PLACING LEGAL CONTEXT IN CONTEXT

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In Biden v. Nebraska, *Justice Barrett authored a concurrence in which she characterized the major questions doctrine as a linguistic canon that accounts for the "legal context" surrounding delegations of power. Some scholars have critiqued Justice Barrett's concurrence on the grounds that empirical research suggests that ordinary readers do not account for "majorness" in the way that the major questions doctrine requires. This Essay argues that those critiques miss the mark because they conflate factual context with legal context.*

Justice Barrett's concurrence should be considered within the broader textualist tradition of understanding "ordinary meaning" as a legal concept, and not simply an empirical fact. But to say that Justice Barrett's concurrence should be understood within that broader textualist tradition is not to say that her concurrence is immune from criticism. To the contrary, this Essay contends that Justice Barrett's concurrence does not account fully for legal context concerning the President's lawmaking functions. The upshot is that textualists eager to embrace the major questions doctrine are better off reconceptualizing the doctrine as a substantive canon that polices the precise lines delineating the lawmaking powers vested in the President and Congress.

INTRODUCTION

In *Biden v. Nebraska*,[1] Justice Barrett offered a unique conception of the major questions doctrine ("MQD"). While many scholars and jurists think of the MQD as a substantive canon (*i.e.*, a canon of statutory interpretation that promotes a policy norm existing "external to a statute"),[2] Justice Barrett explained that she sees the MQD as a linguistic canon (*i.e.*, a canon of interpretation that applies grammatical rules or speech patterns to discern a statute's meaning).[3] For some scholars, Justice Barrett's new defense opened the door to a new critique. Specifically, these scholars contend that empirical research indicates that ordinary people do not account for "majorness" as the MQD suggests. This Essay will first explain why those empirical arguments miss the mark—at least for textualists. This Essay will then explain why textualists should nonetheless object to the linguistic conception of MQD.

The empirical critique misses the mark because it conflates *factual* context with *legal* context. That conflation no doubt stems from textualists' efforts to give a statute its "ordinary meaning,"

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[1] 143 S. Ct. 2355 (2023).

[2] *Id.* at 2376 (Barrett, J., concurring).

[3] *Id.* at 2377 n.2.

which might sound like the meaning that an interpreter could derive from an empirical survey of "ordinary" people. But textualists have not traditionally embraced that sort of Family-Feud-survey conception of statutory meaning.[4] Instead, "textualists treat 'ordinary meaning' as primarily a legal concept, not simply as an empirical fact."[5] This means that empirical evidence suggesting that "ordinary" people do not account for majorness in the manner that the MQD requires is not evidence that should hold much weight with textualists.

That is not to say, however, that textualists should embrace Justice Barrett's linguistic conception of the MQD. To the contrary, her conception of the MQD can be critiqued on the grounds that it fails to account fully for *legal* context. Specifically, Justice Barrett's MQD presumption that "a reasonable interpreter would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to [the executive] branch,"[6] fails to recognize that the Constitution vests lawmaking power in *both* Congress and the President. While Congress is vested with an enumerated subset of federal legislative powers, namely, "[a]ll legislative powers herein granted,"[7] the President is vested with other aspects of federal lawmaking authority—including explicit authority to both recommend and veto legislative measures.[8]

Given that the Constitution mandates that both the President and Congress play a role in shaping federal legislation, jurists should expect the President (and/or the President's congressional allies) to sometimes secure "major" statutory authority for the administrative agents that exercise executive power on the President's behalf. To be sure, the various intra- and inter-branch political negotiations that make up the federal lawmaking process will also work to ensure that an institutionally jealous Congress will *sometimes* have the political ability to refuse to vest the President's administrative agents with "major" statutory authority. But it is precisely because the federal lawmaking process will sometimes favor the President and sometimes favor Congress that textualists jurists should avoid adopting an interpretive canon that stacks the deck in favor of Congress. After all, textualist jurists are faithful agents of *the People*, not Congress. Faithful agents of the People should thus avoid adopting an interpretive canon that purports to favor Congress's institutional jealousies by requiring the President to utilize *extra* political capital to secure *extra*-clear statutory language addressing "major" authority.[9]

Part I of this Essay will situate Justice Barrett's linguistic canon version of the MQD alongside the leading competing conception of the MQD, which views the MQD as a substantive canon.

