AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Presidential Power to Execute the Law

Department of Homeland Security v. Regents of the University of California, \_\_ U.S. \_\_ (2020)

*The Development, Relief, and Education for Alien Minors (DREAM) Act was unsuccessfully introduced in Congress several times since 2001, and in 2010 President Barack Obama endorsed the proposal as a key component of comprehensive immigration reform. At its core, the DREAM Act would grant amnesty to illegal aliens who arrived in the United States as children and are either in school or have graduated from high school and would authorize states to provide in-state tuition for public colleges and would extend eligibility to federally funded scholarships to illegal aliens. When Congress failed to pass the bill, President Obama announced in 2012 that the Department of Homeland Security would no longer take deportation action against individuals who met the criteria that would have been adopted in the DREAM Act (a program known as the Deferred Action for Childhood Arrivals, or DACA). In November 2014, after a televised address on the subject, the president further amended that policy with a guidance statement to prosecutors indicating that they should exercise prosecutorial discretion so as not to “defer action” on pursuing deportation of many of the adults who would have been covered by the DREAM Act. Notably, the statement indicated that “the Department’s limited enforcement resources” should “be focused on those who represent threats to national security, public safety, and border security,” not “children and long-standing members of American society.” The 2014 program was known as Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA. By the end of 2014, nearly three-quarter of a million individuals had applied for deferred action from the government, of which roughly 95 percent were accepted (primarily rejecting those who used the wrong form).*

*In 2017, the Trump administration announced that it would gradually end DACA. Attorney General Jefferson Sessions sent a letter to Acting Secretary of Homeland Security Elaine Duke advising an “orderly and efficient wind-down” of DACA as an unlawful program. Duke in turn issued a memorandum to that effect. Several months later, in response to litigation, Department of Homeland Security Secretary Kirstjen Nielsen issued a new memorandum providing a more elaborate rationale for ending DACA, including some policy reasons for ending the program.*

*The administration was sued in federal district court seeking an injunction preventing the administration from terminating the program on the grounds that the administration had not followed the Administrative Procedures Act (APA) in unspooling the program. The district court found that the plaintiffs were likely to succeed on the merits and granted a preliminary injunction, though it emphasized that the administration did have the authority to eventually terminate the program. The court held that the administration’s belief that DACA was itself unconstitutional was legally erroneous, and thus an administrative decision based solely on that legal belief was arbitrary and capricious. A federal circuit court affirmed that ruling. In a 5-4 decision, the U.S. Supreme Court affirmed the lower courts, holding that the administration had violated the Administrative Procedures Act in how it had attempted to repeal the DACA program.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

. . . .

 The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so.

. . . .

The APA establishes a “basic presumption of judicial review [for] one ‘suffering legal wrong because of agency action.’”

That presumption can be rebutted by a showing that the relevant statute “preclude[s]” review, §701(a)(1), or that the “agency action is committed to agency discretion by law,” §701(a)(2). The latter exception is at issue here.

. . . . This limited category of unreviewable actions includes an agency’s decision not to institute enforcement proceedings, and it is on that exception that the Government primarily relies. *Heckler v. Chaney* (1985).

. . . .

The Government contends that a general non-enforcement policy is equivalent to the individual non-enforcement decision at issue in Chaney. In each case, the Government argues, the agency must balance factors peculiarly within its expertise, and does so in a manner akin to a criminal prosecutor. Building on that premise, the Government argues that the rescission of a non-enforcement policy is no different—for purposes of reviewability—from the adoption of that policy. While the rescission may lead to increased enforcement, it does not, by itself, constitute a particular enforcement action. Applying this logic to the facts here, the Government submits that DACA is a non-enforcement policy and that its rescission is therefore unreviewable.

But we need not test this chain of reasoning because DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely “refus[e] to institute proceedings” against a particular entity or even a particular class. Instead, it directed USCIS to “establish a clear and efficient process” for identifying individuals who met the enumerated criteria. Based on this directive, USCIS solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive the two-year forbearance. These proceedings are effectively “adjudicat[ions].” And the result of these adjudications—DHS’s decision to “grant deferred action,”—is an “affirmative act of approval,” the very opposite of a “refus[al] to act.” In short, the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief. The creation of that program—and its rescission—is an “action [that] provides a focus for judicial review.”

The benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy. As described above, by virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. . . .

. . . .

