 (1991) has a lengthy and helpful exposition of what that Supreme Court thought were the inherent powers of the federal courts. “[T]he power to control admission to its bar and to discipline attorneys who appear before it” is the first listed inherent power with a citation to *Burr*. *Id.* at 43.

²³⁷ See BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 115-21 (2011).

²³⁸ 71 U.S. (4 Wall) 333 (1866).

²³⁹ *Id.* at 374-77.

²⁴⁰ *Id.* at 379. *Cf.* *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 121-23 (1926) (allowing 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).

Thomas v. Arn:²⁴¹ “[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.”²⁴²

In *Bank of Nova Scotia v. United States*,²⁴³ the district court attempted to use its inherent powers to circumvent the harmless-error inquiry required by Federal Rule of Criminal Procedure 52(a). 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.²⁴⁴

A federal court thus has no power to disregard a clearly applicable federal rule, especially because the rule is on a par with “statutory” provisions.

In *Carlisle v. United States*,²⁴⁵ the district court granted a defendant’s untimely post-verdict judgment of acquittal in violation of the express terms of Rule 29 of the Federal Rules of Criminal Procedure. 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.”²⁴⁶

²⁴¹ 474 U.S. 140.

²⁴² *Id.* at 148.

²⁴³ 487 U.S. 250 (1988).

²⁴⁴ *Id.* at 255 (citations and quotation marks omitted).

²⁴⁵ 517 U.S. 416 (1996).

²⁴⁶ *Id.* at 426 (quoting *United States v. Hastings*, 461 U.S. 499, 505 (1983)). *United States v. Payner*, 447 U.S. 727 (1980) is a similar case. In *Payner* a federal district court suppressed evidence that was gathered

The Court has likewise upheld many congressional impingements upon areas frequently claimed as areas of inherent authority. For example, in *Sibbach v. Wilson & Co.*,²⁴⁷ the Court upheld the new Rules Enabling Act (which granted federal courts considerable power in drafting uniform rules of procedure) by explicitly stating Congress' authority in the rule-making area: "argument touching the broader questions of Congressional power . . . is foreclosed. 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 Constitution of the United States."²⁴⁸

The reasoning in *Sibbach* has only become more salient as Congress has taken a heavier hand in federal court rules. Stephen Burbank has very persuasively argued that Congress has exercised substantial authority in rule-making, and has made substantial changes to the rules governing, civil court procedure,²⁴⁹ habeas procedure,²⁵⁰ criminal procedure,²⁵¹ and evidence.²⁵²

2. Cases of Congressional Silence

as the result of "a flagrantly illegal search." The search itself, however, did not violate the Fourth Amendment, so the district court 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 inherent authority. "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.* at 731-32.

²⁴⁷ 312 U.S. 1 (1941).

²⁴⁸ *Id.* at 9-10 (citing *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 21 (1825)).

²⁴⁹ *See, e.g.*, Civil Justice Reform Act (CJRA) of 1990, Pub. L. No. 101-650, 104 Stat. 5089. The CJRA affected multiple different areas of federal civil procedure, although many portions of the Act have now expired. *See* Carl Tobias, *The Expiration of the Civil Justice Reform Act of 1990*, 59 WASH. & LEE L. REV. 541 (2002).

²⁵⁰ *See, e.g.*, The Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 18 U.S.C. § 3601 (2000)).

²⁵¹ For example, a 1985 House Report listed multiple different changes to the Federal Rules of Criminal Procedure from 1973-85, *see* Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (Sept. 24, 1985), reprinted in H.R. Rep. No. 99-422, at 44 (1985).

²⁵² Burbank, *supra* note ___, at 1695-1793.

The seminal case is *In re Peterson*,²⁵³ which allowed a federal court to appoint an auditor to help decide the case at the expense of the parties.²⁵⁴ One of the questions before the Court was whether this appointment was allowable in the absence of express congressional authority: “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.”²⁵⁵ Under these circumstances “[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.”²⁵⁶

This decision is notable for two reasons. First, it is telling that as of 1920 a federal court’s power to act in the absence of express constitutional authorization in this manner was unclear. This speaks volumes about the relative weakness of the inherent power doctrine for the first 130 years of the federal judiciary.²⁵⁷ From *Peterson* forward federal courts have acted regularly (some might say too regularly) without congressional authority. As of 1920, however, the inherent powers doctrine basically consisted of limited dicta in a few cases. Second, even in stating this power, *Peterson* was at pains to note that Congress retains plenary power over this sort of activity and could pass a statute regulating or eliminating it.²⁵⁸

²⁵³ 253 U.S. 300 (1920).

