BROADER IS BETTER: THE INHERENT POWERS OF FEDERAL COURTS

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Article III of the United States Constitution vests the Supreme Court and those lower courts established by Congress with the “judicial power.”1 Through this grant, the federal courts are empowered “to decide, in accordance with law, who should prevail in a case or controversy.”2 The Constitution does not, however, circum-

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* Associate, Schnader Harrison Segal & Lewis LLP. I am grateful to United States District Judge William H. Yohn Jr. and Professor Michael J. Borden, for their insightful comments and suggestions; United States Circuit Judge Robert E. Cowen, for whom I was clerking when I wrote this Article, for his encouragement and support; Christopher Anclien, for being an excellent research assistant and an even better brother; Mary Schroeder, for her patience and love throughout this process; and the staff and editors of the New York University Annual Survey of American Law, for their excellent advice and hard work.

1. See U.S. CONST. art. III, § 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.”). Significantly, this power is self-executing. See David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 BYU L. REV. 75, 89 (1999) (”[A]t least some elements of judicial potency were conceived from the outset to inhere in federal courts by virtue of their being ‘judicial’ bodies—notwithstanding the absence of authorizing legislation, and no matter what their subject matter competence might be.”); John Harrison, The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III, 64 U. CHI. L. REV. 203, 211 (1997) (stating that “the Vesting Clause [of Article III] is a self-executing enactment”); Julian Velasco, Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View, 46 CATH. U. L. REV. 671, 699 (1997) (“The appropriate interpretation is not that Congress must vest the judicial power in the federal judiciary, but that the Constitution itself does the vesting.”).

2. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring); see also The Federalist No. 39, at 233 (James Madison) (Garry Wills ed., 2003) (explaining that decisions of federal courts are “to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality”). While the Constitution does not elaborate on the definition of this short phrase, see Edward S. Corwin, The Doctrine of Judicial Review 16 (Peter Smith 1963) (1914) (“[A]s to what that [judicial] power is, what are its intrinsic nature and scope, [the Constitution] says not a word.”), commentators have taken stabs at fixing its meaning. For instance, Professors Landis and Frankfurter have concluded that the “‘Judicial power’ sums up the whole history of the administration of justice in English and American courts through the centuries.” Felix Frankfurter & James M. Landis, Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers, 37 HARV. L. REV. 1010, 1017 (1924). More recently, Professors Liebman and Ryan have exhaustively combed the records of the Consti-
scribe the means that the courts may invoke on their own initiative to facilitate their exercise of the judicial power. Nevertheless, the courts regularly apply their “inherent powers” to take some action that has not been specifically authorized by the Constitution, written rule, or statute.3

The federal courts’ use of inherent powers represents a sharp break from the usual pattern of congressional dominance, especially over the lower courts. The lower courts exist only because Congress exercised its prerogative to ordain and establish them.4 Consequently, Congress controls the lower courts’ size, location, and organization;5 determines what cases the courts may hear.

3. For a seminal discussion of inherent powers, see Frankfurter & Landis, supra note 2, at 1023 (suggesting that powers may be inherent if: (1) “they ‘inhere’ in nature, so that to deny these powers and yet to conceive of courts is a self-contradiction”; (2) “they ‘inhere’ in our history, so that the formulated experience of the past embodies them”; or (3) “they ‘inhere’ in the idea of a court’s usefulness, so that the courts would otherwise obviously fail in the work with which they are entrusted”).

4. Conceivably, then, Congress could also abolish the lower federal courts. See, e.g., Steven G. Calabresi, The Congressional Roots of Judicial Activism, 20 J.L. & Pol. 577, 581 (2004) (“While the Constitution requires Congress to create and fund the Supreme Court, it technically leaves Congress free to create or abolish lower federal courts and their jurisdiction and funding as it sees fit.”). For instance, in the Act of February 15, 1801, the Federalists created permanent judgeships on the circuit courts and appointed Federalist judges to fill those slots. See Richard H. Fallon, Jr. et al., Hart and Wechsler’s The Federal Courts and the Federal System 34 (5th ed. 2003). However, the incoming Jeffersonians then repealed the law and abolished the judgeships in the Judiciary Act of 1802. See id. But see Theodore Eisenberg, Congressional Authority to Restrict Lower Court Jurisdiction, 83 Yale L.J. 498, 509–13 (1974) (arguing that, while at the time the Constitution was drafted lower federal courts may not have been necessary, as caseloads have grown those courts have become essential to the success of the constitutional scheme).

5. See 28 U.S.C. § 41 (2000) (creating thirteen circuit courts and defining their geographic boundaries); § 44 (setting the number of judges per circuit and their salaries); § 45 (setting qualifications for chief judges); § 48 (listing cities in which each circuit court must hold regular sittings); §§ 81–131 (setting territories
through its near-total authority over their jurisdiction; and establishes the procedures that the courts use to decide cases by prescribing procedural rules. Yet, when courts exercise their inherent powers, they essentially create their own procedural rules without waiting for congressional authorization.

6. See Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) ("Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."); Sheldon v. Sill, 49 U.S. 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers."). See generally Erwin Chemerinsky, Federal Jurisdiction 169–71 (4th ed. 2003).

7. The first Congress enacted sundry procedural laws. See Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (providing courts power to grant new trials, impose and administer oaths and affirmations, punish contempts, and make rules for orderly conducting of business). The Supreme Court has never questioned this power that Congress immediately arrogated to itself. See, e.g., Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").

8. There are two ways in which a court can create a procedural rule: (1) by prescribing a prospective rule, as the Supreme Court has done by drafting the Federal Rules of Civil Procedure; or (2) by creating common law, which takes on authority as precedent. This Article focuses on the latter category. While some have argued that courts possess the authority described in the former category, see Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283, 1319–22 (1993) (arguing that prescribing laws controlling practice and procedure is an inherent power of the courts that may not be divested), this position has been widely criticized, see Martin H. Redish, Federal Judicial Independence: Constitutional and Political Perspectives, 46 Mercer L. Rev. 697, 730–31 (1995); William F. Ryan, Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions, 77 B.U. L. Rev. 761, 798–810 (1997). While a rule adopted in a case may achieve force as precedent, this process is more in keeping with the traditional role of courts than permitting courts to prescribe prospective rules. See, e.g., Stephen B. Burbank, Procedure, Politics and Power: The Role of Congress, 79 Notre Dame L. Rev. 1677, 1681 (2004) (describing as “critically important” the distinction “between procedure fashioned (or applied as precedent) in decisional law and that provided prospectively in court rules”).

9. Thus, this Article focuses on courts’ powers when there is no preexisting congressional statute or rule that forecloses the action the court wants to take. If Congress has authorized the federal courts to follow some rule of procedure, there
It is important to note, at the outset, that this Article treats inherent powers as a subset of implied powers. Thus, whatever obviously is no separation of powers issue if the courts oblige. And if Congress has expressly foreclosed a procedural tack, courts are generally not empowered to disregard Congress’s pronouncement. See Carlisle v. United States, 517 U.S. 416, 426 (1996) (“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.”); Palermo v. United States, 360 U.S. 343, 355 n.11 (1959) (stating that the power of the Supreme Court “to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress”); John Papachristos, Comment, Inherent Power Found, Rule 11 Lost: Taking a Shortcut to Impose Sanctions in Chambers v. NASCO, 59 Brook. L. Rev. 1225, 1253, 1255 (1993) (“[W]here codified sanction provisions provide an adequate means by which to regulate conduct, authority to act under the guise of inherent power is not only unnecessary, but improper.”). Thus, the dynamic situations occur when Congress has not spoken on an issue. This concept is described in Justice Jackson’s classic opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which, while concerning a clash between the executive and legislative branches, provides a useful comparison of a branch’s constitutional authority alone and in conjunction with another branch. Justice Jackson explained that “[w]hen the President acts in absence of either a congressional grant or denial of 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.” Id. at 637 (Jackson, J., concurring). On the other hand, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Id.

10. While some argue that implied and inherent powers are entirely separate, see Scott C. Idleman, The Emergence of Jurisdictional Resequencing in the Federal Courts, 87 CORNELL L. REV. 1, 45–48 (2001), neither the caselaw nor the underlying concepts admit such a sharp distinction. Hudson, regularly referred to as the first case to recognize an inherent power, never actually uses the word “inherent.” See United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). Instead, it refers to “implied powers,” in whose order it includes contempt, the quintessential inherent power. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (calling contempt the “most prominent” inherent power). Other cases similarly use the words interchangeably. See, e.g., Eash v. Riggins Trucking Inc., 757 F.2d 557, 562–63 (3d Cir. 1985) (en banc) (referring to middle level inherent powers (in which it includes contempt) as those “powers implied from strict functional necessity”); cf. David E. Engdahl, The Contract Thesis of the Federal Spending Power, 52 S.D. L. Rev. 496, 499 n.19 (using these terms interchangeably). Moreover, as Justice Jackson wrote in his Youngstown concurrence, it is the concept that is significant, not the term used to describe it. See Youngstown Sheet & Tube Co., 343 U.S. at 647 (Jackson, J., concurring) (“‘Inherent’ powers, ‘implied’ powers, ‘incidental’ powers, ‘ple- nary’ powers, ‘war’ powers and ‘emergency’ powers are used, often interchangeably and without fixed or ascertainable meanings.”). And it is clear that the concepts described by “implied powers” and “inherent powers” coalesce. For instance, in describing implied powers in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall stated that “the powers given to the government imply the ordinary means of execution,” id. at 409, which demonstrates that im-
individuals or courts have stated about implied powers is equally applicable to this Article’s discussion of inherent powers. These inherent powers are unquestionably critical to the federal judicial system. Courts rely heavily on them to manage litigation and to sanction refractory parties. Despite the significance of these powers, and despite the fact that the Supreme Court has recognized their existence since at least 1812, they have been described as “nebulous” and possessing “shadowy” bounds.

Courts wield their inherent powers uneasily due to doctrinal uncertainty on two fronts. First, there is no clear standard establishing when courts may legitimately invoke their inherent powers to take some action that has not been specifically licensed by rule or statute. The Supreme Court’s jurisprudence is schizophrenic: it sometimes states that inherent powers are available only when they are indispensable to the discharge of the judicial power, yet it often authorizes their use in less pressing situations. Meanwhile, the two most prominent commentators to consider courts’ inherent powers have advocated the Supreme Court’s hard-line view, arguing that inherent powers should be constrained to cases of indispensable necessity. Accordingly, these commentators argue that all other uses of inherent power—embodied in hundreds of cases—are illegitimate.

plied powers may be a means to achieve constitutionally vested ends. This is also how the Supreme Court discusses inherent powers. In Chambers v. NASCO, Inc., 501 U.S. 32 (1990), for example, the Court described inherent powers as those “necessary to the exercise of all others” and that are “necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” Id. at 43; see also Ex parte Robinson, 86 U.S. 505, 510 (1873) (the existence of the contempt power “is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice”); Frankfurter & Landis, supra note 2, at 1023 (suggesting that powers may be inherent if “they ‘inhere’ in the idea of a court’s usefulness, so that the courts would otherwise obviously fail in the work with which they are entrusted”). Thus, both ideas concern powers that facilitate a court’s exercise of its Constitutionally granted duties.

11. See infra Part I.A.
12. See infra Part I.A.
13. See Hudson, 11 U.S. (7 Cranch) at 34.
15. See infra Part I.B.
17. See infra Part I.A.
Second, there is no consensus as to Congress’s authority to abrogate court-made rules founded on inherent powers. While a court will initially invoke its inherent powers to take some discrete action in an individual case, if that action is affirmed by an appellate court, the action assumes the weight of precedent and becomes a specialized form of common law. Congress may generally overrule court-made rules; however, separation-of-powers principles guarantee that courts persist as an independent, coequal branch of government. Thus, the question becomes: how broadly may Congress restrict inherent powers without intruding on the exclusive domain of Article III courts? The Supreme Court, in a case concerning the inherent power to punish parties for contempt, stated that inherent powers may “neither be abrogated nor rendered practically inoperative.” Commentators, however, argue that only indispensable inherent powers should be protected from congressional overrule, and that shielding non-indispensable inherent powers from Congress wrongly impinges upon congressional ascendancy.