It is a “foundational principle of administrative law” that judicial review of agency action is limited to “the grounds that the agency invoked when it took the action.” *Michigan v. EPA* (2015). If those grounds are inadequate, a court may remand for the agency to do one of two things: First, the agency can offer “a fuller explanation of the agency’s reasoning at the time of the agency action.” . . . Alternatively, the agency can “deal with the problem afresh” by taking new agency action. . . .

. . . .

Because Secretary Nielsen chose to elaborate on the reasons for the initial rescission rather than take new administrative action, she was limited to the agency’s original reasons, and her explanation “must be viewed critically” to ensure that the rescission is not upheld on the basis of impermissible “post hoc rationalization.” But despite purporting to explain the Duke Memorandum, Secretary Nielsen’s reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. By contrast, Secretary Nielsen’s new memorandum offered three “separate and independently sufficient reasons” for the rescission, only the first of which is the conclusion that DACA is illegal.

. . . .

. . . . Requiring a new decision before considering new reasons promotes “agency accountability,” by ensuring that parties and the public can respond fully and in a timely manner to an agency’s exercise of authority. Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply “convenient litigating position[s].” Permitting agencies to invoke belated justifications, on the other hand, can upset “the orderly functioning of the process of review,” forcing both litigants and courts to chase a moving target. Each of these values would be markedly undermined were we to allow DHS to rely on reasons offered nine months after Duke announced the rescission and after three different courts had identified flaws in the original explanation.

. . . .

Justice Holmes famously wrote that “[m]en must turn square corners when they deal with the Government.” *Rock Island, A. & L.R. Co. v. United States* (1920). But it is also true, particularly when so much is at stake, that “the Government should turn square corners in dealing with the people.” The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

. . . .

Whether DACA is illegal is, of course, a legal determination, and therefore a question for the Attorney General. But deciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA. Those policy choices are for DHS.

. . . .

In short, the Attorney General neither addressed the forbearance policy at the heart of DACA nor compelled DHS to abandon that policy. Thus, removing benefits eligibility while continuing forbearance remained squarely within the discretion of Acting Secretary Duke, who was responsible for “[e]stablishing national immigration enforcement policies and priorities.” But Duke’s memo offers no reason for terminating forbearance. She instead treated the Attorney General’s conclusion regarding the illegality of benefits as sufficient to rescind both benefits and forbearance, without explanation.

. . . .

. . . . *Motor Vehicles Manufacturers Association of the United States v.* State Farm Automobile Insurance Co. (1983)teaches that when an agency rescinds a prior policy its reasoned analysis must consider the “alternative[s]” that are “within the ambit of the existing [policy].” Here forbearance was not simply “within the ambit of the existing [policy],” it was the centerpiece of the policy: DACA, after all, stands for “Deferred Action for Childhood Arrivals.” But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. Duke “entirely failed to consider [that] important aspect of the problem.”

That omission alone renders Acting Secretary Duke’s decision arbitrary and capricious. But it is not the only defect. Duke also failed to address whether there was “legitimate reliance” on the DACA Memorandum. When an agency changes course, as DHS did here, it must “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” *Encino Motorcars, LLC v. Navarro* (2016). “It would be arbitrary and capricious to ignore such matters.” Yet that is what the Duke Memorandum did.

. . . .

. . . . Agencies are not compelled to explore “every alternative device and thought conceivable by the mind of man.” But, because DHS was “not writing on a blank slate,” it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.

. . . .

Lastly, we turn to respondents’ claim that the rescission violates the equal protection guarantee of the Fifth Amendment.

. . . .

To plead animus, a plaintiff must raise a plausible inference that an “invidious discriminatory purpose was a motivating factor” in the relevant decision. Possible evidence includes disparate impact on a particular group, “[d]epartures from the normal procedural sequence,” and “contemporary statements by members of the decisionmaking body.” . . .

None of these points, either singly or in concert, establishes a plausible equal protection claim. First, because Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. . . .

Second, there is nothing irregular about the history leading up to the September 2017 rescission. . . .

Finally, the cited statements are unilluminating. The relevant actors were most directly Acting Secretary Duke and the Attorney General. . . . Instead, respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But, even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as “contemporary statements” probative of the decision at issue. . . .

We do not decide whether DACA or its rescission are sound policies. “The wisdom” of those decisions “is none of our concern.” We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner. The appropriate recourse is therefore to remand to DHS so that it may consider the problem anew.

