INTERCOLLEGIATE STUDIES INSTITUTE
Educating for Liberty

Intercollegiate Review

PUBLISHED BY THE INTERCOLLEGIATE STUDIES INSTITUTE

PRINT

How Much Legislative Power Do Judges Really Have?

Allen Mendenhall

Spring 2018 - Intercollegiate Review Online

February 06, 2018

During his confirmation hearing last year, Justice Neil Gorsuch told Senator Dick Durbin that *Roe v. Wade* was "the law of the land." A recent *Washington Post* headline declared, in light of *Obergefell v. Hodges*, "Same-sex marriage is the law of the land."

What does it mean that opinions of the United States Supreme Court are the law of the land? Is an opinion of the Supreme Court *a law*? If so, do judges *make* law? If judges make law, thereby exercising legislative powers, wouldn't they be legislators, not judges?

If Supreme Court opinions are laws, how can they be overturned by later justices? Were the overruled decisions never actually law to begin with? Were they temporary laws? Were the American people simply bound for years by erroneous rules or judgments?

Ask these vexing questions of ten experts in constitutional law and you'll hear ten different responses.

Why so complicated?

Perhaps because the framework of American government is at stake. Centuries of political theory, moreover, cannot be condensed or expressed in concise opinions involving particular issues about fact-specific conflicts. Judges and justices are not positioned to delineate philosophical principles with nuance and sophistication. Yet they are tasked with administering the legal system and are guided by deeply held convictions or inchoate feelings about the nature and sources of law.

When we debate the role of judges vis-à-vis the legislative or executive branch, we're invoking the separation-of-powers doctrine enshrined in the U.S. Constitution. That doctrine derives principally from the theories of Locke (1632–1704) and Montesquieu (1689–1755).

In his *Second Treatise of Government*, Locke claimed that the preservation of society was "the first and fundamental natural law." Today we worry about the corruption and incompetence of members of Congress, but in Locke's era, when the monarch exercised extraordinary powers, the legislature was a bulwark against tyranny. It represented the will of "the people." The preservation of society thus required robust legislative authority.

"This legislative is not only the supreme power of the commonwealth," Locke intoned, "but sacred and unalterable in the hands where the community have once placed it; nor can any edict of anybody else, in what form soever conceived or by what power soever backed, have the force and obligation of a law which has not its sanction from that legislative which the public has chosen and appointed."

Why must the law emanate from the legislature?

Because the legislature, in his view, embodied "the consent of the society over whom nobody can have a power to make laws." Locke's paradigm holds, accordingly, that the legislature speaks for the people, from whom legitimate government obtains its limited authority; legislation reflects a general consensus among the people about controlling norms, beliefs, and values. The judiciary is curiously absent from this paradigm.

Montesquieu articulated a tripartite model of governance, adding the judiciary to Locke's calculus. He argued that a state of political liberty would not exist if any of the three branches of government—executive, legislative, or judicial—arrogated to itself powers belonging to another branch. The branches competed, effectively offsetting their respective powers through checks and balances.

Montesquieu and Locke were among the most cited thinkers during the American Founding. They were indispensable sources for the framers of the U.S. Constitution. The first three articles of the Constitution establish our three branches of government.

Concerns about the scope and function of judicial power have begun to divide legal scholars on the right. On one side are proponents of judicial restraint as practiced by Robert Bork, William Rehnquist, and Antonin Scalia; on the other side are advocates of judicial engagement, which calls for a more active judiciary that strictly enforces restrictions on government action.

The judicial-restraint camp contends that the judicial-engagement camp would have the judiciary infringe on legislative authority in violation of the separation-of-powers mandate. The judicial-engagement camp contends that judges deferring to political branches often abdicate their duties to enforce not only the constitutional text but also unenumerated rights allegedly inherent in that text.

The view that judges cannot *make* law is increasingly unpopular.

"The dubious aspect of separation-of-powers thinking," Richard Posner says, "is the idea that judges are not to make law (that being the legislator's prerogative) but merely to apply it." Posner submits that "judges make up much of the law that they are purporting to be merely applying," adding that "while the judiciary is institutionally and procedurally distinct from the other branches of government, it shares lawmaking power with the legislative branch."

If Posner is right, then Montesquieu's trifurcated paradigm collapses. That, or our current system is not maximally amenable to liberty as conceived by Montesquieu.

Parties to a case generally recognize judges' rulings as binding. Courts and institutions generally accept Supreme Court decisions as compulsory. Even individuals who defy judicial rulings or opinions understand the risk they're taking, i.e., the probable consequences that will visit them. Judicial rulings and opinions would seem, then, to be law: they announce governing rules that most people respect as binding and enforceable by penalty. If rulings and opinions *are* law, then judges enjoy legislative functions.

Yet the natural law tradition holds that law is antecedent to government promulgation—that indissoluble principles exist independently of, and prior to, pronouncements of a sovereign or official. On this view, the positive law may contradict the natural law. Which, then, controls? Which is *the* law, the one you'll follow when push comes to shove?

Your answer might just reveal how much legislative power *you* believe judges really have.

Allen Mendenhall is associate dean at Thomas Goode Jones School of Law and executive director of the Blackstone & Burke Center for Law & Liberty. Visit his website at AllenMendenhall.com.

Complement with Allen Mendenhall's breakdown of what "rule of law" really means, Gerard V. Bradley's short guide to the study of law, and Jessica Hooten Wilson on what Flannery O'Connor's short stories reveal about American politics today.

INTERCOLLEGIATE REVIEW

IR Home →

About the IR →

Student Voices →

Current Print Issue →

SUBSCRIBE TO THE IR WEEKLY

VIEW UPCOMING EVENTS

Having issues with this page? Submit feedback.

Intercollegiate Studies Institute
3901 Centerville Road, Wilmington, DE 19807 • 800-526-7022
ISI is a 501(c)(3) organization under the Internal Revenue Code.

GET NEWS & UPDATES

First Name

Last Name

Email

SIGN UP

ARTICLE SEARCH