REVISITING CONTEMPT OF CONGRESS

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Suppose that a private citizen or an executive branch official does something that the House or Senate considers contemptuous—say, refusing to respond to a congressional subpoena. May the House or Senate arrest her, try her for contempt, and detain her until she complies? This power is called the "inherent contempt power," and conventional constitutional wisdom concedes that the House or Senate can exercise it unilaterally.

This Article presents the first sustained challenge to the conventional wisdom. I argue that the inherent contempt power has no textual basis in Congress's enumerated powers, and by expressio unius, the Constitution's inclusion of other unicameral powers—e.g., each chamber's power to punish members or to promulgate rules to govern its own proceedings—makes an argument by implication even more doubtful. This Article also rejects two common arguments defending the power. First, the historical evidence that Parliament and state legislatures exercised an inherent contempt power does not show that Article I's grant of "legislative power" includes it. The Constitution's commitment to popular sovereignty and to a novel theory of separation of powers undermines the relevance of pre-constitutional precedent. Second, the structural argument that Congress must be empowered to perform its constitutional functions also fails. Because the inherent contempt power must be the "least possible power necessary to the end proposed," Congress must rely on other constitutional mechanisms to perform such functions.

This Article also contributes to the literature on interpretive methodology. Because the inherent contempt power has been exercised by Congress since 1795, defenders argue that the Constitution's meaning has been "liquidated" or "glossed" by this longstanding historical practice. This argument fails for three reasons. First, only decisions that result from inter-branch contestation and settlement should be considered authoritative liquidations of constitutional meaning. Second, even if the Constitution's meaning was liquidated, it can be de- and re-liquidated as practice shifts with time. Third, if the constitutional justifications for past assertions of the power turn on a structural argument that no longer obtains (as here), then those historical precedents lack binding force. These three assertions bolster the substantive point: Neither chamber of Congress may unilaterally arrest, detain, and try private citizens or executive branch officials for contempt.

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INTRODUCTION

> *I could have arrested Karl Rove on any given day. I'm not kidding. . . . There's a prison here in the Capitol.*[1]
>
> —Nancy Pelosi

Conventional constitutional wisdom concedes that each chamber of Congress possesses what's called the inherent contempt power. This power allows the House or the Senate to have a contemnor "brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and, if found in contempt, . . . imprisoned."[2] Each chamber may use this power to threaten not just its own members, but also private citizens and even executive branch officials.[3] Although nowhere granted in the Constitution's text, the power's historical pedigree derives from a long line of congressional and judicial precedent—dating back to 1795[4] and 1821,[5] respectively. Reviewing these early precedents, Justice Story's 1833 *Commentaries on the Constitution* claimed it was "obvious" that Congress possessed the power.[6]

This Article challenges the conventional constitutional wisdom. Although neither chamber has asserted this power for over seventy-five years,[7] calls to reassert the power are commonplace. Just last January, for example, an editorial in the *Daily Beast* argued that House

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1. Jennifer Bendery, *Nancy Pelosi Slams Contempt Vote: 'I Could Have Arrested Karl Rove . . . But We Didn't'*, HUFFPOST (June 20, 2012, 2:58 PM), https://www.huffingtonpost.com/2012/06/20/nancy-pelosi-contempt-darrell-issa_n_1613086.html?1340218706 [https://perma.cc/M2BL-ZWBZ]. There is not, however, a prison in the Capitol. Instead, if Congress holds someone in contempt, the Sergeant-at-Arms will detain the contemnor in the Capitol Police's headquarters. *Cf.* TODD GARVEY, CONG. RESEARCH SERV., CRS RL34097, CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 10 n.79 (2017) ("Given Congress's plenary power over the District of Columbia, the contemnor could potentially be detained or jailed in a D.C. Metropolitan Police Department facility.").

2. *See* ALISA M. DOLAN ET AL., CONG. RESEARCH SERV., RL 30240, CONGRESSIONAL OVERSIGHT MANUAL 33 (2014).

3. *See generally* 1 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1641–65 (1907) (members); *id.* §§ 1597–1640 (private citizens); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1135–39 (2009) [hereinafter Chafetz, *Executive Branch Contempt of Congress*] (executive branch officials).

4. *See* Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 190–92 (1967) (describing a 1795 incident during which Congress detained a private citizen).

5. *See Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 208 (1821).

6. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 843 (1833).

7. *See* DOLAN ET AL., *supra* note 2, at 33 (describing the inherent contempt power as a tool to enforce subpoenas).

Democrats should reassert the authority to "jail anyone who defies congressional subpoenas."[8] Similar editorials have appeared in the *Wall Street Journal* and the *New York Times*.[9] Among legal commentators, Susan Hennessey and Helen Murillo argued in *Lawfare* that Congress could use its inherent contempt power to enforce a subpoena against Michael Flynn,[10] and many scholars have argued that Congress should reclaim its institutional importance by threatening to assert the power more often.[11] Indeed, Parliament recently exercised its analogous contempt power to seize confidential documents from Facebook: "[P]arliament sent a serjeant at arms to [Mark Zuckerberg's] hotel with a final warning and a two-hour deadline to comply with its order. . . . [H]e was escorted to parliament . . . [and] told he risked fines and even

8. Brad Miller, *Here's How House Democrats Can Play Hardball with Trump*, DAILY BEAST (Jan. 1, 2019), https://www.thedailybeast.com/heres-how-house-democrats-can-play-hardball-with-trump [https://perma.cc/CW3T-AJW3].

9. *See* William McGurn, *Lock One Up, Mr. Grassley*, WALL STREET J. (Sept. 25, 2017), https://www.wsj.com/articles/lock-one-up-mr-grassley-1506381224; Adam Cohen, *Congress Has a Way of Making Witnesses Speak: Its Own Jail*, N.Y. TIMES (Dec. 4, 2007), http://www.nytimes.com/2007/12/04/opinion/04tue4.html [https://perma.cc/783S-LHMH]; *see also, e.g.*, Josh Chafetz, *House Arrest: Congress, Go Get Condi, Karl, and Monica Yourself!*, SLATE (Apr. 26, 2007), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/04/house_arrest.html [https://perma.cc/7V2Q-X727]; Randall Eliason, *Contempt of Congress*, SIDEBARS (Apr. 20, 2015), https://sidebarsblog.com/contempt-of-congress/ [https://perma.cc/74JA-S9GP]; *House Should Pursue Inherent Contempt*, COMMON CAUSE (July 30, 2008), http://www.commoncause.org/press/press-releases/house-should-pursue-inherent-contempt.html?referrer=https://www.google.com/ [https://perma.cc/Z2KE-K4DR].

10. *See* Susan Hennessey & Helen Klein Murillo, *What Can Congress Do if Flynn (Or Anyone Else) Refuses to Comply with a Subpoena*, LAWFARE (May 18, 2017), https://www.lawfareblog.com/what-can-congress-do-if-flynn-or-anyone-else-refuses-comply-subpoena [https://perma.cc/Q72G-7Z9Y].

11. Professor Chafetz is the most prominent and most persuasive. *See generally* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWER (2017) [hereinafter CHAFETZ, CONGRESS'S CONSTITUTION]; JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW 235 (2007) ("[M]istakes in interpreting congressional punishing powers have largely been mistakes in . . . interpreting the power too narrowly and allowing the courts too broad a role.") [hereinafter CHAFETZ, PRIVILEGED FEW]; Chafetz, *supra* note 3; Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715 (2012) [hereinafter Chafetz, *Congress's Constitution*]. Professor Chafetz's work revitalizes an important area of scholarship. *See, e.g.*, J.W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440 (1951); Frederick M. Whitridge, *Legislative Inquests*, 1 POL. SCI. QUART. 84 (1886); James M. Landis, *Constitutional Limitations on the Congressional Power of Investigations*, 40 HARV. L. REV. 153 (1926); C.S. Potts, *Power of the Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 780 (1926). For others that agree with Professor Chafetz, see Michael A. Zuckerman, Note, *The Court of Congressional Contempt*, 25 J.L. & POL. 41 (2009); Timothy T. Mastrogiacomo, Note, *Showdown in the Rose Garden: Congressional Contempt, Executive Privilege, and the Role of the Courts*, 99 GEO. L.J. 164 (2010).

imprisonment if he didn't hand over the documents."[12] Not just a long-dead constitutional curiosity, the inherent contempt power remains a potent but dormant power.

But this Article presents the case that it is not constitutionally permissible. Contrary to conventional wisdom,[13] the Constitution's text and structure militate against the inherent contempt power. Bedrock principles of limited government hold that the branches of the federal government may assert only powers that the Constitution vests in them. In this case, the Constitution simply does not include a textual provision that vests such a contempt power. By contrast, Article I does include several Clauses that grant powers to the chambers in their institutional capacities, or that grant privileges to individual representatives. Although these Clauses, particularly the Rules of Proceeding Clause, might justify a subset of cases in which a chamber asserts the inherent contempt power, they cannot be construed to grant the expansive and generic contempt power that Congress has asserted.

Without a clear textual hook, defenders of the inherent contempt power argue that the power is *incidental* or *implied*. Article I's grant of "legislative power" to Congress, the argument goes, surely includes any incidental powers necessary to "perform its constitutional functions."[14] Because Congress needs both internal order and information to perform its basic constitutional duties, it must also have the power to restrain disorderly spectators or compel recalcitrant witnesses. What's more, Congress's legislative antecedents—the British Parliament and American state legislatures—asserted broad contempt powers, and so this historical backdrop might counsel that the Vesting Clause's grant of "legislative power" should be construed to include the powers that legislative bodies have always been presumed to possess.[15]

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12. Carole Cadwalladr, *Parliament Seizes Cache of Facebook Internal Papers*, THE GUARDIAN (Nov. 24, 2018), https://www.theguardian.com/technology/2018/nov/24/mps-seize-cache-facebook-internal-papers [https://perma.cc/L7SG-R9A4].

13. Some have expressed skepticism, *see, e.g.*, Nathan Chapman & Michael McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1743 (2012) (stating the position that "due process does not preclude the houses of Congress from punishing nonmembers for contempt . . . seems dubious"), but no one in the academic literature has offered an extensive case against the power.

14. STORY, *supra* note 6, § 843; *see also* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 14–15 (1829), http://www.portagepub.com/dl/causouth/rawle.pdf [https://perma.cc/B429-AT4D].

15. *See, e.g.*, C.S. Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. PA. L. REV. 691, 699 (1926) ("The contempt power is everywhere, in the English-speaking world, regarded as an inherent power, an essential auxiliary of 'legislative power,' and, as we will see, the nature and extent of the power was scarcely affected at all by the advent of written constitutions and the doctrine of the separation of the powers of government.").

Some structural considerations perhaps bolster the argument for the conventional wisdom.[16] Congressional independence allows Congress to do its job, and so the unilateral, unicameral power to arrest, try, and detain those who would interfere with the legislative prerogatives protects a constellation of institutional responsibilities. In particular, it allows Congress to "compel the Attendance of absent members,"[17] to enforce its "Rules of Proceedings" and "punish its Members for disorderly behavior,"[18] to expel intruders,[19] and to enforce upon strangers silence and decorum in its presence.[20] Most important, though, it puts the threat of arrest and detention behind ordinary congressional subpoenas.[21] Without this coercion, Congress could not independently gather the information necessary for prudent lawmaking.[22] A unilateral contempt power ensures that Congress can both oversee the administration of the laws and inquire about emerging social problems.

Nevertheless, neither the historical argument nor the functional argument can justify a generic contempt power. First, the Constitution's Congress breaks from the historical analogues of Parliament in a decisive way. Reflecting emerging theories of *popular* rather than *parliamentary* sovereignty, the Constitution sets in place a government of limited and defined powers. Unlike the state legislatures, too, the Constitution's Congress both lacks generic authority to legislate for the common good and divides the authority between two Houses. These differences in basic constitutional structure undermine the relevance of pre-constitutional precedent.

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16. *See generally* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (describing a structural approach to constitutional interpretation). *See also* PHILIP BOBBITT, CONSTITUTIONAL FATE: A THEORY OF THE CONSTITUTION 74–92 (1982) ("Structural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures.").

17. U.S. CONST. art. I, § 5, cl. 1.

18. U.S. CONST. art. I, § 5, cl. 2.

19. STORY, *supra* note 6, § 843.

20. *Id.*

21. *See* DOLAN ET AL., *supra* note 2, at 33 (describing the inherent contempt power as a tool to enforce subpoenas).

22. *See McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."); *see also* Chafetz, *supra* note 11, at 735 n.103 (2012) (citing Moreland, *supra* note 4, at 189 ("In practical terms, the inquisitorial authority of the Congress ends at the point where a witness will be excused . . . for refusing to obey a congressional summons to appear or to produce papers, or for refusing to answer questions posed by a member or committee of Congress.")).

Like the historical argument, the functional argument also fails. Congress already has the means to pursue most of the constitutional interests that supposedly justify the inherent contempt power. And even if the inherent contempt power serves some constitutional function, asserting it violates other deep-set constitutional principles. In particular, although *nemo judex in causa sua*,[23] exercising the power allows the House or the Senate to combine within itself the roles of prosecutor, judge, jury, and victim. And when the contemnor serves in the executive branch, the inherent contempt power short-cuts the Constitution's finely wrought impeachment proceedings.

But my argument cuts against the grain not only of conventional wisdom, but also of longstanding historical practice and judicial precedent. After all of these years, isn't the inherent contempt power a settled question? Has its meaning been "glossed" or "liquidated" such that the arguments from text and structure cannot overcome the weight of history? No, I argue. Arguments from historical gloss or liquidation, although compelling in many cases, should not apply here for three reasons:

First, arguments from practice should be less persuasive when they do not reflect inter-branch agreement about the Constitution's meaning. Here, assertions of the inherent contempt power neither require concurrence of the other chamber nor pass across the President's desk for her signature. Because unicameral interpretations are likely to suffer from motivated reasoning and can never garner inter-branch agreement, they should be less credible evidence of historical gloss. Second, I argue that, even if the provision's meaning *was* settled by historical practice, the failure to exercise the power in recent years has allowed its "de-liquidation." More recent historical practice, then, has "re-liquidated" the Constitution's meaning so that it supports a much narrower power. Third, because the justification for the inherent contempt power is a functional or structural one, the inherent contempt power might be a contingent constitutional power. In other words, some grants of constitutional powers might wax or wane with changing circumstances. If so, when the facts-on-the-ground change so that the power becomes less functionally necessary, then the constitutional power can become illegitimate. Under this theory, what is settled is not the *particular* applications of the structural argument, but rather the legal rule or the mode of analysis. Here, the legal rule that once sustained the inherent contempt power—that it be the "least possible power necessary to the end proposed"[24]—no longer justifies the power.

By challenging this conventional constitutional wisdom, this Article makes two novel contributions to the literature. *First*, it presents

23. *See infra* text accompanying notes 141–43.

24. *Anderson v. Dunn*, 6 U.S. (6 Wheat.) 204, 231 (1821).

the most sustained criticism of Congress's supposed inherent contempt power.[25] This critique revitalizes and elaborates the dissenting opinions of lawyers, politicians, and other constitutional interpreters—including James Madison and Thomas Jefferson—who have challenged the practice. Where relevant, I draw on the arguments of these dissenters in order to situate my own argument within the inter-temporal constitutional debate.[26] More practically, when a chamber of Congress again considers asserting the power, this danger to individual liberty should be challenged and questioned by the relevant decision-maker—whether she be a member of Congress voting on the contempt citation, or a federal judge adjudicating a habeas petition.

The practical import might seem distant now, but future assertions of the power might arise in highly partisan or unsteady times. For example, the House Un-American Activities Committee aggressively exercised its power to hold officials in *criminal* contempt.[27] Because these contempt proceedings—unlike inherent contempt proceedings—were prosecuted in federal courts, the Supreme Court's supervisory authority allowed it to limit abuses by requiring Congress to afford the protections of the Bill of Rights in its investigations.[28] By contrast, an aggressive exercise of the inherent contempt power would not necessarily afford such protections.

Second, the Article makes a methodological argument that contributes to the literature on historical "gloss" or "liquidation."[29] Most interpretive theories consider historical practice when interpreting

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25. For another critic who takes a less radical view than this Article's, see Todd David Peterson, *Contempt of Congress v. Executive Privilege*, 14 U. PA. J. CONST. L. 77 (2011). Professor Peterson argues that Congress does not have an inherent contempt power against *executive branch officials*. *See, e.g.*, *id.* at 79 ("[T]he contention that there are historical precedents for the use of Congress's inherent contempt power against officials who assert the President's claim of executive privilege is incorrect."). Professor Chafetz has challenged Professor Peterson's conclusions. *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 11, at 5643 n.177.

26. *Cf.* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 93 (2016) ("In constitutional construction, we are permitted, even encouraged, to favor some opinions over others—even minority opinions in their day—and render judgments on the past. In the practice of constitutional construction, we employ history not as a command but as a resource.").

27. Peterson, *supra* note 25, at 150.

28. *See generally Watkins v. United States*, 354 U.S. 178, 195 (1957) ("Prior cases, like *Kilbourn*, *McGrain* and *Sinclair*, had defined the scope of investigative power in terms of the inherent limitations of the sources of that power. In the more recent cases, the emphasis shifted to problems of accommodating the interest of the Government with the rights and privileges of individuals. The central theme was the application of the Bill of Rights as a restraint upon the assertion of governmental power in this form."); Harry Kalven Jr., *Mr. Alexander Meiklejohn and the* Barenblatt *Opinion*, 27 U. CHI. L. REV. 315, 318 n.14 (1960).

29. *See generally* sources cited *infra* notes 298–98.

ambiguous constitutional provisions,[30] but the Court's approach seems ad hoc and under-theorized. This Article contributes to the emerging field of scholarship that attempts to theorize the uses of post-Founding historical practice. In particular, this Article highlights and explains the importance of *inter-branch disagreement* before a historical practice can gloss or liquidate constitutional meaning. It also attempts to elaborate a theory of *de-* and *re-liquidation*, and to articulate how theories of liquidation or gloss interact with constitutional provisions that vest powers that are contingent upon factual or functional justifications.

The Article proceeds as follows. Part I gives a brief definition of and introduction to the power. Part II then elaborates the argument that the Constitution precludes Congress's inherent contempt power. Although the arguments from text, history, and structure overlap, the basic organization of the Article is simple. Section II.A begins with an argument from the text of the Constitution itself. Section II.B challenges the claim that Parliament's practices should serve as precedent that should lead us to read "legislative power" more broadly than the text would permit. Section II.C introduces the functional argument that Congress must have the inherent contempt power to perform its other constitutional functions, and it subjects this argument to means-end scrutiny. Section II.D concludes the Part by discussing the limits of this Article's arguments.

