

A “Major” Win for Limited Government

The Supreme Court takes Cato’s suggestion on separation of powers

Amid a flurry of high-profile decisions at the end of June, the Supreme Court issued a 6–3 ruling that dramatically strengthened the constitutional doctrine of separation of powers. In *West Virginia v. Environmental Protection Agency*, the majority opinion by Chief Justice John Roberts codified a new framework for judging when regulatory agencies have gone too far by, in effect, writing laws that were never passed by Congress.

The Constitution provides, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” In practice, the modern administrative state has heavily strained and abused this principle, using executive action based on strained and implausible readings of the statutes passed by Congress.

One such case arose with the EPA’s attempt under the Obama administration to do, as the president himself plainly put it, what Congress had refused to do: enact a comprehensive cap-and-trade scheme for carbon emissions. Even though such a bill had just failed in Congress, the EPA claimed it could do the same thing anyway, relying on a very vague and previously obscure statutory provision relating to air pollutants generally.

The Court not only rejected this power grab but in so doing took up the opportunity to clarify the so-called major questions doctrine more generally, as Cato had urged.

As research fellow Will Yeatman points out, this position was unique to Cato’s amicus briefs in the case, filed jointly with the Mountain States Legal Foundation. Cato’s briefs “were the only ones to ask the Court to flesh out the doctrine to resolve confusion in the lower courts. To that end, we had pitched a framework for identifying major questions. And the majority opinion tracks our framework.”

In previous rulings, the Court had only hinted at the possibility of such a doctrine, striking down some agency actions but never clearly articulating the standard it was applying. This left lower courts with little guidance to follow, and so they often deferred to the government even in cases that strained credulity.

Roberts articulated general principles for deciding when the

administration is unconstitutionally usurping congressional law-making power. The regulation in question must first be economically or otherwise significant, having a large impact. The challenged rule must be based on a broad interpretation of a very vague statutory provision that does not amount to clear direction or authorization from Congress. In addition, several other red flags can weigh against the agency, such as whether the action is far outside the normal course of business, whether Congress considered and rejected doing the same thing, or whether the overall nature of the law in question conflicts with the agency’s claimed interpretation.

Ensuring that laws are made by the people’s elected representatives isn’t just a procedural point. It can have substantive policy implications, which is why the Framers of the Constitution so jealously guarded congressional prerogatives. That Congress is practically limited in its capacity to pass major legislation is a feature, not a bug. In addition to democratic accountability to the voters, congressional enactments bolster the rule of law and regulatory stability.

“The practical problem with the executive branch interpreting vague old laws to make ‘major’ policy is that there’s no permanency,” as Yeatman points out on the *Cato at Liberty* blog. “What any one presidential administration can do, the next can undo.” That is what happened in this case, as climate policy ping-ponged from the Obama administration to the Trump administration and back to the Biden administration.

Above and beyond the direct costs of a new regulation, this kind of uncertainty comes with immense costs as long-term planning is frustrated, especially in an industry such as energy, in which major capital investments and infrastructure projects are planned for decades of use.

By taking up the opportunity pointed out in Cato’s briefs, the Supreme Court delivered a major victory for the rule of law, separation of powers, democratic accountability, and economic prosperity. However the United States might address the issues of carbon change and climate emissions, that decision must be made by Congress, not the president alone. ■



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