In this Article, I endeavor to provide a comprehensive analysis that will dispel the uncertainty concerning inherent powers. First, I show that—despite the commentators’ misgivings—courts may exercise inherent powers whenever such action possesses a natural relation to the exercise of the judicial power. This conclusion is overwhelmingly supported by an originalist understanding of the Constitution, Supreme Court precedent, and policy considerations. Second, I argue that Congress may abrogate or curtail a rule based on an inherent power as long as doing so will not intrude on the “basic function” or the “central prerogative” of the federal courts. This methodology ensures that courts will maintain an indefeasible authority to conduct their essential business, while also recognizing that the Constitution has vested Congress, and not the courts, with the ability to legislate. The Article’s conclusions regarding these two points have the benefit of harmonizing—rather than laying to

18. See, e.g., Louise Weinberg, Federal Common Law, 83 NW. U. L. REV. 805, 844 (1989) (“Finally, no one doubts that Congress has the power of revision when the Supreme Court acts in these ‘legislative’ modes. Even when the Court creates a wholly new cause of action, or rules in other quasi-legislative ways, or violations of statute, national policy, or even the Constitution, there is ample power of oversight by the legislature.”).
19. See infra note 90.
waste—the vast majority of federal court precedents, while providing a heretofore lacking justification for those decisions.

This Article then applies these twin conclusions to the fraud-upon-the-court doctrine, a well-established body of law founded on inherent powers that permits courts to set aside judgments that were procured by fraud. This application is illuminating in two respects. First, it illustrates the value of recognizing a broad form of inherent power. The fraud-upon-the-court doctrine, although not indispensable to the operation of courts, serves the salutary purposes of protecting courts from becoming saddled with ill-gotten judgments, acting as a stick to punish parties who defraud the courts, and furthering general notions of fair play. The natural relation standard advocated by this Article embraces the fraud-upon-the-court doctrine; the indispensably necessary standard advanced by the other commentators rejects the doctrine as illegitimate. Second, this exercise permits a close inspection of the interplay between inherent powers and statutes—here, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)\(^2\)—and helps mitigate concerns that a loose interpretation of inherent powers will tramnel upon Congress’s authority to set policy. Vitally, because cases pitting the fraud-upon-the-court doctrine against the AEDPA are percolating through the federal courts,\(^3\) the courts are presently faced with the precise issues that this Article tackles and hopes to clarify.

This Article proceeds in three parts. In Part I, I introduce the general use of inherent powers and elaborate on the existing debates about when they are available and when they may be abrogated by Congress. In Part II, I argue that history, caselaw, and policy considerations support the availability of inherent powers in

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23. *See, e.g.*, United States v. Barbosa, 239 F. App’x 759, 760 (3d Cir. 2007) ("We have not previously addressed in a precedential decision whether a Hazel-Atlas motion is a legitimate means of attacking a criminal conviction which has already been assailed on direct appeal and via § 2255. We need not resolve that question here . . . ."); Spitznas v. Boone, 464 F.3d 1213, 1216 (10th Cir. 2006) (discussing under which circumstances fraud upon the court constitutes a successive habeas motion and when it constitutes a "true" motion under Fed. R. Civ. P. 60(b)); Workman v. Bell, 227 F.3d 331, 335 (6th Cir. 2000) (en banc) ("[C]ases of fraud upon the court are excepted from the requirements of section 2244."); Fierro v. Johnson, 197 F.3d 147, 152–53 (5th Cir. 1999) (noting that "[i]t is exceedingly difficult to answer the question of whether the AEDPA preempts or modifies courts’ use of their inherent powers because the search for an answer pits the clear statutory language (of § 2244(b)(1)) against long-established ‘inherent’ powers of the judiciary," and ultimately declining to resolve the issue).
all cases in which they possess a natural relation to the exercise of the judicial power. I further argue that Congress may limit the use of an inherent power only if doing so will not hamper the central functioning of courts. Finally, in Part III, I apply my methodology to the fraud-upon-the-court doctrine.

I. INTRODUCTION TO INHERENT POWERS: THEIR USES, THEIR LIMITS, AND THE ROLE OF CONGRESS

As stated above, inherent powers may be defined as the power of a federal court “to control and direct the conduct of ... litigation without any express authorization in a constitution, statute, or written rule of court.” To elucidate this concept, it is useful to canvass the state of the law on three specific inherent powers issues: (1) the specific situations in which federal courts may use their inherent powers; (2) the level of necessity required to justify the invocation of inherent powers; and (3) how broadly Congress may abrogate rules founded on inherent powers. This background analysis reveals the disarray that currently plagues the doctrine, but also paves the way for a comprehensive solution.

A. The Vibrancy of the Inherent Powers Jurisprudence

The inherent powers jurisprudence is rich and varied. While courts typically use their inherent powers to manage litigation and to sanction parties, these categories are so amorphous that they underscore a cardinal truth: courts have relied on their inherent powers at every stage of trial. Above all, inherent powers cases reflect justice’s “suppleness of adaptation to varying conditions.”

Inherent powers have proven invaluable to courts' pretrial case management. The Supreme Court has held that before a case commences, lower courts have the power to stay an action pending the completion of a related action in another court, explaining that “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Courts have also invoked their inherent powers to accom-

26. Id. at 254. While Landis involved staying a federal civil case when another civil case was proceeding in a different federal court, the courts of appeals have concluded that this principle applies with equal vitality when the related action proceeds in a state suit, see Kittel v. First Union Mortgage Corp., 303 F.3d 1193,
plish an array of housekeeping measures, including ordering consolidation of cases during or before trial, requiring defense counsel either to commit to a firm trial date or withdraw, determining the order in which to hear and decide pending issues, designating attorneys to handle pretrial activity, limiting the length of pretrial hearings, setting a time limit for parties to acquire a lawyer, requiring counsel who entered a general appearance to serve in a standby capacity, invoking forum non conveniens to dismiss an action, and controlling their calendars.

In a similar vein, courts have used their inherent powers to promote settlement by requiring parties to have a representative with full settlement authority present—or at least reasonably and promptly accessible—at pretrial conferences.

1194 (10th Cir. 2002); Lunde v. Helms, 898 F.2d 1343, 1345 (8th Cir. 1990); PPG Indus., Inc. v. Cont’l Oil Co., 478 F.2d 674, 682 (5th Cir. 1973); Amdur v. Lizars, 372 F.2d 103, 106 (4th Cir. 1967); Mottolese v. Kaufman, 176 F.2d 301, 303 (2d Cir. 1949), an administrative proceeding, see Cheyney State Coll. Faculty v. Hustedler, 703 F.2d 732, 737 (3d Cir. 1983); Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863–64 (9th Cir. 1979), or arbitration, see WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 76 (2d Cir. 1997); Bledsoe v. Crowley, 849 F.2d 639, 645 (D.C. Cir. 1988); Merritt-Chapman & Scott Corp. v. Pa. Tpk. Comm’n, 387 F.2d 768, 773 (3d Cir. 1967); Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co., 339 F.2d 440, 442 (2d Cir. 1964); see also Air Line Pilots Ass’n v. Miller, 525 U.S. 866, 880 n.6 (1998) (noting that its “recognition of the right of objectors to proceed directly to court does not detract from district courts’ discretion to defer discovery or other proceedings pending the prompt conclusion of arbitration”). A pending criminal case can also justify staying a civil case. See Microfinanc, Inc. v. Premier Holidays Int’l, Inc., 385 F.3d 72, 77 (1st Cir. 2004); Texaco, Inc. v. Borda, 383 F.2d 607, 608 (3d Cir. 1967).

27. See MacAlister v. Guterma, 263 F.2d 65, 68 (2d Cir. 1958).
29. See Marinechance Shipping, Ltd. v. Sebastian, 143 F.3d 216, 218 (5th Cir. 1998).
30. See In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1011–12 (5th Cir. 1977).
31. See In re Calder, 973 F.2d 862, 868 (10th Cir. 1992).
35. See In re Atl. Pipe Corp., 304 F.3d 135, 143 (1st Cir. 2002); Arthur Pierson & Co. v. Provimi Veal Corp., 887 F.2d 837, 839 (7th Cir. 1989).
36. See In re Stone, 386 F.2d 898, 903 (5th Cir. 1968). (“[D]istrict courts have the general inherent power to require a party to have a representative with full settlement authority present—or at least reasonably and promptly accessible—at pretrial conferences.”); In re Novak, 932 F.2d 1397, 1405, 1407 (11th Cir. 1991); Luis C. Fortez a e Hijos, Inc. v. Mills, 534 F.2d 415, 418 (1st Cir. 1976) (explaining that court may use inherent power to force client to either accept settlement or face default when client has repeatedly acted to delay trial and then refused to
Courts have also turned to their inherent powers to manage and expedite trials by interrupting counsel and setting time limits, limiting the number of expert witnesses who may testify, conditionally admitting some exhibits and then striking them after the close of evidence, excluding exhibits or refusing to permit the testimony of witnesses not listed prior to trial, declaring parties who were absent from docket call ready for trial, making in limine rulings, altering common law rules of procedure, excluding evidence that would be unfair to admit, permitting the taking and filing of post-trial depositions, refusing to subpoena witnesses for indigent civil litigants who cannot tender fees, issuing and responding to letters rogatory, implementing discovery procedures (accept settlement negotiated by counsel). But see In re NLO, Inc., 5 F.3d 154, 158 (6th Cir. 1993) (holding that courts lack authority to compel parties to participate in summary jury trial open to public and media); David A. Rammelt, Note, "Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?, 65 Ind. L.J. 965, 1001 (1990) ("[T]he use of mandatory ad hoc procedures, independently imposed by the judiciary [often by invoking inherent powers] for the sake of judicial economy, is a dangerous solution."). 37. See United States v. Maloof, 205 F.3d 819, 828 (5th Cir. 2000); United States v. Gray, 105 F.3d 956, 964–65 (5th Cir. 1997); Sims v. ANR Freight Sys., Inc., 77 F.3d 846, 849 (5th Cir. 1996).

38. See Aetna Cas. & Sur. Co. v. Guynes, 713 F.2d 1187, 1193 (5th Cir. 1983). But see United States v. Colomb, 419 F.3d 292, 301–02 (5th Cir. 2005) (holding that it was improper for a district court to exclude government witnesses who would testify to probative and relevant evidence).


43. See Funk v. United States, 290 U.S. 371, 382 (1933) ("That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt.").

44. See Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992) (approving exclusion of insurer’s expert testimony evidence showing that moored boat was destroyed by fire caused by electric space heater where other side was precluded from gaining expert testimony since heater and boat had been destroyed).


46. See Lloyd v. McKendree, 749 F.2d 705, 707 (11th Cir. 1985); Estep v. United States, 251 F.2d 579, 582 (5th Cir. 1958).

47. See In re Letter Rogatory, 523 F.2d 562, 564 (6th Cir. 1975) ("[I]t has been held that federal courts have inherent power to issue and respond to letters rogatory . . . ."); United States v. Reagan, 453 F.2d 165, 173 (6th Cir. 1971); United
in habeas cases,48 and requiring the prosecution to produce the previously recorded statements of its witnesses.49

Courts have also relied on their inherent powers to enhance the efficacy of the fact-finding process. Most famously, in *Ex Parte Peterson*, the Supreme Court approved of a district court’s decision to appoint an auditor “to make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the Office of the Clerk of this Court with a view to simplifying the issues for the jury.”50 The Court held broadly that “[c]ourts have . . . inherent power to provide themselves with appropriate instruments required for the performance of their duties,” including the “authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.”51 Courts have also relied on inherent powers to appoint amici curiae on their own motion,52 require the attendance of parties at a hearing to discuss the disappearance of evidence,53 and compel the government to submit a memorandum of law.54

Finally, one of the most common and important roles of inherent powers is to allow courts to craft flexible sticks to sanction contumacious parties. For instance, in *Link v. Wabash Railroad Co.*, the Supreme Court affirmed a district court’s dismissal of an action for

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50. 253 U.S. 300, 304 (1920).
51. *Id.* at 312. The Court elaborated:

To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make finding thereon . . . are among the purposes for which such aids to the judges have been appointed.