²⁵⁴ *Id.* at 311-15.

²⁵⁵ *Id.* at 312.

²⁵⁶ *Id.*

²⁵⁷ See Tyrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L. Q. 459, 486-87 (1937) (stating that in “every decade from 1790 and 1920” courts considered the congressional power over court rules superior to the judicial).

²⁵⁸ *Id.*

The various “supervisory authority” generally fit under this category as well. *McNabb v. United States*,²⁵⁹ decided in 1943, was the first supervisory power case.²⁶⁰ The Supreme Court claimed a “supervisory authority over the administration of justice in the federal courts” and held that confessions gained as a result of prolonged detention in violation of various federal statutes must be suppressed under this power.²⁶¹ This was not the first time that the Court had suppressed evidence gained in violation of a federal statute,²⁶² but it was the first time it announced a supervisory power over federal criminal procedure or the investigation of federal crimes. Thus, *McNabb* and its companion case, *Mallory v. United States*,²⁶³ announced a substantial change in the Court’s relationship with federal criminal law and investigations.²⁶⁴

A break in past practice like *McNabb* does not occur in a vacuum. *McNabb* was a culmination of years of concern over federal law enforcement tactics and the suddenly burgeoning role of federal criminal law. During the first 100 years of the United States, federal criminal prosecutions were few and appeals to the Supreme Court were not even allowed by statute until 1889.²⁶⁵ This all changed with

²⁵⁹ 318 U.S. 332 (1943).

²⁶⁰ Barrett, *supra* note ___, at 371-72.

²⁶¹ *McNabb*, 318 U.S. at 346-47.

²⁶² For example, in *Nardone v. United States*, 302 U.S. 379 (1937) the Court suppressed evidence gathered in violation of a federal telecommunications law. *Id.* at 381-85.

²⁶³ 354 U.S. 449 (1957).

²⁶⁴ Note that 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. Amy Barrett has argued that cases where the Supreme Court controls lower court procedures or processes are likely unconstitutional. Barrett, *supra* note ___, at 327-28. For further discussion of this “hierarchical” question, see Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary”*, 78 TEX. L. REV. 1513, 1514-17 (2000) and James E. Pfander, *Jurisdiction Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1442-59 (2000).

²⁶⁵ 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).

prohibition and other expansions of federal criminal prosecutions. Between 1901 and 1932 the number of federal criminal cases quintupled.²⁶⁶ On top of the growth in the number of prosecutions there was a growing concern over abusive law enforcement tactics like wiretapping and coercive interrogations. Justice Brandeis famously opposed these tactics in a series of dissents from the 1920s.²⁶⁷

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 an authority to centralize and modernize the federal common law rules of evidence in *Funk v. United States*.²⁶⁸ Funk was quite explicit that “[o]f course, Congress has that power [to change the rules of evidence] but, if Congress fail to act” the Court could act on its own to modernize the rules of evidence.²⁶⁹

In 1934 Congress first granted the Court the power to create the Federal Rules of Civil Procedure,²⁷⁰ which were adopted in 1938.²⁷¹ 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.²⁷² As such, the Court’s conception of a “supervisory authority” was at least partially based on congressional

²⁶⁶ Beale, *supra* note __, at 1441-42.

²⁶⁷ See, e.g., *Olmstead v. United States*, 277 U.S. 438, 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; in order to preserve the judicial process from contamination”); *Casey v. United States*, 276 U.S. 413, 423-25 (1928) (Brandeis, J., dissenting) (similar argument for entrapment); *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”).

²⁶⁸ 290 U.S. 371 (1933).

²⁶⁹ *Id.* at 381-84.

²⁷⁰ Act of June 19, 1934, ch. 651, 48 Stat. 1064.

²⁷¹ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3 (2010).

²⁷² George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 694-95 (1946).

grants of power and a shifting view of the Supreme Court's role in the federal judiciary.

Moreover, *McNabb* quite explicitly states that it is not a constitutional decision (and thus beyond the purview of Congress)²⁷³ and goes to great lengths to argue that the case generates out of the federal laws requiring federal law enforcement officers to take arrestees "immediately . . . before a committing officer."²⁷⁴ The last paragraph of the decision notes that the decision arises out of "respect [for] the policy which underlies Congressional legislation."²⁷⁵ *McNabb* does not explicitly state that Congress could overrule the decision if it chose, but the Court describes the decision as non-constitutional and its reference to its role in defining the federal common law rules of evidence (which it had just recognized could be changed by Congress in *Funk*), strongly suggests that *McNabb* falls into the camp of cases not proscribed by congressional action and subject to congressional review and overturn.