*Affirmed*.

JUSTICE SOTOMAYOR, concurring in part.

The majority rightly holds that the Department of Homeland Security (DHS) violated the Administrative Procedure Act in rescinding the Deferred Action for Childhood Arrivals (DACA) program. But the Court forecloses any challenge to the rescission under the Equal Protection Clause. I believe that determination is unwarranted on the existing record and premature at this stage of the litigation. I would instead permit respondents to develop their equal protection claims on remand.

. . . .

JUSTICE KAVANAUGH, dissenting in part.

. . . .

The question before the Court is whether the Executive Branch acted lawfully in ordering rescission of the ongoing DACA program. To begin with, all nine Members of the Court accept, as do the DACA plaintiffs themselves, that the Executive Branch possesses the legal authority to rescind DACA and to resume pre-DACA enforcement of the immigration laws enacted by Congress. Having previously adopted a policy of prosecutorial discretion and nonenforcement with respect to a particular class of offenses or individuals, the Executive Branch has the legal authority to rescind such a policy and resume enforcing the law enacted by Congress. The Executive Branch’s exercise of that rescission authority is subject to constitutional constraints and may also be subject to statutory constraints. The narrow legal dispute here concerns a statutory constraint—namely, whether the Executive Branch’s action to rescind DACA satisfied the general arbitrary-and-capricious standard of the Administrative Procedure Act, or APA.

The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. As the Court has long stated, judicial review under that standard is deferential to the agency. The Court may not substitute its policy judgment for that of the agency. The Court simply ensures that the agency has acted within a broad zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision. *Motor Vehicles Manufacturers Association of the United States v.* State Farm Automobile Insurance Co. (1983)

. . . .

The Nielsen Memorandum was issued nine months after the Duke Memorandum. Under the Administrative Procedure Act, the Nielsen Memorandum is itself a “rule” setting forth “an agency statement of general . . . applicability and future effect designed to implement . . . policy.” Because it is a rule, the Nielsen Memorandum constitutes “agency action.” As the Secretary of Homeland Security, Secretary Nielsen had the authority to decide whether to stick with Secretary Duke’s decision to rescind DACA, or to make a different decision. Like Secretary Duke, Secretary Nielsen chose to rescind DACA, and she provided additional explanation. Her memorandum was akin to common forms of agency action that follow earlier agency action on the same subject—for example, a supplemental or new agency statement of policy, or an agency order with respect to a motion for rehearing or reconsideration. Courts often consider an agency’s additional explanations of policy or additional explanations made, for example, on agency rehearing or reconsideration, or on remand from a court, even if the agency’s bottom-line decision itself does not change.

Yet the Court today jettisons the Nielsen Memorandum by classifying it as a post hoc justification for rescinding DACA. Under our precedents, however, the post hoc justification doctrine merely requires that courts assess agency action based on the official explanations of the agency decisionmakers, and not based on after-the-fact explanations advanced by agency lawyers during litigation (or by judges). . . .

Indeed, the ordinary judicial remedy for an agency’s insufficient explanation is to remand for further explanation by the relevant agency personnel. It would make little sense for a court to exclude official explanations by agency personnel such as a Cabinet Secretary simply because the explanations are purportedly post hoc, and then to turn around and remand for further explanation by those same agency personnel. Yet that is the upshot of the Court’s application of the post hoc justification doctrine today. The Court’s refusal to look at the Nielsen Memorandum seems particularly mistaken, moreover, because the Nielsen Memorandum shows that the Department, back in 2018, considered the policy issues that the Court today says the Department did not consider.

. . . .

Because the Court excludes the Nielsen Memorandum, the Court sends the case back to the Department of Homeland Security for further explanation. Although I disagree with the Court’s decision to remand, the only practical consequence of the Court’s decision to remand appears to be some delay. The Court’s decision seems to allow the Department on remand to relabel and reiterate the substance of the Nielsen Memorandum, perhaps with some elaboration as suggested in the Court’s opinion.

The Court’s resolution of this narrow APA issue of course cannot eliminate the broader uncertainty over the status of the DACA recipients. That uncertainty is a result of Congress’s inability thus far to agree on legislation, which in turn has forced successive administrations to improvise, thereby triggering many rounds of relentless litigation with the prospect of more litigation to come. In contrast to those necessarily short-lived and stopgap administrative measures, the Article I legislative process could produce a sturdy and enduring solution to this issue, one way or the other, and thereby remove the uncertainty that has persisted for years for these young immigrants and the Nation’s immigration system. . . .