*Id.* at 313.

52. See *In re Utils. Power & Light Corp.*, 90 F.2d 798, 800 (7th Cir. 1937).
failure to prosecute after plaintiff’s counsel repeatedly delayed the case and then missed a pretrial conference without a valid excuse. The Court explained that a court’s authority “to dismiss *sua sponte* for lack of prosecution [is] an ‘inherent power,’ governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” Similarly, courts may dismiss an appeal or a civil complaint filed by a fugitive, and vacate judgments upon proof that the judgment was obtained through fraud upon the court.

Most notably, courts possess the “power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates” through the contempt power. The Supreme Court has also permitted courts to assess attorney’s fees against a counsel or party who has litigated in bad faith. Similarly, courts of appeals have justified, by reference to inherent powers, sanctions such as ordering an attorney to pay the government the cost of empanelling a jury for one day and punishing an individual for the unauthorized practice of law.

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56. Id. at 630–31.
58. See *In re Prevot*, 59 F.3d 556, 565 (6th Cir. 1995). Courts have even held that courts have the inherent power to dismiss an action for failure to state a claim before the plaintiff finishes making his case. See *D.P. Apparel Corp. v. Roadway Express, Inc.*, 756 F.2d 1, 3–4 (1st Cir. 1984).
60. *Anderson v. Dunn*, 19 U.S. 204, 227 (1821); see also *Shillitani v. United States*, 384 U.S. 364, 370 (1966) (“There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt.”); *Ex parte Robinson*, 86 U.S. 505, 510 (1873) (“The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.”). For a seminal discussion of contempt power, see Frankfurter & Landis, *supra* note 2. The contempt power further permits courts to appoint an attorney to prosecute the contempt. See *Young v. United States ex rel.Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987).
61. The Court has also approved the use of inherent powers to control admission to its bar and to discipline attorneys. See *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 551 (1824).
64. See *United States v. Johnson*, 327 F.3d 554, 560 (7th Cir. 2003).
Manifestly, inherent powers are not some esoteric, antiquated doctrine valuable only to mavens of federal procedure. Rather, inherent powers are a flexible tool that enables courts to respond to the changing realities of litigation without requiring a prolix code of procedure.

B. The Legitimacy of Courts' Invocation of Inherent Powers

Despite the frequency with which lower courts rely on inherent powers, and the Supreme Court's amenability to such reliance, the Court has never articulated an overarching standard establishing when these powers may be used. The commentators, meanwhile, have argued that separation-of-powers principles mandate that courts may use their inherent powers only when doing so is indispensably necessary to their achieving their fundamental purpose.

The Supreme Court first recognized implied powers in the judiciary in *United States v. Hudson.* There, in the course of rejecting the existence of jurisdiction over common law crimes, the Court stated:

"Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce 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 . . . ."

Since *Hudson,* the Supreme Court has occasionally harkened to this confined version of implied power, while frequently authorizing the use of implied powers without discussing indispensability. For instance, in *Landis v. North American Co.,* the Supreme Court recognized the inherent power of courts to stay proceedings as a way to manage a "docket with economy of time and effort for itself, for counsel, and for litigants." Absent in this discussion was any assertion that courts would be crippled without this power; rather, as the Supreme Court recognized, the authority is useful and efficient. Similarly, in *Gulf Oil Corp. v. Gilbert,* the Supreme Court
bottomed its acceptance of the inherent power of invoking forum non conveniens on general policy concerns such as preventing plaintiffs from attempting to “vex,’ ‘harass,’ or ‘oppress’ the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy,”\textsuperscript{70} and in fairly apportioning the burdens of litigation among courts and localities.\textsuperscript{71} Again, there is nary a mention of indispensability.

Not only did the Supreme Court neglect to include any discussion of the indispensability standard in these cases, but also its holdings are flatly incompatible with that standard. Forum non conveniens—by its very terms—is grounded on interests of convenience. No one would argue that this power is indispensable to courts. Similarly, courts stay actions for reasons of convenience and efficiency. Courts would not be rendered incapable of performing their Article III duties if they could not stay cases. As analysis of the sundry inherent powers discussed in Part I.A reveals, indispensability is the exception, not the rule.\textsuperscript{72}

Notwithstanding the Supreme Court’s general amenability to lower courts’ reliance on inherent powers, the two most comprehensive articles to consider when inherent powers may be used agree with \textit{Hudson}’s standard and argue that federal courts may exercise inherent powers only when doing so is indispensable to their exercise of the judicial power. Professor Van Alstyne has argued that the Necessary and Proper Clause assigns to Congress alone the responsibility to say by law what additional authority, if any, the executive and the courts are to have beyond that core of powers that are indispensable, rather than merely appropriate, or helpful, to the performance of their express duties under articles II and III of the Constitution.\textsuperscript{73}

Professor Pushaw, who has written the most detailed article about inherent powers to date, proffers a similar argument. Professor Pushaw demarcates two categories of inherent powers: (1) implied indispensable powers, which are “absolutely essential to fulfill the Article III mandate”; and (2) beneficial powers, which are

\begin{itemize}
  \item \textsuperscript{70} 330 U.S. 501, 508 (1947).
  \item \textsuperscript{71} \textit{Id.} at 508–09.
  \item \textsuperscript{72} Another example is \textit{Ex Parte Peterson}, 253 U.S. 300 (1920), in which the Supreme Court recognized the inherent power to appoint an auditor to investigate the factual background of a case.
  \item \textsuperscript{73} Van Alstyne, \textit{supra} note 16, at 107.
\end{itemize}
“merely helpful, useful, or convenient.” Professor Pushaw then argues that beneficial powers are illegitimate, because they invade Congress’s domain.

C. Congress’s Role in the Inherent Powers Scheme

Any inherent powers discussion must account for the fact that Congress is the only branch constitutionally vested with legislative authority, which includes the authority to enact rules of procedure. The Supreme Court has explained that “the exercise of the inherent power of lower federal courts can be limited by statute and rule.” This simple proposition has been significantly qualified, however, by other Court precedent that has restricted Congress’s latitude.

74. Pushaw, supra note 16, at 741. This is similar to the Third Circuit’s methodology in Eash v. Riggins Trucking Inc. See 757 F.2d 557, 562–63 (3d Cir. 1985) (en banc) (recognizing three levels of inherent powers: (1) “irreducible inherent authority, [which] encompasses an extremely narrow range of authority involving activity so fundamental to the essence of a court as a constitutional tribunal that to divest the court of absolute command within this sphere is really to render practically meaningless the terms ‘court’ and ‘judicial power’”; (2) “powers implied from strict functional necessity”; and (3) useful inherent powers). The Supreme Court declined to adopt this framework in Chambers v. NASCO, Inc. See 501 U.S. 32, 47–48 n.12 (1990) (listing the Eash categories and stating “this Court has never so classified the inherent powers, and we have no need to do so now”).

75. Pushaw, supra note 16, at 745.

76. Chambers, 501 U.S. at 47.

77. The Supreme Court has also established a clear-statement rule, requiring Congress to unmistakably manifest its intent to abrogate a rule founded on an inherent power. See, e.g., id. at 47 (Supreme Court stating that it would not “lightly assume that Congress has intended to depart from established principles’ such as the scope of a court’s inherent power” (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982))). Commentators dispute whether this requirement is appropriate. Compare William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1023 (1989) (“Deferring again to the constitutional values inherent in separation of powers, the Court may also presume that Congress does not intend to strip federal courts of their inherent powers, especially their power to fashion creative relief in equity (the rule against overriding traditional judicial powers).”), with Elizabeth T. Lear, Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power, 91 Iowa L. Rev. 1147, 1163 (2006) (stating that in cases where a rule or statute regulates the same area of law as a “beneficial” inherent power, courts should presume that Congress intended to displace the inherent power unless there is a clear statement to the contrary), and Ernest A. Young, Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 Tex. L. Rev. 1549, 1602 n.274 (2000) (“I suspect that ‘inherent powers’ could justify descriptive canons but not normative ones.”). This is an interesting discussion, to which I hope to contribute in the future, but it is beyond the scope of this Article.
Most vitally, in *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, the Supreme Court, while evaluating whether provisions of the Clayton Act circumscribing the contempt power unconstitutionally infringed courts’ inherent powers, explained that “the attributes which inhere in [the contempt] power and are inseparable from it can neither be abrogated nor rendered practically inoperative.” At the same time, however, the Court recognized that the contempt power “may be regulated within limits not precisely defined.” The Court concluded that the statute was a legitimate form of regulation because it involved only a narrow class of contempts, did not limit courts’ ability to punish contempts that occurred in the courts’ presence, and was carefully defined. Thus, while *Michaelson* attempted rhetorically to protect the prerogatives of the judiciary from legislative incursion, it ultimately accepted the legislation’s curbing of the contempt power. *Michaelson* is further devitalized by the Supreme Court’s failure to apply the decision outside the context of contempt.

In *Eash*, the Third Circuit attempted to refine *Michaelson*’s holding. The court divided inherent powers into various classes, including powers “implied from strict functional necessity” and powers that are “necessary only in the practical sense of being useful.” The court concluded that the former strand of inherent powers is protected by the rule articulated in *Michaelson*, while the latter strand may be freely altered or invalidated by Congress. Although the Supreme Court declined to adopt this methodology in *Chambers*, Professor Pushaw has further cultivated *Eash*’s teachings. According to Professor Pushaw, “[b]ecause the Constitution grants federal judges implied indispensable powers, it surely does

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78. 266 U.S. 42 (1924).
79. *Id.* at 65–66.
80. *Id.* at 66.
81. *Id.*
82. *Id.*
83. The Court has, however, continued to recognize this limitation. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47–48 (1990); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–32 (1962); Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 Duke L.J. 929, 968 (1996) (“The relation between ‘inherent power’ of the judiciary and powers that may not be withdrawn by Congress has never been illuminated by the Court for there has been no occasion to consider it.”).
85. *Id.* at 563.
86. See *id.* at 562–63.
87. See supra note 74.
not authorize Congress to destroy or impair them.”88 On the other hand, “federal courts must defer completely” to legislation regulating beneficial powers.89

In sum, the inherent powers jurisprudence and scholarship is plagued by inconsistency and uncertainty. The Supreme Court has paid lip service to a standard that would rarely permit the lower courts to invoke their inherent powers, but has then frequently approved invocations that do not satisfy that demanding standard. Moreover, its only statement concerning Congress’s power to overrule an inherent power seems to entrench inherent powers, but this standard has never been applied.

The commentators, on the other hand, attempt to constrict the courts’ ability to rely on their inherent powers, notwithstanding the bevy of cases to the contrary. The commentators argue that this narrow approach, although impractical, is mandated by the intent of the early Federalists. As demonstrated in the next section, this assertion is faulty.

II. A NEW METHODOLOGY

While conventional wisdom holds that courts may invoke their inherent powers only when doing so is indispensably necessary to their exercise of the judicial power, the original understanding of the early Federalists, Supreme Court precedent, and policy considerations warrant a more flexible approach that permits courts to invoke inherent powers whenever doing so possesses a natural relation to their exercise of the judicial power. Moreover, because inherent powers are derived from the Constitution, Congress’s ability to abrogate them must be limited to instances where doing so will not imperil courts’ core functions.