Turning to broader questions of interpretive method, Part III responds to the argument that past practice should settle the Constitution's meaning. Section II.A elaborates the argument that liquidation should require inter-branch contestation and resolution. Section III.B argues that, even if meaning *was* once settled, the text has been "de-" and "re-" liquidated so that past practice should no longer be considered binding on constitutional interpreters. Section III.C argues that functional arguments, because they depend so heavily on ever-changing facts-on-the-ground, resist liquidation. A short conclusion follows.

I. INTRODUCING THE INHERENT CONTEMPT POWER

A. Definition

What does it mean for a chamber of Congress to hold someone in contempt?[31] The Congressional Research Service provides the following definition:

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30. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 430–32 (2012).

31. I use "contempt of Congress" interchangeably with "breach of privilege." *See* MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE

> Congress's contempt power is the means by which Congress responds to certain acts that in its view obstruct the legislative process. Contempt may be used either to coerce compliance, to punish the contemnor, and/or to remove the obstruction. Although any action that directly obstructs the effort of Congress to exercise its constitutional powers may arguably constitute a contempt, in recent decades the contempt power has most often been employed in response to the refusal of a witness to comply with a congressional subpoena.[32]

Although useful at a high level of generality, this definition elides a series of distinctions that will be relevant when assessing each chamber's authority. In particular, Congress's contempt power can be analytically distinguished along at least three axes: (1) the constitutional interest served (preserving order in internal proceedings, protecting the integrity of the chamber, or information gathering); (2) the target of contempt (members of Congress, private citizens, or executive branch officials); and (3) the origin of the authority (statutory or inherent).

First, a finding of contempt must be linked to one of Congress's "constitutional powers."[33] Chambers of Congress have issued contempt citations for diverse forms of obstruction: for "creat[ing] a disturbance" as a spectator;[34] for publishing "false, defamatory, scandalous, and malicious assertions and pretended informations" about the Senate;[35] and for refusing to comply with a subpoena duces tecum issued by the House Committee on Mines and Mining.[36] In this Article, I simplify the relevant constitutional interests into the categories of preserving order in internal proceedings, protecting the integrity of the chamber, or gathering information. Different constitutional interests can be more or less compelling, and more or less harmful to other constitutional interests.[37]

Second, besides the constitutional interest that justifies exercise of the contempt power, there is also the *target* of the contempt. Each chamber of Congress can assert this authority against its own members,

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AMERICAN COLONIES 206 (1943) ("Often [contempt] was synonymous with breach of privilege, and the House of Commons, as well as a colonial assembly, might use the two terms interchangeably."); CHAFETZ, PRIVILEGED FEW, *supra* note 11, at 193 (defining and comparing breach of privilege and contempt of Parliament).

32. GARVEY, *supra* note 1, at 10.

33. *Id.*

34. *See* HINDS, *supra* note 3, § 1605.

35. *See* 10 ANNALS OF CONG. 115 (1800).

36. *See* HINDS, *supra* note 3, § 1608.

37. *See infra* Section II.C.

against private citizens, and against executive branch officials.[38] Congress has specific constitutional authority over its own members,[39] and the law that governs these interactions is a complex mix of constitutional law and House or Senate rules.[40] But Congress's textual authority to govern itself does not also extend to private citizens or executive branch officials. Therefore, Congress's power over these categories of alleged contemnors is more doubtful. This Article, then, focuses on the constitutionality of the assertions against either private citizens or executive branch officials.

Third, complicating contempt even further, the source of Congress's authority differs. Either chamber might rely on its inherent power, or it may rely on congressional authorization. In 1857, for instance, Congress passed a statute making it a crime to refuse to respond to a congressional subpoena.[41] Under this statute, the House or the Senate may certify to the United States Attorney that a witness "fail[ed] to appear to testify or fail[ed] to produce any books, papers, records, or documents, as required" by congressional subpoena.[42] If so, the prosecutor's "duty . . . shall be to bring the matter before the grand jury."[43] Along with the criminal contempt power, chambers of Congress have also brought civil suits to enforce a congressional subpoenas.[44] Some such suits have seemed to rely on Congress's *inherent* authority to request information from the executive branch, and courts have entertained such suits under general federal question

38. *See generally* HINDS, *supra* note 3, §§ 1641–65 (members); *id.* §§ 1597–1640 (private citizens); Josh Chafetz, *Executive Branch Contempt of Congress*, *supra* note 3, at 1135–39.

39. *See, e.g.*, U.S. CONST. art. I, § 5.

40. *See generally* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 7–8 (8th ed. 2008); Chafetz, *Congress's Constitution*, *supra* note 11, at 754–68.

41. An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress, and to Compel Them to Discover Testimony, 11 Stat. 155 (1857) (codified as amended at 2 U.S.C. §§ 192–94 (2018)).

42. 2 U.S.C. § 194 (2018).

43. *Id.* Inter-branch information disputes present a more complicated question. *See generally* Peterson, *supra* note 25 (discussing the issue). In particular, the Office of Legal Counsel concluded that executive branch officials cannot be prosecuted under 2 U.S.C. §§ 192–94 when the President has asserted a claim of executive privilege. *See* Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101 (1984); Response to Congressional Requests for Information Regarding Decisions Made Under Independent Counsel, 10 Op. O.L.C. 68 (1986). As a result, "Congress effectively loses the enforcement sanction of the criminal contempt of Congress statute as a method for inducing compliance with a congressional subpoena." Peterson, *supra* note 25, at 110.

44. Peterson, *supra* note 25, at 110.

jurisdiction.[45] Congress may also pass a statute—as it has done in the criminal context—authorizing its chambers to bring suit to compel information.[46] Finally, Congress has also exercised the inherent contempt power.[47] With this power, "the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned or detained in the Capitol or perhaps elsewhere."[48] Setting aside criminal and civil enforcement of contempt citations, this Article focuses mostly on the constitutionality of the inherent contempt power.

B. Origins

In 1795, the House of Representatives, for the first time,[49] asserted its authority to arrest, detain, and try private citizens for breach of the House's privileges.[50] On December 28, Representative Smith of South Carolina "requested the attention of the House . . . to a subject of a very delicate nature."[51] He claimed that a man named Robert Randall had devised a scheme to bribe members of Congress to support a grant of land to himself and his colleagues.[52] By the day's end, the House of Representatives had

> *Resolved*, That Mr. Speaker do issue his warrant, directed to the Sergeant-at-Arms attending this House, commanding him to take into custody, wherever to be found, the body of the

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45. *See Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 64 (D.D.C. 2008) (citing *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973)). Although I focus in this Article on assertions of the inherent contempt power to arrest and detain, civil suits initiated without prior congressional authorization may raise a similar set of problems that assertions of the inherent contempt power do. These suits also raise important questions of standing that are beyond the scope of this Article. *See generally, e.g.*, Tara Leigh Grove & Neil Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571 (2014).

46. *E.g.*, 2 U.S.C. § 288d (2018) (authorizing the Senate counsel to "bring a civil action . . . to enforce . . . any subpoena or order issued by the Senate or a committee or a subcommittee of the Senate authorized to issue a subpoena or order").

47. *See* GARVEY, *supra* note 1, at 10.

48. *Id.*

49. *See* 5 ANNALS OF CONG. 182 (1795) (statement of Rep. William Smith) ("This [is] the first instance, since the organization of this Government, in which it [has] been found necessary to resort to this high prerogative.").

50. For brief descriptions of this early incident, see Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 190–92 (1967) (describing the incident); CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 11, at 172 (same); HINDS, *supra* note 3, §§ 1599–1603 (1907) (same).

51. 5 ANNALS OF CONG. 166 (1795).

52. *Id.* at 167.

> said Robert Randall, and the same in his custody to keep, subject to the further order and direction of the House.[53]

The Speaker prepared this warrant, along with a similar one for Charles Whitney, and the Sergeant-at-Arms reported the next day that he had taken the two offenders into custody and would "ke[ep] them at the disposal of the House."[54]

The House rooted its authority in the "rights and privileges which belonged to every Legislative institution."[55] For example, Representative Smith—one of the most vocal defenders of the authority—asserted that "every jurisdiction had certain powers necessary for its preservation," and so "the Legislature possessed certain privileges incident to its nature and essential for its very existence."[56] What's more, he continued, the House inherited the "power of arrest" from the "long-established usages" in England and in the State Legislatures, which both exercised it.[57] Without this power, "the House . . . would be altogether dependent on the other branches of the Government, and in every case of aggression be obliged to send the offenders to the civil magistrate."[58]

Although some House members were doubtful of their power to detain Randall,[59] the only *sustained* challenge to the House's power came from Randall's attorney, William Tilghman. He conceded that the House "had the privilege essential to its existence to defend itself from any insult from within or without," but the "Constitution says nothing of privilege, . . . and one of the amendments to it, says, that the people

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53. *See* 2 H.R. JOURNAL 390, 4th Cong. (Dec. 28, 1795); *see also* HINDS, *supra* note 3, § 1600 (1907).

54. *See* 2 H.R. JOURNAL 390, 4th Cong. (Dec. 28, 1795); 5 ANNALS OF CONG. 169 (1795).

55. 5 ANNALS OF CONG. 181 (1795).

56. *Id.* at 181.

57. *Id.* at 181–82.

58. *Id.* Members conceded that the inherent contempt power was the only justification for the arrest. *See, e.g.*, *id.* at 187 (statement of Rep. Murray) ("[I]f the House were not defensible on the doctrine of privilege, where would an authority be found for what they had already done? We all know, and we all knew at the time of committing Randall, that it was done without any support from law. By carrying this reasoning to its utmost length, the Speaker might be liable in an action of damages."). No Representative suggested any other justifications for the arrest of Randall and Whitney, and others echoed Representative Murray's arguments. *See, e.g.*, *id.* at 189 (statement of Rep. Smith); *id.* at 182.

59. *See, e.g.*, *id.* at 190 (statement of Rep. Sherburne) ("When we speak of privileges of the House, it seems a word of cabalistic meaning. Will any gentleman define or point out these privileges? In what book of the laws are they written?"); *id.* at 193 (statement of Representative Brent) ("[W]hen the writ for apprehending Randall and Whitney was issued, he had his doubts that the House were proceeding too far: he was suspicious that they exceeded the limits of their authority.").

shall be understood to have retained whatever they have not granted."[60] While the privileges of the "English Parliament rested on immemorial usage," "those of this House [depend] on a written Constitution, which had considerably narrowed [the privileges]."[61] He concluded: "It follows, then, that since what has been expressly granted reaches not to Randall, that it is retained."[62] Nevertheless, the House voted seventy-eight to seventeen to hold Randall in contempt.[63]

But James Madison voted against the contempt citation.[64] When the House first sought to apprehend Randall, Madison stated his reservations: "[S]ince Randall was already in custody, he did not perceive the necessity for issuing the writ against him instantly. It was a new case; and he would give his vote with more satisfaction if he was permitted to wait until tomorrow."[65] No other statement by Madison in the House seems to have been recorded, but he soon expressed his skepticism about the inherent contempt power in a letter to Thomas Jefferson. Discussing Randall's case, he wrote:

> In the arguments of the Counsel, and in the debates in the House, the want of jurisdiction in such a case over persons not members of the body was insisted on, but was overruled by a very great majority. There cannot be the least doubt, either of the turpitude of the charge, or the guilt of the accused; but it will be difficult, I believe, to deduce the privilege from the Constitution, or to limit it in practice, or even to find a precedent for it in the arbitrary claims of the British House of Commons. What an engine may such a privilege become, in the hands of a body once corrupted, for protecting its corruptions against public animadversion, under the pretext of maintaining its dignity and preserving the necessary confidence of the public![66]

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60. *Id.* at 214.

61. *Id.* at 215.

62. *Id.* at 214.

63. *See* 2 H.R. JOURNAL 405–06, 4th Cong. (Jan. 6, 1796), https://memory.loc.gov/cgi-bin/ampage?collId=llhj&fileName=002/llhj002.db&recNum=400&itemLink=r%3Fammem%2Fhlaw%3A%40field%28DOCID%2B%40lit%28hj002240%29%29%230020358&linkText=1 [https://perma.cc/5P57-6CFT].

64. *Id.* at 406.

65. 5 ANNALS OF CONG. 169 (1795) (statement of Rep. Madison).

66. Letter from James Madison to Thomas Jefferson (Jan. 10, 1796), *in* 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 70 (William C. Rives & Philip R. Fendall eds., 1865), https://founders.archives.gov/?q=contempt%20randall&s=1111311111&sa=&r=5&sr= [https://perma.cc/9PK4-RF3M].

Put simply, Madison doubted the House's "jurisdiction" over "persons not members of the body." He challenged the House's authority to unilaterally hold Randall in contempt, arguing that neither the Constitution itself nor the "precedent" of the "arbitrary claims of the British House of Commons" supports the inherent contempt power. He also warned that the House could abuse the power "under the pretext" of preserving the House's "dignity" and the "confidence of the public." Of course, Madison's concerns with the inherent contempt power were only recorded in a private correspondence to Thomas Jefferson, but he also cast a public vote against the practice.

Since 1795, both the House and the Senate have repeatedly claimed the authority—the Senate for the first time in 1800.[67] But neither chamber has asserted the power since 1935.[68] Basic institutional developments might explain Congress's neglect of this power. As mentioned, in 1857 Congress passed a statute that criminalized contempt.[69] The statute made prosecution by the House or Senate unnecessary. And as Congress has become bigger and busier, the time and attention required for a contempt proceeding make it an increasingly unwieldly enforcement mechanism.

C. Doctrine

In 1821, the Court in *Anderson v. Dunn*[70] approved the House's assertion of the inherent contempt power.[71] Still, the Court's stamp of approval of the power came with several salient limitations on the power. First, the Court affirmed its own capacity to review inappropriate detainment by Congress.[72] In *Anderson*, the Court entertained a trespass suit against the Sergeant-at-Arms who arrested the contemnor.[73] (The Court has since moved beyond damages remedies. In *Marshall v. Gordon*,[74] for example, the Court granted a writ of habeas corpus and directed the Sergeant-at-Arms to release the contemnor.). Second, the Court in *Anderson v. Dunn* affirmed only the

67. GARVEY, *supra* note 1, at 5–6.

68. *Id.* at 12.

69. An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress, and to Compel Them to Discover Testimony, 11 Stat. 155 (1857) (codified as amended at 2 U.S.C. §§ 192–94) (2018)).

70. 19 U.S. (6 Wheat.) 204 (1821).

71. *Id.* at 234–35.

72. *See Watkins v. United States*, 354 U.S. 178, 192 (1957) ("Unlike the English practice, from the very outset the use of contempt power by the legislature was deemed subject to judicial review.") (citing *Anderson*, 19 U.S. (6 Wheat.)).

73. *See Anderson*, 19 U.S. (6 Wheat.) at 204, 210.

74. 243 U.S. 521, 548 (1917).

"least possible power adequate to the end proposed."[75] Since then, the Court has repeatedly insisted that Congress's exercise of the inherent contempt power should satisfy this exacting standard.[76]

II. LEGAL JUSTIFICATIONS

Given history's gloss, the arguments in favor of the inherent contempt power might seem insurmountable.[77] After all, "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision."[78] Defenders note that both chambers of Congress have asserted the inherent contempt power since the earliest days of the Republic, and the Court has blessed the claims to power. Although "past practice does not, by itself, create power,"[79] this historical gloss provides compelling reason to conclude that the inherent contempt power still exists.

In this Part though, I set aside the difficult question of post-Ratification history. Because historical gloss that "violates the document's plain meaning or deep structure" should be repudiated,[80] this Part reconsiders the inherent contempt power in light of the Constitution's text and structure. Section II.A elaborates the textual argument against the inherent contempt power. Sections II.B and II.C reject the *historical* and *structural* arguments that defenders of the inherent contempt power regularly advance. Section II.D recognizes some limitations on this argument.

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75. *Anderson*, 19 U.S. (6 Wheat.) at 231.

76. *E.g.*, *Marshall*, 243 U.S. at 541.

77. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 337 (2012) ("[T]he text was glossed almost immediately after it went into effect, and this gloss now defines how modern Americans properly read the text."). *See generally id.* at 335–41 (discussing the inherent contempt power).

78. *NLRB v. Canning*, 134 S. Ct. 2550, 2594 (2014). *But see Powell v. McCormack*, 395 U.S. 486, 546–47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.").

79. *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Reagan*, 453 U.S. 654, 686 (1981)).

80. AMAR, *supra* note 77, at 340.

A. Text

1. ENUMERATED POWERS

To reiterate a first principle, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined."[81] The principle does not mean that the powers of the government will be paltry or narrow.[82] Indeed, changed factual circumstances might make these "few and defined" powers expand to encompass new areas of regulation.[83] But the principle does mean that federal power must have its source in the Constitution itself. Methodological disagreements might lead some to draw authority from extra-textual sources, but the American constitutional tradition purports, by widespread agreement, to be an interpretive practice that explicates the meaning of the Constitution's text.[84]

For defenders of the inherent contempt power, the problem is that virtually everyone who writes about the question admits that there is no explicit constitutional text that supports the power. For example, Josh Chafetz, a persuasive defender of the power, admits that the "authority to punish nonmembers has no explicit textual basis."[85] What's more, the Framers considered but did not include a provision that would vest

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81. THE FEDERALIST NO. 45, at 292–93 (Alexander Hamilton) (Clinton J. Rossiter ed., 1961).

82. *Cf.* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1347 (1988) ("The concept of a 'limited' federal government does not mean that the size of the federal government must be small or that Congress and the Executive must limit their exercise of constitutional power; it means, more fundamentally, that the federal government is a defined set of activities constituting a subset of all activities within the polity.").

83. Akhil Reed Amar, *The President, the Cabinet, and Independent Agencies*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 36, 54–56 (2010) (explaining in a lecture how this analysis might apply to the Commerce Clause).

84. *See, e.g.*, STORY, *supra* note 6, § 210 ("[E]very word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. . . . The people make [constitutions]; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss."); *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824) ("As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey."); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1224 (1995) ("Constitutional law, it seemed to me then, was a field in which argument was disciplined—both by constitutional text and by at least a few accepted ground rules for interpreting that text.").