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[4] Family Feud is a gameshow in which contestants guess the most popular answers to various survey questions. *See Family Feud*, WIKIPEDIA, https://en.wikipedia.org/wiki/Family_Feud. I credit my friend and former colleague Aaron Smith for this analogy.

[5] Tara Leigh Grove, *Foreword: Testing Textualism's "Ordinary Meaning,"* 90 GEO. WASH. L. REV. 1053, 1057 (2022).

[6] Biden v. Nebraska, 143 S. Ct. at 2380 (Barrett, J., concurring) (citation omitted).

[7] U.S. CONST. art. I, § 1.

[8] *Infra* Part III.A.

[9] To be sure, the current MQD might be better understood as a means of empowering the judiciary in relation to the political branches, rather than an effort to support Congress's purported interest in answering major questions. *See, e.g.*, Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L. J. 465, 526 (2023) ("[T]he major questions doctrine offers a more discreet alternative for judicial self-aggrandizement at Congress's expense."). Nonetheless, the Essay will take at face value the idea that the MQD actually does seek to strengthen, rather than weaken, Congress's ability to fulfill their constitutional role. The broader point is that, regardless of whether a court is correct to think that the current MQD assists Congress's legislative preferences, a court should not place an interpretive thumb on the scale in favor of either of the two political branches that make up the federal lawmaking process.

Part II will then introduce an empirical critique lodged against Justice Barrett's linguistic canon, and explain why that critique should not prove persuasive for textualists. Part III will then explain why textualists should nonetheless object to the linguistic canon version of the MQD on the grounds that it fails to account fully for relevant legal context.

I. TEXTUALISM AND THE INTERPRETIVE CANONS

Part I.A will begin by defining textualism and its unique conception of faithful agency.[10] Parts I.B and I.C will then introduce the substantive and linguistic conceptions of the MQD.

A. Textualism

Textualists "understand courts to be faithful agents of *the [P]eople*," and those People can task their political agents to "express the [P]eople's will . . . in . . . statutes."[11] The federal lawmaking process requires that the People's will be shaped through particular political processes involving three institutions: the House, the Senate, and the President.[12] Given that the 536 different humans that make up those three institutions might each approach proposed legislation from a different perspective, textualists interpret law by focusing primarily on the historical meaning of a statute's *text* (*i.e.*, the only part of the statute that survived participation by the House, Senate, and President at a particular moment in time) rather than attempt to elucidate and elevate the intention of any one subset of political actors.

Other theorists seek to channel Congress's intent when interpreting a statute.[13] A core idea behind that non-textualist approach is that Congress has a purpose, or an intent, when it enacts statutes into law.[14] These non-textualists thus look to legislative history (such as committee reports and floor speeches) as a means of better understanding what Congress (or, at least, some members of Congress) intended to accomplish through a particular statute.[15] To the extent that legislative history suggests that the text of a statute does not square with some conception of Congress's intent, many non-textualists posit that a court fulfills its obligation to act as a faithful agent of *Congress* by stretching statutory language in order to better reflect what Congress purportedly intended to accomplish.[16]

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[10] Portions of Part I were first published in Chad Squitieri, *"Recommend … Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 BAYLOR L. REV. 706 (2024).

[11] Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL'Y 463, 465, 481–82 (2021) (emphasis added) (citations omitted) (internal quotation marks omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 138 (2012) (explaining that "courts are assuredly not agents of the legislature" but instead "are agents of the people"); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (Gorsuch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010)) (explaining that clear statement rules can help "courts 'act as faithful agents of the Constitution.'").

[12] U.S. CONST. art. I, § 7.

[13] Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. L. REV. 871, 882 (2015) ("[P]urposivists treat the text as the best evidence of statutory purposes and a source of constraint, but understand interpretation as a process of implementing statutory purposes, not merely adhering to statutory text.").