A. The “Proper” Scope of Inherent Powers—The Natural Relation Standard

1. The Early Federalists’ Broad Understanding of Inherent Powers

Contrary to commentators’ arguments that federal courts possess only those implied powers that are indispensable to their exercising the judicial power, the historical evidence demonstrates that the early Federalists understood courts to hold implied powers that were either naturally related or directly connected to the judicial

88. Pushaw, supra note 16, at 848.
89. Id. at 849.
power. This conclusion follows inexorably from three uncontroversial propositions: (1) Article III granted a specific power—“the judicial power”—to the federal courts; (2) the Federalists believed that the Constitution impliedly authorized the government to exercise those means “necessary” to effectuate each enumerated power; and (3) the leading Federalists interpreted the word “necessary” to mean “naturally related” or “definitely connected,” and to be broader than “indispensable.”

a. The Judicial Power as a Power Vested by the Constitution

The best reading of the Constitution interprets the clause vesting “[t]he judicial Power of the United States” in the Supreme Court and those inferior courts created by Congress as a general grant of power to the federal courts that is insulated from the political branches. Most simply, this clause must be construed as a grant of power because there can be no doubt that the Federalists intended for the federal courts to be an independent and coequal branch of government,90 and nowhere else does the Constitution explicitly grant power to the courts.91 Two of the Constitution’s bedrock purposes—checking the mischief of states92 and ensuring

90. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., 2d ed. 1891) (1836) [hereinafter ELLIOT’S DEBATES] (statement of Alexander Hamilton) (“[T]he legislative, executive, and judicial branches are rendered distinct . . . .”); THE FEDERALIST NO. 78 (Alexander Hamilton), supra note 2, at 473 (describing the judiciary as an independent, separate department), No. 48 (James Madison), at 300 (“It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evidence, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers.”); see also Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 232 (1985) (“[T]he first three Articles of the Constitution establish three equal and co-ordinate branches of federal government, each of which derives its power not from the other branches, but from the Constitution itself.”).


92. The Framers sought to create a government that would rectify the abuses of the states that prompted the Constitutional Convention. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 167 (Max Farrand ed., 1911) [hereinafter FARRAND] (statement of Mr. Wilson) (“To correct its vices is the business of this convention. One of its vices is the want of an effectual control in the whole over its parts.”). To this end, they recognized that it was essential to empower federal courts to overrule state laws that were incompatible with federal laws or the Constitution. See, e.g., THE FEDERALIST NO. 80 (Alexander Hamilton), supra note 2, at 484 (“The states, by the plan of the convention are prohibited from doing a variety
that the newly created federal legislature did not overstep its boundaries—relied on the efficacy of the federal courts. It would be impossible for the courts to meaningfully discharge these vital duties if they did not have some inviolate power beyond the reach of the legislature. This point is recognized in the elaborate mea-

guments, some of which are incompatible with the interests of the union, and others with the principles of good government. . . . No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them.\).

93. The Framers believed the federal legislature to be the most-feared branch of government. See The Federalist No. 48 (James Madison), supra note 2, at 301 ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."). To check the advances of the federal legislature, the Framers relied on the federal courts to strike down laws repugnant to the Constitution. See 3 Elliot's Debates, supra note 90, at 553 (statement of John Marshall) (noting that if Congress "were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution," and that the judges, therefore, "would declare it void"); The Federalist No. 78 (Alexander Hamilton), supra note 2, at 473 (arguing that the limitations to legislative authority in the Constitution "can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void"). Indeed, Professor Beard calculated that of the twenty-five men who were the dominant element in the Constitutional Convention, seventeen supported this kind of judicial review. Charles A. Beard, The Supreme Court and the Constitution 17–18 (1912).

94. By exercising these powers, the courts were designed to stand as the last bastion of the protection of individual liberties. See 2 Elliot's Debates, supra note 90, at 480–81 (statement of Mr. Wilson) ("I believe that public happiness, personal liberty, and private property, depend essentially upon able and upright determinations of independent judges."); 3 id. at 554 (statement of John Marshall) ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?"); The Federalist No. 78 (Alexander Hamilton), supra note 2, at 473 (stating that without the courts, "all the reservations of particular rights or privileges would amount to nothing").

Despite some worries about the judiciary, see, e.g., 3 Elliot's Debates, supra note 90, at 521 (statement of George Mason) (asking, given jurisdiction of federal courts, "What is there left to the state courts?"); 4 id. at 151 (statement of Mr. Bloodworth) ("[I]f I understand the thing right, the trial by jury is taken away."), such fears had little currency, see, e.g., William N. Eskridge, Jr., All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806, 101 Colum. L. Rev. 990, 1054 (2001) ("It seems doubtful that the judicial tyranny arguments had any traction in the convention. Virginia's ratification, like that of Massachusetts before it and New York later, included a list of suggested amendments to the Constitution, including several relating to the judiciary, but none seeking to compromise judicial independence or the power of federal judges to declare state as well as federal laws void and unconstitutional.").

95. Moreover, the idea that Congress could control the use of the judicial power was rejected in the Constitutional Convention, where the delegates rejected, by a vote of six states to two, a proposal to add a sentence stating: "In all the other
sures contained in the Constitution to protect the independence of the courts from the political branches. There would be no reason to protect courts’ formal independence if there were not some power, unimpeachable by the political branches, vested solely in the courts. That grant of power was unmistakably included in the succinct phrase “the judicial power.”

b. Implied Powers = Necessary and Proper Powers

The Federalists, when confronted with the arguments of anti-Federalists that the Necessary and Proper Clause would destroy all semblance of a government of limited powers and annihilate the states, responded with near-universal voice that the Necessary and Proper Clause merely made explicit the authority that the Constitution necessarily conferred by implication. George Nicholas, in the Virginia Convention, explained that the Necessary and Proper clause “only enables [Congress] to carry into execution the powers given to them, but gives them no additional power.” This belief was widespread, and indeed, explains why the Clause was added at the Constitutional Convention without debate.

Critically, in presenting these arguments, the Federalists rested on universal principles of government; that is, that the authority to effectuate powers with necessary and proper means accompanied every power granted by the Constitution. As Alexander Hamilton stated in the Federalist:

cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct.” 2 FARRAND, supra note 92, at 425, 431; see also Liebman & Ryan, supra note 2, at 768–69 (emphasizing this decision as preserving “qualitative” judicial power).

96. See U.S. CONST. art. III, § 1 (“[J]udges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); THE FEDERALIST NOS. 78, 79 (Alexander Hamilton) (discussing the importance of these guarantees).

97. See 2 ELLIOT’S DEBATES, supra note 90, at 331 (statement of Mr. Williams) (“It is perhaps utterly impossible fully to define this power. . . . A case cannot be conceived which is not included in this power.”); 3 id. at 441–42 (statement of George Mason) (worrying that Congress would be able to abridge the freedom of speech and destroy the right to a jury trial).

98. 3 id. at 246.

99. See, e.g., 4 id. at 141 (statement of Mr. MacLaine) (“This clause gives no new power, but declares that those already given are to be executed by proper laws.”); Randy E. Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 185 (2003).

100. See Barnett, supra note 99, at 185.
Strange as it may appear after all this clamour [about the Necessary and Proper Clause], to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal [sic] Government, and vesting it with certain specified powers. This is so clear a proposition, that moderation itself can scarcely listen to the railings which have been so copiously vented against this part of the plan, without emotions that disturb its equanimity.

James Madison offered a similar explanation:

Had the Constitution been silent on this head, there can be no doubt that all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorised; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.

Thus, Hamilton and Madison did not argue that the Constitution granted the legislature alone broad implied powers; they asserted that the same scope of implied power accompanied every
formal grant. Indeed, the Federalists manifested this conception of implied powers by discussing their application to the executive branch. This is unequivocally demonstrated by Edmund Randolph’s statement regarding the implied powers of the President, “Does it not reasonably follow that he must have some incidental powers? The principle of incidental powers extends to all parts of the system.” Hamilton made a similar argument.

No one has argued that both the executive and the legislative branches, but not the judiciary, possess implied powers. There is simply no textual support for such an argument, especially given that Congress was the most feared branch while the judiciary was recognized as the “least dangerous” branch with “neither Force nor Will, but merely judgment.” Given these circumstances, it seems far-fetched to suppose that the Framers intended to provide the most threatening branch with sweeping implied powers while strictly restraining its less-powerful counterpart. Indeed, because Article III confers the “judicial power,” without restriction, upon the federal courts, while Article I vests Congress with only the “legislative Powers herein granted,” the Framers may well have expected federal courts to possess more implied power, not less. In any event, the fact that no one discussed the implied powers of the judiciary says more about the fact that the anti-Federalists concerns about the judiciary were focused elsewhere than it does about the lack of this power.

103. 3 Elliot’s Debates, supra note 90, at 463–64 (statement of Mr. Randolph).

104. See Opinion of Hamilton, supra note 101, at 99 (providing, as an example of implied powers, “[t]hat which declares the power of the President to remove officers at pleasure, acknowledges the same truth in another, and a signal instance”).

105. The Federalist No. 78 (Alexander Hamilton), supra note 2, at 472.

106. See Louis Lusky, By What Right?: A Commentary on the Supreme Court’s Power to Revise the Constitution 81 (1975) (“Article III grants ‘the judicial power’ with no definitional restriction, unlike Article I which gives Congress only ‘legislative powers herein granted’ and then (mainly in Article I, Section 8) goes on to specify those powers. Hence there is some basis for believing that the Constitutors not only thought of judicial authority as a ‘power,’ the same term used to denote the authority of the two other branches, but might have embraced the idea of implied judicial power even more readily than the idea of implied legislative power.”).

107. See Pushaw, supra note 16, at 822 (explaining that neither the Framers nor the Ratifiers discussed implied judicial power); cf. 4 Elliot’s Debates, supra note 90, at 536 (Commonwealth of Massachusetts Answer to Virginia Resolution, February 9, 1799) (after discussing implied powers, stating “This Constitution has established a Supreme Court of the United States, but has made no provision for its protection, even against such improper conduct in its presence, as might dis-
Even Edmund Randolph, the most significant Ratifier to argue that the Necessary and Proper Clause was broader than implied powers, only tepidly challenged the status quo. While Randolph argued during the Virginia Convention that the Necessary and Proper Clause must be broader than those implied powers to avoid being redundant and that the Necessary and Proper Clause was "ambiguous," he abandoned this distinction within two years, when, as Attorney General of the United States, he argued that a national bank was unconstitutional. In his memorandum to President Washington, Randolph opposed the bank because the power to create it was not legitimately implied from Congress’s specific powers. Then, concerning the Necessary and Proper Clause, Randolph explained: "But as the friends to the bill ought not to claim any advantage from this clause, so ought not the enemies to it, to quote the clause as having a restrictive affect. Both ought to consider it as among the surplusage which as often proceeds from inattention as caution." Thus, in the face of overwhelming consensus that the implied powers of the federal government were co-terminous with the Necessary and Proper Clause, Randolph capitulated. This about-face should be interpreted as evidence that the early Federalists came to agree that the Necessary and Proper clause provided no powers that were not already impliedly bestowed by the Constitution—to all branches of government.

108. 3 ELLIOT’S DEBATES, supra note 90, at 463–64.
109. 3 id. at 470. Randolph also worried, presciently, that the Clause would, “by gradual accessions, gather to a dangerous length.” Id.
111. Id.
c. The Breadth of the Necessary and Proper Clause, and Therefore of Implied Powers

Because the early Federalists agreed that the Necessary and Proper Clause was coextensive with implied powers, their interpretation of the Necessary and Proper Clause must apply with equal force to implied powers. Felicitously, the luminaries of early American political life briskly debated the topic while considering whether Congress possessed the constitutional authority to incorporate a national bank.