JUSTICE ALITO, dissenting in part.

Anyone interested in the role that the Federal Judiciary now plays in our constitutional system should consider what has happened in these cases. Early in the term of the current President, his administration took the controversial step of attempting to rescind the Deferred Action for Childhood Arrivals (DACA) program. Shortly thereafter, one of the nearly 700 federal district court judges blocked this rescission, and since then, this issue has been mired in litigation. In November 2018, the Solicitor General filed petitions for certiorari, and today, the Court still does not resolve the question of DACA’s rescission. Instead, it tells the Department of Homeland Security to go back and try again. What this means is that the Federal Judiciary, without holding that DACA cannot be rescinded, has prevented that from occurring during an entire Presidential term. Our constitutional system is not supposed to work that way.

. . . .

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, dissenting in part.

Between 2001 and 2011, Congress considered over two dozen bills that would have granted lawful status to millions of aliens who were illegally brought to this country as children. Each of those legislative efforts failed. In the wake of this impasse, the Department of Homeland Security (DHS) under President Barack Obama took matters into its own hands. Without any purported delegation of authority from Congress and without undertaking a rulemaking, DHS unilaterally created a program known as Deferred Action for Childhood Arrivals (DACA). The three-page DACA memorandum made it possible for approximately 1.7 million illegal aliens to qualify for temporary lawful presence and certain federal and state benefits. When President Donald Trump took office in 2017, his Acting Secretary of Homeland Security, acting through yet another memorandum, rescinded the DACA memorandum. To state it plainly, the Trump administration rescinded DACA the same way that the Obama administration created it: unilaterally, and through a mere memorandum.

Today the majority makes the mystifying determination that this rescission of DACA was unlawful. In reaching that conclusion, the majority acts as though it is engaging in the routine application of standard principles of administrative law. On the contrary, this is anything but a standard administrative law case.

DHS created DACA during the Obama administration without any statutory authorization and without going through the requisite rulemaking process. As a result, the program was unlawful from its inception. The majority does not even attempt to explain why a court has the authority to scrutinize an agency’s policy reasons for rescinding an unlawful program under the arbitrary and capricious microscope. The decision to countermand an unlawful agency action is clearly reasonable. So long as the agency’s determination of illegality is sound, our review should be at an end.

Today’s decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision. The Court could have made clear that the solution respondents seek must come from the Legislative Branch. Instead, the majority has decided to prolong DHS’ initial overreach by providing a stopgap measure of its own. In doing so, it has given the green light for future political battles to be fought in this Court rather than where they rightfully belong—the political branches. Such timidity forsakes the Court’s duty to apply the law according to neutral principles, and the ripple effects of the majority’s error will be felt throughout our system of self-government.

Perhaps even more unfortunately, the majority’s holding creates perverse incentives, particularly for outgoing administrations. Under the auspices of today’s decision, administrations can bind their successors by unlawfully adopting significant legal changes through Executive Branch agency memoranda. Even if the agency lacked authority to effectuate the changes, the changes cannot be undone by the same agency in a successor administration unless the successor provides sufficient policy justifications to the satisfaction of this Court. In other words, the majority erroneously holds that the agency is not only permitted, but required, to continue administering unlawful programs that it inherited from a previous administration. . . .

. . . .

At the outset, Congress clearly knows how to provide for classwide deferred action when it wishes to do so. On multiple occasions, Congress has used express language to make certain classes of individuals eligible for deferred action. . . .

Other provisions pertaining to relief from removal further demonstrate that DHS lacked the delegated authority to create DACA. As with lawful presence, Congress has provided a plethora of methods by which aliens may seek relief from removal. For instance, both permanent and temporary residents can seek cancellation of removal if they meet certain residency requirements and have not committed certain crimes. . . .

. . . Congress has provided for relief from removal in specific and complex ways. This nuanced detail indicates that Congress has provided the full panoply of methods it thinks should be available for an alien to seek relief from removal, leaving no discretion to DHS to provide additional programmatic forms of relief.

. . . .