[14] *See* John F. Manning, *What Divides Textualists and Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006).

[15] Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L. J. 1275, 1276 (2020) ("[M]odern purposivists regularly invoke statutory purpose, intent, and legislative history.").

[16] Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2193–98 (2017) [hereinafter Barrett, *Congressional Insiders and Outsiders*].

Textualists, by comparison, "have long objected to the use of legislative history on the ground that it is designed to uncover a nonexistent, and in any event irrelevant, legislative intent."[17] But this is not to say that textualists ignore intent entirely. To the contrary, "textualists look to . . . statutes' objectified intent,"[18] which is "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[19] When elucidating a statute's objectified intent, textualists often look outside of the four corners of a statute to consider statutory structure and history,[20] as well as canons of statutory interpretation.[21]

B. MQD as an Interpretive Canon

Canons of statutory interpretation come in at least two types: linguistic and substantive.[22] Substantive canons "promote policies external to a statute."[23] There are at least two types of substantive canons. The first serve as "tie breakers between two equally plausible interpretations of a statute."[24] The second are strong-form substantive canons, which include clear statement rules.[25] Strong-form substantive canons are "aggressive" and "direct[] a judge to forgo the most plausible interpretation of a statute in favor of one in better accord with some policy objective."[26]

In *West Virginia v. EPA*,[27] Justice Gorsuch authored a concurring opinion, joined by Justice Alito, which conceptualized the MQD as a strong-form substantive canon. In describing the *majority* opinion in *West Virginia*, for which Justices Gorsuch and Alito supplied two of its six votes, Justices Gorsuch wrote that, "our precedents have usually applied the [MQD] as a clear-statement rule, and the Court today confirms that is the proper way to apply it.[28]

In *Nebraska*, Justice Barrett offered a competing view. As she explained, "[t]he [MQD] situates text in context, which is how textualists, like all interpreters, approach the task at hand."[29] For Justice Barrett, the relevant "legal context framing any delegation" would lead a "reasonable interpreter" to conclude that an agency does not have the statutory authority to make major policy—at least in the absence of clear statutory language.[30] For support, she analogized to "a parent who hires a babysitter to watch her young children over the weekend," and who instructs the babysitter to "[m]ake sure the kids have fun."[31] A reasonable interpretation of that instruction,

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[17] *Id*. at 2205 (citation omitted).

[18] Squitieri, *supra* note 11, at 482.

[19] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., Princeton 1997).

[20] *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L & PUB. POL'Y 61, 64 (1994).

[21] *See* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, __ FLA. L. REV. __ (forthcoming 2024) (SSRN last revised Sept. 9, 2023, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4503583), at 8 ("Any plausible defense of textualism will not leave substantive canons off-limits. After all, Anglo-American law has long embraced them.").

[22] Barrett, *Substantive Canons*, *supra* note 11, at 117.

[23] *Id.*

[24] *Id*.

[25] *Id.* at 118.

[26] *Id.*

[27] 142 S. Ct. 2587 (2022).

[28] *Id.* at 2620 n.3 (Gorsuch, J., concurring) (citing Barrett, *Substantive Canons*, *supra* note 11, at 109).

[29] *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring).

[30] *Id.* at 2380.

[31] *Id.* at 2379.

Justice Barrett posited, would authorize a babysitting-trip "to the local ice cream parlor or movie theater," but not a more major "multiday excursion to an out-of-town amusement park."[32]

Similar to how a reasonable interpreter might think that a parent does not ordinarily give major child-rearing authority to the babysitter, Justice Barrett wrote that, "when it comes to the Nation's policy, the Constitution gives Congress the reins."[33] She thus concluded that a "reasonable interpreter would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch."[34] Placed in terms of the MQD, the upshot is that an agency (*i.e.*, the babysitter) does not ordinarily have the authority to make major decisions of the sort that are ordinarily reserved for Congress (*i.e.*, the parent).

II. THE EMPIRICAL CRITIQUE AND ITS CRITIQUE

Justice Barrett's linguistic conception of the MQD has been critiqued on the grounds that empirical research suggests that ordinary people do not account for majorness in the way that the linguistic MQD requires. Part II.A will offer an overview of this critique. Part II.B will then explain why that critique should not prove persuasive for textualists.

