OPINION

GUEST ESSAY

Looks Like the Supreme Court Will Continue to Overturn the 20th Century

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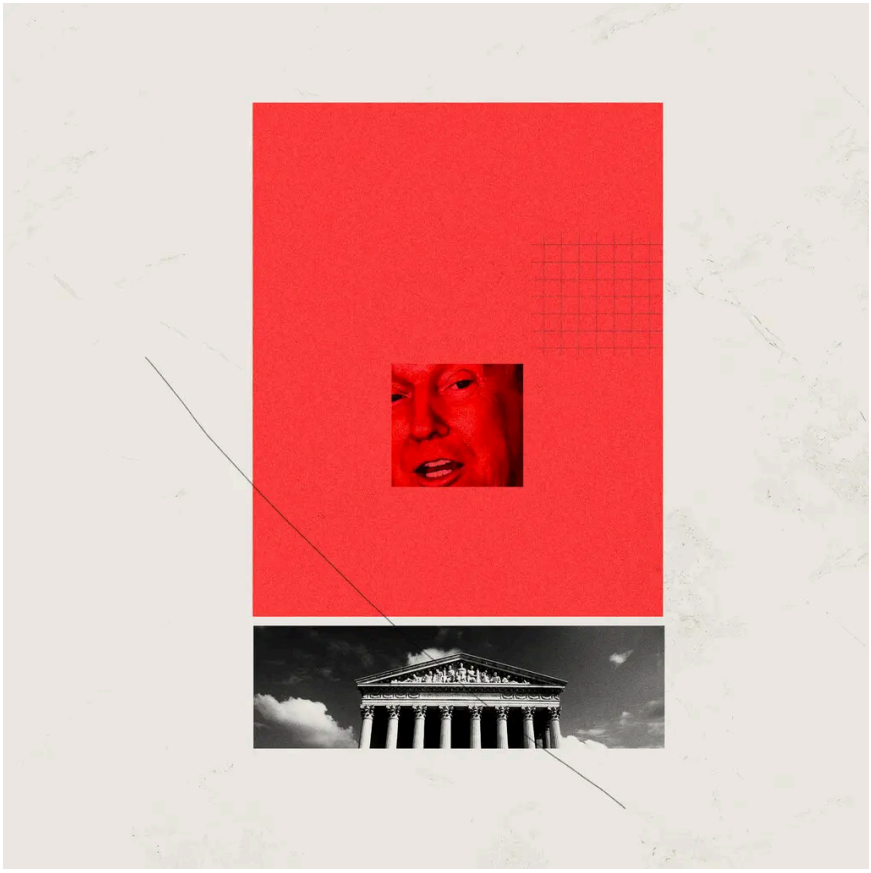

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By Kate Shaw, William Baude and Stephen I. Vladeck

Ms. Shaw is a contributing Opinion writer and law professor at the University of Pennsylvania. Mr. Baude is a professor at the University of Chicago Law School. Mr. Vladeck is a professor at Georgetown University Law Center.

On Monday, the Supreme Court heard oral arguments in Trump v. Slaughter, a case that will decide whether Congress can require cause before the president removes the heads of most independent agencies.

To assess the arguments and explore the vast implications, Kate Shaw, a contributing Opinion writer, hosted a written online conversation with Will Baude, a law professor at the University of Chicago, and Stephen Vladeck, a law professor at Georgetown and the author of "The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic."

Kate Shaw: Let's dive right in. Most observers of the Supreme Court have assumed that the court will bless the president's ability to fire heads of independent agencies at will, and that it will overturn Humphrey's Executor v. United States, the New Deal-era case that affirmed the constitutionality of independent agency heads with a degree of protection from presidential removal. Did anyone hear anything from the oral arguments that suggests a different outcome?

Will Baude: Nope. The question is not whether the court will overturn Humphrey's Executor, but how, and how broadly.

Stephen Vladeck: Indeed, there was just one question about the second issue the court asked the parties to brief and argue, which would matter only if the government loses on the president's removal power. The signal is that it won't matter because the government's not losing.

Shaw: That was my overall read as well. If we're all in agreement about the outcome, the real question is how broadly the court will rule. I actually thought the Democratic appointees, in particular Justice Elena Kagan, were successful enough in raising the alarm about destabilizing the operations of government that there's at least a chance that the majority will try to write this very narrowly.

In terms of the agency at the center of this week's case, the Federal Trade Commission, the justices all but told us they'll do here what they did in 2020 in Seila Law v. Consumer Financial Protection Bureau: sever the "for cause" provision for firing commission members but not blow up the F.T.C. entirely. But Justice Kagan raised an important practical question about this, noting that Congress has given a lot of power to agencies like the F.T.C., and it

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has done so with the understanding that the agencies would be headed by these bipartisan groups the president couldn't just fire at will.

As she pointed out, if you take away half of that bargain, you end up with huge unchecked power in the hands of the president. What did you make of that concern? Perhaps counterintuitively, would it be *more* restrained to blow up the agency entirely?

Baude: This is the old problem of "severability," which used to ask the justices to imagine what Congress would have wanted if it had known that the court was going to hold part of the statute unconstitutional. As as textualists have now realized, it's not clear you can coherently answer the question of what Congress would have wanted. All we know is it wanted to enact the statute it enacted.

Maybe, counterintuitively, the most restrained thing for the court to do would be to start taking the original separation of powers more seriously *across the board*. That means reckoning with the constitutional problems in the rise of the administrative state. If agencies didn't effectively write our laws and try our cases, maybe we wouldn't freak out so much about letting the president control them.

Vladeck: As my Georgetown colleague Josh Chafetz has pointed out, this has been a major problem in the court's separation-of-powers jurisprudence since 1983, when it invalidated legislative vetoes (and opened the door to a bevy of pre-1983 statutes delegating powers to the executive branch that Congress might never have intended to provide on these revised terms but that now essentially can't be repealed without veto-proof majorities in both chambers).

Among other things, it's a good critique of "formalism" in separation-of-powers analysis. The basic premise of formalism is that the Constitution creates bright lines among the three branches of government when it divides powers among them. But even if you are attracted to formalism in theory (and I'm not), even formal analysis tends to require far more functional and practical solutions when it comes time to *fix* things, such as what happens to agencies like the F.T.C. if or when the court invalidates parts of their statutory structure. The inescapability of functionalism in separation of powers cases seems like a pretty significant rejoinder to Justice Neil Gorsuch's (and Will's) plea during Monday's argument for a return to some idyllic, hyperformalist original understanding that never existed.

Shaw: Let's talk about the potential implications beyond the F.T.C. It was pretty clear to me that the justices — in particular Brett Kavanaugh and Samuel Alito — want to steer clear of saying anything that might implicate the Federal Reserve.

But I'm not sure they can avoid the potential impact of this decision on other entities — as Amit Agarwal, the lawyer for the plaintiff, Rebecca Slaughter, said at one point, "If petitioners get their way, everything is on the chopping block." Is that what you heard? And isn't that concerning?

Baude: With apologies to lay readers, I think we have to be legally specific for a minute about what the court will likely say. It sounds likely the court will say that principal officers who exercise significant executive power must be removable at will by the president, and it will leave the question about other kinds of power (the Federal Reserve, so-called legislative courts) and about inferior officers (the register of copyrights, civil servants) for another day. And that seems just fine to me.

Vladeck: I don't understand, and have never understood, how folks like Will can be so equivocal about the necessary implications of endorsing the unitary executive theory. It seems to me that, if the court is going to overrule a 90-year-old precedent on the ground that Congress can *never* interfere with the president's ability to fire someone who exercises even a little executive power, waving our hands and saying, "That doesn't answer the question of how it applies to different facts" is both inconsistent with the logic of the unitary executive theory, and oblivious to how the court has *already* established its understanding of the theory through rulings on emergency applications.

Shaw: So, Will, since Steve mentioned the unitary executive theory, I'm going to put you on the spot a little. You're an avowed originalist, and if I'm not mistaken, you haven't really taken a position on the strength of the originalist arguments for the unitary executive theory — either in general, or how the theory cashes out for a presidential power that encompasses the power to fire at will officials like Slaughter. What should an originalist do in this case?

Baude: If you asked me to time-travel back to 1789, I'm genuinely not sure which side of the unitary executive debate I would have taken. As Prof. Caleb Nelson recently wrote, there are good textual and structural arguments on both sides. So to me the real question is, how do originalists resolve ambiguities in the Constitution's meaning? And the fact that so much of our history — for the first 100 years of the Republic, and for the last couple of decades, too —

supports the unitary executive theory makes Humphrey's Executor look like the outlier to me.

As to Steve, the unitary executive theory has several strands — that Article II's grant of the executive power includes the power to remove officials; that the power to remove officers is usually implied by default in the power to appoint them; and that the president's obligation to "take care that the laws be faithfully executed" implies the powers necessary to do so. The court hasn't always teased those three points apart, because independent agencies transgress all three, but in the post-Humphrey's Executor world, the details matter more.

Putting both those points together, Slaughter looks like an easy case, and the harder cases are the ones yet to come.

Vladeck: As ever, Will is more nuanced than the justices whose efforts he's defending. But at the risk of being a bit impolite, ambiguity is and ought to be a stake in the heart for the unitary executive theory, entirely because it's premised on the idea that, to quote the Supreme Court's majority opinion in Seila Law, "the 'executive power' — all of it — is 'vested in a president.'" If it turns out that the historical answer has been "the executive power — well, at least some of it, anyway — is vested in the president," then that's more than just an inconvenience for defenders of this understanding, much like the fact that the original draft of the Judiciary Act of 1789 would have had the attorney general, the chief law enforcement officer in the country, appointed by the Supreme Court. (The final version used the passive voice to describe who would pick the attorney general.) The unitary executive theory makes sense only if it's absolute.

Shaw: I take Will's answer as a pretty qualified endorsement of what the historical record really shows here, and I got the same impression from D. John Sauer, the solicitor general, who made pretty sparing reference to history — perhaps an implicit acknowledgment that this history isn't necessarily all that helpful to his case.

Agarwal seemed more eager to engage with both founding-era and more recent historical practice, though he admitted that the record was somewhat ambiguous. I guess I wish the justices would be more candid about the indeterminacy of the historical record in a case like this one.

Baude: As a law professor, I wish *everybody* would be more candid and careful about what the materials show; some of the court's

critics are just as guilty of overclaiming in their claims that history refutes the unitary executive.

Shaw: But shouldn't the burden be on the party seeking to blow up settled practice? In this case, that's President Trump.

Baude: As I see it, and as the court sees it, Seila Law largely answered these questions five years ago, and so the burden is on those who want to revisit the conclusions the court made then.

Shaw: Seila Law left Humphrey's standing!

Baude: Only sort of.

Shaw: I'm sorry, the Seila Law court made up a distinction between single-member agencies, which it said were impermissible, and multi-member bodies like the F.T.C., which it said it wasn't touching.

Baude: Which is to say, Seila Law already narrowed Humphrey's Executor to an indefensible sliver, as everybody knows today.

Vladeck: It seems to me that what this entire exchange reflects is what I've long viewed as a flawed premise about constitutional interpretation — that it takes a theory to beat a theory. If, as Will rightly suggests, the history is complicated, maybe that's compelling evidence that the answers to many of these constitutional questions are (and ought to be) as well? Why are we (and, more important, the Republican-appointed justices) so allergic to the specter of constitutional complexity?

Shaw: To shift gears, can we talk about the connections between this case and Trump v. United States, the case granting former presidents broad immunity from criminal prosecution and carving out a swath of presidential conduct that courts are essentially barred from examining? The case came up several times in the argument. What do you think are the connections between the cases? When Justice Kavanaugh asked Sauer why no president since Humphrey's had tried to fire members of bodies like the F.T.C., it occurred to me that Trump v. United States so emboldened the president that it's largely responsible (at least as much as Seila Law).

Baude: I'm no fan of Trump v. United States, which is full of muddled reasoning with little basis in the Constitution. And it does, among its muddled reasoning, contain some of the strongest statements in favor of the unitary executive that we've seen outside of cases like Myers and Seila Law. But I still disagree with

the causal story here. The court is at least as eager to overturn Humphrey's Executor as the president is.

Vladeck: Two things can be true — that this court has been chomping at the bit to pare Humphrey's Executor back to a fare-thee-well, and that there is a lot of careless language and analysis in the chief justice's majority opinion in the presidential immunity case that only emboldens claims of indefeasible executive power in contexts in which we would previously have thought Congress could do *something*. Is it now unconstitutional to require the solicitor general to be a lawyer? Or to bar active-duty (or recently retired) service members from becoming secretary of defense?

That, to me, is the real story here: In the name of a very formalist reading of Article II (except for all of the exceptions the court doesn't want to have to acknowledge), the majority is continuing to kneecap Congress in ways that will be very hard to recover from, and that will enable only more aggressive efforts by this president and his successors to consolidate power in the executive branch.

Shaw: The court's conservative justices seem to think the president represents the height, if not the exclusive repository, of democratic responsiveness and legitimacy. Justice Ketanji Brown Jackson was very focused on this issue, as was Agarwal, who reminded the court repeatedly that Congress itself is democratically accountable, and that for decades, Congress and the president together have created agencies with a degree of independence. Why are the conservative justices so blinkered by democratic legitimacy's embodiment in the president? House members are elected every two years!