Congress has, in fact, acted to correct supervisory power decisions on two occasions. In 1957, Congress passed a law narrowing and clarifying the holding in *Jencks v. United States*²⁷⁶ that required the government to provide the defendant with written materials from government informants.²⁷⁷

²⁷³ *McNabb v. United States*, 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").

²⁷⁴ *Id.* at 341-43.

²⁷⁵ *Id.* at 347.

²⁷⁶ 353 U.S. 657 (1957).

²⁷⁷ *Id.* at 670-72. The congressional law can be found at Act of Sept. 2, 1957 71 Stat. 595 (1957) (codified as amended at 19 U.S.C. § 3500).

In *Palermo v. United States*,²⁷⁸ the Court upheld the provisions of the Jencks Act. The Court recognized that *Jencks* was a supervisory power case, i.e. the *Jencks* Court was “[e]xercising our power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts.”²⁷⁹ The Court then described the passage of the Act and briskly affirmed Congress’ power to change the non-constitutional result in *Jencks*: Congress “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” and the Court upheld Congress’ power to do so.²⁸⁰ Thus, *Jencks*, the Jencks Act and *Palermo* well establish that Congress is free to change or alter supervisory authority cases (assuming there are no constitutional concerns with the new law) as it sees fit.

In 1968, Congress passed a second law aimed at limiting a supervisory power case. Section 3501 of the Omnibus Crime Control and Safe Streets Act was meant to overturn the *McNabb-Mallory* rule on lengthy detentions by stating 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.”²⁸¹ Section 3501 was also meant to reverse or substantially limit the decisions in *Miranda v. Arizona*²⁸² and *Escobedo v. Illinois*.²⁸³

²⁷⁸ 360 U.S. 343 (1959).

²⁷⁹ *Id.* at 345.

²⁸⁰ *Id.* at 347-48.

²⁸¹ Pub.L. No. 90-351, Title II, § 701(a), 82 Stat. 210 (1968). This section was also meant to reverse or substantially limit the decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964).

²⁸² 384 U.S. 436 (1966).

²⁸³ 378 U.S. 478 (1964). For a description of how Section 3501 attempted to address *Miranda* and *Escobedo*, see Beale, *supra* note ___, at 1454 n. 151.

The different fates of the different parts of Section 1501 well establish Congress' plenary Article I power to alter non-constitutional supervisory power cases. In *Corley v. United States*²⁸⁴ the Court the Court upheld the congressional changes to the *McNabb-Mallory* rule.²⁸⁵ *Corley* does not even discuss Congress' power to adjust *McNabb-Mallory*; it takes that power as a given and proceeds immediately to analyzing the meaning of the statute.²⁸⁶

In comparison, the Court held the portions of the statute that sought to restrict the constitutionally based *Miranda* rule unconstitutional in *Dickerson v. United States*.²⁸⁷ *Dickerson* quite plainly explains 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.²⁸⁸

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

3. Cases Where the Court Elided Congress

There is a third group of cases that are the most problematic for this Article's vision of weak, non-constitutional inherent authority: cases where a congressional act may apply and the Court allows an exercise of inherent authority regardless.

²⁸⁴ 129 S. Ct. 1558 (2009).

²⁸⁵ *Id.* at 1566-67.

²⁸⁶ *Id.*

²⁸⁷ 530 U.S. 428, 436-38 (2000).

²⁸⁸ *Id.* at 437.

Notably, the Supreme Court has never stated that it is attempting to elude congressional intent in these cases. To the contrary, 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.

The first of these cases is a 1962 case, *Link v. Wabash*,²⁸⁹ which held that federal courts retained the right to *sua sponte* dismiss a case for failure prosecute, despite the fact that Federal Rule of Civil Procedure 41(b) did not provide that power.²⁹⁰ 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*.²⁹¹ The petitioner argued "by negative implication" that 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 must be initiated by the defendant.²⁹²

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 the fact that state and federal courts had continued to regularly use the sanction, even after the adoption of Rule 41(b). 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."²⁹³

²⁸⁹ 370 U.S. 626 (1962).