85. *See* Chafetz, *Executive Branch Contempt of Congress*, *supra* note 3, at 1127; *see also* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 11, at 171–72 (making the same point); GARVEY, *supra* note 1, at 10 ("Congress's inherent contempt power is not specifically granted by the Constitution . . . .").

an explicit contempt power.[86] Charles Pinckney referred the following provision to the Committee of Detail:

> Each House shall be the Judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same; or who, in the place where the Legislature may be sitting and during the time of its Session, shall threaten any of its members for any thing said or done in the House, or who shall assault any of them therefore—or who shall assault or arrest any witness or other person ordered to attend either of the Houses in his way going or returning; or who shall rescue any person arrested by their order.[87]

With this provision, the Constitution would seemingly enshrine something approaching the expansive powers of the House of Commons.[88] Because the provision died without debate in the Committee of Detail,[89] the Committee might have thoughtfully rejected it, or simply considered it redundant. Nevertheless, the rejection of the provision shows that the Framers at least *considered* a textual provision granting the inherent contempt power. Yet the provision was not adopted.

Whole-text arguments provide even stronger evidence against the inherent contempt power. Several constitutional provisions in Article I, Section 5 grant power to chambers of Congress in their individual capacities. Because the expression of one thing implies the exclusion of another, the presence of these constitutional provisions reaffirms that the Constitution does not grant a broad inherent contempt power. In particular, consider the Rules of Proceeding Clause and the Judge of Elections Clause.

First, the Rules of Proceeding Clause gives each House authority to "determine the Rules of its Proceedings," to "punish its members for disorderly behavior," and "with the Concurrence of two thirds, to expel a member."[90] The same Clause affirms each chamber's near-plenary authority over its own members: "[T]he right to expel [members]

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86. *See* CHAFETZ, PRIVILEGED FEW, *supra* note 11, at 208 (discussing this drafting history).

87. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 341 (Max Farrand ed., rev. ed. 1966). James Madison interpreted the provision as one allowing Congress to "imprison for insult." *Id.* at 340.

88. *See, e.g.*, CHAFETZ, PRIVILEGED FEW, *supra* note 11, at 7–8 (making this claim).

89. *Id.* at 208.

90. U.S. CONST. art. I, § 5. For a thorough discussion of the Clause, see John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE. W. RES. L. REV. 489, 522–42 (2001).

extends to all cases where the offense is such as in the judgment of the [individual house] is inconsistent with the trust and duty of a member."[91] Of course, these crucial institutional powers might have seemed obvious to the Framers.[92] Legislative bodies on both sides of the Atlantic had long claimed the right to govern their own internal proceedings.[93] But the Rules of Proceeding Clause dispelled any lingering doubts. The Clause makes clear that each chamber has the power over internal proceedings that is necessary to the institutional integrity of Congress.[94] And the Clause makes good structural sense. Without this power, as Justice Story argued, "it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order."[95]

Second, the Judge of Elections Clause serves an analogous function. It states that each chamber should "be the Judge of the Elections, Returns and Qualifications of its own Members."[96] If no constitutional actor were vested with such a power, Justice Story warned, there would be "no certainty, as to who were legitimately chosen members."[97] But vesting this responsibility with another constitutional actor—say, the President—would endanger Congress's "independence, its purity, and even its existence and action."[98] Following the "uniform practice of England and America," then, the Constitution vested these powers in each chamber so that Congress would "guard its own rights and privileges from infringement, [] purify and vindicate its own character, and [] preserve the rights . . . [and] free choice of its constituents."[99] Further, the same Clause extended the power over internal proceedings to some instances in which the interference would come from outside the chamber—that is, from a member's non-attendance at the legislative session. Each chamber could "compel the Attendance of absent Members" whose laziness,

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91. *In re Chapman*, 166 U.S. 661, 669–70 (1897). The right to *expel* (under the Rules and Expulsion Clause) is not to be confused with the right to *exclude* (under the Elections Clause). *See Powell v. McCormack*, 395 U.S. 486, 507–12 (1969).

92. *See* Roberts, *supra* note 90, at 528.

93. *See id.*

94. *Cf. Powell*, 395 U.S. at 548 ("Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds.").

95. STORY, *supra* note 6, § 419.

96. U.S. CONST. art. I, § 5, cl. 1; *see also Powell*, 395 U.S. at 519–40 (interpreting the Clause).

97. *See* STORY, *supra* note 6, § 416.

98. *Id.*

99. *Id. But cf. Powell*, 395 U.S. at 547–49 (finding that the Court could review some congressional decisions under the Judge of Elections Clause).

negligence, or clever electoral maneuvering[100] threatened to obstruct the work of legislation.[101]

With this set of unicameral prerogatives clustered in Article I, Section 5, the absence of a broader contempt power is striking. Like the institutional functions preserved by the other Clauses in Section 5, the purpose of a generic contempt power rests on a similar institutional justification—namely, the "right of the House to preserve the means of discharging its legislative duties."[102] Were Section 5 never included within the Constitution, one could argue that the prerogatives now contained therein (along with a more expansive contempt power) should be construed as powers incidental to the "legislative power."[103]

But this selective inclusion is meaningful for what it excludes. Although the Rules of Proceeding Clause and Judge of Elections Clause could be cautionary redundancies, a defender of the inherent contempt power must affirm that the Framers were only *selectively cautious* in crafting the text of Article I, Section 5. Put differently, they were cautious enough to reiterate some powers, but not enough to reiterate another set of closely related ones. This response to the *expressio unius* argument strains credibility. More still, the Framers could have modeled a "Contempt Clause" after those regularly adopted in revolutionary state constitutions.[104] Indeed, the prevalence of these

100. *See, e.g.*, Nick Madigan, *On the Lam, Texas Democrats Rough It*, N.Y. TIMES (Aug. 1, 2003), http://www.nytimes.com/2003/08/01/us/on-the-lam-texas-democrats-rough-it.html ("Democratic state senators from Texas fled . . . to New Mexico on Monday to deny their Republican counterparts a quorum . . . .").

101. U.S. CONST. art. I, § 5, cl. 1.

102. *Marshall v. Gordon*, 243 U.S. 521, 546 (1917).

103. *See* Roberts, *supra* note 90, at 528 (arguing that the Framers would expect that a "legislative body has the inherent power to create enactment processes that satisfy its own needs"); STORY, *supra* note 6, § 416 (noting that the power to judge elections has "always been lodged in the legislative body by the uniform practice of England and America").

104. *See, e.g.*, DEL. CONST. of 1776, art. 5 ("They may also severally expel any of their own members for misbehavior, but not a second time in the same sessions for the same offence, if reelected; and *they shall have all other powers necessary for the legislature of a free and independent state*.") (emphasis added); S.C. CONST. of 1776, arts. VII–IX ("And the general assembly and legislative council, respectively, shall enjoy *all other privileges* which have at any time been claimed or exercised by the Commons house of Assembly, but the legislative council shall have no power of expelling their own members.") (emphasis added); PA. CONST. of 1776, § 9 ("The General Assembly . . . [shall have power to] judge of the elections and qualifications of their own members; they may expel a member, but not a second time for the same cause; they may administer oaths or affirmations on examination of witnesses; redress grievances; . . . and shall have *all other powers necessary for the legislature of a free state or commonwealth*.") (emphasis added); MD. CONST. of 1776, art. X ("That the house of delegates may . . . call for all public or official papers and records, and send for persons, whom they may judge necessary in the course of their inquiries, concerning affairs relating to the public interest."); VT. CONST. of 1777, § VIII (listing

clauses—in Delaware, South Carolina, Pennsylvania, Maryland, Vermont, and Massachusetts—undermines the argument for the implicit contempt power in the federal Constitution.[105] Because the state legislatures already possess a general police power and plenary authority to legislate, the argument for an implicit contempt power would be even stronger.[106] Therefore, enumeration in many state constitutions strengthens the argument that enumeration is necessary.

For all of these reasons, the best reading of the text is that the Constitution includes the powers it lists and excludes the powers it doesn't.[107] Given the lack of an explicit textual provision, and given the *expressio unius* argument based on the surrounding institutional

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a series of institutional powers, then claiming that "[t]he members of the House of Representatives . . . shall have all other powers necessary for the legislature of a free State"); MASS. CONST. of 1780, ch. I, § 3, art. X ("The house of representatives . . . shall have authority to punish by imprisonment, every person, not a member, who shall be guilty of disrespect to the House, by any disorderly, or contemptuous behaviour, in its presence; or who, in the town where the General Court is sitting, and during the time of its sitting, shall threaten harm to the body or estate of any of its members, for any thing said or done in the House; or who shall assault any of them therefor; or who shall assault, or arrest, any witness, or other person, ordered to attend the House, in his way in going, or returning; or who shall rescue any person arrested by the order of the House."). Other state constitutions declined to vest a generic and expansive inherent contempt power. *See, e.g.*, VA. CONST. of 1776; N.J. CONST. of 1776; N.C. CONST. of 1776, art. X; GA. CONST. of 1777, art. VII; N.Y. CONST. of 1777.

105. *See* sources cited *supra* note 104.

106. *See, e.g.*, THE FEDERALIST NO. 45 (James Madison) ("Those [powers] which are to remain in the State governments are numerous and indefinite."); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1180 (1992) ("[H]istorically state governments have been viewed as possessing plenary powers.").

107. *Cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) (stating that the expression of one thing is the exclusion of others (*expressio unius est exclusio alterius*)). Of course, critics can respond that every canon has its opposite. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 401 (1950). In this case, Justice Story presents *expressio unius*'s opposite, *ex majori cautela* (or *ex aubundunti cautela*):

> Another rule of interpretation of the constitution, suggested by the foregoing, is, that the natural import of a single clause is not to be narrowed, so as to exclude implied powers resulting from its character, simply because there is another clause, which enumerates certain powers, which might otherwise be deemed implied powers within its scope. . . . In few cases could the [rule], *ex majori cautela*, occur with more claim to respect.

STORY, *supra* note 6, § 449.

prerogatives,[108] the defenders of the inherent contempt power lack a clear textual argument.[109]

Nonetheless, "in the interpretation of the constitution there is no solid objection to implied powers,"[110] and the inherent contempt power's defenders have always claimed it to be an *incidental* or *implied power*. For example, in 1833, Justice Story argued that "it is obvious, that . . . such a power, to some extent, exists by implication"—noting the "remarkable" fact that the Constitution included no such provision.[111] Similarly, Chafetz admits that the "authority to punish nonmembers has no explicit textual basis," but argues that "sound structural and historical reasoning dictates that such a power must exist."[112] If this inherent contempt power is to exist, then it must be part of the "vast mass of incidental powers which must be involved in the constitution if that instrument be not a splendid bauble."[113] This Article will return more fully to these historical and structural arguments in Sections II.B and II.C.

2. RIGHTS-PROTECTING PROVISIONS

The Constitution's rights-protecting provisions reinforce the argument against the contempt power. The memories of legislative abuses under the revolutionary state constitutions were fresh in the Founders' minds, and so the Constitution includes structural protections against intemperate or vindictive legislatures.[114] Together, these provisions institute due-process and separation-of-powers mechanisms—i.e., mechanisms that carefully limit or curtail "trial by legislature." Against the baseline rule that constitutional powers must be enumerated, these limitations make the inference of an implied inherent contempt power increasingly unlikely. I will discuss three sets of interrelated provisions: (1) those forbidding bills of attainder or ex post

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108. *See Anderson v. Dunn*, 19 U.S. 204, 214 (1821) ("The [Constitution] authorizes the House to punish *its members: et enumeratio unius est exclusio alterius*.").

109. For an early argument to this effect, see ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 146–50 (Clyde N. Wilson ed., 2012).

110. STORY, *supra* note 6, § 433.

111. STORY, *supra* note 6, § 842.

112. Chafetz, *Executive Branch Contempt of Congress*, *supra* note 3, at 1127–28; *see also* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 11, at 171–72 (making the same point); TODD GARVEY, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE, CRS RL34097, at 10 (2017) ("Congress's inherent contempt power is not specifically granted by the Constitution . . . .").

113. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

114. *Cf. Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1331–32 (2016) (Roberts, C.J., dissenting) (listing the abuses of state legislatures).

facto laws, (2) the impeachment provisions, and (3) the rules for expelling and punishing members of Congress.

Bills of Attainder and Ex Post Facto Laws: Within Article I, the Constitution included a "short list of don'ts protecting individual liberty and republican equality against Congress and the states."[115] Under the British Constitution, Parliament could "inflict capital punishment[] . . . without any conviction in the ordinary course of judicial proceedings."[116] The common law called these bills of attainder, and Joseph Story commented that the power was justified as one of the "transcendent powers of parliament" and the exercise of the "highest power of sovereignty."[117] After the Revolution, many states claimed this power and, unsurprisingly, abused it.[118]

Breaking with the parliamentary tradition, the Bill of Attainder Clause forbids "special acts of the legislature" that single out individuals for special punishment.[119] Although "at common law a bill of attainder was a legislative condemnation to death without trial for either treason or felony, accompanied by corruption of blood,"[120] the Constitution's Bill of Attainder Clause has long been construed to include lesser punishments.[121] Reinforcing this ban on bills of attainder, the same Clause forbade Congress from passing *ex post facto* laws—those that declare an action to be criminal "when it was not a crime when done."[122] An egregious example would be a law that makes an entire category of conduct retroactively illegal, but tamer laws might still violate the principle. Joseph Story, for example, noted that the Clause forbade laws "whereby the act, if [already] a crime, is

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115. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 124 (2005).

116. *See* STORY, *supra* note 6, § 1338; *see also* [John Hart Ely], Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962).

117. *See* STORY, *supra* note 6, § 1338.

118. *See* Michael P. Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 HASTINGS CONST. L.Q. 767, 777 (1978) ("Even if they were unaware of Parliament's excesses, they probably knew that many of the state legislatures had enacted bills of attainder or bills of pains and penalties in order to punish loyalists during the American Revolution.").

119. *See* STORY, *supra* note 6, § 1338.

120. Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 356 (1978).

121. *See* STORY, *supra*, § 1338; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138–39 (1810) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."); *see also* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 212 (1996) (arguing that "American Attainder Clause jurisprudence has long recognized . . . that legislatures may not pass such laws singling out named persons for abuse"); Michael P. Lehmann, *The Bill of Attainder: A Survey of Decisional Law*, 5 HASTINGS L.Q. 767, 768–72 (1978) (same).

122. STORY, *supra* note 6, § 1339.

aggravated in enormity, or punishment; or whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed."[123] A long line of doctrine agrees.[124]

This Clause, then, instantiates both a "narrow idea[] of adjudicative due process" and "much deeper principles of separation of powers."[125] Criminal convictions should require a day in court, notice of the charges, the protections of the rules of evidence, and an impartial jury—none of which an ordinary legislature is particularly well-suited to provide.[126] The Clause's dual provisions require Congress (or the States) to penalize conduct "generally and prospectively," behind a "suitably impersonal veil of ignorance."[127] Without these protections, Congress would be, in Joseph Story's words, "governed solely by what it deems political necessity or expediency," and "too often under the influence of unreasonable fears, or unfounded suspicion."[128] We might add partisanship to Story's litany of possible abusive influences.[129]

This Clause provides additional textual evidence that the inherent contempt power is unconstitutional. Although an assertion of the power would not be a *law*,[130] the Bill of Attainder Clause can still be construed to govern the official actions of the House or Senate. When a chamber acts in its individual capacity, the dangers that the Clause seeks to abate become graver. Because bicameralism and presentment require the concurrence of both chambers and the President, the coolest head among the three relevant actors should prevail. In times of divided government, bicameralism and presentment may prevent Congress from

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123. *Id.*

124. *Calder v. Bull*, 3 U.S. 386, 390 (1798); *Peugh v. United States*, 569 U.S. 530, 538 (2013) (citing *Calder v. Bull*, 3 U.S.).

125. Amar, *supra* note 121, at 209–10; *United States v. Brown*, 381 U.S. 437, 442 (1965) ("[T]he Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.").

126. For a recent Article making a similar point, see Andrew McCanse Wright, *Congressional Due Process*, 85 MISS. L.J. 401, 403 (2016) ("Congress demonstrates institutional indifference to due process for government officials, private citizens, and corporate entities subject to its oversight investigations.").

127. Amar, *supra* note 121, at 210.

128. STORY, *supra* note 6, § 1338.

129. *Cf. In Showdown With Lerner, House Imprisonment Not Out of the Question*, ROLL CALL (Apr. 29, 2014), https://www.rollcall.com/news/in_showdown_with_lerner_house_imprisonment_not_out_of_the_question-232638-1.html [https://perma.cc/NX2E-FRQL] (noting that critics of a recent congressional investigation accuse it of partisan bias).

130. *See* E. Garrett West, *Congressional Power over Office-Creation*, 128 YALE L.J. 166, 180, 180 n.60 (2018) (noting that the phrase "by Law" in the Constitution is usually a term of art that refers to lawmaking through bicameralism and presentment).

behaving in a purely partisan manner. So, a unicameral contempt citation presents a greater danger to individual liberty because it does not require these structural protections. Therefore, the Bill of Attainder Clause's "general safeguard against . . . trial by legislature"[131] can be interpreted to apply to unicameral legislative actions, including a vote to issue a warrant for a contemnor's arrest.

Justice Powell's concurrence in *Chadha* employs similar reasoning. In that case, Justice Powell likened the *one-house* veto that ordered Chadha's deportation to a bill of attainder.[132] Likewise, a single-house contempt proceeding constitutes the same "trial by legislature" that "lacks the safeguards necessary to prevent the abuse of power."[133] Indeed, the proceeding bears the marks of *both* a bill of attainder *and* an ex post facto law. The chamber certainly "singles out" an individual for punishment, and the chamber can define a new crime, increase the punishment, or lower the standard of proof at will.

Even if the power does not directly violate the Clause, though, its commitment to separation-of-powers and due-process principles make the structural inference of an inherent contempt power increasingly unlikely. The rights-protecting and power-granting provisions of the Constitution, then, interrelate with one another. The Clause is an attempt to avoid the trial-by-legislature injustices committed by Parliament and the State Legislatures. Because the inherent contempt power contravenes this rights-protecting provision, it is unlikely that such a power should be read into the Constitution. Functionally, allowing for an unbridled inherent contempt power could replicate the same evils outlawed by the Clause.

Impeachment: Even though the Bill of Attainder Clause articulates a general principle against trial by legislature, the impeachment provisions dictate precisely that Congress will conduct a trial. Indeed, Hamilton states in *The Federalist* that Senators serve in their "judicial character" when sitting "as a court for the trial of impeachments."[134] Nevertheless, in the unusual trial-by-legislature circumstance, the Constitution includes unique safeguards that prevent the arbitrary deprivation of life and liberty.

First, it imposes a *structural* safeguard by separating the powers to initiate and try impeachments, placing them with the House and the Senate respectively.[135] With this separation, the Constitution handed the

131. *United States v. Brown*, 381 U.S. 437, 442 (1965).

132. *See INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring).

133. *Id.* at 962 (Powell, J., concurring).

