

Has Congress Lost the Legislative Power?

Constitution Day Lecture for the Boston College Department of Political Science

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- I. The Atrophy of Legislative Power
 - the Executive and the Administrative State
 - the Courts
 - Democracy & Representation
- II. Two Caveats about Congress
 - Federalism and “herein granted”
 - Non-legislative powers of Congress
- III. The Political Theory of Law & Legislation I: Classical Views
 - Aristotle on law, the assembly, & the people
 - Aristotle on the legislative art
 - Romans: pagan and Catholic
- IV. The Political Theory of Law & Legislation II: Modern Inventions
 - Machiavelli & the priority of executive power
 - Hobbes & sovereign legislation
 - Locke & the invention of legislative power
 - Montesquieu & Rousseau: the return of the legislator?
 - Bentham & the theory of legislation
- V. The (Anglo-)American Practice of Law and Law-Making
 - Common Law and the High Court of Parliament
 - Blackstone’s Commentaries
 - Colonial assemblies and the American Revolution
 - the States and the initial Congress
 - the new Congress
- VI. Congress’s Constitutional Power
 - law-making: tax; regulate commerce; establish uniform rules on naturalization and bankruptcies; standardize money and weights; secure patents and copyright; punish counterfeiting and piracy; govern capital district; “necessary & proper”
 - other: spend; borrow; establish government agencies (including military); declare war; impeachment; amendment
 - unwritten/auxiliary power: investigate
 - (Senate only: confirm appointments; ratify treaties)
 - later amendments: “appropriate legislation” to enforce rights

VII. Congress's Legislative Record, or, Are there 100 Acts of Congress Everyone Should Know?

- What criteria of importance?
- What criteria of success?
- What do important and successful acts of legislation have in common?

VIII. When Congress Chooses NOT to Legislate

- Constitutional amendments
- Delegation of authority to agencies and courts
- "Legislative vetoes"
- Ceding interpretation to agencies and courts
- Leaving issues to the states

IX. Has Congress Lost the Legislative Power?

- Remember the legislative power is limited
- Observe when Congress has delegated, ceded, or refrained
- Representation and Democracy