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The court begins to strike back at the administrative state

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June 21 was "government structure day" at the Supreme Court. In four separate cases, interpreting four different administrative-law or separation-of-powers doctrines, the justices produced opinions that will keep law professors updating syllabi for their constitutional and administrative law classes all summer. I initially focused on *Lucia*, given both my previous writings about the case and my general interest in the appointment and removal powers, but then I discovered the common theme to the quartet: Structure matters.

Here's how the Supreme Court rolled that out:

First, in Wisconsin Central v. United States, Justice Neil Gorsuch's majority opinion made a clear point about *Chevron* deference in the context of an otherwise low-key statutory-interpretation case. Under the Railroad Retirement Tax Act of 1937 — which I'd never heard of — private railroads and their employees pay tax on "compensation," which is defined as "any form of money remuneration." But what about stock options? To me that's an easy question: Stock options aren't cash money.

Gorsuch unpacks that intuition with the usual interpretive tools, but then responds to the government's (and implicitly the dissent's) argument for deference to a more recent IRS interpretation that runs the other way. "[W]e think it's clear enough that the term 'money' excludes 'stock,' leaving no ambiguity for the agency to fill." This is a very Scalia opinion: Regardless of what one thinks of *Chevron* deference — and we know that Gorsuch and several of his colleagues would like to cut it back — it doesn't even apply when there's no "gap" from the agency to fill in the first place. But regardless, the point is that if Congress doesn't like this result, Congress should change the law.

Second, in what for most people in this symposium (but not the wider world) was the main attraction, the Supreme Court issued a separation-of-powers decision that may have more long-

term doctrinal impact than any other case decided that day. In Lucia v. Securities and Exchange Commission, the Supreme Court ruled that SEC administrative law judges are "officers of the United States" and thus under the appointments clause must be tapped by the president or "department head," in this case the SEC itself (not by commission staff).

It's gratifying that the Supreme Court takes constitutional structure seriously, at least with respect to the president's appointment of inferior officers. Justice Elena Kagan's majority opinion powerfully and concisely explains what was clear all along: ALJs are powerful officers with significant discretionary powers over big monetary and regulatory cases, rather than mere clerks. That power and discretion is what sets officers apart from mere employees, as we know from 1991's Freytag v. Commissioner. Accordingly, ALJs should indeed be part of the executive branch's chain of command instead of residing in the nebulous "fourth branch." This ruling will increase accountability for these executive officers even as they perform quasi-judicial tasks.

I only wish, as the government argued, that the Supreme Court had addressed the removal power, which is the flip-side to appointments. Only Justice Stephen Breyer's partial concurrence/partial dissent addressed that issue, whose resolution we'll have to await in some future case. Breyer was particularly concerned that combining *Lucia* with 2010's Free Enterprise Fund v. Public Company Accounting Oversight Board might require ALJs to be removable at will, throwing into doubt much of the administrative state's legitimacy. Well, even (and especially) if Breyer's fears about upending the free-floating bureaucratic blob are valid, to me that's a feature, not a bug. In any case, *Lucia* will go down as a case in which the court actually reads what the Constitution says and applies it, regardless of what that might mean for government efficiency.

Third, the Supreme Court decided an immigration case called Pereira v. Sessions, which is notable only because it comes as immigration heats up in our political discourse. But more important than the subject matter or technical statute at hand was Justice Anthony Kennedy's concurring opinion, which was both exceedingly short and exquisitely fraught. Kennedy derides the "cursory analysis" of lower courts who bowed to the Board of Immigration Appeals' statutory interpretation by declaring in as little as a single sentence that the statute was ambiguous and thus that they need not do their job and actually judge the cases.

"This analysis," Kennedy writes, "suggests an abdication of the Judiciary's proper role in interpreting federal statutes." *Chevron* now results in "reflexive deference" that is "troubling." And so he believes, following at least three colleagues, that "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how the courts have implemented that decision." That's a big deal — regardless of how long Kennedy himself stays on the court — but in light of Justice Samuel Alito's solo dissent (which rests firmly on *Chevron*, without questioning that doctrine's scope), it might take more than one change in personnel to really move the ball.

Fourth and finally, South Dakota v. Wayfair is the least statutory or administrative decision of the day (and also the only one with which I disagree), but it fits nicely into the "structure theme" by reminding us that the question of what Congress can regulate – and what states can do when it chooses not to — can't be waved away by either fair-weather federalists or novice nationalists. Moreover, overturning bad precedent in and of itself isn't bad — when old cases are really wrong and create unworkable legal regimes, they deserve to be overturned — but here the court says that 1992's Quill v. North Dakota is out of step with modern commerce clause precedents.

That's the wrong way to go: The court should be conforming its jurisprudence to the original meaning of constitutional clauses, not conforming the Constitution to the times. This doctrinal area, the "dormant" commerce clause — the idea that states can't interfere with Congress' implied nonregulation of interstate commerce — is the only one on which thus far I've found myself in disagreement with Gorsuch (and the only structural area on which I part ways with Justice Clarence Thomas). Still, *Wayfair* does enhance state power, which is always good way to push back on an overweening federal regulation.

At the literal end of the day, the justices had given us much food for thought about both statutory and constitutional interpretation in the context of separation of powers and administrative law. Their rulings on this "government structure day" will have significant consequences and will pop up in briefs arguing in a plethora of legal fields. At the same time, they left many questions for another day: from the removal of ALJs and other officers to the limits on states' extraterritorial taxation, and of course the scope of judicial-deference doctrines. These four cases may not be thought of together often — and could be overlooked in OT17 discussions in light of culture-war issues with bigger political salience. But they also could mark the beginning of the Supreme Court's strike against the administrative state.

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