134. FEDERALIST NO. 65 (Alexander Hamilton).

135. *Compare* U.S. CONST. art. I, § 2 ("The House of Representatives shall . . . have the sole Power of Impeachment."), *with id.* at art. I, § 3 ("The Senate shall have the sole Power to try all Impeachments.").

House the role of the prosecutor and the Senate the role of judge and jury. This protection is important because many impeachment proceedings founder in the Senate.[136] *Second*, it circumscribes the punishments for public, impeachable offenses to public sanctions; the judgment "shall not" exceed "removal" and "disqualification" from holding office.[137] This provision "transformed impeachment into a more precise and proportionate system of *political* punishment."[138] Of course, if the impeachable conduct violates the criminal law, the impeached party "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[139] Impeachment happens in Congress, but criminal convictions happen in court. In this way, the Constitution carefully ensures that the "persons who had disposed of his fame" should not, "for the same offense, be also the disposers of his life and his fortune."[140] *Third*, even this political conviction requires the "concurrence of two thirds of the Members present."[141] This voting threshold departs from the majority-rules presumption of the rest of the Constitution. Together, these safeguards abate the danger of trial by legislature.

Inherent contempt proceedings lack each of these three protections. The House and the Senate claim *independent* authority to sanction recalcitrant witnesses and contumacious citizens. Most disturbing, each chamber functions as the prosecutor, judge, jury, and victim. This structure violates a foundational legal principle: "No man ought . . . to be a judge in his own cause."[142] This bedrock due process principle—that *nemo judex in causa sua*—should inform the Constitution's meaning. Stated forcefully in Sir Edward Coke's ruling in *Bonham's Case* and prominent in Blackstone's *Commentaries*,[143] the Founders' interpretation of the Constitution would have been informed by this

136. *See* LANCE COLE & STANLEY M. BRAND, CONGRESSIONAL INVESTIGATIONS AND OVERSIGHT: CASE STUDIES AND ANALYSIS 391–94 (2011) (discussing the impeachments of Presidents Clinton and Johnson, who were both acquitted by the Senate).

137. *See* U.S. CONST. art. I, § 3, cl. 7.

138. *See* AMAR, *supra* note 115, at 202 (emphasis added).

139. U.S. CONST. art. I, § 3, cl. 7.

140. FEDERALIST NO. 65 (Alexander Hamilton).

141. U.S. CONST. art. I, § 3, cl. 6.

142. THE FEDERALIST NO. 80 (Alexander Hamilton); *see also* AMAR, *supra* note 77, at 13 (discussing this principle and citing THE FEDERALIST). *But see* Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384, 386–90 (2012) (discussing the origins of the principle and critiquing it).

143. *See* AMAR, *supra* note 77, at 7–8 (citing *Bonham's Case* and Blackstone's *Commentaries*).

legal principle.[144] Indeed, members of Congress raised just this point when the House first asserted its inherent contempt power.[145]

Besides the *nemo judex* problem, the inherent contempt power breaks from the baseline impeachment protections in questionable ways. With regard to executive branch officials, the personal punishment circumvents both the procedural and substantive protections that the impeachment process provides. Congress could punish a recalcitrant executive branch official with imprisonment, not just political sanction, and it could do so without the structural House-Senate separation or the higher voting threshold. With regard to private citizens, the inherent contempt power allows a trial by legislature that's less rights-protective than even the Constitution's impeachment proceedings. But it makes little sense that the Constitution would give stronger protections to those who hazard a career in public service than to those privately going about their business. Put differently, if impeachment requires special procedures because it could "doom to honor or to infamy the most . . . distinguished characters of the community,"[146] certainly deprivations of liberty deserve at least the same protections.

The Judgment of Members: Each chamber also exercises a judicial function when it judges elections or expels, excludes, or punishes its members. As discussed, this cluster of institutional prerogatives strengthens the inference against an implied contempt power.[147] But the implicit safeguards also underscore the broad scope of the inherent contempt power. First, the power to "punish" extends only to members, not to private citizens or executive branch officials.[148] Second, expulsion requires a supermajority vote by the chamber.[149] Third, the right to exclude, although only requiring a majority, must be limited to qualifications within the Constitution.[150] What these three provisions show is that the Founders were aware of the dangers of trial by legislature. The Rules of Proceeding and Judge of Elections Clauses vest with Congress a power necessary to control their own functions, but they include provisions that protect the members from arbitrary

144. *See* William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084 (2017) (arguing that preexisting "rules of law . . . determine the legal effect of written instruments," including "new statutes and the U.S. Constitution").

145. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 235 (1997) ("Representative Harper . . . argued that it made Members of Congress judges in their own cause.").

146. THE FEDERALIST NO. 65 (Alexander Hamilton).

147. *See supra* notes 90–113 and accompanying text.

148. *See Powell v. McCormack*, 395 U.S. 486 (1969).

149. *See id.*

150. *See id.* at 486–87.

punishments. The inherent contempt power, by contrast, requires no such protections.

3. THE NECESSARY AND PROPER CLAUSE

Finally, the Necessary and Proper Clause offers an additional textual reason to doubt that the inherent contempt power exists by implication. The Clause vests Congress with the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[151] Once again, this text gives Congress broad authority to structure the other two branches of government, though some read it more narrowly.[152]

But the plain text of the Clause can also be interpreted to authorize Congress to pass laws to assist each chamber in the exercise of its own authority. The text states that Congress may pass laws to "carry[] into Execution . . . *all* other Powers vested . . . in the Government of the United States."[153] Under Article I, Section 7's bicameralism and presentment requirements, the Constitution contemplates that both the House and the Senate will pass bills that may become laws, that the House will impeach certain officials, and so on. Thus, Congress could use its authority under the Necessary and Proper Clause to give each chamber the tools necessary to fulfill such constitutional obligations. Indeed, Congress has done just that by criminalizing contempt and by authorizing certain committees to bring suit to enforce subpoenas.[154]

The Necessary and Proper Clause weakens the case for the unicameral exercise of the inherent contempt power. The Clause offers Congress—not individual *chambers* of Congress—the authority to grant whatever incidental powers might be useful to the exercise of the "powers vested . . . in the Government of the United States."[155]

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151. U.S. CONST. art. I, § 8, cl. 18.

152. *Compare* William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "the Sweeping Clause,"* 36 OHIO ST. L.J. 788, 792, 804 (1975) (defending broad power to structure the federal government), *and* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 2 (2014) (similar), *with* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 270–72 (1993) (advancing a narrower view).

153. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

154. *See supra* notes 41–42.

155. *See* Van Alstyne, *supra* note 152, at 107–20 (advancing such an argument); *cf. id.* at 797 ("Neither the executive nor the judiciary possesses any powers not essential (as distinct from those that may be merely helpful or appropriate) to the performance of its enumerated duties as an original matter—and each can exercise a

Congress can pass—and indeed has passed—statutes that give it greater authority to enforce its contempt citations.[156] Of course, some such statutes might not be considered "proper" mechanisms to enforce such contempt proceedings,[157] but the presumption would shift: while the exercise of unenumerated powers is disfavored in the constitutional system, a congressional determination to authorize such a power warrants deference.[158]

Indeed, Thomas Jefferson, in his *Manual of Parliamentary Practice*, expressly argued that Congress should pass a statute defining contempt and delineating the possible punishments.[159] After recounting the arguments for and against the inherent contempt power,[160] Jefferson concluded:

> Perhaps Congress in the meantime, in their care for the safety of the citizen, as well as that for their own protection, may declare by law what is necessary and proper to enable them to carry into execution the powers vested in them, and thereby hang, up a rule for the inspection of all, which may direct the conduct of the citizen, and at the same time test the judgments they shall themselves pronounce in their own case.[161]

Jefferson's argument, of course, does not necessarily entail that the Constitution *requires* Congress to use the Necessary and Proper Clause, but only that it would be sound policy to define contempt in advance. But Jefferson also offers the explicit constitutional argument: The Constitution authorizes Congress to "provide by law for an undisturbed exercise of their functions," but "till the law be made, it does not exist, and does not exist *from their own neglect*."[162] Put simply, the Constitution authorizes Congress to define each chamber's authority to

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wider scope of incidental power if, but only if, Congress itself has determined such powers to be necessary and proper.").

156. *See infra* text accompanying notes 357–59.

157. *See* Lawson & Granger, *supra* note 152 (discussing the limitations on powers authorized through the Necessary and Proper Clause).

158. *See* Manning, *supra* note 152, at 78–83 (discussing the implications of the Necessary and Proper Clause for the appropriate level of deference to congressional statutes).

159. *See* HINDS, *supra* note 3, § 1597 (citing Jefferson's views on the inherent contempt power).

160. Though Jefferson offers arguments for and against the power, one commentator concludes from the discussion that "[t]here can be little doubt that Jefferson believed that Congress had no inherent or common law authority to take such summary action." Moreland, *supra* note 4, at 194.

161. HINDS, *supra* note 3, § 1597.

162. *Id.* (emphasis added).

punish contempt; we should not, therefore, recognize an *implied* power to do so.

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The inherent contempt power not only lacks a textual basis, but it is also incongruous with the Constitution's commitments to a government of enumerated powers and to its more specific rights-protective provisions. Since before Joseph Story's 1833 *Commentaries*, however, defenders of the inherent contempt power advance an argument from *implication*—that "legislative power" simply must include this inherent contempt power, whatever the text might suggest to the contrary.[163] This pedigreed argument turns on two claims: (1) a *historical* claim that similar powers have been exercised by Parliament and by the several states; and (2) a *structural* claim that the power preserves each chamber's capacity to exercise its constitutional powers and its institutional independence.[164] I will address each in turn.

B. History

Defenders of the inherent contempt power have long argued that Congress should possess the power because Parliament did. In 1795, for example, the House arrested and detained a man for allegedly bribing its members.[165] Eschewing specific constitutional provisions, the House rooted its authority in "rights and privileges which belonged

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163. Against this argument by implication, one can advance one more straightforward formalist counterargument. Basically, the Vesting Clause cannot grant the inherent contempt power to each chamber because the Vesting Clause grants "legislative Powers" to *Congress*—and it grants *all* of them to it. Because neither the House nor the Senate may constitutionally exercise the legislative power without the assent of the other, *see, e.g.*, U.S. CONST. art. I, § 7, cl. 2 (Bicameralism and Presentment Clause), there's no *unicameral* legislative power that can justify the inherent contempt power. Careful constitutional readers should note which institutional actors have what powers within the constitutional scheme, *see, e.g.*, Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209 (2010), and Article I repeatedly distinguishes between the powers of the House of Representatives, the powers of the Senate, the powers of *each* House separately, and the powers of Congress as a whole. That said, a plausible reading of Article I, § 1 could interpret the phrase as vesting "legislative power" in each chamber separately, then later specifying that *lawmaking*—a particular subset of legislative power—must follow the strictures of the Bicameralism and Presentment Clause.

164. *See, e.g.*, *Kilbourn v. Thompson*, 103 U.S. 168, 182–83 (1880) ("The advocates of this power have, therefore, resorted to an implication of its existence, founded on two principle arguments. These are, 1, its exercise by the House of Commons of England, from which country we, it is said, have derived our system of parliamentary law; and, 2d, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them."); *see also* sources cited *supra* notes 111–12.

165. *See* CURRIE, *supra* note 145, at 232–38 (recounting this event).

to every Legislative institution."[166] Representative Smith, a vocal but typical defender, asserted the House's power based on a *historical* claim about Congress's inherited powers. Because "every jurisdiction had certain powers necessary for its preservation," the legislature has "certain privileges incident to its nature, and essential for its very existence."[167] In England, this power is called the "parliamentary law," and from it the State Legislatures adopted their "usages and proceedings."[168] So too with Congress, these "long-established usages" should guide the "proceedings of this House."[169]

Following similar reasoning, the Court in *Anderson v. Dunn* claimed that the Constitution "is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments."[170] Because of the historical powers of Parliament and the States, then, defenders of the inherent contempt power infer that the grant of legislative power gives to each House the power to declare others in contempt.[171]

This Section makes an edgier claim than the last one: Parliament's precedents cannot secure Congress's inherent contempt power. Of course, high-level arguments about the original public meaning of concepts like "legislative power" should look to across-the-Atlantic antecedents for support. Analogously, arguments about the meaning of "executive power" often turn to eighteenth-century political theory and political precedent.[172] But Professor David Currie suggests the response in this case:

> [T]here was precedent for all of this in England and the colonies. There was precedent for just about any excess a legislative body might commit. But it was not obvious that such precedents could be incorporated wholesale into a document that expressly guaranteed freedom of the press, due process, and the right to trial by jury.[173]

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166. 4 ANNALS OF CONG. 181 (1795).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 232 (1821).

171. *See generally* Chafetz, *Executive Branch Contempt of Congress*, *supra* note 3, at 1093–127 (describing the history of the contempt power in England and America); CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 11, at 153–71 (same); Potts, *supra* note 11, at 699.

172. *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 265–72 (2001) (relying on eighteenth-century political theory).

173. CURRIE, *supra* note 145, at 268.

More specifically, two factors lessen Parliament's relevance here: (1) the Constitution's origins in an act of *popular* sovereignty marks a decisive breach with *parliamentary* sovereignty;[174] and (2) the novel articulation of separation-of-powers theory at the Founding.

1. POPULAR SOVEREIGNTY

American constitutional government rejects the notion of sovereignty that justifies Parliament's contempt power.[175] Historically, the development of privilege and contempt under the British Constitution has been tied to (often competing) notions of parliamentary sovereignty.[176] To this day, the Parliament conceives of its privileges as an incident of its sovereignty.[177]

By contrast, "American legal theorists during the 1780s conceptually relocated sovereignty from Parliament to the people themselves,"[178] and the Constitution enacted this abstract theory of popular sovereignty first with ink on parchment, then with the votes of

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174. *See, e.g.*, Frederic R. Coudert, *Congressional Inquisition vs. Individual Liberty*, 15 VA. L. REV. 537, 550 (1929) ("It has also been recognized that it did not have that general and unlimited power which is lodged in the British Parliament as the supreme and unlimited organ of the British State.").

175. The nature of parliamentary sovereignty is doubtless a matter of ongoing debate. *See, e.g.*, JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 1 (2010) (defending parliamentary sovereignty against its critics). Nevertheless, what's relevant here is that *Americans* rejected a vision of parliamentary sovereignty both during the revolutionary period and with the Constitution's ratification. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 280–81 (rev. ed. 1998) (discussing the American rejection of an "omnipotent legislature").

176. *See, e.g.*, CHAFETZ, PRIVILEGED FEW, *supra* note 11, at 6 ("For Blackstone, then, the primary function of parliamentary privilege was the defense of a sovereign legislature against encroachments by a jealous monarch or nobility.").

177. *See generally* HM GOVERNMENT, PARLIAMENTARY PRIVILEGE (2012) (referring throughout to contempt of Parliament and breach of privilege as flowing from Parliamentary sovereignty), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79390/consultation.pdf [https://perma.cc/L6Q8-UVZV]. *See, e.g.*, *id.* at 10–12.

178. AMAR, *supra* note 115, at 106; *see* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429–66 (1987) (presenting a "stylized" history of theories of sovereignty); *see also, e.g.*, Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States (Nov. 26, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON 213–14 (Kermit L. Hall & Mark David Hall eds., 2007) ("I mentioned, that Blackstone will tell you, that in Britain, [sovereignty] is lodged in the British Parliament . . . . [But] the truth is, that the supreme, absolute, and uncontrollable authority remains with the people. I mentioned, also, that the practical recognition of this truth was reserved for the honor of this country. I recollect no constitution founded on this principle; but we have witnessed the improvement, and enjoy the happiness of seeing it carried into practice."). For a thorough intellectual history, see GORDON WOOD, *supra* note 175, at 347–49.

the American people.[179] From the Preamble's "We the People" to *Federalist 1*'s invitation to "deliberate on a new Constitution,"[180] signs of this novel theory littered the act of ratification.[181] The *Federalist Papers* elaborated this "theory of constitutional law,"[182] and in the First Congress, the Tenth Amendment reaffirmed "that the central government would wield only limited powers."[183]

This conceptual shift in the Constitution's theory of sovereignty affects the deep structure of the government. With this novel theory, besides the obvious enumerated-powers limitation discussed above,[184] something like what Bruce Ackerman calls "dualist democracy" becomes a political possibility.[185] Unlike Parliament, Congress cannot claim "transcendent power" and "political omnipotence."[186] Instead, it remains shackled by the fundamental law of the Constitution.[187] This limitation makes possible radical political constructs like judicial review,[188] which runs "directly counter to the Blackstonian theory of legislative sovereignty."[189] Just as popular sovereignty alters the relationship between the legislature and the judiciary, so too it alters the relationship between the legislature and its subjects. Parliament, for example, could pass bills of attainders, bills of pains and penalties, and ex post facto laws; it could impeach private citizens. The rejection of these powers reflects the broader rejection of the British Constitution's

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179. *See* AMAR, *supra* note 115, at 106.

180. *See* U.S. CONST. pmbl.; THE FEDERALIST NO. 1 (Alexander Hamilton).

181. *See generally* Amar, *supra* note 178, at 1439–51 (discussing these signs). *See also* STORY, *supra* note 6, § 362 ("The people, and the people only, in their original sovereign capacity, had a right to change their form of government, to enter into a compact, and to transfer any sovereignty to the national government.").

182. Bruce A. Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

183. *See* AMAR, *supra* note 115, at 327.

184. *See* Section II.A.1.

185. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3–7 (1991). *See also* David Signh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 692–96 (2018) (discussing the implications of sovereignty for constitutional interpretation).

186. WOOD, *supra* note 178, at 280 (quoting Thomas Tudor Tucker, *Conciliatory Hints, Attempting by a Fair State of Matters, to Remove Party Prejudices*, GAZETTE OF SOUTH CAROLINA, Sept. 21, 1786).

187. *See* Ackerman, *supra* note 182, at 1026 ("In contrast to the doctrine of legislative supremacy, *The Federalist* insists that *no* legal form can transubstantiate *any* political institution of normal politics into We the People of the United States.").

188. *Marbury v. Madison*, 5 U.S. 137, 176–78 (1803); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME SOURT AT THE BAR OF POLITICS 1–14 (1962) (criticizing *Marbury v. Madison*'s theory of judicial review); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 335–36 (1998) (defending Marshall's theory).

189. WOOD, *supra* note 175, at 255.

relationship between the government and the governed. The inference from Parliamentary practice, then, is cast somewhat in doubt by the radical political theory of the Founding.