Read together, the detailed statutory provisions governing temporary and lawful permanent resident status, relief from removal, and classwide deferred-action programs lead ineluctably to the conclusion that DACA is “inconsisten[t] with the design and structure of the statute as a whole.” As the District Court stated in the DAPA litigation and as then-Attorney General Sessions agreed, “[i]nstead of merely refusing to enforce the INA’s removal laws against an individual, the DHS has enacted a wide-reaching program that awards legal presence . . . to individuals Congress has deemed deportable or removable.” The immigration statutes contain a level of granular specificity that is exceedingly rare in the modern administrative state. It defies all logic and common sense to conclude that a statutory scheme detailed enough to provide conditional lawful presence to groups as narrowly defined as “alien entrepreneurs,” is simultaneously capacious enough for DHS to grant lawful presence to almost two million illegal aliens with the stroke of a Cabinet secretary’s pen.

. . . .

. . . . On the majority’s understanding of APA review, DHS was required to provide additional policy justifications in order to rescind an action that it had no authority to take. This rule “has no basis in our jurisprudence, and support for [it] is conspicuously absent from the Court’s opinion.”

The lack of support for the majority’s position is hardly surprising in light of our Constitution’s separation of powers. No court can compel Executive Branch officials to exceed their congressionally delegated powers by continuing a program that was void ab initio. . . . In reviewing agency action, our role is to ensure that Executive Branch officials do not transgress the proper bounds of their authority, not to perpetuate a decision to unlawfully wield power in direct contravention of the enabling statute’s clear limits.

. . . . In implementing DACA, DHS under the Obama administration arrogated to itself power it was not given by Congress. Thus, every action taken by DHS under DACA is the unlawful exercise of power. Now, under the Trump administration, DHS has provided the most compelling reason to rescind DACA: The program was unlawful and would force DHS to continue acting unlawfully if it carried the program forward.

The majority’s demanding review of DHS’ decisionmaking process is especially perverse given that the 2012 memorandum flouted the APA’s procedural requirements—the very requirements designed to prevent arbitrary decisionmaking. Even if DHS were authorized to create DACA, it could not do so without undertaking an administrative rulemaking. The fact that DHS did not engage in this process likely provides an independent basis for rescinding DACA. But at the very least, this procedural defect compounds the absurdity of the majority’s position in these cases.

. . . .

. . . . The majority insists that DHS was obligated to discuss its choices regarding benefits and forbearance in great detail, even though no such detailed discussion accompanied DACA’s issuance. And, the majority also requires DHS to discuss reliance interests at length, even though deferred action traditionally does not take reliance interests into account and DHS was not forced to explain its treatment of reliance interests in the first instance by going through notice and comment. The majority’s demand for such an explanation here simply makes little sense.

. . . .

. . . . Even assuming the majority correctly characterizes the Fifth Circuit’s opinion [finding DAPA unlawful], it cites no authority for the proposition that arbitrary and capricious review requires an agency to dissect an unlawful program piece by piece, scrutinizing each separate element to determine whether it would independently violate the law, rather than just to rescind the entire program.

. . . .

. . . . Neither State Farm nor any other decision cited by the majority addresses what an agency must do when it has inherited an unlawful program. It is perhaps for this reason that, rather than responding with authority of its own, the majority simply opts to excise the “unlawful policy” aspect from its discussion.

. . . . No amount of reliance could ever justify continuing a program that allows DHS to wield power that neither Congress nor the Constitution gave it. Any such decision would be “not in accordance with law” or “in excess of statutory . . . authority.” Accordingly, DHS would simply be engaging in yet another exercise of unlawful power if it used reliance interests to justify continuing the initially unlawful program, and a court would be obligated to set aside that action.

Even if reliance interests were sometimes relevant when rescinding an ultra vires action, the rescission still would not be arbitrary and capricious here. Rather, as the majority does not dispute, the rescission is consistent with how deferred action has always worked. As a general matter, deferred action creates no rights—it exists at the Government’s discretion and can be revoked at any time. . . .

. . . . In fact, DHS repeatedly argued in court that the 2014 memorandum was a valid exercise of prosecutorial discretion in part because deferred action created no rights on which recipients could rely. . . . If that treatment of reliance interests was incorrect, it provides yet one more example of a deficiency in DACA’s issuance, not its rescission.

President Trump’s Acting Secretary of Homeland Security inherited a program created by President Obama’s Secretary that was implemented without statutory authority and without following the APA’s required procedures. Then-Attorney General Sessions correctly concluded that this ultra vires program should be rescinded. These cases could—and should—have ended with a determination that his legal conclusion was correct.

. . . .