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Justice Kavanaugh: There is Already a Nondelegation/"Major Question" Case on the Court's Docket

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This morning, Justice Kavanaugh issued a statement respecting the denial of cert in *Paul v. United States*. He praised Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine" from *Gundy*. Kavanaugh observed that the nondelegation doctrine "may warrant further consideration in future cases."

Kavanaugh carefully and concisely describes the relationship between the nondelegation doctrine and the major questions doctrine. He writes:

JUSTICE GORSUCH's opinion built on views expressed by then-Justice Rehnquist some 40 years ago in *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 685–686 (1980) (Rehnquist, J., concurring in judgment). In that case, Justice Rehnquist opined that major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch.

In the wake of Justice Rehnquist's opinion, the Court has not adopted a nondelegation principle for major questions.

In *Gridlock*, I explained that the major question doctrine is something of an offshoot of the nondelegation doctrine. The Court need not revisit *Schechter Poultry* altogether. Rather, the Court's post-New Deal jurisprudence simply does not apply to so-called major questions. Kavanaugh explains:

But the Court has applied a closely related statutory interpretation doctrine: In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide *e.g., Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302 (2014); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120 (2000); *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218 (1994);Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986).

The 5th Circuit decision that found unlawful DAPA (the closely related policy to DACA) relied on what I call the major question *trilogy*: *Brown & Williamson*, *UARG*, and *King v. Burwell*. (*MCI v. AT&T* is a worthy contender for a major question quartet.) *See* 809 F.3d at 181. The

Attorney General expressly relied on this section of the 5th Circuit's opinion. His judgment is best understood to rely on the nondelegation doctrine.

Kavanaugh continues:

The opinions of Justice Rehnquist and JUSTICE GORSUCH would not allow that second category—congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority. Under their approach, Congress could delegate to agencies the authority to decide less-major or fill-up-the-details decisions.

Kavanaugh concludes:

Like Justice Rehnquist's opinion 40 years ago, JUSTICE GORSUCH's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.

I agree with my co-blogger Jonathan Adler: "If that's not an invitation for litigants to bring additional non-delegation challenges, I do not know what is."

But there's no need to wait. The DACA cases squarely present the question of whether Congress delegated the authority to resolve such a major policy concerning immigration.

The Cato Institute's amicus brief (which I co-authored) carefully explains the relationship between DACA, the INA, the nondelegation doctrine, and the major question doctrine. And we framed the question presented in the same terms that Justice Kavanaugh's statement explains, with citations to the major question *trilogy*. Here is the key excerpt (pp. 18-19):

First, consider the regulation that authorizes the secretary to grant DACA recipients with work authorization, with which we can presume the attorney general was familiar.6 8 C.F.R. 274a.12(c)(14) provides a crystalline illustration of the elephant-in-mousehole framework. In 1987, the Immigration and Naturalization Service denied a petition for rulemaking to re-strict the issuance of work authorization to certain aliens. See Dep't of Justice, Immig. & Naturalization, Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092 (Dec. 4, 1987). **The government justified the denial, in part, because the number of such work authorizations would be "quite small"—so small, that the number was "not worth recording statistically." Id. at 46,092-93.** Moreover, such authorizations would "normally [be] of very limited duration," and would be very rare. Id. at 46,092.

DACA operates in a very different fashion. The policy could provide roughly 1.5 million aliens with work authorization, and those authorizations could be renewed for years to come.7 **This elephantine-sized grant of work authorizations—limited in neither size and "with no established end-date"—cannot conceivably be jammed into a not-statistically-significant mousehole.** In every sense, this provision of benefits relies on a reading of federal immigration law that amounts to "an unconstitutional exercise of authority by the Executive Branch"—that is, the exercise of legislative powers. The attorney general's conclusion is consistent with the Court's admonition in Brown & Williamson: "Congress could not have intended to delegate a deci-sion of such economic and political significance"—the ability to provide work authorization to 1.5 million aliens—"in so cryptic a fashion."8

I maintain that this argument is the only viable path by which the Court can find that DACA is in fact illegal, and uphold the Attorney General's legal determination.

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