2. SEPARATION OF POWERS IN THE AMERICAN CONSTITUTION

The British Constitution also lacked the American Constitution's theory of the separation of powers. According to Gordon Wood, "[w]hile the doctrine of separating functional powers was never lost from English thought" and "its modern development owed its impetus" to Montesquieu, the Americans "were to elevate the doctrine of the separation of three powers into what James Madison called in 1792 'a first principle of free government.'"[190] This notion, that the legislative, executive, and judicial functions should be divided, developed significantly between the Revolution and the ratification of the Constitution,[191] as "constitutional reformers in the years after 1776 exploited it with a sweeping intensity."[192]

For example, critics of the Pennsylvania Constitution argued that the executive and judicial powers were "unduly dependent" on the legislature, such that the "the *legislative*, *executive* and *judicial* powers may be said to be *united* in *one* body."[193] The unicameral nature of the legislature, in the Pennsylvania Constitution, "made this unity of power particularly dangerous."[194] Wood concludes: "Wherever in the years after 1776 there was concern with the effects of legislative sovereignty and the unanticipated excesses of the Revolutionary constitutions, men invoked the principle of the separation of powers in order to unscramble what seemed to be a dangerous blurring of the three functions of government."[195]

This theoretical development between 1776 and 1787 affected the Constitution's design in two relevant places: (1) the Constitution divided the legislative power against itself in the House and the Senate; (2) its Vesting Clauses separated the legislative, judicial, and executive powers into distinct branches. Although these two separation-of-powers notions were "once distinct concepts," by the ratification of the Constitution they had "become thoroughly blended."[196] As discussed in Section I.B, the inherent contempt power circumvents *both* of these separation-of-powers innovations. Each chamber claims the right to

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190. *Id.* at 151–52.
191. *Id.* at 152–54.
192. *Id.* at 449.
193. *Id.* at 450 (quoting PA. GAZETTE, Oct. 23, 1776).
194. *Id.*
195. *Id.* at 451.
196. *See id.* at 559–60, 604–05.

punish contempt without the concurrence of the other, and it avoids the due-process limits of a division between Congress and the Courts for the punishment of crimes.

3. HISTORICAL CHALLENGES TO THE HISTORICAL ARGUMENT

Critics of the inherent contempt power have long based their criticisms on theories of popular sovereignty and separation of powers. In 1795, for example, Randall's attorney disputed the House's power to detain him and hold him in contempt.[197] Questioning the relevance of foreign precedent, he argued that the inherent contempt power must be enumerated.[198] Even if "the privileges of the House of Commons extend to a certain degree," it does not follow that Congress has the same "extent of privileges."[199] After all, while the "privileges of an English Parliament rested on immemorial usage; those of this House [depend] on a written Constitution," and the document "had considerably narrowed them, in comparison with those of British Parliaments."[200] Again, because the "privileges" of the "English Parliament" had no limits, "some writers on law called it omnipotent."[201] But in the United States, the Constitution says "that the people . . . retain[] whatever they have not granted."[202] Put simply, the "Constitution says nothing of privilege, that reaches to the case of [Randall]."[203]

Randall's attorney also adverted to the rights-based provisions of the Constitution. Summing up, he asked, "[W]hat kind of Court of Law is this? The members are not upon oath, while they are at once parties, judges, and witnesses."[204] And because "[t]he offense was punishable at Common Law," the House was "trying a prisoner twice for the same offence, and making him hazard a double sentence."[205] We see here the attorney weaving together theoretical and textual challenges to Congress's arrest power.

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197. *See generally* CURRIE, *supra* note 145, at 232–38 (discussing the case at length); CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 11, at 172.

198. *See* CURRIE, *supra* note 145, at 236.

199. 4 ANNALS OF CONG. 214 (1796).

200. *Id.* at 215.

201. *Id.* at 216.

202. *Id.* at 214.

203. *Id.*

204. *Id.* at 215.

205. *Id.* The Court indicated in *In re Chapman* that a contempt proceeding would not bar a later criminal sanction. *See In re Chapman*, 166 U.S. 661, 672 (1897) ("[T]he contumacious witness is not subjected to jeopardy twice for the same offense, since the same act may be an offense against one jurisdiction and also an offense against another . . . ."). *But see* GARVEY, *supra* note 32, at 8 n.65 ("[S]ubsequent developments in the interpretation of the double jeopardy clause suggest that this aspect of the *Chapman* decision is no longer good law.").

Senators made similar arguments during the *Aurora* controversy.[206] For example, Senator Pinckney rooted a (long-winded) challenge to the inherent contempt power in the enumerated powers:

> In considering, first, what are the privileges of Congress, and how far they are defined by the Constitution, I . . . entreat the House to recollect the nature of our federal system; that all powers not expressly and specifically delegated to Congress, are reserved to the States and the people.[207]

When powers are "expressly defined as the privileges of Congress are," he continued, the Senate should "consider the consequences" before holding someone in contempt—otherwise, the Senate might regret the decision when, after a time, "cool reflection" finds that they exceeded their power.[208] The Senator distinguished between the "*unlimited* privileges of the British Parliament, colonial assemblies, or councils," and the privileges that the Founders "fixed by the Constitution."[209]

* * *

This Section argues that parliamentary precedent does not necessarily show that Congress has an inherent contempt power. Unlike Parliament, Congress is instituted by a written Constitution that enumerates its powers. This Constitution, when ratified, also rested on a theory of popular sovereignty that rejected what the Founders took to be the British notion of parliamentary sovereignty. With this underlying conceptual shift, the relationship between legislature and subject shifts, and so the relevance of Parliament becomes more doubtful. What is more, the Constitution rests on a theory of separation of powers that breaks from the British Constitution. All of these militate against using parliamentary precedent to establish a power in the teeth of clear, contrary text.

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206. *See generally* CURRIE, *supra* note 145, at 266–68 (discussing the case); CHAFETZ, *supra* note 11, at 172–73 (same).

207. 6 ANNALS OF CONG. 69 (1800).

208. *Id.*

209. *Id.* Further, in *Anderson v. Dunn*, the plaintiff's lawyer challenged the relevance of state and British precedent: "As to the usage of the State Legislatures, it is either under colour of their unlimited powers, of express provisions in their Constitution, or of the common law and the usage of Parliament. In this case, unlimited powers and express provision are not pretended." 19 U.S. 204, 215 (1821) (emphasis added).

C. Structure

Besides text and history, defenders of the inherent contempt power also advance a *structural* argument that Congress must have the powers necessary to fulfill a particular constitutional interest. Justice Story's 1833 *Commentaries on the Constitution* distills the functional argument in a way that is worth quoting at length:

> It is remarkable, that no power is conferred to punish for any contempts committed against either house; and yet it is obvious, that, unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions. For instance, how is either house to conduct its own deliberations, if it may not keep out, or expel intruders? If it may not require and enforce upon strangers silence and decorum in its presence? If it may not enable its own members to have free ingress, egress, and regress to its own hall of legislation? And if the power exists, by implication, to require the duty, it is wholly nugatory, unless it draws after it the incidental authority to compel obedience, and to punish violations of it.[210]

The argument takes the classic form of the *reductio ad absurdum*. Because the Constitution vests the legislative powers in the Congress, it contemplates that it will have the institutional capacity to fulfill its responsibility. Without the power to "expel intruders" and enforce "silence and decorum in its presence," neither chamber could "perform its constitutional functions."[211] Therefore, the Constitution must grant the inherent contempt power "by implication."[212] With this tight logic, Joseph Story establishes the basics of the structural argument. The same argument has long been advanced by the Court,[213] by commentators,[214] and by members of the House and Senate.[215]

In defense of this argument, it does somewhat resonate with the Constitution's broader commitments. Under a compelling reading of

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210. STORY, *supra* note 6, § 842.

211. *Id.*

212. *Id.*

213. *See generally, e.g.*, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 229–31 (1821); *McGrain v. Daugherty*, 273 U.S. 135, 160–61 (1927).

214. *See* CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 11, at 171–72; AMAR, *supra* note 77, at 335–40.

215. *See, e.g.*, CURRIE, *supra* note 145, at 232–38 (recounting an example from the Fourth Congress).

Article I, the Constitution makes Congress *primus inter pares*[216]—both because it grants Congress significant *substantive* powers over the other branches and because it preserves Congress's *institutional* independence.[217] Regarding its substantive authority, the Necessary and Proper Clause grants Congress broad authority to structure and define the powers of the other two branches of government.[218] The Appropriations Clause, likewise, imposes "powerful limitations on the executive branch" because "the federal government may not spend monies . . . without legislative permission to do so,"[219] and the Appointments Clause requires Congress to create federal offices and the Senate to confirm many of the President's nominees.[220] Besides these substantive powers, the Constitution also articulates a host of powers and privileges that ensure Congress's institutional independence.[221] Arguably, this constellation of powers and privileges supports the functional argument that the inherent contempt power exists by implication. After all, if the Framers vested Congress with all of these important powers, the argument goes, they would not have made it

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216. I borrow the term from William V. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 791 (1975); *see also, e.g.*, AMAR, *supra* note 115, at 110–13 (describing "Congress's primacy among the three federal branches").

217. *See generally* Chafetz, *Congress's Constitution*, *supra* note 11 (discussing Congress's powers over other branches).

218. *See generally* Van Alstyne, *supra* note 216.

219. Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988). *But see* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162 (responding to Professor Stith).

220. *See* West, *supra* note 130; *Officers of the United States within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73 (2007).

221. As discussed, the Rules of Proceeding Clause and the Judge of Elections Clause preserve each chamber's power to carry on its business without interference from the other branches. *See supra* Section II.A. Likewise, the Speech and Debate Clause, at the least, prevents individual members from being "held criminally or civilly liable for speech acts (speaking, debating, introducing legislation, voting, etc.) performed in Congress." Chafetz, *supra* note 11, at 743–44. Because of its protections, neither "the executive nor the judiciary [can] punish a lawmaker for any floor speech," and this "private right vindicate[s] the larger public interest" in the form of robust and independent congressional debate. AMAR, *supra* note 115, at 102; *see also* CHAFETZ, PRIVILEGED FEW, *supra* note 11, at 87–90 (supporting the argument that the privilege serves the public interest by encouraging free and open debate within a legislature). The Constitution also included the Privilege from Arrest Clause, which protected representatives from "various civil cases, still prevalent in the eighteenth century, in which a litigant sought the physical arrest of a defendant." AMAR, *supra* note 115, at 101. Long dormant, this Clause has lost its relevance as these civil cases have fallen out of fashion and as the Court has broadly construed the Clause's "Treason, Felony, and Breach of the Peace" exception. U.S. CONST. art. 1, § 6, cl. 1; *see* Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts*, 63 N.C. L. REV. 879, 890 n.85 (1984) (describing in depth the history of the Clause).

"utterly impossible for either house to perform its constitutional functions."[222]

But what's notable about the functional defense is just how contingent and circumscribed it is—at least as it has been interpreted by the Court. Indeed, in the Court's 1821 opinion, *Anderson v. Dunn*, it claimed that the inherent contempt power would be constrained to "the least possible power adequate to the end proposed."[223] Likewise, the Court's 1917 opinion in *Marshall v. Gordon* stated:

> [T]his implied power embrace[s] . . . that which is *essential* to the execution of some other and substantive authority expressly conferred. . . . It is a means to an end, and not the end itself. Hence it rests solely upon the right of *self-preservation* to enable the public powers given to be exerted.[224]

The justification from necessity or self-preservation suggests to the constitutional interpreter a means-end fit between the implied constitutional power (the means) and the defined constitutional function (the end). Like other means-end tests,[225] the assertion of the power has to be appropriately tailored to the significance of the interests.

Regarding the interest asserted, the necessity justification has been historically asserted to protect a series of institutional interests: removing a spectator in the gallery who "created disturbance;"[226] preventing the "corrupt[ion of] the integrity of its Members" by an

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222. STORY, *supra* note 6, § 842. Of course, there was a significant current in Founding Era constitutional theory that feared the tyranny of the legislature. *See, e.g.*, THE FEDERALIST NO. 48 (James Madison) ("The legislative department is everywhere extending the vortex of its activity and drawing all power into its impetuous vortex."); *id.* NO. 71 (Alexander Hamilton) ("The tendency of the legislative authority to absorb every other has been fully displayed and illustrated . . . ."); *id.* NO. 73 (Alexander Hamilton) ("The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments has been already more than once suggested.").

223. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

224. *Marshall v. Gordon*, 243 U.S. 521, 541 (1917) (emphasis added).

225. Means-end doctrinal tests pervade constitutional law. *See generally* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449 (1988); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007). In the context of this Article, my criticism of justifications for the inherent contempt power mimics one of the Court's rough balancing tests. What is Congress's asserted constitutional interest? How necessary is this assertion of power to this interest? What alternatives does Congress have to this power? All of these bear on whether, to borrow *Anderson*'s language, the inherent contempt power is the "least possible power adequate to the end proposed."

226. *See* HINDS, *supra* note 3, § 1605.

attempted bribery;[227] preventing "false, defamatory, scandalous, and malicious, assertions and pretended information" about the Senate in a local newspaper;[228] enforcing a subpoena duces tecum issued to a private citizen by the House Committee on Mines and Mining;[229] arresting executive branch officials who refused to comply with a congressional subpoena;[230] and more.[231] If the test for the power's scope is whether or not the means are tailored to the interest asserted, as both Justice Story and the doctrine in cases like *Gordon* and *Anderson* suggest, then these claims should not all be equally compelling.

The rest of this Section evaluates the means-end fit between these assertions and the interests at stake. Abstracting from the specific examples given, the interests can be classified within a few categories. *First*, the power to preserve order within the chamber itself. In Justice Story's words, this might include "expel[ling] intruders," enforcing "silence and decorum," and ensuring "free ingress, egress, and regress to its own hall of legislation."[232] *Second*, the interest in preserving the integrity of the legislative body as a whole. Under this category, we might include preventing libels against the chamber, preventing corruption of its members because of bribery, and assaults on its members. *Third*, Congress's interest in obtaining relevant information—that is, its inquisitorial or investigative function.[233] Chambers have asserted this interest against both private citizens and executive branch officers (a distinction that will matter when we discuss each chamber's alternatives).

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227. *See id.* § 1601 (Randall's case).

228. *See* 10 ANNALS OF CONG. 115 (1800).

229. *See* HINDS, *supra* note 3, § 1608.

230. *See* Chafetz, *Executive Branch Contempt of Congress*, *supra* note 3, at 1136–39 (discussing the arrests of Snowden Marshall and George F. Seward).

231. An early Court case listed the instances in which the House or Senate asserted the "implied power to deal with contempt." *See Marshall v. Gordon*, 243 U.S. 521, 543, 543 n.3 (1917). These include:

> 1795, attempt to bribe members of the House; 1800, publication of criticism of the Senate; 1809, assault on a member of the House; 1818, attempt to bribe a member of the House; 1828, assault on the Secretary to the President in the Capitol; 1832, assault on a member of the House; 1835, assault on a member of the House; 1842, contumacious witness; 1857, contumacious witness; 1858, contumacious witness; 1859 contumacious witness; 1865, assault on a member of the House; 1866, assault on a clerk of a committee of the House; 1870, assault on a member of the House; 1871, contumacious witness; 1874, contumacious witness; 1876, contumacious witness; 1894, contumacious witness; 1913, assault on a member of the House.

Id.; *see also* HINDS, *supra* note 3, §§ 1597–640 (listing instances).

232. *See* STORY, *supra* note 6, § 842.

233. *See generally* Robert B. Tunstall, *The Investigating Power of Congress: Its Scope and Limitation*, 40 VA. L. REV. 875 (1954).

1. INTERNAL PROCEEDINGS

Among the asserted interests, the most easily defensible is preserving internal order—that is, preventing misbehavior and disorder within the chamber itself.[234] Indeed, Justice Story establishes the power by adverting to these dangers, including the need to "keep out" or "expel intruders," or to "enforce upon strangers silence and decorum in its presence."[235] Here, Justice Story contemplates disorders, nuisances, and dangers created not by *members*, but by *interlopers*.

But the power to control internal proceedings does not require that the Vesting Clause grant a generic contempt power. Instead, the defenders have a plausible *textual* argument that the Rules of Proceeding Clause grants this power. The Clause represents a textual commitment to each House's authority over goings-on within the chamber itself, and so the power to "determine the Rules of Proceedings" could include the power to preserve those proceedings against disorder and disruption.[236] Therefore, the uncontroversial assertions of Congress's contempt power just do not require recourse to the functional argument from implication.

Suppose, however, that each chamber's power over internal proceedings *does* require the recognition of an implied inherent contempt power. Justice Story's broader defense extrapolates from this narrow concession: If Congress possesses the power "in the case of an immediate insult or disturbance," then "it is impossible to deny it in other cases, which, although less immediate or violent, partake of the same character, by having a tendency to impair the firm and honest discharge of public duties."[237] Even if the structure of Story's argument is true, the tricky question is whether or not the disturbance "partake[s] of the same character." The functional argument requires means-ends analysis for each category of the power's uses. Each individual exercise

234. *Cf.* Walter Nelles, *The Summary Power to Punish for Contempt*, 31 COLUM. L. REV. 956, 966–69 (1931) (discussing the judicial power to punish for contempt).

235. *See* STORY, *supra* note 6, § 843.

236. Admittedly, the next two phrases of the Clause (vesting power to "punish" or "expel" its *members*) could suggest that the Clause does not apply to non-members. Reading the phrases in context, *see, e.g.*, WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW 76–79 (2016) (describing the *noscitur a sociis* canon), a reader could argue that the Clause enshrines a principle of "self-control"—power over only members. Nonetheless, reading the Clause to stand for a more general "control over proceedings" makes good sense—a disorderly outsider can obstruct proceedings just as well as a member. Besides, it does less violence to the text to read authority over non-members into the Rules of Proceedings Clause than into "legislative power."

237. *See* STORY, *supra* note 6, § 843.

must stand on its own as the "least possible power adequate to the end proposed."[238]

2. INTEGRITY OF THE LEGISLATIVE BODY

Beyond the justification based on internal proceedings, Congress has asserted the power to prevent more metaphorical obstructions: libels against a chamber and bribery of its members. Grouped here under the heading of protecting the "integrity" of the legislative body, I address each in turn.

