



Perspectives from FSF Scholars
September 19, 2022
Vol. 17, No. 47

On Constitution Day, Celebrate the Separation of Powers

by

Randolph J. May *

[Washington Examiner](#)
September 17, 2022

Each September 17, Americans celebrate Constitution Day, commemorating the date in 1787 that 39 Founders signed the newly drafted Constitution in Philadelphia. On June 21, 1788, the Constitution became the official governing framework of the United States when New Hampshire became the ninth of the 13 states to ratify it.

The Bill of Rights, comprised of the first 10 amendments to the Constitution, was added to the Constitution later after it was ratified by the required three-fourths of the states in December 1791. It is rightly celebrated for its protections of certain fundamental rights, such as freedom of speech and religion, the right to be free from unreasonable searches and seizures, the right to due process, the right to a speedy jury trial, and so forth.

Without diminishing the significance of the Bill of Rights, it's worth remembering on Constitution Day that the *structure* of the Constitution of 1787 is just as important, if not more so, in safeguarding our liberty. Given the innate "ambition" of men, the Framers understood that individuals and interests of all kinds, inevitably, would seek to aggrandize their power. Thus, the

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

Framers conceived a constitutional design in which "ambition" would counter "ambition," a plan "of supplying by opposite and rival interests, the defect of better motives...."

The core of the Framers' constitutional design – the most important *structural safeguard* embodied in the Constitution – is the separation of powers. Here's what James Madison famously said in [Federalist No. 47](#): "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." And in [Federalist No. 51](#), Madison warned that the "separate and distinct exercise of the different powers of government...is essential to the preservation of liberty."

Fortunately, in its recently completed term, the Supreme Court showed a keen appreciation for respecting the Constitution's separation of powers. This is especially so when it comes to constraining what, all too frequently, is the seemingly unbounded power of the bureaucracy. Often called the "administrative state," these alphabet agencies like the FCC, SEC, FDA, CFTC, OSHA, DHS, and dozens of others, exercise what is, in effect, a lawmaking power by virtue of the authority delegated to them by Congress to adopt regulations that bind citizens and businesses alike.

The problem is that the executive agency officials, not surprisingly, are often tempted to promulgate diktats that exceed the authority Congress actually delegated to them. For example, in [National Federation of Independent Business v. Occupational Health and Safety Administration](#), the court determined that the vaccine mandate imposed on most of the nation's workforce exceeded OSHA's statutory authority. Likewise, in [Alabama Association of Realtors v. Department of Health and Human Services](#), the court let the Biden administration's moratorium on the eviction of tenants expire because the CDC exceeded its authority in maintaining it.

But with respect to the role of executive branch agencies in our constitutional system of separated powers, the most important Supreme Court case decided this past term, and perhaps in many years, is [West Virginia v. EPA](#). In this case the court held that Congress did not grant the EPA authority in the Clean Air Act to establish emissions caps based on what the agency itself called a far-reaching transformative "generation-shifting" approach to moving electricity production from coal to lower-emitting renewable sources.

In invalidating the EPA's rule, the majority relied on what is now known as the "major questions doctrine" which holds there are certain "extraordinary cases," typically involving major issues of "economic or political significance," that require a "clear congressional authorization" before the agency may exercise the rulemaking powers it claims. According to the court, the major questions doctrine addresses a recurring problem – "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." In *West Virginia*, the court found no clear congressional authorization for the EPA to adopt what it called a regulatory regime of "such magnitude and consequence."

It is noteworthy that, as a foundational backdrop to reliance on the major questions doctrine, Chief Justice Roberts' majority opinion referred to the separation of powers principles. And at the beginning of his concurring opinion, Justice Neil Gorsuch also declared that the major

questions doctrine "operates to protect foundational constitutional guarantees." Like other judicial doctrines requiring clear statements from Congress, Gorsuch explained how the major questions doctrine especially works "to protect the Constitution's separation of powers."

Of course, protecting the Constitution's separation of powers is not important as an abstract theoretical matter. Gorsuch rightly emphasized that the Framers knew "the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty." That's why, under our Constitution, with respect to major policy questions, the people's elected representatives in Congress, who are accountable to the people, are the decisionmakers, not the unelected bureaucrats.

It's never a bad time to study the Constitution to gain further appreciation of our system of government. And, on this Constitution Day, you could do worse than to study what the court had to say about the importance of separation of powers in *West Virginia v. EPA*.

* Randolph J. May is President of the Free State Foundation, an independent think tank in Rockville, Maryland. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it. *On Constitution Day, Celebrate Separation of Powers* was published in the *Washington Examiner* on September 17, 2022.