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The Legality of DACA After West Virginia v. EPA

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Last month, DACA turned ten years. Despite its vintage, the Supreme Court has never passed on the legality of the policy. Indeed, *DHS v. Regents* ducked the issue altogether, finding that the Trump Administration failed to justify the DACA rescission. (That precedent seemed to have expired with *Biden v. Texas*.) In *Regents*, I filed an amicus brief on behalf of the Cato Institute. We argued that DACA would trigger the major question doctrine.

As I read through *West Virginia v. EPA*, my mind kept wandering to DACA. Much of the Chief's analysis concerning the Clean Air Act would apply to federal immigration law.

DACA involves what I called "presidential discovery" of a transformative power in general provisions of the INA--a transformation that Congress repeatedly declined to enact by statute. The Chief Justice laid out some guardrails in *West Virginia*:

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to **substantially restructure** the American energy market, EPA "claim[ed] to **discover** in a long-extant statute an unheralded power" representing a "**transformative expansion** in [its] regulatory authority." *Utility Air*. It **located that newfound power in the vague language** of an "ancillary provision[]" of the Act, *Whitman*, one that was designed to function as a **gap filler and had rarely been used in the preceding decades**. And the Agency's **discovery** allowed it to adopt a regulatory program that Congress had **conspicuously and repeatedly** declined to enact itself. *Brown & Williamson*; *Gonzales*; *Alabama Assn*. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*.

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Finally, we cannot ignore that the **regulatory writ EPA newly uncovered conveniently enabled it to enact a program that**, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. *Brown & Williamson*; see also *Alabama Assn.*; *Bunte Brothers* (lack of authority not previously exercised "reinforced by [agency's] unsuccessful attempt … to secure from Congress an express grant of [the challenged] authority"). At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. Congress, however, has **consistently rejected proposals** to amend the Clean Air Act to create such a program. It has also declined to enact similar measures, such as a carbon tax. "The importance of the issue,"

along with the fact that the same basic scheme EPA adopted "has been the subject of an earnest and profound debate across the country, … makes the oblique form of the claimed delegation all the more suspect." *Gonzales*.
Virtually every clause in these paragraphs can be applied to DACA.

Admittedly, the "expertise" point cuts differently. The Court found that the EPA lacks expertise to create the generating shifting approach. By contrast, DHS would have the expertise with regard to DACA. Still, the Court does not require a lack of relevant expertise to trigger the major questions doctrine. Justice Gorsuch recognized this point in his concurrence:

The dissent not only agrees that a mismatch between an agency's expertise and its challenged action is relevant to the major questions doctrine analysis; the dissent suggests that such a mismatch is necessary to the doctrine's application. But this Court has never taken that view. See, *e.g.*, *Brown & Williamson*, (drug agency regulating tobacco); *King v. Burwell* (2015) (tax agency administering tax credits).
Eventually, the DACA litigation will hit the Fifth Circuit. *West Virginia v. EPA* will play an important role in that case.

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