Libels against a chamber: The clearest abuses of the contempt power have been congressional attempts to suppress political speech. For example, in 1800, the Senate became concerned that a local newspaper, the *Aurora*, had printed a story that included allegedly "false, scandalous, defamatory and malicious assertions and pretended information respecting the Senate."[239] Because these falsities would "bring [the Senate] into contempt and disrepute" and "excite against them the hatred against the good people of the United States," the Senate, with Thomas Jefferson presiding, held the editor of the *Aurora* in contempt and summoned him to appear before the Senate.[240] Likewise, leading up to *Marshall v. Gordon*, the House issued a warrant against a United States Attorney in the Southern District of New York because he published an editorial accusing members of Congress of impeding a grand jury investigation.[241] The House alleged that the publication was "defamatory and insulting and tend[ed] to bring the House into public contempt and ridicule."[242]

These assertions of power raise serious constitutional concerns at both steps of a means-end analysis. Congress lacks a compelling interest in suppressing "public contempt and ridicule," given that its members are public figures and the House's goings-on are a matter of public concern.[243] Under bedrock First Amendment doctrine, Congress cannot suppress truthful political speech.[244] Worse, the exercise of the inherent contempt power raises some of the dangers that make prior restraints uniquely disfavored under the Constitution.[245] First, the

238. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821) (emphasis omitted).

239. *See* HINDS, *supra* note 3, § 1604.

240. *Id.*

241. *See Marshall v. Gordon*, 243 U.S. 521, 531–32 (1971).

242. *Id.* at 532.

243. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *see also* U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time-to-time publish the same . . . .").

244. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

245. *See Near v. Minnesota*, 283 U.S. 697 (1931).

punishment can be effectuated without the procedural protections that a court would provide.[246] Second, because the House or Senate is the insulted party, the chamber's interest in prosecuting its own case can lead, as with the censor whose whole job is to stamp out unacceptable speech, to "unintelligent, overzealous, and usually absurd administration."[247] Congress simply cannot assert this interest as a justification for the inherent contempt power.[248]

Bribery of members: Congress has often sought to hold parties in contempt for bribing representatives. Unlike the suppression of speech, preventing true quid pro quo corruption is a compelling constitutional interest.[249] Congress should "promote the general welfare," but bribes buy-off public votes for the sake of private goods. More still, a corrupt legislature can undermine public confidence in the institution.[250] These anti-corruption arguments appear not only in the Court's modern doctrine, but also during Congress's own debates on the contempt power.[251]

Even granting the legitimacy of the end, the inherent contempt power is not the "least possible power" necessary to pursue it.[252] First, Congress already has the authority to punish *its own members* for accepting bribes. If the bribery corrupts the election itself, then the chamber can, with a simple majority vote, refuse to seat the official under the Judge of Elections Clause.[253] If it occurs during the term,

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246. *See* Thomas L. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 657 (1955) ("Under a system of prior restraint, the issue of whether a communication is to be suppressed or not is determined by an administrative rather than a criminal procedure. This means that the procedural protections built around the criminal prosecution—many of which are constitutional guarantees—are not applicable to a prior restraint.").

247. Emerson, *supra* note 246, at 658–59 (discussing the "personality" of the interested licensor or censor and his or her "professional interest"); *cf.* CLARKE, *supra* note 31, at 222–23 ("No doubt [contempt power] was . . . used, for personal convenience, to cover many things which it did not strictly apply.").

248. *See also* 10 ANNALS OF CONG. 69 (1800) (statement of Senator Pickney) (warning the Senate to reflect before exercising a doubtful power, lest "cool reflection" reveal that it had violated its constitutional limits).

249. *See Citizens United v. FEC*, 558 U.S. 310, 359 (2010) ("When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.").

250. *See* Scott Turow, *What's Wrong with Bribery*, 4 J. BUS. ETHICS 249, 251 (1985).

251. *See, e.g.*, 4 ANNALS OF CONG. 167 (1795) (noting that Randall should be arrested "lest some innocent members might . . . become liable to suspicion").

252. *See Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821) (emphasis omitted).

253. *See* Akhil Reed Amar & Josh Chafetz, *How the Senate Can Stop Blagojevich*, SLATE (Dec. 31, 2008, 6:23 PM), https://slate.com/news-and-politics/2008/12/how-the-senate-can-stop-blagojevich.html [https://perma.cc/9RGS-

then the Rules of Proceedings Clause allows the chamber to "punish" or "expel" the member for the activity.[254] Indeed, Congress has often punished and expelled its members for corruption, and others have preemptively resigned.[255] And if the power over members is insufficient to prevent quid pro quo corruption,[256] then Congress also has the authority to criminalize bribery.[257]

Given this power to unilaterally expel and punish *members*, and given the power to criminalize bribery under the Necessary and Proper Clause,[258] initiating these inherent contempt proceedings against *non-members* is an overbroad remedy for the constitutional interest. Analogous free speech case law helps advance this point. Under First Amendment doctrine, the government should advance its compelling interests by imposing stricter control on public officials, rather than on private citizens. For example, government employees can be prosecuted for "leaking" classified information, but "other private actors who publish leaked information appear to occupy a privileged position."[259] Of course, the publication of truthful information has some constitutionally recognized value, while bribery does not. Nevertheless, the same means-end analysis is appropriate here. The question is whether the "interest served" by congressional punishment of bribery outweighs the interests of private citizens to avoid "trial by legislature."[260] And it does not.

Randall's case is a dramatic example of the contempt power's superfluity for bribery cases. In 1795, the House had legitimate reason

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8NK9]; *Powell v. McCormack*, 395 U.S. 486, 520 n.41 (1969); Note, *The Power of a House of Congress to Judge the Qualifications of its Members*, 81 HARV. L. REV. 673 (1968).

254. *See* U.S. CONST. art. 1, § 5.

255. *See, e.g.*, JACK MASKELL, CONG. RESEARCH SERV., CRS RL31382, EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES 4–5 nn.21–25 (2016), https://fas.org/sgp/crs/misc/RL31382.pdf [https://perma.cc/5TUL-N84R] (listing Representatives that were expelled for taking bribes).

256. *But see* Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENT. 97, 104 (1986) (noting that "no one thinks that such transactions are in any sense common . . . in the Congress").

257. *See, e.g.*, 18 U.S.C. § 201(b)(1) (2012).

258. *See* CURRIE, *supra* note 145, at 233.

259. David E. Pozen, *The Leaky Leviathon: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 525–26 (2013) (citing *Pentagon Papers Case*, 403 U.S. 713, 714 (1971) (per curiam) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001)).

260. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) ("Accordingly, it seems to us that there are important interests to be considered on both sides of the constitutional calculus.").

to fear that a reputation for corruption would weaken its standing.[261] Thus, the House's decision to arrest, detain, and try Randall might have seemed especially important. But strikingly, Randall was *already being prosecuted for the attempted bribery*.[262] Before Randall's alleged crime was brought before the chamber, one Representative informed a local magistrate who arrested Randall.[263] Because the crime was "punishable at Common Law," Randall's attorney complained that Randall had been "taken out of the hands of an officer belonging to a Court of Law."[264] To this day, the appropriate place for the such punishments is a court.

3. INFORMATION DISPUTES

Finally, the most commonly asserted modern congressional interest is Congress's inquisitorial or investigative responsibility.[265] Congress should doubtless oversee federal programs, investigate official misconduct, and gather information about emerging social problems.[266] But Congress has more appropriate tools to gather information, so the functional argument based on Congress's investigative power fails. Consider two distinct interests: Congress's capacity to extract information from (1) private citizens and (2) executive branch officials.

Information from private citizens: Congress has exercised its inherent contempt power to compel private citizens to provide testimony. But Congress has other, more appropriate, ways to collect information from these citizens. For example, instead of arresting the citizen like in *McGrain v. Daugherty*,[267] Congress has used the Necessary and Proper Clause to criminalize the refusal to comply with a congressional subpoena.[268] (Thomas Jefferson, when discussing the contempt power, urged Congress to do just that.[269]) With this statute in

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261. During the struggle for ratification in New York, the Anti-Federalist Brutus charged that the "small number which is to compose this legislature" would "expose it to the danger of . . . corruption, . . . undue influence," and "bribery." *Brutus No. 4*.

262. *See* 4 ANNALS OF CONG. 169 (1795).

263. *See id.* ("[Randall] was already in custody of the City Marshall.").

264. *Id.* at 215.

265. *See* Landis, *supra* note 11.

266. *See* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 290 (7th ed. 2007) ("Congress's oversight roles are both to take stock of national governmental responsibilities and to ensure, as the Constitution states, that 'the laws are faithfully executed' by the president and federal administrators.").

267. 273 U.S. 135 (1927).

268. *See* An Act More Effectually to Enforce the Attendance of Witnesses on the Summons of Either House of Congress, and to Compel Them to Discover Testimony, ch. 19, 11 Stat. 155–56 (1857) (codified as amended at 2 U.S.C. §§ 192–94 (2018)).

269. Moreland, *supra* note 4, at 203.

place, the courts have developed a set of rules that limit and confine what sorts of contempt proceedings merit punishment.[270] The courts, then, function as a backstop that protects individual rights and ensures that congressional committees investigating information function fairly. Besides the threat of criminal sanctions, courts have recently entertained *civil* suits brought by a chamber or a duly-authorized committee to compel executive branch officials to turn over documents.[271] Nothing would seem to limit these civil suits to inter-branch disputes.

Congress can also direct administrative agencies to monitor private parties and gather information. For example, environmental statutes often require private parties to submit information—sometimes periodically, sometimes to receive a permit or gain access to a market.[272] Congress could either require the information to be submitted to Congress as well or seek the information from the administrative agency instead. And because so much governance happens in administrative agencies, Congress's interest in extracting information from private citizens directly, rather than indirectly through an agency, is diminished. On balance, then, Congress's interest in obtaining information from citizens does not outweigh the dangers of trial-by-legislature.[273]

Information from executive branch officials: Congress's power to extract information from executive branch officials raises slightly different concerns. Most salient, two OLC opinions determine that an executive branch official cannot be prosecuted under 2 U.S.C. § 192 for refusing to comply with a subpoena.

Congress drafted the statute to impose a duty to prosecute. If the President of the Senate or the Speaker of the House certifies that a person has violated the statute, then the United States Attorney's "duty . . . *shall be* to bring the matter before the grand jury."[274] During the Reagan Administration, however, OLC construed this provision narrowly:

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270. *See, e.g.*, *id.* at 254–63. Many of these cases arose out of investigations by the Committee on Un-American Activities of the House of Representatives. *See Deutch v. United States*, 367 U.S. 456 (1961) (citing *Quinn v. United States*, 349 U.S. 155 (1955); *Emspak v. United States*, 349 U.S. 190 (1955); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Wilkinson v. United States*, 365 U.S. 399 (1961); *Braden v. United States*, 365 U.S. 431 (1961)).

271. *See, e.g.*, *Comm. on Oversight & Gov't Reform, House of Representatives v. Lynch*, 156 F. Supp. 101 (D.D.C. 2016).

272. *See generally* Arnold W. Reitze, Jr. & Lee D. Hoffman, *Self-Reporting and Self-Monitoring Requirements Under Environmental Law*, 1 ENVTL. LAW. 681 (1995).

273. *See generally supra* Section II.A.2.

274. 2 U.S.C. § 194 (2018); *see also* 8 Op. O.L.C. 101, 108–10 (1984) (describing this provision).

> First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context.[275]

Practically speaking, this interpretation of the statute renders it mostly useless against executive branch officials. When Congress asks for information from a compliant official, there's no reason to compel the production of information; if the administration is recalcitrant, though, it can simply assert privilege and refuse to comply with the subpoena.

Even without the threat of criminal sanction, though, Congress has plenty of other ways to extract general information from the executive branch.[276] *First*, Congress can impose reporting requirements and other forms of automatic information-collection on agencies. Of course, these oversight methods suffer from the fact that the agency controls the flow of information—it reports only what it chooses to report. But the inherent contempt power is a late-stage response to these sorts of failures to provide information. *Second*, Congress can create inspector generals within the agency that serve as Congress's eyes in the organization. These IGs can correct the problem of agency control of information, even though they might suffer from forms of cultural capture[277] (or other cognitive biases) that might cause them to become too sympathetic to the agency's plight and unwilling to serve as the taskmaster that Congress wants.[278] *Third*, Professor Parrillo's work on the *judicial* contempt power suggests that "agencies do typically take contempt findings quite seriously, often coming into compliance at the mere threat of one, even if sanctions seem unimaginable."[279]

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275. 8 Op. O.L.C. 101 (1984); *see also* 10 Op. O.L.C. 68, 83–85 (1986).

276. *See* OLESZEK, *supra* note 40, at 340–54.

277. *Cf.* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 81–82 (Daniel Carpenter & David A. Moss eds., 2014).

278. *See generally* JACK GOLDSMITH, POWER AND CONSTRAINT 95–111 (2012) (discussing IGs in the CIA).

279. Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 770 (2018).

Defenders of the inherent contempt power, however, might argue that Congress needs a tool in times of escalating inter-branch information disputes. But the Constitution includes other means by which Congress can compel executive-branch compliance. Congress could threaten to initiate impeachment proceedings against recalcitrant officers. If the official is not the President, then Congress can abolish the office itself,[280] though the President's veto makes this option only somewhat helpful. Congress can refuse to confirm executive branch officers, and it can withhold appropriations from related (or unrelated) programs.[281] These alternative ways to gather information render the inherent contempt power unnecessary.

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This Section challenged the functional or structural argument in favor of the inherent contempt power. Because this defense rests on a theory of "necessity" or "self-preservation,"[282] it invites by its own terms functional arguments that challenge the continued necessity of the power. Put in the terms of *Anderson v. Dunn*, it must be the "least possible power necessary to the end proposed."[283] This exacting scrutiny, I argue, is not met here.

D. Limitations

So far, I have argued that the Constitution does not support the unicameral exercise of the inherent contempt power. Here, I show that the argument need not cast doubt on two analogous powers: (1) judicial contempt and (2) contempt during impeachment proceedings.

1. JUDICIAL CONTEMPT

The argument against the inherent contempt power might also seem to preclude the federal courts' capacity to hold parties in contempt.[284] The Supreme Court affirmed the broad contempt power in federal courts in *Ex Parte Robinson*:

> The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial

280. *See* West, *supra* note 130 (discussing Congress's authority to create and destroy offices).

281. *See, e.g.*, CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 11, at 66 ("Control over spending also provides Congress with significant leverage to use in negotiations over other policies . . . .").

282. *See* sources cited *supra* notes 58, 224.

283. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

284. For an extremely thorough overview of contempt of court, see Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971).

> proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.[285]

Just as with the legislative inherent contempt power, no provision of the Constitution authorizes federal courts to hold parties in contempt. Does my argument leave federal courts without the capacity to ensure the "preservation of order in judicial proceedings?"

Perhaps not, for a couple reasons. The first is that it is possible to distinguish between the powers granted by the Vesting Clauses in Article I and Article III. Unlike Articles II and III, Article I's Vesting Clause is limited and modified by the phrase "herein granted."[286] By contrast, Article III's grant of "judicial power" confers a "somewhat nebulous grant[] of power" that is defined and limited only by the categories of cases and controversies to which such judicial power extends.[287] This textual distinction offers a reason to disfavor arguments for implied power for Congress, but to read Article III's Vesting Clause to include certain residual powers. Indeed, Professors Calabresi and Prakash have used the analogy between Articles II and III to defend a residual grant of *executive* power to the President,[288] and a similar argument supports a residual judicial contempt power.

Second, Congress has never left the federal courts without the authority to hold persons in contempt of court; in other words, the claims to an "inherent" power have never become necessary, for Congress has always provided such power.[289] In 1789, for instance, the

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285. 86 U.S. 505, 510 (1873); *see also Ex parte Terry*, 128 U.S. 289, 302–04 (1888) (similar); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 79–80 (1807) (similar); STORY, *supra* note 6, § 1774 (similar). *But see* Richard C. Brautigam, *Constitutional Challenges to the Contempt Power*, 60 GEO. L.J. 1513, 1514 (1971) (questioning the "validity of the contempt power").

286. *Compare* U.S. CONST. art. I, § 1 ("All legislative Powers *herein granted* shall be vested. . ."), *with id.* art. II, § 1 ("The executive Power shall be vested . . ."), *and id.* art. III, § 1 ("The judicial Power of the United States, shall be vested . . . "). *See also* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1186 (1992) (discussing this distinction).

287. Calabresi & Rhodes, *supra* note 286, at 1195.

288. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 571–72, 574–76 (1994).

289. *See* 18 U.S.C. § 401 (2018) ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.").

Judiciary Act gave "all the said courts of the United States" the power "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[290]

Indeed, though the Court's statement in *Robinson* (and related cases) offers a defense of "inherent" authority, the actual holding of the case is more limited. In *Robinson*, the Court went on to recognize that Congress could impose limitations on the inferior federal courts' use of the contempt power:

> The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted.[291]

Thus, *Robinson* recognizes that the judicial contempt power—at least for inferior federal courts, which owe their existence to Congress[292]—is subject to congressional limitations. This concession, however, lends some support to the argument that the metes and bounds of *legislative* contempt authority should also be established by Congress pursuant to the Necessary and Proper Clause.

2. IMPEACHMENT

This Article's challenge to the inherent contempt power also need not curtail the Senate's capacity to compel witnesses pursuant to its

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290. *See* An Act To Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73, 83 (1789).

291. 86 U.S. at 510–11; *see also Ex parte Terry*, 128 U.S. 289, 304 (1888) ("But this power, so far as the circuit courts of the United States are concerned, is not simply incidental to their general power to exercise judicial functions' it is expressly recognized, and the cases in which it may be exercised are defined, by acts of congress."); 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 (1924) (discussing Congress's power to control contempt authority in federal courts).

292. *See* U.S. CONST. art. I, § 8, cl. 9 (giving Congress authority to "constitute Tribunals inferior to the supreme Court"); *id.* 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.").

"Power to try all Impeachments."[293] In that context, Senators serve not as legislators, but in their "judicial character" when sitting "as a court for the trial of impeachments,"[294] and the Constitution vests the Senate's "sole Power to try all Impeachments" in a relatively sparse provision (Article I, Section 3). Thus, because the Section does not include a detailed list of the *judicial* powers that the Senate will have in such proceedings, the Constitution can more likely be read to incorporate the background rules of courts of law.

IV. THE LIMITS OF LIQUIDATION

If the argument so far has been convincing, then the inherent contempt power rests on shaky foundations. The Constitution's text seems to exclude any such power, the historical antecedents seem irrelevant to a government of limited and enumerated powers, and the functional argument is overbroad. What remains is the fact that Congress has exercised this power, more or less unchallenged, for over 200 years, and neither chamber has ever "renounced [its] authority to exercise this self-help remedy."[295] And although the case law "ebbs and flows,"[296] the Court has repeatedly reaffirmed the power's existence.

This generally unchallenged constitutional practice, pursued in the teeth of contrary constitutional text, raises thorny questions about interpretive methodology. I will consider three: *First*, if the argument is that the meaning of the Constitution has been "glossed" or "liquidated" by historical practice, then what sorts of institutional practices are sufficient to settle constitutional meaning? *Second*, even if the meaning of the Constitution has been liquidated, can it be de- and re-liquidated if practice shifts over a period of time? *Third*, if the constitutional justification for past assertions turn on a functional argument that no longer obtains, what weight should precedent carry? I address each in turn.