Thomas Jefferson, as Secretary of State, opposed the bank. He argued that the Necessary and Proper Clause permitted Congress to exercise only means “without which the [specific] grant of the power would be nugatory.”\footnote{112. Opinion of Thomas Jefferson, Secretary of State, on the Same Subject, in Legislative and Documentary History of the Bank of the United States, supra note 101, at 93.} He argued that because all of Congress’s specifically enumerated powers could be executed without a bank, the bank was therefore unauthorized by the Constitution.\footnote{113. Id. at 92.}

Jefferson’s austere version of federal power—which is similar to that proposed by the commentators—was roundly rejected. Even Madison, Jefferson’s close ally, rejected Jefferson’s view while agreeing that such an act exceeded Congress’s authority:

Those two words [“necessary” and “proper”] had been, by some, taken in a very limited sense, and were thought only to extend to the passing of such laws as were indispensably necessary to the very existence of the government. He was disposed to think that a more liberal construction should be put on them,—indeed, the conduct of the legislature had allowed them a fuller meaning,—for very few acts of the legislature could be proved essentially necessary to the absolute existence of government. He wished the words understood so as to permit the adoption of measures the best calculated to attain the ends of government, and produce the greatest quantum of public utility.\footnote{114. 4 Elliot’s Debates, supra note 90, at 417 (statement of James Madison).}

Madison did not, however, believe that implied powers and the Necessary and Proper Clause permitted legislation that was merely “conducive” to executing an enumerated power.\footnote{115. 1 Annals of Cong., supra note 102, at 1898.} Instead, he argued that to be legitimate, there must be “a definite connection...
between means and ends,” and that the enumerated and incidental powers must be linked “by some obvious and precise affinity.” 116

Hamilton, finally, held an even more expansive view of implied powers than Madison. He took it as a given that implied powers were as “effectually delegated” as express powers,117 and proceeded to argue that implied means were acceptable as long as they possessed a “natural relation” to the express power.118 Hamilton then considered the assertion that the Necessary and Proper Clause restricted those powers otherwise granted by implication and excoriated Jefferson’s interpretation. Hamilton argued that Jefferson’s reading inserted the word “absolutely” or “indispensably” before “necessary,” which was not the case.119 He posited that “few measures of any government . . . would stand so severe a test,” including several congressional acts already taken.120 Hamilton thus argued that the central question was “whether the mean to be employed . . . has a natural relation to any of the acknowledged objects or lawful ends of the Government.”121 Hamilton eventually won the day when on April 25, 1791, President Washington signed the bank bill into law.

This historical evidence demonstrates that Jefferson was in the minority in arguing that only those powers indispensable may be implied (or applied through the Necessary and Proper Clause). The other members of Washington’s cabinet patently rejected his view, as did the President and Congress in approving the bill that incorporated the bank. Jefferson’s view also has serious textual problems,122 and, as Hamilton pointed out, such a parsimonious view of the federal government’s powers “would beget endless uncertainty and embarrassment.” 123 While the evidence of original in-

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116. Randolph seemed to hold a view similar to Madison’s. In Randolph’s letter to Washington, he argued that incidental powers were defined as “the natural means of executing a power,” which appears to be broader than “indispensable.” Opinion of Randolph, supra note 110, at 89. Randolph argued that the standard was stricter than mere facilitation. Id.


118. Id. at 97.

119. Id. at 98.

120. Id.

121. Id. at 97.

122. For instance, his interpretation does not account for the contrast between the word “necessary” as used in the Necessary and Proper Clause and the use of “absolutely necessary” in Article I, Section 10, Clause 2, which states: “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection laws . . . .” U.S. Const. art. I., § 10, cl. 2.

123. Opinion of Hamilton, supra note 101, at 98.
tent is simply not specific enough to ascertain whether Hamilton’s “natural relation” or Madison’s “definite connection” represents the accepted view of the early Federalists, the evidence is sufficient to bury Jefferson’s view. Moreover, the evidence is just as plain that the Federalists believed that the power bestowed by the Necessary and Proper Clause was already impliedly granted to each branch of government. Thus, this discussion about the bounds of the Necessary and Proper Clause applies with equal force to the judiciary.

2. Supreme Court Precedent Confirms the Federalists’ Conclusions

Supreme Court precedent unmistakably supports an expansive interpretation of implied powers. Most notably, in *McCulloch v. Maryland*, Chief Justice Marshall held that the Constitution granted Congress the authority to establish a national bank based on Hamilton’s broad concept of inherent powers. In rejecting the narrow view that Congress was entitled to imply powers only “for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory,” Marshall explained that while the Constitution’s enumerated powers did not include the power to incorporate a bank, unlike the Articles of Confederation, the Constitution did not prohibit implied or incidental powers. Thus, Marshall concluded, the Constitution intended to provide the outlines of government, and the ingredients that fell within those outlines should be deduced. It was in this context

124. Hamilton’s view was arguably validated by the government writ large when it approved the bill creating the bank. Madison’s view, meanwhile, was shared by Randolph. See Opinion of Randolph, supra note 110, at 89. Further, modern commentators who have searched for the original meaning of the Necessary and Proper Clause have endorsed Madison’s view. See Barnett, supra note 99, at 206–07; Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 197–99 (2001). But see Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 284–85 (1992) (“The framers’ theory of separation of powers simply was not worked out in enough detail to answer a question like whether federal courts could make common law. On the contrary, the historical evidence suggests that the framers’ notion of separation of powers was unformed and tentative, and that they had few fixed institutional arrangements in mind beyond the basic idea that there should be a separation.”).

125. 17 U.S. (4 Wheat.) 316 (1819).

126. Id. at 413.

127. Id. at 406; see also ARTICLES OF CONFEDERATION, art. II (“Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”).

that Marshall famously stated: "[I]t is a constitution we are expounding."129 Accordingly, Marshall ruled that:

[T]he powers given to the government imply the ordinary means of execution. . . .

. . . .

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.130

It was on this ground that Marshall ruled that Congress had the power to incorporate a bank; he discussed the Necessary and Proper Clause only to rebut Maryland’s argument that that clause limited the powers impliedly bestowed.131 Marshall explained that the Clause neither enlarged nor restrained the implied powers of Congress,132 and concluded in language equally applicable to implied powers: “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.”133

129. Id.
130. Id. at 409–10.
131. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 14 (1969) (“A reasonably careful reading shows that Marshall does not place principal reliance on [the Necessary and Proper Clause] as a ground of decision; that before he reaches it he has already decided, on the basis of far more general implications, that Congress possesses the power, not expressly named, of establishing a bank and chartering corporations; that he addresses himself to the necessary and proper clause only in response to counsel’s arguing its restrictive force . . . .”); Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 VA. L. REV. 647, 648–49 (1996) (“Though often misread, Chief Justice Marshall’s opinion in McCulloch v. Maryland . . . does not try to prove that the clause actually expands Congress’s powers, but only that it does not shrink them.”).
133. Id. at 421. While Marshall’s standard may appear amenable to either Hamilton’s interpretation, because it uses the word “appropriate,” or to Madison’s interpretation, because it uses the phrase “plainly adapted,” the best interpretation of the case is that Marshall sided with Hamilton. First, and most simply, Marshall upheld the constitutionality of the bank, which is what Hamilton sought and what Madison rejected. Second, Marshall’s opinion largely tracked Hamilton’s essay, as it began by arguing about implied powers and then considered the proposition that the Necessary and Proper Clause restricted powers otherwise available by implication. Third, the Supreme Court has consistently interpreted McCulloch to stand for Hamilton’s interpretation, and not Madison’s. See, e.g., Marshall v.
Marshall explained that while this interpretation arguably rendered the Necessary and Proper Clause redundant, “[i]f no other motive for [the clause’s] insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers.”134 This conclusion comports with the early Federalists’ cautious tendency to attempt to make implied rights and duties explicit; for instance, many Framers argued that a bill of rights was unnecessary because the Constitution itself prevented the federal government from intruding on those rights.135 Further, the Necessary and Proper Clause is important because when it grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,”136 it provides Congress with the authority to effectuate the Constitutionally vested powers of the other branches.137

The Supreme Court has also extended the rule of *McCulloch* to the executive branch. This is significant, because the executive, like the judiciary and unlike the legislature, is bestowed power through broad grants and does not have anything approximating the Necessary and Proper Clause.138 In *United States v. Nixon*, President Nixon sought to quash a subpoena requiring him to produce tape recordings and documents concerning conversations he had conducted with aids and advisors on the ground that his conversations enjoyed absolute privilege.139 The special prosecutor argued that

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134. *McCulloch*, 17 U.S. (4 Wheat.) at 420–21; see also *The Federalist* No. 33 (Alexander Hamilton), supra note 2, at 187 (“The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless.”).


137. *See Engdahl*, supra note 1, at 104–19 (demonstrating that Congress’s authority to regulate the judiciary stems solely from the Necessary and Proper Clause); Lawson, supra note 124, at 198 (advocating Engdahl’s interpretation).

138. One of Professor Van Alstyne’s central arguments is that Articles II and III lack a version of a Necessary and Proper Clause. *See Van Alstyne*, supra note 16, at 107.

the Court should not recognize the President’s claim of privilege because unlike Article I,\textsuperscript{140} Article II lacks an explicit grant of privilege.\textsuperscript{141} The Court swiftly rejected that argument, stating: “The rule of constitutional interpretation announced in \textit{McCulloch v. Maryland}, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it.”\textsuperscript{142} Thus, because some form of privilege was “reasonably appropriate and relevant” to the President’s exercise of his constitutionally prescribed duties, the Court interpreted the Constitution to grant it.\textsuperscript{143}

While the Supreme Court has never defined the federal courts’ implied powers in such succinct language, the Court’s holdings are consistent with the interpretation of implied powers found in \textit{McCulloch} and \textit{Nixon}—and not with a requirement that implied powers be indispensable. The Court has approved the use of inherent powers to stay cases, vacate a judgment for fraud upon the court, appoint a special master, and invoke forum non conveniens, while the courts of appeals have affirmed an even wider reliance on inherent powers.\textsuperscript{144} These decisions are entirely consistent with the natural relation standard, but they are impossible to square with the indispensably necessary standard. For instance, depriving courts of their ability to dismiss a case for forum non conveniens would not result in any material change to the way courts perform their duties; rather, courts would just occasionally be inconvenienced.\textsuperscript{145} Thus, one is left to conclude either that the Supreme Court has erred over and over, or that it intends for courts’ inherent powers to be measured by a reasonableness standard.

In sum, starting with \textit{McCulloch} and proceeding through the inherent judicial powers cases, the Supreme Court has regularly approved the use of inherent powers that are reasonably related to an enumerated power. While the Court has intermittently paid lip service to stricter standards, the soundest reading of its cases supports

\textsuperscript{140} See U.S. Const. art. I, § 6, cl. 1 (stating of members of Congress that “for any Speech or Debate in either House, they shall not be questioned in any other Place”).

\textsuperscript{141} 418 U.S. at 705 n.16.

\textsuperscript{142} Id. at 706 n.16 (quoting Marshall v. Gordon, 243 U.S. 521, 537 (1917)) (internal quotation marks and citation omitted).

\textsuperscript{143} Id.

\textsuperscript{144} See generally supra Part IA.

\textsuperscript{145} See Lear, supra note 77, at 1160 (“Few modern forum non conveniens dismissals are necessary for the courts to function.”); Pushaw, supra note 16, at 855 (terming this power "beneficial").
the Hamiltonian view of inherent powers for all branches of government.

3. Policy Reasons Support a Broad View of Inherent Powers

Not only do history and caselaw support an expansive version of implied powers, so does policy.146 This is probably the least controversial of the three justifications presented in this Article: Professor Pushaw, for instance, concedes that “the Necessary and Proper Clause and structural constitutional principles prohibit federal courts from unilaterally asserting beneficial powers, even if doing so might be more practical and efficient than waiting for Congress to act.”147 Thus, even the advocates of the indispensably necessary standard forfeit this point.

Most simply, as Professor Ryan has trenchantly observed, “no code of procedure is going to be fully comprehensive, and it is somewhat unrealistic to expect a judge to refrain from filling procedural gaps on the ground that doing so is merely useful, and not absolutely essential.”148 Given the limited availability of inherent powers—they may be exercised only if they are naturally related to deciding cases149 and in the absence of law to the contrary—there seems to be little danger in permitting courts to fill these infre-

146. See Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189, 1233 (1987) (emphasizing use of policy arguments in constitutional interpretation and stating that “when more than one explanation of the practice and its rule structure is reasonably defensible, the best theory will be that which is not merely descriptively plausible, but also guides future conduct in the most normatively attractive way”).