Baude: So in a way I agree with you both — the thing that most concerns me is the risk that the court won't take its own formalist principles as seriously when it comes to *restraining* executive power. The jury is still out on that, and the tariff case will be an important data point, but Trump v. United States was a very bad sign. I'd rather have a non-originalist court than a court that uses originalism to help the president win cases and then finds excuses not to use it against him.

Vladeck: It was interesting how current events, which seemed to play a more visible role during the oral argument in the tariffs case last month, made only brief appearances in the Slaughter argument (including Justice Kagan's not-so-subtle reference to the Department of Education). That may just be further evidence of Will's point that overruling Humphrey's Executor is a project on the right that preceded, and is broader than, the current

president's agenda — and it's just totally an unfortunate coincidence how those two things are so effectively reinforcing each other at this particular moment.

Shaw: One final question on a different topic. Last week the court stepped into the debate over mid-decade redistricting with a shadow-docket order allowing Texas to use a congressional map that a lower court had found was most likely an unconstitutional racial gerrymander. I guess I wasn't surprised by the bottom line, but I was struck by how thinly reasoned the order was.

On Justice Amy Coney Barrett's recent book tour, she defended the court's work on the shadow docket by underscoring that its rulings were temporary and highlighting their limited impact. But here the impact is quite significant — the court has overridden a 160-page District Court opinion in a few paragraphs and decreed that Texas may use a map the lower court found was most likely an unconstitutional racial gerrymander — something this court claims to take very seriously in other contexts. Steve, you and I have both been critical of this order. Will, you've often defended the court's recent shadow or emergency docket orders. What did you make of this one?

Baude: I thought Judge Jerry Smith's dissent from the District Court ruling was right. It is far more plausible to see Texas' gerrymander as a partisan power grab, which (for better or worse) is beyond the power of the federal courts to stop. That said, I'm not sure I agree with the court's reasons for overturning it, especially its conclusion that almost a year before the 2026 election is too late to issue a ruling under the so-called Purcell Principle, which disfavors court-mandated changes to voting procedures close to elections.

Vladeck: I'm hard-pressed to see how a dissent that refers to George and Alexander Soros more than a dozen times in a context in which neither was a party could ever be described as "right." But the larger issue is that the majority of the three-judge district court panel made a series of specific factual findings supporting the conclusion that Texas had acted at least in part based upon race. Will (and justices in the majority) may *disagree* with those findings, but the Supreme Court isn't supposed to upend them without concluding that they are clearly erroneous, especially on this kind of truncated, emergency-relief-based review. That didn't happen here.

Baude: I am inclined to think that both the lower court *and* the Supreme Court were wrong.

Vladeck: It seems to me equal parts striking and unfortunate that, in just six years, we've gone from the court's almost apologetic tone in Rucho v. Common Cause, in which a 5-4 majority held that federal courts couldn't entertain constitutional challenges to partisan gerrymandering even if such behavior is unconstitutional, to the mindset that comes through especially in Justice Alito's concurring opinion in the Texas case — that partisan gerrymandering is a legitimate government enterprise that courts should be in the business of affirmatively protecting. One can think Rucho is right (I don't), and still think severe partisan gerrymandering is an anti-democratic scourge that Congress can and should eliminate.

Baude: It's amazing how many of our problems today could be solved by a Congress that was willing and able to legislate in response to national problems.

Vladeck: Indeed. One might even include the Supreme Court's recent behavior in the list of such problems warranting statutory reforms.

Shaw: Sounds like something we can all get behind. I think that's a perfect place to leave it.

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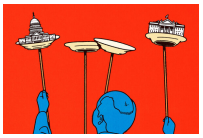

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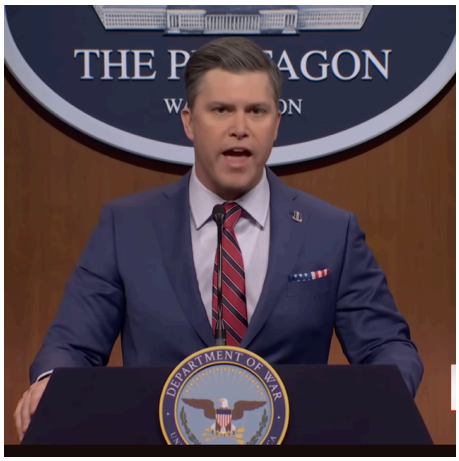

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