A. Inter-Branch Liquidation

With theoretical antecedents in James Madison's *Federalist No. 37*,[297] the notion that historical practice can settle constitutional

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293. U.S. CONST. art. I, § 3, cl. 6.

294. FEDERALIST NO. 65 (Alexander Hamilton).

295. AMAR, *supra* note 77, at 339.

296. *See* Chafetz, *Executive Branch Contempt of Congress*, *supra* note 3, at 1131 n.345.

297. THE FEDERALIST NO. 37 (James Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

meaning—whether called "gloss," "liquidation," or something else[298]—is uncontroversial with most interpreters.[299] Under this approach, both judicial and extra-judicial precedent can settle the meaning of the Constitution's text. Examples of these historical glosses abound,[300] but Professor Fallon notes that several open questions remain. In particular, "[m]ust thoughtful deliberation of constitutional validity occur in order for legislative or executive practice to constitute a binding liquidation?"[301] Yes, I argue. If we think of "gloss" or "liquidation" as a form of extra-judicial precedent,[302] then the quality of the deliberation that led to the decision should matter.[303] But Professor Fallon's question raises another question: What should count as *evidence* of thoughtful deliberation?

1. THEORY

Decisions that do not result from inter-branch constitutional contestation and resolution should count as only weak evidence of deliberation. In this Section, I advance three basic arguments in support of this claim: (1) a departmentalist theory of constitutional structure favors inter-branch agreement in disputed constitutional questions; (2) Supreme Court doctrine supports my theory; and (3) both the democratic and epistemic justifications of liquidation favor a

298. *See* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1773–78 (2015) (distinguishing these concepts but calling them "closely related").

299. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (describing James Madison's theory of "liquidation"); Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75 (2013); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 412 (2012) (discussing Justice Frankfurter's concept of "gloss" in his *Youngstown* concurrence and discussing the use of history in separation-of-powers contexts); Fallon, *supra* note 298 (presenting a general theory of history in constitutional adjudication); Michael M. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003) (discussing the uses of history in originalist thought). *NLRB v. Noel Canning* brings some of these interpretive debates into the spotlight. *Compare NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (majority opinion), *with id.* at 2645 (Scalia, J., concurring).

300. *See* Fallon, *supra* note 298, at 1773.

301. *Id.* at 1774–75.

302. *See, e.g.*, *id.* at 1773 (analogizing "judicial precedent" to "settlement through nonjudicial practice").

303. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring) ("Sound judicial decisionmaking requires both a vigorous prosecution and a vigorous defense of the issues in dispute, and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.").

requirement of contestation and settlement. In the next Section, I apply this argument to the inherent contempt power.

First, within the Constitution's governmental scheme, each of the three co-equal branches has the authority and responsibility to interpret the Constitution in its own sphere. Despite frequent claims of judicial supremacy by the Court,[304] the Constitution itself contemplates that other branches will also engage in constitutional interpretation.[305] For example, the text orders the President to swear to "preserve, protect, and defend the Constitution of the United States,"[306] and Article VI requires all federal officials to take a similar oath.[307]

Nevertheless, each institution has *different* institutional capacities and interpretive proclivities.[308] For example, Article III's case-and-controversy requirement means that judicial elaboration resolves narrow questions presented by the parties themselves, but Congress considers so-called legislative facts that balance competing interests within society at large.[309] Distinctive institutional approaches to constitutional interpretation, though, should lead to disagreement about the Constitution's meaning, at least in some cases. But if this disagreement is the product of legitimate differences in institutional capacity, then these disagreements are built-in facets of departmentalist constitutional interpretation—"a natural and predictable result of institutional differences."[310] This basic argument—that the Constitution bakes in inter-branch interpretive disagreement—suggests that liquidating constitutional meaning should not be the province of just one of the branches. If so, then an extra-judicial constitutional precedent is more likely to liquidate constitutional meaning if it represents the considered judgment of several branches of government.

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304. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Cooper v. Aaron*, 358 U.S. 1 (1958); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

305. *See, e.g.*, Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) (challenging the theory of judicial supremacy).

306. U.S. CONST. art. II, § 1, cl. 8.

307. U.S. CONST. art. VI.

308. *See generally* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (elaborating the argument that interpretive methods should be sensitive to institutional capacities); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997) (using a similar argument to critique the reasoning of *Boerne*).

309. *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

310. McConnell, *supra* note 308, at 185; Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336 (2001) ("The structural variances between the courts and Congress can be analyzed profitably to develop a theory of interbranch interpretation that takes advantage of the comparative strengths of each branch.").

Second, doctrine underscores the importance of contestation and resolution. Consider a leading extra-judicial precedent: the Decision of 1789.[311] That decision is considered to have determined that the President could "unilaterally remove a high-level executive-branch appointee."[312] The Court's decisions in *Myers* and, more recently, *Free Enterprise Fund* support this interpretation of the legal effect of this decision.[313] Regarding removal power, then, the Decision of 1789 presents especially weighty evidence of constitutional meaning. But this is so precisely because it arose out of contestation and settlement. Leading up to the Decision of 1789, President Washington argued that officers should "assist the supreme Magistrate in discharging the duties of his trust."[314] In Congress, Madison made the argument on behalf of the President in explicitly constitutional terms. In this way, inter-branch contestation raised the constitutional question such that it could be "settled" when Congress "bowed to the views of the administration."[315]

Myers also reasons that this decision had special relevance because of contestation and resolution. Chief Justice Taft, noting that the Court "devoted much space to discussion and decision of the question of the Presidential power of removal in the First Congress," explains why the decision was relevant.[316] The decision,

> if erroneous, it would be likely to evoke dissent and departure in future Congresses. It would come at once before the executive branch of the Government for compliance and, might well be brought before the judicial branch for a test of its validity. As, we shall see, it was soon accepted as a final decision of the question by all branches of the government.[317]

Here, the Court emphasizes the possibility of *dissent between and within the branches*. Within Congress, later decisions could be challenged as new legislation was introduced. Likewise, the law would be brought before the executive branch for signature, and the judicial branch could test its validity. The Court, then, treats it as especially

311. *See* AMAR, *supra* note 115, at 310.

312. *Id.* at 193.

313. *See Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483–84 (2010); *Myers v. United States*, 272 U.S. 52, 136 (1926) ("[The Decision of 1789] would come at once before the executive branch of the government for compliance, and might well be brought before the judicial branch for a test of its validity. As, we shall see, it was soon accepted as a final decision of the question by all branches of the [g]overnment.").

314. AMAR, *supra* note 115, at 193 (recounting the story of the Decision of 1789); CURRIE, *supra* note 145, at 36–41 (same).

315. *See* AMAR, *supra* note 115, at 193.

316. *See Myers*, 272 U.S. at 136.

317. *Id.*

relevant because it represents a "final decision" by "all branches of the Government."[318]

Chief Justice Marshall makes a similar argument in *McCulloch v. Maryland*.[319] In that case, the Court considered whether Congress had the power to establish a Bank of the United States. He writes:

> The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. . . . It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance.[320]

Again, the Chief Justice emphasizes both the quality of the deliberation and the inter-branch nature of the dispute. First, the bill "did not steal upon an unsuspecting legislature," but was "opposed with equal zeal and ability."[321] Legislative deliberation, then, should make the extra-judicial precedent carry more weight. Second, the *executive cabinet* debated the measure with the same amount of zeal, and these arguments "convinced minds as pure and as intelligent as this contrary can boast"—that is, President George Washington—before it could become a law.[322] With this, Chief Justice Marshall suggests that the interpretation carried such great weight, in part, because of the inter-branch contestation and subsequent agreement. Therefore, the Court's doctrine supports the requirement of inter-branch contestation.[323]

Third, this emphasis on inter-branch liquidation could serve at least two distinct values, one *democratic* and the other *epistemic*. The democratic justification flows from the premise that no branch of

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318. *Id.*

319. *See* 17 U.S. 316, 402 (1819); *see also* Nelson, *supra* note 298, at 527–28; Baude, *supra* note 298, at 16–21.

320. *McCulloch*, 17 U.S. at 402.

321. *See* Baude, *supra* note 299, at 24 (quoting *McCulloch*, 17 U.S. (Wheat. 4) at 402).

322. *Id.* at 24–25.

323. These sorts of arguments about inter-branch acquiescence are also quite common in *Youngstown*-style approaches to executive-congressional disputes. *See generally* Bradley & Morrison, *supra* note 30, at 432–38.

government can claim to be the singlehanded representative of We the People. Again, the American theory of constitutional law draws a distinction between the law-giving capacity of the (popular) sovereign and the government or administration.[324] The *Federalist Papers*, according to Bruce Ackerman, elaborate this "dualistic" conception of political life.[325] Within this system, "we must systematically reject the idea that when Congress (or the President or the Court) speaks during periods of normal politics, we can hear the *genuine* voice of the American people."[326] Because supposed liquidations take place in moments of ordinary politics, it cannot claim to be the people's interpretation of the Constitution—just the working interpretation by We the People's agents or stand-ins.

Of course, constitutional liquidation does not need to claim the authority of the sleeping sovereign. Instead, the Constitution's normal rules of interpretation might incorporate a notion of liquidation, and the document might have been ratified on the assumption that normal politics would fix its meaning.[327] Even so, extra-judicial precedent should be weightier when several branches of government participate. Because the House, Senate, and President represent distinct electoral communities, their concurrence about the Constitution's meaning should represent broad-based agreement by the electorate that the interpretive decision is sound. Indeed, according to Will Baude, James Madison described liquidation in just this way: "A liquidated practice would 'carry with it the public sanction' [and] would reflect 'the acquiescence of the people at large.'"[328] Although "interstitial interpretations or questions left unresolved by the text could be answered by any officer into whose jurisdiction they fell," the answers could only "become binding constitutional law" when similarly "endorsed by the people."[329]

A second justification is that multiple, concurring institutional decisions might be more likely to be *correct*.[330] Besides faith in sheer

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324. *See* David Singh Grewal & Jedediah Purdy, *The Original Theory of Originalism*, 127 YALE L.J. 664, 668 (2018) ("[I]n a democratic regime, the sovereign people can be said to act through plebiscitary initiative and then 'go to sleep,' leaving the 'government' (which would include, in the United States, the Supreme Court) to administer its fundamental law.").

325. *See* Ackerman, *supra* note 182, at 1022.

326. *Id.* at 1027.

327. *See* Nelson, *supra* note 299, at 525–30 (discussing the notion of liquidation at the Founding).

328. *See* Baude, *supra* note 299, at 19 (quoting letters from James Madison).

329. *Id.* at 20–21.

330. *But see* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEG. ANALYSIS 1, 2 (2009) ("[M]any-minds arguments often rest on fragile mechanisms that apply only under relatively narrow conditions, and are typically pitched at a high

numbers, the distinct interests and institutional capacities of the different actors should increase the confidence in the decisions. Under a traditional Madisonian theory of the separation of powers, each institution's interpretations should be self-interested in certain ways. Without a check on the branch's action, the actor is liable to engage in motivated reasoning or to attempt a naked power grab. If so, the absence of conflict suggests general agreement between the branches about constitutional interpretation.[331] Besides self-interest, the different branches engage in distinct modes of constitutional interpretation that differ in some instances, and their agreement suggests that the interpretation is a good one. Of course, academics have challenged the Madisonian theory,[332] but even under Levinson and Pildes theory of "separation of parties," institutional agreement in times of divided government could be a strong sign that the interpretation is correct.[333] Either way, the basic point is that inter-branch contestation and subsequent agreement improves the reliability of the decision.

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Several mutually reinforcing arguments support the claim that only inter-branch contestation and settlement should liquidate or gloss constitutional meaning. First, a departmentalist constitutional theory supposes that each co-equal branch has the independent responsibility to interpret the Constitution.[334] If so, then no single branch's interpretation should bind other constitutional actors. Second, the Court's decisions in both *Myers* and *McCulloch* suggest that extra-judicial precedent carries great weight only if it is the "final decision . . . by all branches of the Government."[335] Third, this requirement makes good sense, both as a democratic matter (i.e., government agents should not usurp the powers of We the People with wayward interpretations) and as an epistemic matter (i.e., concurring institutional decisions are more likely to interpret the Constitution correctly). The next Section applies this argument to the question of the inherent contempt power.

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level of abstraction, making it difficult to apply them to the concrete institutions of the legal system.").

331. *Cf.* Bradley & Morrison, *supra* note 30, at 433–35 (describing the theory that acquiescence can be a form of agreement between the branches).

332. *See id.* at 439, 439 n.18 (collecting sources).

333. *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 199 HARV. L. REV. 1 (2006).

334. *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 116–20 (2004).

335. *See Myers v. United States*, 272 U.S. 52, 136 (1926).

2. APPLICATION

The reliance on inter-branch settlement undermines the precedential value of past exercises of the inherent contempt power. When a single chamber of Congress asserts this authority, the assertion lacks not only inter-branch contestation and acquiescence, but also inter-*chamber* acquiescence. Indeed, Thomas Jefferson made just this point in his *Manual of Parliamentary Practice*. Presenting the argument that Congress should pass a law defining its privileges, he wrote:

> [I]n requiring a previous law, the Constitution had regard to the inviolability of the citizen . . . ; as, should one House, in the regular form of a bill, aim at too broad privileges, it may be checked by the other, and both by the President; and also as, the law being promulgated, the citizen will know how to avoid offense.[336]

Without inter-branch contestation in these unicameral contexts, questionable assertions of constitutional meaning cannot win the acquiescence of the other co-equal constitutional interpreters. Unlike in other separation-of-powers cases, an inherent assertion of contempt power requires neither the other chamber nor the President to consider and assent to the constitutionality of the decision. Because "ambition" *cannot* "be made to counteract ambition," the assertion cannot lead to acquiescence.[337] If this acquiescence should be a necessary component for a liquidation, the extra-judicial precedents and practices of the Congresses should not be binding on current interpreters.

Besides the basic problem of inter-branch contestation, each chamber's constitutional interpretation might be less reliable because it is not elaborated in the exercise of its traditional role. If the departmentalism justification is that branches have differing institutional approaches to constitutional interpretation, then we might discount interpretations that do not leverage those distinct institutional advantages. For Congress, its institutional advantage might be the capacity to evaluate competing social goals and craft a generalizable regulatory scheme. But in the inherent contempt context, Congress acts in an abnormal role—in a *judicial* role. Without its distinct institutional capacity brought to bear on the constitutional question, we might be less willing to take its interpretation as binding.

Perhaps most concerning, the unicameral process suggests that Congress might be engaged in motivated reasoning when interpreting the scope of its power. An analogous inter-branch dispute makes this

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336. *See* HINDS, *supra* note 3, § 1598.

337. *See* THE FEDERALIST NO. 51 (Alexander Hamilton).

point salient. The Judiciary Act of 1789 gave the federal courts the power to "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[338] The statute's vagueness "left [the courts] to their own interpretations, based in part upon the traditional material of the common law, and in part upon those pervading conceptions of the liberty of the individual."[339] Some thirty years later, a federal judge abused the statute when he "imprisoned and disbarred a lawyer for publishing a detailed criticism of an opinion while an appeal from him was pending."[340]

Appalled by the abuse, the House initiated impeachment proceedings, but the Senate acquitted the judge after he argued that he had relied on the "staunch precedents of the common law."[341] The *very next day*, Congress introduced, and eventually passed, a statute that would limit the contempt powers of the federal courts.[342] With this turn of events, Congress recognized the dangers of a freewheeling contempt power after an abuse, much like that of *Aurora* or that of *Marshall v. Gordon*.[343] The absence of similar congressional concern in its own exercise of the inherent contempt power implies motivated reasoning.

B. De- and Re-Liquidation

Even if historical practice can liquidate or settle historical meaning, can subsequent practice unsettle or disrupt the Constitution's new meaning? In Professor Fallon's words, "Once practice has 'liquidated' the meaning of a constitutional term, does the meaning as thus liquidated become fixed forever, or can evolving practice endow vague or ambiguous terms with historically changing meanings?"[344] I argue that the meaning can change. If liquidation serves democratic values, then the premise of liquidation is that the residual ambiguity of

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338. *See* An Act To Establish a Judiciary of the United States, ch. 20, 1 Stat. 73, 83 (1789).

339. 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 (1924).

340. *Id.* at 1024–25.

341. *Id.* at 1025.

342. *See id.* at 1025–31 (quoting *Ex parte Wall*, 107 U.S. 265, 302 (1882) ("The power to punish for contempt—a power necessarily incident to all courts for the preservation of order and decorum in their presence—was formerly so often abused for the purpose of gratifying personal dislikes, as to cause general complaint, and led to legislation defining the power and designating the cases in which it might be exercised. The act of Congress . . . limits the power of the courts.")).

343. *See supra* notes 239–42 and accompanying text.

344. Fallon, *supra* note 298, at 1774–75; *see also* Baude, *supra* note 299, at 53 (quoting Fallon, *supra*).

the Constitution should be worked out by representatives in ordinary politics. These liquidations do not represent amendments to the Constitution's higher law, but as working interpretations that gain some legitimacy through consistent, inter-temporal agreement. When a particular practice ceases within the political branches, the practice loses its *prima facie* claim to general agreement between the political branches.

What's more, if liquidation is a form of extra-judicial precedent, then asking whether or not the principles that justify departing from *judicial* precedent might help us understand whether a provision's meaning should be de-liquidated.[345] Generally, defenses of stare decisis argue that adhering to a system of precedent makes sense because it *protects reliance interests*, and because it ensures *principled decision-making*.[346] Neither of these justifications should prevent political actors from breaking from this historical tradition.

1. GOVERNMENTAL RELIANCE[347]

Defenders of stare decisis often argue that it protects reliance interests and ensures stability in the legal system.[348] More specifically, adhering to past precedent protects those "who have relied reasonably on the rule's continued application."[349] Although a stronger presumption of stare decisis applies to interpretations of statutes,[350] the same reliance interests factor into constitutional decisions. In this case, too, continued historical practice might counsel against a finding that this doctrine has been de-liquidated.

But what would it look like for a branch of the federal government to rely on an interpretation? Congress generally lacks the personal and business interests that allow private parties to stake a claim of reliance.

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345. Of course, some argue that there's little room for stare decisis within the constitutional system. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23–24 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 293 (2005).

346. Doubtless, this set of justifications is under-inclusive. *E.g.*, Johnathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI-KENT L. REV. 93, 93–94 (1989).