148. Ryan, supra note 8, at 777; see also Jeffrey W. Stempel, Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform,” 64 LAW & CONTEMP. PROBS. 197, 246 (2001) (“At some point, one simply cannot construct a rule that works absent substantial discretion in application, effectively requiring act utilitarianism in the decisionmaking. Even if one accepts that discovery in civil litigation should be a utilitarian inquiry, it may be that the greatest good for society is wrought by case-by-case applications of discretion, rather than efforts to rewrite the Rules to shift the defaults of discretion or to reduce the need to invest resources in the exercise of discretion.”).

149. This limitation ensures that courts’ rule-making power is limited to procedural, not substantive, law. See Richard L. Marcus, Slouching Toward Discretion, 78 NOTRE DAME L. REV. 1561, 1605, 1607 (2003) (noting, under the heading “Substantive discretion is more troubling than procedural discretion,” that “[t]here is limited ground for concluding that procedural discretion has been wielded to serve judges’ substantive agendas with much frequency”). Moreover, it encapsulates the well-established principle that courts may not abrogate substantive law. See, e.g., Ex parte United States, 242 U.S. 27, 41–42 (1916); United States v. Weinstein, 452 F.2d 704, 714–15 (2d Cir. 1971).
quenty arising procedural gaps. Further, as the caselaw demonstrates, the vast majority of procedural rules remain embodied in rules or statutes, so the courts have shown no propensity to abuse the authority they have arrogated.

Moreover, the current regime has proved to be an effective method of law development. The sundry district courts have been powerful tools of innovation, working to discover the best methods of resolving recurring problems. This has frequently yielded useful results, as demonstrated by the slew of procedural rules—including the power to stay actions, appoint an expert, and vacate judgments for fraud upon the court, inter alia—that began as inherent powers but have since been codified.\footnote{150}{See Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962) (explaining that Rule 41(b) codifies the inherent power of a court to dismiss a case for failure to prosecute); KPS & Assocs., Inc. v. Designs By FMC, Inc., 318 F.3d 1, 12 (1st Cir. 2003) (explaining that Rule 55(c), which permits courts to set aside default judgments, is “an expression of the traditional inherent equity power of the federal courts” (quoting 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2692 (3d ed. 1998))); United States v. Buck, 281 F.3d 1336, 1341 (10th Cir. 2002) (detailing that the savings clause of Rule 60(b) concerns inherent power to vacate judgments for fraud upon the court); Byrne v. Nezhat, 261 F.3d 1075, 1132 n.112 (11th Cir. 2001) (“18 U.S.C. § 401, 28 U.S.C. § 1927, Fed. R. Civ. P. 11, 16, 26, 30, 37, and 56 [all] codify aspects of the court’s inherent power to address litigation abuses . . . .”); Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985) (noting that Rule 42(a), which permits consolidation of multiple cases, is a codification of the \textit{Landis} rule); Eash v. Riggins Trucking Inc., 757 F.2d 557, 562 n.8 (3d Cir. 1985) (en banc) (“Although now codified at 18 U.S.C. § 401 (1982) and in Fed.R.Crim.P. 42, the contempt power is rooted principally in the inherent power of the judiciary.”); Reed v. Cleveland Bd. of Educ., 607 F.2d 757, 743 n.1 (6th Cir. 1979) (noting that Rule 55, which allows courts to appoint a master, is a codification of \textit{Ex Parte Peterson}, 253 U.S. 300 (1920)); Alcoa S. S. Co. v. M/V Nordic Regent, 654 F.2d 147, 156 (2d Cir. 1978) (stating that 28 U.S.C. § 1404(a) codifies the inherent power to dismiss an action for forum non conveniens); United States v. Clay, 481 F.2d 133, 137 (7th Cir. 1973) (“Rule 48(b) is a codification of the inherent power of a court to dismiss a case for want of prosecution.”) (internal quotation marks omitted)); United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972) (“Rule 65(d), as a codification rather than a limitation of courts’ common-law powers, cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment.”).}
unique expertise over procedure.\textsuperscript{151} This was one of the principal arguments precipitating the Federal Rules of Civil Procedure in favor of lodging initial rule-making power in the Supreme Court.\textsuperscript{152} Moreover, because legal precedents are critiqued and honed by other courts, which observe the efficacy of the rule in subsequent cases, rules created through inherent powers inevitably develop and improve.\textsuperscript{153}

Reality entirely tracks this simple proposition. Most rules springing from inherent powers have evolved to be exceedingly narrow. For instance, the fraud-upon-the-court doctrine originated in 
Hazel-Atlas Glass Co. v. Hartford-Empire Co.,\textsuperscript{154} in which the Supreme Court recognized, simply, that a court may set aside a judgment upon proof that it was procured by fraud. This rather open-ended rule has been repeatedly circumscribed by the lower courts; the Third Circuit, for example, now requires clear and convincing evidence of “(1) an intentional fraud; (2) by an officer of the court;.

\textsuperscript{151} Indeed, this rule-making power is really just a narrow form of common law power. Courts regularly engage in common law-making. See Chemerinsky, supra note 6, at 353. If anything, the law-making described in this Article should be less offensive than any other kind of common law, because procedural rules are particularly susceptible to court expertise. Moreover, because procedural rules created by federal courts do not displace state law, federalism concerns are abated. See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 51–55 (1990) (rejecting party’s argument that sanction of attorney’s fees ran afoul of Erie doctrine). See generally John Hart Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693 (1974) (arguing that the Rules Enabling Act should be read as subordinating the Federal Rules of Civil Procedure to state laws based on any substantive policy).

\textsuperscript{152} See Symposium, Judicial Versus Legislative Determination of Rules of Practice and Procedure, 6 Or. L. Rev. 36, 41 (1926) (“[T]he best results can be derived, in the matter of court procedure, from utilizing, rather than ignoring, the genius, ability, study, experience and knowledge of the judges and lawyers who are most nearly concerned in the procedure of the courts.” (internal quotation marks omitted)); Roscoe Pound, The Rule-Making Power of the Courts, 12 A.B.A. J. 599, 602 (1926) (“When rules of procedure are made by judges, they will grow out of experience, not out of the ax-grinding desires of particular law-makers.”); William Howard Taft, Possible and Needed Reforms in Administration of Justice in Federal Courts, 8 A.B.A. J. 601, 607 (1922) (“In this way the procedure would be framed by those most familiar with it and whose duty it is to enforce it.”); Jack B. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905, 929 (1976) (“Rulemaking is delegated so that Congress may profit from the expertise of courts and specialists in areas of litigation procedure with which they are far more conversant than Congress.”).

\textsuperscript{153} See Kramer, supra note 124, at 271 (“[T]he decentralized nature of judicial decisionmaking allows new rules to be tested repeatedly, and judges in subsequent cases can (and often do) weed out poorly reasoned or unworkable precedents.”).

\textsuperscript{154} 322 U.S. 238, 245 (1944).
which is directed at the court itself; and (4) that in fact deceives the court.”

Relatedly, the appellate courts have been vigilant in monitoring the lower courts’ use of inherent powers, and their willingness to reverse those courts ensures that these rules develop by careful accretion. Thus, it is evident that there is an innate restraining force, inherent in the judiciary, which tends to circumscribe the application of inherent powers and prevent a troubling incursion into the legislative domain.

This broader view of implied powers is also useful to ensure that the judiciary is not hindered by congressional inaction. Again, concerns that Congress was not cognizant of the shortcomings of procedural law animated the movement to vest law-making power in the Supreme Court. Even if Congress is more alert to issues of procedure now than it was in the late nineteenth and early twentieth centuries, it is incontrovertible that Congress cannot anticipate every gap in the procedural law. While Congress may be diverted


Similarly, courts of appeals have frequently reversed lower courts’ dismissals of actions for failure to prosecute. See Federal Election Comm’n v. Al Salvi for Senate Comm., 205 F.3d 1015, 1018 (7th Cir. 2000); Harris v. Callwood, 844 F.2d 1254, 1256 (6th Cir. 1988); McKelvey v. AT&T Techs., Inc., 789 F.2d 1518, 1520–21 (11th Cir. 1986); Titus v. Mercedes Benz of N. Am., 695 F.2d 746, 751 (3d Cir. 1982); Camps v. C & P Tel. Co., 692 F.2d 120, 124–25 (D.C. Cir. 1981); Tolbert v. Leighton, 623 F.2d 585, 587 (9th Cir. 1980); Saylor v. Busted, 623 F.2d 230, 239 (2nd Cir. 1980); Dove v. Codescio, 569 F.2d 807, 810 (4th Cir. 1978).

157. See Charles H. Paul, The Rule-Making Power of the Courts, 1 WASH. L. REV. 163, 168 (1926) (“The Legislature is not the proper body to pass on the details of legal procedure. . . . [because it] is engrossed with political matters, not the dry details of legal procedure, which is as special a subject as chemistry, or physics or higher mathematics.”); Edson R. Sunderland, The Exercise of the Rule-Making Power, 12 A.B.A. J. 548, 550 (1926) (“Normally, legislatures are timid about making important procedural changes, because they lack technical information. They are usually inclined, therefore, either to leave the subject alone or to busy themselves with meddlesome changes in minor details.”). A more sinister problem is suggested by Professor Mullenix, who argues that “[t]o the extent that the judicial rulemaking process is transformed into a legislative one, so-called ‘majoritarian preferences’ (meaning interest group preferences) will embellish the Federal Rules of Civil Procedure.” Linda S. Mullenix, Judicial Power and the Rules Enabling Act, 46 MERCER L. REV. 723, 755 (1995).

158. See Kramer, supra note 124, at 270 (explaining that courts’ making common law “improves the government’s lawmaking by addressing problems that may
from issues of procedure by more pressing matters, courts have no such discretion in hearing cases; they are obligated to address whatever claims parties raise. It is only natural that the body that is compelled to disentangle novel procedural issues that fall in the interstices of existing law should have the authority to undertake to solve them. And, of course, if Congress is displeased with the result, it may, within limits, overrule a particular exercise of inherent judicial power by legislation. Accordingly, the interests of flexibility and efficiency strongly militate toward permitting broad implied powers.

4. Conclusions

The original understanding of the Constitution, Supreme Court precedent, and policy considerations all contradict the assertion that the implied powers of federal courts are limited to instances of indispensable necessity. While the definite connection and natural relation standards are both historically tenable, the evolution of the national government since 1789 renders the broader standard superior.

First, Madison’s interpretation of the Necessary and Proper Clause—and by extension, his evaluation of the scope of the implied powers possessed by each branch—has never gained any traction. The national bank was created, over his objection, and when its constitutionality was considered in *McCulloch v. Maryland*, Marshall considered only the reasonable/indispensable dichotomy. Courts and commentators since have followed suit. It would be curious indeed to suggest that courts today ought to adhere to a view that has been ignored for the past two hundred years.

Moreover, Hamilton’s version of implied powers has been applied in unbroken succession since at least *McCulloch*. Recently, eight members of the Supreme Court agreed that the Necessary and Proper Clause permits legislation that furthers a federal purpose that never get on the legislature’s agenda or that appear insignificant from its vantage”.

159. See infra Part II.B. Congress has recognized that it cannot foresee every procedural issue that will arise, and has empowered the federal courts to fill the gaps. See Fed. R. Civ. P. 83(b) (permitting judges, when there is no controlling law, to “regulate practice in any manner consistent with federal law”); Fed. R. Civ. P. 57(b); Fed. R. App. P. 47(b) (“A court of appeals may regulate practice in a particular case in any manner consistent with federal law . . . .”). However, given Congress’s increased interest in procedural rules, see generally Burbank, supra note 8, it is essential that courts understand their independently held powers.

160. See supra note 133.

pose by “rational means.” At this stage, *McCulloch* has so thoroughly permeated the federal system that it has acquired a kind of constitutional currency. As Justice Frankfurter explained in *Youngstown Sheet & Tube Co. v. Sawyer*:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.

The Hamiltonian conception of implied powers, as ratified in *McCulloch*, is a consummate example of constitutional gloss.

While *McCulloch* expressly concerned only the implied powers of Congress, it was premised on the same general notions of government—that implied powers accompany every enumerated grant—that animated Hamilton’s and Madison’s discussions in the *Federalist*. Further, because the public’s demands on the federal courts, and, concomitantly, the business of the courts, have spiked so dramatically since the founding, it would be nonsensical to contend that Congress’s implied powers have grown over the years


163. See JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING 263 (1984) (arguing that *McCulloch* is “less an interpretation of the Constitution than an amendment to it, the overruling of which is unimaginable”); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1678 (2002) (“The accumulated practice of Parliament and of the Congress in disclaiming the authority to bind their successors, or in ignoring attempted bindings by earlier legislatures, has put an implicit restrictive gloss on the Constitution’s grant of legislative powers.”); cf. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 321 (1999) (“[T]he Jeffersonians’ failure to remove Justice Samuel Chase did yield an enduring gloss on the Constitution, namely, the notion that it is inconsistent with the arrangements for judicial security contained in that document, and hence with the core of federal judicial independence, to remove a federal judge from office for the content of her judicial behavior.”).

164. 343 U.S. 579 (1952).

165. *Id.* at 610–11 (Frankfurter, J., concurring).

166. See *supra* notes 101–02 and accompanying text.
while the courts’ have remained stable.\footnote{167} The Framers believed that few disputes would be heard in lower federal courts,\footnote{168} and experience bore this out:

The record of the first eight years plainly shows the district courts reluctant to assume jurisdiction . . . that would appear to have been properly within their legal sphere. They were disposed to defend their prerogatives in a few instances only, leaving decisions in all others to the states or to the executive branch of the government.\footnote{169}

However, the traditional role of the federal courts exploded during the Civil War era, when Congress, seeking to advance national prerogatives, drastically increased federal jurisdiction.\footnote{170} Thereafter, the federal courts “ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the

\footnote{167. See United States v. Classic, 313 U.S. 299, 316 (1941) (“For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.”); cf. The Federalist No. 80 (Alexander Hamilton), supra note 2, at 484 (“If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number.”).}

\footnote{168. See Eisenberg, supra note 4, at 509 (discussing this understanding); Roger Sherman, The Letters of a Citizen of New Haven (originally published in The New Haven Gazette, Dec. 25, 1788), in Essays on the Constitution of the United States 241 (Paul Leicester Ford ed., 1892) (stating that “it is not probable that more than one citizen to a thousand will ever have a cause that can come before a federal court”).}

\footnote{169. Dwight F. Henderson, Courts for a New Nation 61 (1971). The above quote refers to admiralty and maritime causes, which were the “most important” for federal courts at the time of the founding. Id. at 55; see also Carrington, supra note 83, at 932 (stating that “until 1875, the federal courts were exercising little responsibility for the enforcement of national law, in part because there was little national law to enforce”); Eisenberg, supra note 4, at 510 (“Between 1789 and 1801 the Supreme Court disposed of fewer than 90 cases. During the first four terms of the Court, not a single case was argued.”); Weinstein, supra note 152, at 910 (discussing “steadily mounting caseloads”).}

\footnote{170. See Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 60–61 (1928) (discussing this jurisdictional expansion); Stanley I. Kutler, Judicial Power and Reconstruction Politics 143 (1968) (“The fifteen years following the outbreak of Civil War, indeed, witnessed the greatest legislative expansion of jurisdiction since 1789.”).}
Since that time, the federal courts’ responsibilities in enforcing federal law have only increased. Given that the role of courts in our federal system has increased virtually in lockstep with that of Congress, it is only reasonable that the scope of their implied powers remain linked. As our nation expects more and more from courts, courts must possess the most effective tools that the Constitution may be construed to afford. Chief Justice Marshall’s statement is particularly resonant: “[T]hose who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.” Accordingly, the most compelling reading of the Constitution grants federal courts the implied powers, with the exceptions noted above, to select means that possess a natural relation to the discharge of the judicial power.

171. Frankfurter & Landis, supra note 170, at 65; see also Steffel v. Thompson, 415 U.S. 452, 464 (1974) (quoting Frankfurter & Landis, supra note 170, at 65). A review of the number of cases heard by the federal courts demonstrates just how stark the increase was. From 1789 to 1797, the district courts of Connecticut, Georgia, Kentucky, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, and Virginia disposed of a total of 1,120 cases. Henderson, supra note 169, at 147. During 1790–97, all the circuit courts disposed of 3,254 cases. Id. at 70–72. Meanwhile, in 1873, there were just over 29,013 cases pending before the district and circuit courts. Frankfurter & Landis, supra note 170, at 60.

172. See Fallon et al., supra note 4, at 829 (stating that since that time, Congress has created “myriad new federal rights” and provided “for their enforcement in the national courts”). Moreover, since 1789, courts have exercised greater authority over trial practice, see Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 Yale L.J. 27, 77–81 (2005) (discussing the nineteenth-century expansion of judicial power), and pretrial practice, see Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 445 (1982).


B. Congress’s Vital Role in Governing Inherent Powers

Thus far, this Article has investigated the scope of courts’ inherent powers when the courts act in the absence of any congressional pronouncement. However, a complete diagnosis of inherent powers requires an analysis of a competing situation. That is, how extensively may Congress abrogate preexisting doctrines founded on inherent powers? As shown below, neither of the extreme positions—that Congress may never or may always abrogate inherent powers—is tenable. Thus, the best approach balances the interests of each branch and ensures that the core functions of each branch remain inviolate.

Most simply, any assertion that Congress is precluded from legislating in areas governed by inherent powers must fail because, as ably demonstrated elsewhere, Congress, and not the courts, possesses ultimate authority over procedure. Locating courts’ authority within their inherent powers may not reanimate the discredited argument that the regulation of procedure is purely a judicial function.

Nevertheless, the opposite conclusion, that Congress may always override a rule grounded in inherent powers, is no more defensible. A key feature of our Constitution’s separation of powers is that “a branch [may] not impair another in the performance of its constitutional duties.” Hence, Congress may not behave in a manner that seriously impairs courts’ abilities to exercise the judicial power, and to exercise that power effectively. While Congress, like Congress, must be conceded authority to do what they consider ‘appropriate’ or ‘conducive’ to carrying out their express powers.

175. See, e.g., Burbank, supra note 8, at 1681–85; Redish, supra note 8, at 724–25; Ryan, supra note 8, at 765–75.

176. In short, the Framers recognized this principle. See, e.g., The Federalist No. 83 (Alexander Hamilton), supra note 2, at 506 (stating that “[a] power to constitute courts is a power to prescribe the mode of trial”). Congress has acted on it from the start. See Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 85. And the Supreme Court has so held without exception. See supra note 7.

177. Loving v. United States, 517 U.S. 748, 757 (1996); see also Clinton v. Jones, 520 U.S. 681, 691 (1997) (discussing "the doctrine of separation of powers that restrains each of the three branches of the Federal Government from encroaching on the domain of the other two"); The Federalist No. 48 (James Madison), supra note 2, at 300 (“It is equally evident, that neither of [the departments] ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers.

178. See Irving R. Kaufman, The Essence of Judicial Independence, 80 COLUM. L. REV. 671, 691 (1980) (“The constitutional power to decide cases fairly in accordance with law can be exercised effectively only if the deliberative process of the
gress may generally establish procedural rules for the courts to follow, certain rules would violate separation-of-powers principles by debilitating the courts’ ability to decide cases. For instance, if Congress were to entirely abrogate courts’ contempt power, courts’ ability to decide cases would be illusory because they would be unable to exert the modicum of control necessary to succeed. Certain inherent powers, therefore, are so integral to the exercise of the judicial power as to be indissoluble from the judicial power, and any effort by Congress to abrogate these powers represents an unconstitutional encroachment into Article III terrain.

Accordingly, Congress’s power to invalidate inherent-power-based rules lies somewhere between these polar points; that is, Congress is neither always precluded from nor always permitted to abrogate these rules. To more specifically calibrate the extent of these competing authorities, it is necessary to adopt a functional separation-of-powers approach. As the Supreme Court has explained, the act of one branch may hamper the prerogative of another branch without creating a constitutional violation.\(^\text{179}\) Only significant intrusions are constitutionally problematic.\(^\text{180}\) For instance, in United States v. Nixon, while the Supreme Court recognized a “presumptive privilege for Presidential communications,”\(^\text{181}\) it concluded that that privilege must give way when its application would “gravely impair the basic function of the courts.”\(^\text{182}\) Similarly, in Miller v. French, the Court explained that “the Constitution prohibits one branch from encroaching on the central prerogatives of another.”\(^\text{183}\) Thus,
the legislature overreaches when its act intrudes on the "basic function" or the "central prerogative" of the courts.\footnote{See Peter L. Strauss, \textit{Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?}, 72 CORNELL L. REV. 488, 510–16 (1987) (Congress may exercise power intruding on other branches' prerogatives as long as it does not interfere with a branch's "core functions"); \textit{cf.} Erwin Chemerinsky, \textit{Controlling Inherent Presidential Power: Providing a Framework for Judicial Review}, 56 S. CAL. L. REV. 863, 872–74, 890–92 (1983) (arguing that the test articulated in the \textit{Nixon} cases represents the best test of the constitutionality of the executive's claims of inherent power).}

While the "basic function" test advocated here is necessarily indeterminate, it does the best job of accommodating the competing interests of the legislature and judiciary. Moreover, while it is not this Article's goal to precisely demarcate those rules that are protected from congressional abrogation and those that are not, Professors Liebman and Ryan's definition of the judicial power serves as a useful starting point. They reason that any congressional enactment that restrains "the Article III judge's authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law" is constitutionally suspect.\footnote{185. Liebman & Ryan, \textit{supra} note 2, at 771 (emphasis omitted).} Some rules founded on inherent powers are so essential to the exercise of the judicial power that they are unassailable by Congress. The contempt power, as noted above, is one example. Similarly, as Professors Levin and Amsterdam have noted,

Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge or how he shall comport himself to judging or which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of the separation of powers \ldots \footnote{186. A. Leo Levin & Anthony G. Amsterdam, \textit{Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision}, 107 U. PA. L. REV. 1, 32 (1958); \textit{see also} Carrington, \textit{supra} note 83, at 972 (stating that "Congress creates departments of the executive branch and can abolish them, just as it can abolish lower federal courts; however, having created them, it cannot micromanage them without taking leave of its constitutional role"). Other commentators have suggested other limitations. \textit{See, e.g.}, Lawson, \textit{supra} note 124, at 223, 226 (claiming that "federal statutes that prescribe a standard of proof for federal courts," statutes defining "the admissibility or the weight of various pieces of evidence," and "congressional regulation of judicial remedies" are all unconstitutional infringements of the judicial role).}


However, because it is the essence of the rule that is important, and not its specific articulation, Congress enjoys latitude to regulate even those most important inherent powers. 

III.
A CASE STUDY: INHERENT POWERS, FRAUD UPON THE COURT, CONGRESS, AND THE AEDPA

As shown above, courts may create a procedural rule by invoking their inherent powers whenever doing so possesses a natural relation to their exercise of the judicial power. However, Congress may subsequently abolish such a rule as long as doing so does not prevent courts from performing their central prerogatives. The fraud-upon-the-court doctrine, a fairly well-established rule founded on inherent powers, is an example of a legitimate use of inherent powers that may nevertheless be abrogated by Congress.

A. Background of Fraud upon the Court

The fraud-upon-the-court doctrine originated in Hazel-Atlas Glass Co. v. Hartford-Empire Co. There, a patent attorney for Hartford wrote an article lauding a Hartford product as an advance in the field and arranged to have the article printed in a trade journal under the name of an ostensibly disinterested expert, and the circuit court relied in part on this Article in granting relief to Hartford. Almost ten years after the final judgment, Hazel-Atlas gained “indisputable proof” that the article was fraudulent and commenced suit seeking to set aside the prior judgment.

The Supreme Court granted relief to Hazel-Atlas. The Court identified a general rule dating before the establishment of the United States that permits courts to devitalize judgments when justice demands, and explained:

This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford’s sworn admissions, we find a deliberately planned and carefully executed scheme to defraud

187. See Michaelson v. United States ex rel. Chi., St. Paul, Minneapolis & Omaha Ry. Co., 286 U.S. 42, 66 (stating that it “may not be doubted” that while the contempt power may “neither be abrogated nor rendered practically inoperative” by Congress, “it may be regulated within limits”).
188. 322 U.S. 238 (1944).
189. Id. at 240.
190. Id. at 241.
191. Id. at 238.
not only the Patent Office but the Circuit Court of Appeals. Proof of the scheme, and of its complete success up to date, is conclusive.\textsuperscript{192}

Since Hazel-Atlas, the circuit courts have struggled to establish the doctrine’s contours. The classic formulation, which originated with Professor Moore, holds that the doctrine embraces that species of fraud “that does, or at least attempts to, defile the court itself, or that is perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases.”\textsuperscript{193} However this doctrine is defined, it is now recognized (although obliquely so) in the Federal Rules of Civil Procedure.\textsuperscript{194}

While Hazel-Atlas was a civil case, its decision is no less applicable in the criminal context. As the Seventh Circuit has unequivocally explained:

The fact that this case involves a fraud perpetrated upon the court during the criminal sentencing process rather than during a civil proceeding, such as in Hazel-Atlas, does not change the result. It is the power of the court to correct the judgment.

\textsuperscript{192} Id. at 245–46 (citation omitted). The Court made two further rulings that greatly increased the expansiveness of this rule. First, it explained that the fact that Hazel had not been entirely diligent in uncovering the fraud was of no moment, because “tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant.” \textit{Id.} at 246. The Court stated that “the integrity of the judicial process” cannot be held hostage to the diligence of the parties. \textit{Id.} Second, the Court declined to analyze whether the article was material to the Third Circuit’s opinion, explaining that Hartford had pressed the article on the Third Circuit and was therefore “in no position now to dispute its effectiveness.” \textit{Id.} at 247.

\textsuperscript{193} 12 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 60.21[4][a] (3d. ed. 2007) (internal quotation marks and citation omitted). The Second, Ninth, and Eleventh Circuits have all relied on this standard, see Appling v. State Farm Mut. Auto. Ins. Co., 340 F.3d 769, 780 (9th Cir. 2003); SEC v. ESM Group, Inc., 835 F.2d 270, 273 (11th Cir. 1988); Kupferman v. Consol. Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972), and the Eighth and Tenth Circuits have used similar versions, see Switzer v. Coan, 261 F.3d 985, 988 (10th Cir. 2001); Landscape Props., Inc. v. Vogel, 46 F.3d 1416, 1422 (8th Cir. 1995). It is interesting to note that those courts that require the fraud to be committed by an officer of the court, see, e.g., Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005), have probably misinterpreted Hazel-Atlas. Hazel-Atlas noted that lawyers were involved only in passing, and it erroneously labeled Hatch, the Hartford employee who wrote the fraudulent article, as a lawyer. 322 U.S. at 241.

\textsuperscript{194} See Fed. R. Civ. P. 60(b) (stating, after listing six specific grounds for vacating a judgment, that the “rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court”).
gained through fraud which is determinative and not the nature of the proceeding in which the fraud was committed.  

B. The Fraud-upon-the-Court Doctrine Possesses a Natural Relation to the Judicial Power

Under the standard developed in this Article, the cardinal issue in analyzing the legitimacy of an inherent power is whether it possesses a natural relation to the judicial business. The fraud-upon-the-court doctrine undoubtedly passes this test. 

In order to accomplish their fundamental purpose—determining “who should prevail in a case or controversy” —it is vital that courts have access to true facts. Otherwise, their decisions will be arbitrary and unfair, and “the judicial power” will be essentially meaningless. To ensure that legitimate evidence is presented to courts, it is helpful for them to retain the power to reopen otherwise final judgments. This helps both to accomplish justice by per-
mitting the deserving party to prevail and also to deter aspirant parties from submitting false evidence.

The fraud-upon-the-court doctrine is also useful as a tool of self-defense. As the Supreme Court recognized in *Hazel-Atlas*, "tampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public . . . ."199 Just as the effective administration of justice demands that courts not be impotent against contemptuous behavior in their presence, it is useful for courts to hold the independent power to protect themselves, so they need not "always be mute and helpless victims of deception and fraud."200 The fraud-upon-the-court doctrine is thus beneficial in the same way that other sanctioning powers are: it permits the court to rein in or punish recalcitrant parties.

The heritage of the fraud-upon-the-court doctrine further underscores its relation to the judicial power. As one commentator has noted, "[e]ver since the year 1616 when James I finally settled the long-standing controversy for supremacy between the law and equity judges, the power of equity to restrain the enforcement of judgments at law has not been seriously questioned."201 The Supreme Court has recognized a similar power since at least 1813.202 This longstanding practice demonstrates that courts—who are the best judge of a doctrine’s usefulness—have repeatedly endorsed it. Thus, there can be little question that the doctrine at least has a natural relation to the judicial power.

C. Nevertheless, the Fraud-upon-the-Court Doctrine Is Within Congress’s Reach

While the fraud-upon-the-court doctrine is indisputably legitimate, that does not mean that it is inviolate. With the AEDPA, Congress has attempted to regulate the entire field of post-conviction motions.203 It would make little sense to interpret the AEDPA to

199. 322 U.S. at 246.
200. Id.
202. See Marine Ins. Co. v. Hodgson, 11 U.S. (7 Cranch) 332, 336 (1813) ("[A]ny fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a Court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery.").
203. Permitting the fraud-upon-the-court doctrine to survive in the face of the AEDPA would be manifestly inconsistent with Congressional intent. Section 2255
apply to all collateral challenges to federal convictions except claims based on fraud upon the court. Indeed, the Supreme Court has held that the AEDPA governs all “claims,” that is, “an asserted federal basis for relief from a . . . judgment of conviction.”204 Any filing that meets this definition—including one founded on a court’s inherent powers205—must be considered a habeas motion and subjected to the AEDPA’s strictures.206 Based on the statutory structure, it is clear that Congress desires that motions alleging fraud upon the court in a federal trial be construed as § 2255 motions.

Thus, the doctrine’s survival depends on whether Congress has the power to abrogate it. For sundry reasons, the power to vacate judgments for fraud upon the court is not so significant that a law curtailing it intrudes on the basic functioning or central preroga-
tive of the courts, and accordingly, Congress may abrogate the doctrine.

Most importantly, the primary responsibility for detecting fraud rests on the opposing party.\textsuperscript{207} This is a bedrock principle of our adversarial system. Thus, removing this tool from courts’ arsenals leaves the primary method of eradicating fraud intact.

Moreover, on the nonpareil authority of Chief Justice Marshall, the authority to punish a party for presenting fraudulent evidence is not so essential as to pierce to the heart of federal courts. In \textit{McCulloch}, Marshall argued that the ability to punish “the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court”\textsuperscript{208}—crimes that are similar to perpetrating a fraud upon the court—is beneficial, and not indispensable, because “courts may exist, and may decide the causes brought before them, though such crimes escape punishment.”\textsuperscript{209}

Further, the narrowness of both the AEDPA and the fraud-upon-the-court doctrine itself militates toward permitting congressional regulation. The AEDPA will vitiate the fraud-upon-the-court doctrine only in criminal cases, and not civil cases, the latter of which make up the overwhelming majority of the doctrine’s applications. One of the reasons that the Supreme Court accepted the legislation in \textit{Michaelson} was that it permitted the majority of contempt actions to proceed unabated.\textsuperscript{210} Likewise, fraud upon the court has been defined to include only the narrowest strand of

\textsuperscript{207.} See Bronston v. United States, 409 U.S. 352, 358–59 (1973) (“If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.”); United States v. Throckmorton, 98 U.S. 61, 65 (1878) (denying relief to party who was the victim of fraud unless the successful party had acted so egregiously that “there was in fact no adversary trial or decision of the issue in the case”); Monroe H. Freedman, \textit{Judge Frankel’s Search for Truth}, 123 U. Pa. L. Rev. 1060, 1065 (1975) (stating that the adversarial system “proceeds on the assumption that the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence for its side in as thorough and persuasive a way as possible”); Robert H. Dann, Note, \textit{Judgment: Equity Relief Against Judgment Obtained by Perjury}, 12 Cornell L.Q. 385, 388 (1926) (stating that in general, “[r]ules of evidence, the cross-examination of witnesses, and the fear of criminal prosecution, with the production of counter testimony constitute the only security afforded by law to litigants” against the presentation of fraudulent evidence).

\textsuperscript{208.} \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 417 (1819).

\textsuperscript{209.} \textit{Id}.

fraud: many circuits hold that fraud upon the court occurs only if the proscribed conduct is committed by an officer of the court, and the fraud must go beyond committing perjury or submitting false documents.\footnote{211}{See supra note 155.} It is difficult to fathom a doctrine’s being necessary for courts to achieve their central prerogatives when it is used so conspicuously rarely.

Finally, the interests of courts in protecting their integrity through this doctrine is tempered by the competing interest of finality, which, as embodied in statutes of limitation for causes of action and time limits for filing motions and appeals, is often permitted to trump accuracy.\footnote{212}{See, e.g., FED. R. CIV. P. 60(b)(3) (permitting a motion to relieve a party from a judgment for “fraud . . . , misrepresentation, or other misconduct of an adverse party,” as long as it is filed within one year of the judgment’s being entered); Teague v. Lane, 489 U.S. 288, 309 (1989) (“Without finality, the criminal law is deprived of much of its deterrent effect.”); Throckmorton, 98 U.S. at 68–69 (“[T]he mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.”).} Balancing these values represents a quintessentially legislative activity, and accordingly, the decisions made by Congress in the AEDPA should be accorded deference.

As illustrated by this discussion of the fraud-upon-the-court doctrine, permitting courts to invoke inherent powers when such action is reasonably related to the exercise of the judicial power, while also recognizing Congress’s authority to abrogate inherent powers as long as doing so will not imperil the central prerogatives of the courts, facilitates the smooth operation of the courts and ensures that both branches maintain their constitutionally vested authority. Under this Article’s formulation, courts will have the broad ability to fill procedural gaps with rules of their own creation. However, this does not marginalize Congress: as in the case of the fraud-upon-the-court doctrine, Congress may regularly overrule these court-made rules. This approach, thus, advances the goal of flexibility while retaining the critical congressional oversight.

IV.
CONCLUSION

The original understanding of the Constitution, centuries of Supreme Court jurisprudence, and compelling policy arguments all demonstrate that federal courts possess the implied powers to select
and develop, in the absence of a statute or rule to the contrary, any means that possess a natural relation to the exercise of the judicial power. Numerous Supreme Court and circuit court opinions implicitly accept this premise, but the cases are littered with misguided appeals to “indispensable necessity.” The Court has long since abandoned any reliance on a standard of indispensability, but, oddly, has never announced an alternative standard nor elucidated the justification for broad implied powers. The Court would do well to explicitly adopt the natural relation standard, as articulated by this Article, because doing so would facilitate a clear understanding among lower courts and litigants alike. Indeed, such a clear statement would ensure that words like “shadowy” and “nebulous” never again accompany a discussion of inherent powers.

At the same time, this Article’s prescription would not provoke a free-for-all in which courts would be sheltered from the checks and balances so essential to our Constitution of separated powers. Rather, Congress maintains the primary responsibility for enacting procedural rules, and it is empowered to overrule any decision founded upon an inherent power as long as doing so will not endanger the “central functions” or “core prerogatives” of the courts. Few inherent powers thus far recognized are so critical that they could escape congressional abrogation. Nevertheless, this functional approach will flexibly keep pace with the evolution of federal litigation and ensure that courts possess a floor of powers that will permit them to discharge the power vested in them by the Constitution. Through this organization, “the judicial power” will retain meaning and the federal courts will continue to fulfill the responsibilities placed on them by the founding generation and this generation alike.