²⁹⁰ *Id.* at 629-31.

²⁹¹ *Id.* at 630 (quoting Fed. R. Civ. Pro. 41(b)).

²⁹² *Id.*

²⁹³ *Id.* at 631-32.

There are a few ironies about this decision. First, *Link* was decided during the period where the Court itself had a major and largely unfettered role in drafting the Rules, so in assessing the intent behind Rule 41(b) it was actually in large part assessing its own intent. Second, while the Court brushed off the petitioner's argument, it is worth wondering why an inherent power, like the one claimed in this case, should survive after the creation of the Rules of Civil Procedure, largely by the federal courts themselves. If the Rules were legislatively drafted, the argument to act in the interstices would be much more persuasive than adding inherent powers on top of a set of rules drafted largely by the courts themselves.

Link is the first time the Court stated that Congress needs to make a "much clearer expression" in a law to displace an existing inherent power. 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* about a constitutionally protected core inherent contempt power, it is *Link* and its progeny that suggest some sort of special constitutional status for inherent powers.

*Chambers v. NASCO*²⁹⁴ expanded on *Link*'s "clearer expression" language: "we do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power."²⁹⁵ In *Chambers* a district court sanctioned a party for bad-faith litigation conduct. The court imposed these sanctions under its inherent powers, rather than Rule 11 or 28 U.S.C. § 1927,

²⁹⁴ 501 U.S. 32 (1991).

²⁹⁵ *Id.* at 47.

because it found that neither Rule 11 nor § 1927 was sufficient to reach the behavior at issue in the case.²⁹⁶

The Supreme Court affirmed, finding that neither Rule 11 nor § 1927 were meant to displace the traditional inherent powers of the court to sanction.²⁹⁷ 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.²⁹⁸

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.²⁹⁹

These relatively contradictory statements were necessary because the Court could not uphold the *Chambers* sanction if the lower court should have first exhausted its remedies under existing rules and statutes, because that court did no such thing and the existing rules and statutes offered a wide array of options to punish misbehavior.³⁰⁰

²⁹⁶ *Id.* at 40-42.

²⁹⁷ *Id.* at 47-49.

²⁹⁸ *Id.* at 50.

²⁹⁹ *Id.*

³⁰⁰ The 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.

Nevertheless, the Court did not want to hold that a court's inherent powers were to be used as a vehicle to simply disregard the applicable rules and statutes. Instead, the Court struck a compromise position: in a case where some of the behavior would not be reached by the existing statutes and rules a court could use the inherent powers to reach all of the behavior at once.³⁰¹ The Court supplements this holding by finding, as it did in *Link* and other cases, that the rules and statutes had not meant to displace the existing inherent powers of courts, but to supplement them.³⁰²

Gulf Oil Corp. v. Gilbert,³⁰³ the first modern *forum non conveniens* case, is also a case where the Court allows a district court to avoid a seemingly applicable congressional jurisdictional statute in favor of an inherent power to dismiss because another forum would be more convenient.³⁰⁴ *Gulf Oil* is also an inherent powers

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.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).

Id. at 62 (Kennedy, J., dissenting).

³⁰¹ See *id.* at 50.

³⁰² See *id.* at 47-49. There are other cases in the same vein as *Chambers*. *Roadway Express v. Piper*, 447 U.S. 752, 764-68 (1980), upheld a court's inherent power to assess attorneys fees against opposing counsel, despite the existence of 28 U.S.C.A. § 1927.

³⁰³ 330 U.S. 501 (1947).

³⁰⁴ *Id.* at 840-43.

case that resulted in congressional action. Months after the case Congress responded by allowing inter-district transfers in 28 U.S.C. § 1404.³⁰⁵

While these cases come close to applying inherent powers in the teeth of existing congressional actions, it is worth noting that the Court never says that is what it is doing. 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 perfectly consistent with congressional power to shape federal court rules and processes.³⁰⁶

B. *A Brief Word on State Court Inherent Power*

The fact that the Supreme Court has never invalidated a congressional act under the inherent powers doctrine is particularly notable given the comparative behavior of state supreme courts in this area. State supreme courts have applied a much more muscular inherent powers doctrine.³⁰⁷ State supreme courts have used this power to repeatedly overturn legislative acts, especially if an act affects the regulation of lawyers.³⁰⁸ Given the comparative example of state courts, the federal court reticence in this area is particularly marked. If the Court needed a model for overturning congressional acts, it had many to choose from.