347. *See generally* Randy J. Kozel, Stare Decisis *as Judicial Doctrine*, 67 WASH. LEE L. REV. 411, 454–59 (2010) (introducing the concept of governmental reliance).

348. *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J., 1459,1465 (2013) ("A related fixture in the Court's discussions of stare decisis is the reliance interest of stakeholders whose lives and livelihoods are affected by judicial precedent."); *see also id.* (collecting sources).

349. *See Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992).

350. *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW 420 (2017) (citing *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015)).

For example, Congress does not "organize[] intimate relationships" around a constitutional doctrine,[351] and it does not rely on interpretations regarding property or contract rights "in order to conduct transactions."[352] Still, Congress might have *built out institutional capacities* in reliance on past precedent.[353] For example, Justice Stevens' dissent in *Citizens United* argued that "[t]he Federal Congress . . . specifically relied on [a past precedent] throughout the years it spent developing and debating [the Bipartisan Campaign Reform Act of 2002],"[354] and Justice Alito, again in dissent, made a similar argument in *Arizona v. Gent*.[355]

Here, Congress has not relied on the inherent contempt power in this way. If, as one writer has suggested that it should, Congress had created an Article I "Court of Congressional Contempt" that doled out contempt citations,[356] then Congress would have invested public resources—i.e., spent time and public funds, hired employees, etc.—in this interpretation. Similarly, if Congress hired more sergeants-at-arms, built out its own detainment facilities, or authorized its committees under the Rules of Procedure Clause to effectuate arrests and trials, then it would have relied on the interpretation. Instead, however, historical practice has moved decisively *against* the inherent contempt power.

Consider a series of institutional developments. First, neither chamber has asserted the power since 1935.[357] Because the exercise of the power requires the chamber to act in a quasi-judicial capacity, and because Congress has not built up the institutional capacity to exercise it more forcefully, the exercise of the inherent contempt power is too burdensome to be of much use. Replacing the inherent contempt power, Congress relies on *criminal prosecutions* and *civil suits* to enforce its subpoenas. For example, Congress has been much more willing to enforce its subpoenas against executive branch officials through civil

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351. *See Planned Parenthood*, 505 U.S. at 856.

352. *See* Kozel, *supra* note 348, at 1489–90 (citing Court doctrine).

353. *Cf. id.* at 1492 ("Overrulings require government officials to spend their—that is, our—time and resources formulating new approaches."); Kozel, *supra* note 347, at 454 ("Like private citizens, our legislative and executive branches of government rely on the Supreme Court's rulings as setting the rules of the road.").

354. *Citizens United v. FEC*, 558 U.S. 319, 411–12 (2010) (Stevens, J., dissenting in part) (quoted by Kozel, *supra* note 347, at 457).

355. *See* 556 U.S. 332, 358–60 (2009) (Alito, J., dissenting) (quoted by Kozel, *supra* note 347, at 456).

356. *See* Zuckerman, *supra* note 11, at 44, 75.

357. *See* GARVEY, TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE AND PROCEDURE 12 (2017).

suits, and the Court has been willing to entertain them.[358] With these suits, Congress implicitly concedes that the lawsuits present an acceptable method of enforcing its interest in information-gathering and investigation.

And Congress's passage of the 1857 act that criminalized contempt suggests a truly *inter-branch* settlement of the appropriate means of punishment. With this statute's exercise, all three co-equal branches of government affirm the importance of Congress's institutional interests. What's more, the Court has developed a complex body of doctrine to prevent congressional abuses in contempt proceedings. During the 1950s and 1960s, the House's Un-American Activities Committee engaged in a series of aggressive investigations.[359] The Court checked Congress's assertions of its criminal contempt power by interpreting the criminal contempt statutes to allow defenses based in the Bill of Rights. If anything, then, the development of these alternative channels of contempt enforcement have led to investment in institutional resources that would become useless if Congress re-asserted its inherent contempt power.[360]

These institutional developments undermine the argument that the political branches have justifiably relied on past practice. If Congress does not regularly assert this power, then the working interpretation of the political branches is no longer an important aspect of separation-of-powers law. Without this continued importance, neither Congress nor the President could plausibly claim that it has built up institutional practices.

2. PRINCIPLED DECISION-MAKING

Defenders of *stare decisis* also often claim that precedent constrains judicial decision-making.[361] Some argue, for example, that

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358. *See* Chafetz, *Executive Branch Contempt of Congress*, *supra* note 3, at 1083–91 (recounting examples).

359. *See supra* note 270; *supra* note 28.

360. The executive branch has also questioned whether Congress still has the power. The executive branch has claimed, citing *Chadha* and *Buckley v. Valeo*, that "[t]he Court has also been careful in recent cases to restrict Congress to its legislative functions and not to permit it to exercise authority belonging to another branch," and so the Court "may not afford Congress the same latitude with respect to its inherent contempt power that was provided during the 19th and early 20th centuries." *See* Response to Cong. Requests for Info. Regarding Decisions made Under the Indep. Counsel Act, 10 Op. O.L.C., 68, 86 (1986).

361. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 852 (1991) (Marshall, J., dissenting) ("Contrary to what the majority suggests, *stare decisis* is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of 'the judiciary as a source of impersonal and reasoned judgments.'") (quoting *Moragne v. States Marine*

the rules of precedent encourage judges to base their decisions on neutral, generally applicable rules of decision—rather than fact-bound determinations influenced by impermissible factors, like the identity of the parties.[362] These neutral articulations constrain judicial discretion.[363] Reasoning by analogy, liquidation might encourage principled constitutional analysis by the political branches and give guidance when the text remains ambiguous. For example, for some separation-of-powers cases (particularly regarding war powers), the reliance on historical gloss "might simply provide the most principled means of deciding disputes."[364] Given the Constitution's terse text, "it is not clear how one could reliably define the boundary of [the President's war powers] without looking to past practice."[365] Indeed, the Office of Legal Counsel often relies on historical practice to justify the President's use of force.[366] This reliance on history might serve rule-of-law values.

Regardless, this justification makes little sense in the context of the inherent contempt power. First, this gloss has resulted from prior congressional assertions that were not well-designed to ensure a neutral decision. Without the inter-branch processes discussed above, interpretations by Congress cannot claim to be correct or public-regarding by virtue of the process that led to the interpretation. Put differently, the precedential decisions did not serve the *forwards-looking* value of principled-decisionmaking, and so adhering to the decisions today would in fact undermine one of the very values that extra-judicial precedent is designed to further. Second, the traditional tools of interpretation can resolve the scope of the inherent contempt power more easily. As discussed, the text and structure of the

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Lines, 398 U.S. 375, 403 (1970)); *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 2 (2011) (citing Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005)).

362. *See generally* BOBBITT, *supra* note 16, at 39–59 (describing the "doctrinal" modality of judicial decision-making).

363. *See generally* Kozel, *supra* note 348, at 1463–68 (2013) (surveying the literature and citing, among others, Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012)); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989)).

364. Bradley & Morrison, *supra* note 30, at 455–56.

365. *See id.*

366. *See, e.g.*, Walter Dellinger, Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 330–31 (1995) ("[T]he relationship of Congress's power to declare war and the President's authority as Commander in Chief and Chief Executive has been clarified by [two hundred] years of practice."); Caroline D. Krass, Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 7 (2011) ("This historical practice is an important indication of constitutional meaning . . . .").

Constitution provide more determinative evidence of Congress's authority here than in the President's war powers.[367] What's more, the functional argument applies a means-ends analysis that is a common tool in constitutional law.[368] Therefore, justification based on principled decision-making should not prevent constitutional interpreters from finding that the inherent contempt power has been de-liquidated.

C. Contingent Powers

In this Section, I confront the fact that judicial precedent authorizes the contempt power. Though other institutional actors should disregard such precedent if fidelity to the Constitution so compels, I offer a reason to distinguish these cases. Specifically, I argue that the inherent contempt power represents a "contingent power" that waxes and wanes as facts-on-the-ground change. Even assuming that the inherent contempt power exists, its existence turns on whether or not it's currently the "least possible power necessary to the end proposed." Put differently, the scope of this particular constitutional power is contingent, and so the judicial precedent preserves only the legal rule—not the application to particular facts.

1. EVOLUTION OF THE ARGUMENT

The structure of the functional argument admits enough flexibility that it can be redeployed in new contexts. In particular, the argument can shift as political actors conceive of Congress's role differently. Between 1795 and 1927, then, we see the conceptual argument for the inherent contempt power evolve with Congress's political role.

Thus, in the early Republic, the fledgling Congress asserted its interest as one of "self-preservation." Leaving prosecution to the other branches would render the House "altogether dependent on the other branches of government."[369] With time, however, the inherent contempt power has come to be seen as a way to gather *information*. For example, a 1917 case, *Marshall v. Gordon*,[370] listed nineteen instances in which a House or the Senate had asserted the inherent contempt power.[371] Of them, the first contumacious witness case occurred in 1842—and after that seven out of eleven assertions were for

367. *See generally supra* notes 83–150 and accompanying text.

368. *See supra* note 225.

369. CURRIE, *supra* note 145, at 236 (quoting 5 ANNALS OF CONG. 182 (1795)).

370. 243 U.S. 521 (1917)

371. *See id.* at 543.

contumacious witnesses.[372] Before 1842, however, all the assertions were for assaults, attempts to bribe, or libels against the House.[373] Likewise, commenting on the outcome of *Jurney v. MacCracken*,[374] then-Senator Hugo Black claimed: "I never doubted the Senate's right to punish for contempt . . . . To have held otherwise would have been an absolute destruction of the Senate's power *to conduct investigations thoroughly*."[375] Today's Congressional Research Service manuals clearly tie the contempt power to the investigative power.[376]

Consider *McGrain v. Daugherty*.[377] The Court in *Daugherty* masterfully wedded the longstanding constitutional interest in gathering information[378] to the assertion of the inherent contempt power. Like the debaters in the House of Representatives in 1795, the Court conceded that "there is no provision expressly investing either house with power to make investigations and exact testimony," so the question was "whether this power is so far incidental to the legislative function as to be implied."[379] First, the Court recognized the constitutional interest in information:

> [T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to

372. *See id.* at 543 n.1.

373. *See id.*

374. 294 U.S. 125 (1935).

375. *McCracken Loses on Senate Jailing: Supreme Court Upholds Power of Congress to Punish Witness for Contempt*, N.Y. TIMES (Feb. 5, 1935) (emphasis added), https://www.nytimes.com/1935/02/05/archives/maccracken-loses-on-senate-jailing-supreme-court-upholds-power-of.html [https://perma.cc/XYS2-LAXD].

376. *See, e.g.*, TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE AND PROCEDURE 12 (2017) ("[I]n recent decades the contempt power has most often been employed in response to the refusal of a witness to comply with a congressional subpoena—whether in the form of a refusal to provide testimony, or a refusal to produce requested documents."); ALISA M. DOLAN ET AL., CONG. RESEARCH SERV., RL 30240, CONGRESSIONAL OVERSIGHT MANUAL 33 (2014) ("Between 1795 and 1934 the House and Senate utilized the inherent contempt power over [eighty-five] times, in most instances to obtain (successfully) testimony and/or production of documents."); *see also* sources cited *supra* note 22.

377. 273 U.S. 135 (1927).

378. *See* CURRIE, *supra* note 145, at 20–21.

379. *Daugherty*, 273 U.S. at 161.

> their action—and both houses have employed the power accordingly up to the present time.[380]

Because of this longstanding historical interest in information, it should be taken to be a "practical construction, long continued," that "should be taken as fixing the meaning of those provisions."[381]

Interestingly, however, the Court admitted that the *inherent contempt cases* that it relied upon did not concern information disputes.[382] In other words, even though Congress's interest in information has long been a legitimate congressional interest, the *process* by which Congress effectuated this interest had not been its inherent contempt authority. These two allegedly incidental aspects of "the legislative power," a right and a method of compulsion, come together in the arrest of the contumacious witness—in this case, Daugherty.

What is important about this case is that Congress's interest in information and the inherent contempt power need not be so tightly linked. The Court noted, for example, that Congress had passed a statute that made it a regular crime to defy a congressional subpoena.[383] Although the criminal enforcement method might be problematic when it wants information from an executive branch official,[384] Congress and congresspersons have other ways of making executive branch officials speak: intensifying public and media pressure, withholding appropriations, bringing a civil suit in federal district court, eliminating the federal office, and even impeachment. By its own terms, the *Anderson v. Dunn* test requires that the inherent contempt power

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380. *Id.* at 174. *But see supra* notes 65–71 and accompanying text (showing that Madison voted *against* the contempt citation).

381. *Daughtery*, 273 U.S. at 174 (citing, for example, *Stuart v. Laird*, 5 U.S. 309 (1803); and *Martin v. Hunter's Lessee*, 14 U.S. 351 (1816)).

382. *See id.* at 175.

> We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this Court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. *While the power to exact information in aid of the legislative function was not involved in those cases*, the rule of interpretation applied there is applicable here.

Id. (emphasis added).

383. *See Daugherty*, 273 U.S. at 171–72; *see also* Act of Jan. 24, 1857, ch. 19, 11 Stat. 155–56 (1857) (codified as amended at 2 U.S.C. §§ 192, 194); *In re* Chapman, 166 U.S. 661, 271–72 (1897) (construing the Act of 1857 and calling it constitutional).

384. *See, e.g.*, Response to Cong. Requests for Info. Regarding Decisions Made under the Independent Counsel Act, 10 Op. O.L.C. 68, 85 (1986); Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege, 8 Op. O.L.C. 101, 101–02 (1984).

continue to be the "least possible power adequate to the end proposed."[385] Thus, current institutional actors should continue to engage in means-end analysis to determine the power's continuing lawfulness.

2. CHALLENGING PRECEDENT

This evolution undermines the claim that historical practice and precedent must forever fix the Constitution's meaning. Changed circumstances sometimes mean that constitutional powers expand or contract "in accordion-like fashion."[386] A traditional example is the scope of the Commerce Clause. Because much more activity is interstate commerce, the Commerce Clause allows Congress to regulate much more of American life.[387] But it is also possible that the powers can shrink. In this case, the strongest argument for the inherent contempt power turns on what is the "least possible power adequate" to the constitutional purpose. If the constitutional purpose becomes less pressing, or if the power becomes too onerous compared to less restrictive alternatives, then the institutional facts-on-the-ground might narrow Congress's contempt power—or eliminate it entirely.

The functional nature of the argument undermines the claim that the Constitution's meaning has been liquidated with respect to the power. Consider another analogy to judicial precedent. "Precedents wield authority and power only to the extent that they establish or reinforce a legal rule or principle," and so they have "no application to findings of fact."[388] Justice Brandeis, dissenting in *Burnet v. Coronado Oil & Gas Co.*,[389] advanced a similar argument:

> The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution. . . . The controversy is usually over the application to *existing conditions of some well-recognized constitutional limitation*.[390]

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385. 19 U.S. (6 Wheat) 204, 230–31 (1821).

386. Akhil Reed Amar, *The President, the Cabinet, and Independent Agencies*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 36, 54–56 (2010).

387. *See id.*

388. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 302, 382 (2016).

389. 285 U.S. 393 (1932).

390. *Id.* at 410 (Brandeis, J., dissenting).

Put in "legal parlance," Justice Brandeis distinguished between "fact[s]" and "declaration[s] of a rule of law."[391] When the past precedent found facts instead of declared the law, the Court should be more willing to distinguish or overrule the precedent. As examples, he mentioned

> cases [arising] under the due process clause when the question is whether a statute is unreasonable, arbitrary, or capricious; . . . under the equal protection clause when the question is whether there is any reasonable basis for the classification made by a statute; and . . . under the commerce clause when the question is whether an admitted burden laid by a statute upon interstate commerce is so substantial as to be deemed direct.[392]

Similarly, the strongest defense of the inherent contempt power is the functional argument, which succeeds or fails based on whether Congress needs to assert the power to achieve a particular end. Although the *legal rule*—that Congress has the "least possible power adequate to the end proposed"—might be settled, the particular assertions rest on "findings of fact" that render the power's exercise susceptible to new challenge. As these facts-on-the-ground change (that is, as Congress's need for information becomes more easily satisfied through other means), the scope of the inherent contempt power should shrink. And neither judicial nor extra-judicial precedents should prevent it from doing so.

CONCLUSION

Congress lacks the authority to arrest, detain, and try private citizens or executive branch officials for contempt. Most important, the defenders cannot point to a clear textual source for the power. Meanwhile, other power-granting provisions—namely, Article I, Section 5—grant specific institutional powers to Congress, and other rights-protecting provisions—namely, the Bill of Attainder and Ex Post Facto Clauses—prevent "trial by legislature." Given this whole-text reading of the Constitution, the document should not be read to include an implicit inherent contempt power. What's more, the reliance on Parliamentary and state precedent neglects to recognize the transformative relevance of the Constitution's affirmation of a radical theory of popular sovereignty. And the functional argument fails when subjected to means-end scrutiny.

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391. *Id.* at 410–11. (Brandeis, J., dissenting).

392. *Id.* (Brandeis, J., dissenting)

After rejecting these traditional constitutional arguments for the power, I turn to the argument that historical practice has glossed, liquidated, or settled the Constitution's meaning. In particular, the Constitution's meaning should not be considered liquidated for three reasons. *First*, both theory and doctrine suggest that the settlement of constitutional meaning should follow only after *inter-branch contestation and acquiescence*. Without this multi-party agreement, the settlement is not uniquely likely to be a *correct* ascertainment of constitutional meaning, and it lacks the democratic sanction of an agreement by the full government. *Second*, Congress's repeated decision to exercise its interest in punishing contemnors through other means undermines the claim that the meaning is completely liquidated. Instead, the relevant institutional actors seem to have settled on a different interpretation of the Constitution. *Third*, the functional nature of the constitutional argument necessarily makes it less susceptible to liquidation, given that each assertion of the authority must turn on mutable facts-on-the-ground.

The Article seeks to make two contributions to the literature on constitutional interpretation, one *substantive* and the other *methodological*. Regarding substance, the arguments presented in Parts I and II challenge the conventional constitutional wisdom that Congress has this inherent contempt power. Regarding method, the Article contributes to discussions of constitutional liquidation by refining the theory against a particular constitutional example. What this example has that others do not is its lack of inter-branch disputation. Most cases of constitutional liquidation concern a separation-of-powers dispute in which Congress and the President face off against one another. Therefore, evaluation of the inherent contempt power here requires much more refined analysis of the causes and explanations of constitutional liquidation. Whether or not one agrees with the analysis in Part I, the peculiarities of the practice should generate further discussion, in this context and others, about when and how "governmental practice" should guide the "interpretation of an ambiguous constitutional provision."[393]

393. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring).