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LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

The Future of the “Major Questions Doctrine” and Executive Power After the Tariffs Case

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Learning Resources, Inc. v. Trump, which held that the International Emergency Economic Powers Act (IEEPA) does not authorize the President to impose tariffs in the way President Donald Trump did during the first year of his second term in office, was undoubtedly momentous. Perhaps the most enduringly significant aspect of the ruling was the back-and-forth among nearly all the Justices over the

legitimacy, foundation, and scope of the so-called “Major Questions Doctrine” (MQD). Justice Neil Gorsuch’s concurring opinion in particular admirably canvassed the basis for, and the broad applicability of, this canon of statutory construction that requires courts to avoid, absent clear congressional authorization, reading federal enactments to confer authority on the President to make policy determinations of major economic and political significance. Not all of his colleagues shared his vision in this regard. But for reasons we explore below, we—like Justice Gorsuch—hope that those on the Court who are not yet on board with his approach will give his ideas “another look.”

Probably the most important question concerning the MQD is where it comes from. The part of Chief Justice John Roberts’s opinion in *Learning Resources* that addressed the MQD, a section joined by Justice Gorsuch and Justice Amy Coney Barrett, premised the doctrine on “both separation of powers principles and a practical understanding of legislative intent.” This agnostic characterization of the origins of the MQD was consistent with the way the Court and various of its members had discussed the MQD in past rulings, such as *West Virginia v. EPA* and *Biden v. Nebraska*, and had the big-tent virtue of not alienating any Justice with a more focused justification.

But the bigger the tent, the more wind it can catch, so sometimes a streamlined and aerodynamic explanation is more likely to remain well-grounded. And this is where Justice Gorsuch’s 46-page

concurrency comes in. Much more so than any of the Court's earlier opinions on the MQD (including Gorsuch's own previous writings), Gorsuch's *Learning Resources* opinion carefully and thoroughly rooted the MQD in constitutional principles and, in particular, Article I's specification that "all legislative power herein granted shall be vested in a Congress" that must make laws only via bicameralism and presentment. True, past invocations of the MQD (and even Chief Justice Roberts' own mention of "separation of powers" in *Learning Resources*) had gestured at Article I, the non-delegation doctrine, and protection of congressional prerogatives conferred by the Constitution, but in *Learning Resources* Justice Gorsuch was the first Justice to give a full-throated account of why the MQD makes eminent constitutional sense (and is not just a tool to discern what Congress might likely have intended).

Justice Gorsuch's explanation proceeded in a one-two fashion. *First*, he observed that the MQD is "pro-Congress" insofar as it helps prevent the President from using vague language in a statute to circumvent the will of the enacting House and Senate and make law unto himself, circumventing Article I and Congress's central role in lawmaking. As Gorsuch put the point:

[H]ighly resourceful members of the executive branch have strong incentives to exploit any doubt in Congress's past work to assume new power for themselves. The major questions doctrine helps prevent that kind of exploitation. Our founders understood that men are not angels, and we

disregard that insight at our peril when we allow the few (or the one) to aggrandize their power based on loose or uncertain authority. . . . Even if unelected agency officials were uniquely immune to the desire for more power (an unserious assumption), they report to elected Presidents who can claim no such modesty.

Second, and crucially, delegations to the President are particularly dangerous because, owing to the President's veto power, they are hard to retrieve. As Gorsuch wrote:

When a private agent oversteps, a principal may fix that problem prospectively by withdrawing the agent's authority. Under our Constitution, the remedy is not so simple. Once this Court reads a doubtful statute as granting the executive branch a given power, that power may prove almost impossible for Congress to retrieve. Any President keen on his own authority (and, again, what President isn't?) will have a strong incentive to veto legislation aimed at returning the power to Congress. . . . [R]etrieving a lost power is no easy business in our constitutional order. And without doctrines like major questions, our system of separated powers and checks-and-balances threatens to give way to the continual and permanent accretion of power in the hands of one man. That is no recipe for a republic.

Gorsuch's opinion dwelt on this retrieval problem and invoked it

multiple times in response to his colleagues' reservations about the MQD. For Gorsuch, the fact that the President wears two hats—recipient of power and holder of a veto with regard to efforts to retrieve the power—is a fundamental reality that should make courts very wary of conferrals of broad authority that may stray into impermissible delegations of legislative power.

We find Gorsuch's 1-2 punch here compelling. Indeed, one of us, Vik (along with former Congressman Mickey Edwards), filed **an amicus brief** (based on Vik's academic writings published in 1996 when a Democrat was in the White House) in *Learning Resources* that laid out in detail the precise kind of argument Justice Gorsuch embraced (and was the only brief in *Learning Resources* to do so, or to mention words like “retrieve” or “retrieval problem” or the “one-way ratchet” of accretion of presidential power.) Vik's brief, like Gorsuch's opinion, unfolded as a two-punch sequence. *First*:

It is all too easy for a statutory conferral of policy-making power to the Executive to be exercised by subsequent presidential administrations in a manner inconsistent with the intent of the original actors—House, Senate, and signing President—who, pursuant to the Constitution's design, were required to join together to confer the power in the first place. Our Constitution contemplates that federal law and policy can be changed only by a process involving both chambers of the legislature and the President (or, in the absence of presidential assent, a supermajority of the

legislature.)

And *second*:

[While not all] delegations of power are . . . problematic *per se*, [history and doctrine show that they] are [most] constitutionally offensive when delegated power is hard to reclaim after it has been delegated. . . . Should Congress attempt to claw back a broad delegation of power to the President (or agencies over which he exercises complete dominion), the President enjoying that delegated power can simply veto the proposed repeal law, requiring a supermajority of both houses to overcome. . . . [A] majority of Congress can . . . give the President . . . power (because he will generally be glad to sign laws conferring it), but it requires an historically rare supermajority to retract any of that power, once given. . . . Amici's core contention is that the fundamental constitutional concerns undergirding the nondelegation [doctrine's worry about the retrieval problem] counsel against reading statutes to confer upon the Executive broad powers . . . , because once the Court deems power to have been so delegated, it will be nearly impossible for Congress to retrieve. . . . [W]hen—as here—the President claims that a statute has conferred on him broad powers that might cross the hard-to-define but important-to-respect line between executive and legislative authority. . . it is thus not only statutory prudence, but constitutional jurisprudence,

that demands a narrow construction . . . [in light of the fact that] [p]ower conferred to the President has historically been a one-way ratchet.

What did the other Justices say in response to this kind of reasoning? Chief Justice Roberts appeared to embrace it, albeit without prolonged explanation, when he adverted to the retrieval problem in observing that “the only way of restraining the [President’s exercise of [his asserted emergency] power is a veto-proof majority in Congress.”

Justices Elena Kagan, Sonia Sotomayor and Ketanji Brown Jackson (in an opinion concurring in part and concurring in the judgment), didn’t invoke the MQD at all, saying they didn’t need to in the present case. Why they wouldn’t embrace Justice Gorsuch’s reasoning and create a majority to rein in overly ambitious executive power is a mystery, except that they had rejected the MQD’s application when Joseph Biden was in office, and perhaps they don’t want to appear hypocritical. But these three Justices also regularly insist on the importance of *stare decisis*, and the MQD—regardless of its justifications—is clearly part of the caselaw. Moreover, the *results* the three supported in the Biden-era cases involving the MQD would subject them to the same charges of hypocrisy they evidently sought to avoid in *Learning Resources*. In any event, their rejection of Gorsuch’s MQD reasoning is “dicta” since they reach the same outcome (that the IEEPA does not permit tariffs) on other grounds. Perhaps over the next three years and beyond, Gorsuch can win them

over.

Justice Brett Kavanaugh, joined by Justices Clarence Thomas and Samuel Alito, seemed to cursorily challenge the existence of a meaningful retrieval problem when he said:

In light of Congress’s appropriations authority and its other robust powers, it is not correct to suggest—as [the Chief Justice] elliptically does, . . .that two-thirds majorities of both Houses of Congress would need to pass new legislation over a Presidential veto in order to limit these IEEPA tariffs or, more generally, to restrict the President’s use of IEEPA to impose tariffs.

But even Justice Kavanaugh recognized that “appropriations” and “other robust” congressional powers are clumsy to employ—think of how much damage a rogue President can do before the next appropriations cycle, and how current events in DC illustrate the bluntness of using budgeting shutdowns as a means of objecting to a single area of policy. So Kavanaugh’s objection here seems half-hearted and a sidelight to his main argument in *Learning Resources*—that the rules are different in the foreign-affairs context of tariffs. (We agree with Justice Gorsuch here that this “foreign affairs exception” cuts too widely to be accepted.) And elsewhere (e.g., in *FCC v. Consumers Research*), Kavanaugh has firmly grounded the MQD in the non-delegation doctrine; unless he is retreating from much of what he has written in past cases (and he doesn’t admit to

that) or has a different account than Gorsuch about how the MQD reinforces the non-delegation principle (which he doesn't offer), Kavanaugh's objection to Gorsuch's basic theory should not be overread.

Then there is Justice Thomas, who thinks "legislative powers" in Article I, and thus, the non-delegation doctrine designed to protect Congress' involvement in them, are limited to actions that "make substantive rules setting the conditions for deprivations of life, liberty, or property." That is a striking claim generally, and even more so for a dissent in the *Learning Resources* case: If imposing taxes (and tariffs are of course taxes of a sort) on private businesses and persons does not deprive persons of property, it is hard to see what does.

All of which brings us to Justice Barrett, whose exchange with Justice Gorsuch is the richest and most interesting. Like Justice Barrett herself, we are not sure these two Justices are "very far apart." Barrett, like Gorsuch, grounds the MQD in constitutional values insofar as "context" and "structure" (including Article I's grant of exclusive powers to make law) are factors that, for her, explain the doctrine.

Justice Barrett does ask: "[I]f the Constitution permits Congress to give the Executive a particular power, who are we to get in the way?" Yet this query is somewhat tautological: the key question

undergirding Gorsuch’s approach is whether what Congress has given to the Executive might have gone too far and amounted to an impermissible, that is, unconstitutional, delegation of legislative power. Gorsuch’s invocation of the MQD is (as Vik’s brief argues it should be), in effect, an *Ashwander*-like avoidance canon: to avoid deciding whether a questionable conferral of power (because of its breadth and essential unretrievability) violates the Constitution, we adopt a narrower, rather than broader, reading of statutes that are unclear as to the scope of their delegations.

That leaves Justice Barrett’s concern that “[s]trong-form substantive canons—canons instructing a judge to adopt ‘an inferior-but-tenable reading’—veer beyond interpretation and into policymaking.” But even Barrett does not reject (or want to overrule) all such strong-form canons, as she herself acknowledges. She does want to be careful (and that’s good) about creating new canons, and she quotes from her former boss, Justice Antonin Scalia, who lamented that “whether these dice-loading rules are bad or good, there is . . . the question of where the courts get the authority to impose them.” But the examples from the pages of Justice Scalia’s book that Justice Barrett cites (involving, for example, the rule that treaties with Indians shall be construed in favor of Indians) do not explicitly involve any *constitutionally grounded* canons, but rather concern some external policy preferences that Justice Scalia did not share. When it came to canons that promote constitutional values that might have been hard to enforce more directly (as the MQD does for the non-delegation