³⁰⁵ 28 U.S.C. § 1404(a). For a general discussion of *Gulf Oil* and this statute, see Lear, *supra* note ___, at 1148-49.

³⁰⁶ Further examples of this category of cases can be found in Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 315-19 (2010).

³⁰⁷ See Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 462 (2008).

³⁰⁸ 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).

C. *Youngstown's Taxonomy of Presidential Power*

A close parallel to the inherent power of federal courts are the powers of the President. The Court's treatment of presidential power has followed this Article's theory quite closely. The most famous statement is Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.³⁰⁹ Jackson divided exercises of presidential power into three categories: actions authorized by Congress; those neither authorized nor prohibited by Congress; and those prohibited by Congress.³¹⁰

Each of these three categories suggests a different level of presidential authority. "When 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."³¹¹ 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."³¹² In the interstices Presidential authority can derive support from "congressional inertia, indifference or quiescence."³¹³ Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its

³⁰⁹ 343 U.S. 579 (1952). In *Youngstown* the Court overruled President Truman's decision to seize steel mills without congressional approval in order to guarantee the production of steel during the Korean War. *Id.* at 582-85. *Youngstown* is one of the most famous separation of powers cases, *see, e.g.*, Symposium, *Youngstown at Fifty*, 19 CONST. COMMENT. 1 (2002).

³¹⁰ *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

³¹¹ *Id.* at 635.

³¹² *Id.* at 637

³¹³ *Id.*

lowest ebb,” and the Court can sustain his actions “only by disabling the Congress from acting upon the subject.”³¹⁴

Jackson’s *Youngstown* concurrence has been adopted by the Court in multiple majority opinions since and is the accepted rubric for measuring the constitutionality of questionable presidential assertions of power.³¹⁵ 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.”³¹⁶ When the President acts in the teeth of congressional authority however, his powers are severely limited: he may only act where Congress cannot act at all, a limited set of powers,³¹⁷ and an analogous set to the pure judicial power of deciding cases.³¹⁸

D. *Two Different Approaches From the Courts of Appeals*

The confusion at the Supreme Court level has led to some outlier cases amongst the courts of appeals. On 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 Posner has described inherent authority as “a residual authority, to be exercised sparingly” and

³¹⁴ *Id.* at 637-638.

³¹⁵ *See, e.g.,* *Medellin v. Texas*, 552 U.S. 491, 523-25 (applying the Jackson test); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (same).

³¹⁶ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

³¹⁷ Examples include the use of force to repel an invasion, see G. Sidney Buchanan, *A Proposed Model for Determining the Validity of the Use of Force Against Foreign Adversaries Under the United States Constitution*, 29 HOUSTON L. REV. 379, 398 n. 96 or the power to recognize foreign governments. *See* Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1635 (2007).

³¹⁸ A fuller 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 utilizing the implied powers of the President, Congress itself and the judiciary as a launching point.

only to address issues “not adequately dealt with by other rules, [e.g.,] Rules 11 and 37 of the Federal Rules of Civil Procedure.”³¹⁹ Judge 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.”³²⁰

At the other extreme, two recent cases have explicitly stated a requirement of clear congressional intent to abrogate inherent powers and have disregarded the underlying law in the absence of such a statement. While these cases do not explicitly overrule an Act of Congress, they do suggest that a federal court can disregard an applicable federal law under their inherent powers.

In *Lin v. U.S. Department of Justice*,³²¹ the Second Circuit addressed 8 U.S.C. § 1252(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,³²² which explicitly stripped federal courts of the power to remand cases to the Bureau of Immigration Appeals for the taking of additional evidence.³²³ In *Lin* the Second Circuit did exactly what § 1252(a) barred: it remanded an immigration

³¹⁹ *Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 390-91 (7th Cir. 2002).

³²⁰ *United States v. Widgery*, 778 F.2d 325, 329 (7th Cir.1985); *see also* *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir.1991) (Kozinski, J.) (“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.”); *In re* *United States*, 426 F.3d 1, 9 (1st Cir. 2005) (“The court’s supervisory power does not license it to ignore an otherwise valid existing jury plan or to bypass the mechanism provided by statute to alter such plan.”); *United States v. Thorpe*, 471 F.3d 652, 665 (6th Cir. 2006) (rejecting the district court’s grant of discovery based upon a claim of inherent power that disregarded contrary statutory and Supreme Court law); *Atchison, Topeka and Santa Fe Ry. Co. 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. Washington*, 549 F.3d 905, 912-14 (3rd Cir. 2008) (rejecting argument that a district court has an inherent power to vacate its own criminal judgments because of fraud because 18 U.S.C. § 3582(c) and Federal Rule of Criminal Procedure 35 circumscribe such a power).

³²¹ 473 F.3d 48, 53 (2nd Cir. 2007).

³²² *See* 8 U.S.C. § 1252(a).

³²³ *Id.* at 52.

appeal. The Second Circuit did so on the agreement of the parties, which does not appear to be an exception to the strictures of § 1252(a).³²⁴ In dicta the court opined that regardless of the agreed remand and despite clear congressional intent to bar remand, a court could in fact remand under its inherent authority.³²⁵

The reasoning and ruling in *Lin* was echoed in *Sahyers v. Prugh, Holliday & Karatinos, P.L.*³²⁶ *Sahyers* was an FLSA fees case. Plaintiff Sahyers worked as a paralegal for a law firm and claimed unpaid overtime and other FLSA violations. After somewhat contentious and drawn out discovery, the defendants offered plaintiff a \$3500 judgment under Federal Rule of Civil Procedure 68. Plaintiff accepted and plaintiff's attorney filed for attorney's fees under the FLSA's mandatory fee provision.

³²⁴ See 8 U.S.C. § 1252(a).

³²⁵ The quote from *Lin* is worth reading, just to get a sense of the breadth of the power claimed:

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.

Lin, 473 F.3d at 52-55. The Second Circuit has since cast doubt upon this discussion, see *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 261-62 (2d Cir. 2007), and other circuits have likewise declined to follow it. See *Wan Ping Lin v. Mukasey*, 303 Fed. Appx. 465, 468 (9th Cir. 2008); *Zhen Jiang v. Attorney General of United States*, 324 Fed. Appx. 196, 198 n.4 (3rd Cir. 2009).

³²⁶ *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241 (11th Cir. 2009). Unless noted separately, all of the facts and law that follow come from this decision. See *id.* at 1242-45. Please note that I advised plaintiff's counsel *pro bono* in this case and also helped *pro bono* on the petition for certiorari to the U.S. Supreme Court.

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 at all.³²⁷ Like *Lin*, *Sahyers* involved a federal court disregarding contrary statutory language based on inherent powers. The FLSA's fee provision is mandatory and contains no exception for lawyer collegiality.³²⁸ The *Sahyers* court evaded the statutory language as follows: "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."³²⁹

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.³³⁰ *Lin* and *Sahyers* make the danger of Supreme Court overreaching in this area clear: federal courts can disregard virtually any

³²⁷ *Id.*

³²⁸ See 29 U.S.C. § 216(b); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415-16 & nn. 5 & 6 (1978) (stating that the statute's use of the word "shall" rather than "may" directs that a fee award is mandatory).

³²⁹ *Sahyers*, 560 F.3d at 1245 n. 6.

³³⁰ A search of the Westlaw database "USC" for the terms "inherent power" /s court returns 29 documents, almost all of them from the Federal Rules of Civil or Criminal Procedure and none explicitly abrogating inherent authority in the manner suggested by *Lin* and *Sahyers*.

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., *Hermanos*, 313 F.3d at 390-91. *Lin* and *Sahyers* ask whether the statute at issue clearly abrogates the claimed inherent authority. 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.

congressional act or rule by finding “no clear intent” to dislodge an existing inherent power.

CONCLUSION

The ramifications of this understanding of inherent powers are quite straightforward. First and foremost, federal courts should more clearly recognize Congress’ superior Article I power in this area. The regular sabre rattling of the federal courts, starting with the dicta in *Bollman* and *Hudson*, to the effect that there is an indeterminate core constitutional inherent power and that 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.

Similarly, the Court should consider overruling the portion of *Chambers v. NASCO* that allows a court to exercise its inherent powers despite potentially applicable statutes or rules.³³¹ Given Congress’ superior constitutional power courts should not act in an area where Congress has spoken. Courts can, of course, continue to work in the interstices amongst the various statutes and rules, but cannot choose to exercise an inherent power when an applicable statute or rule is available.

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,

³³¹ See *supra* notes ___ and accompanying text.

cases like *Sahyers* and *Lin*,³³² should not be followed. Any generally applicable statute or rule should trump a court's inherent powers.

³³² See *supra* Section IV.C.