A. The Empirical Critique

Following *Nebraska*, Professors Kevin Tobia, Daniel E. Walters, and Brian Slocum (collectively, "TWS") published a fascinating paper "challeng[ing] the essential empirical claims at the heart of the arguments for the linguistic MQD.."[35] TWS understand Justice Barrett's linguistic conception of the MQD to rest upon an "empirically testable proposition: Ordinary people understand general delegations to be limited to only the most reasonable actions falling under the language of the delegation."[36]

In response to Justice Barrett's babysitter hypothetical, TWS conducted a survey of roughly 500 participants.[37] The participants were asked:

> Imagine that [Patricia/Patrick] is a parent, who hires [Blake/Bridget] as a babysitter to watch [Patricia's/Patrick's] young children for two days and one night over the weekend, from Saturday morning to Sunday night. [Patricia/Patrick] walks out the door, hands [Blake/Bridget] a credit card, and says: "Use this credit card to make sure the kids have fun this weekend."[38]

The survey participants were then presented with various scenarios, including those indicating that (1) "[Blake/Bridget] uses the credit card to buy the children pizza and ice cream and to rent a movie to watch together," and (2) "[Blake/Bridget] uses the credit card to buy the children admission to an amusement park and a hotel; [Blake/Bridget] takes the children to the

[32] *Id.* at 2380.

[33] *Id.* at 2381.

[34] *Id.* at 2380.

[35] Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 U. S. CAL. L. REV. (forthcoming 2024) (SSRN as of Nov. 8, 2023, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697), at 62 [hereinafter, TWS, *Common Sense?*].

[36] *Id.* at 33.

[37] *Id.* at 41.

[38] *Id.* at 39.

park, where they spend two days on rollercoasters and one night in a hotel."[39] All of the scenarios concluded with the phrase "The kids have fun over the weekend."[40] The survey participants were then asked to determine whether the babysitter in a particular scenario "followed" or "violated" the parent's instruction to "make sure the kids have fun this weekend."[41]

The survey results indicated that the participants *did* "understand different actions to vary in their reasonableness as a response to the rule 'Use this credit card to make sure the kids have fun this weekend[.]'"[42] As TWS explain, participants "evaluated some actions as highly reasonable, such as buying pizza and a movie for the kids," whereas "[o]ther actions appeared less reasonable, like taking the kids to an amusement park."[43]

But critically, the survey evidence indicated that the participants did *not* "understand authorizing rules to be limited to only the set of most reasonable actions."[44] As TWS explain, "[a]lthough people evaluate Barrett's 'major' action (taking the kids to an amusement park) as less reasonable than at least one alternative, they nevertheless understand it as consistent with the rule."[45]

TWS consider those findings to be devastating to the linguistic conception of the MQD. As TWS explain:

> [T]he linguistic properties identified by the MQD's defenders do not find support in the intuitions (or "common sense") of ordinary people. Consequently, at least in the absence of further empirical studies, the MQD cannot, and should not, be defended as a valid linguistic canon capturing how ordinary readers understand delegating statutes.[46]

B. Conflating Legal and Factual Context

TWS's conclusion—that, "at least in the absence of further empirical studies, the MQD cannot, and should not, be defended as a valid linguistic canon capturing how ordinary readers understand delegating statutes"[47]—relies on the implicit presumption that "ordinary meaning" is a matter of empirically testable fact. But as it turns out, that is not the understanding of "ordinary meaning" that textualists traditionally embrace.

As Professor (and textualist) Tara Leigh Grove explains, "the ordinary meaning of a federal statute" is not necessarily "equivalent to a conversation on the street."[48] Instead, textualists recognize that "a federal statute" is "a *legal* document full of *legal* concepts," meaning that "[t]he

[39] *Id.* at 39.
[40] *Id.* at 40.
[41] *Id.*
[42] *Id.* at 43.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 47.
[47] *Id.*
[48] Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*,102 TEX. L. REV. 639, 689 (2024).

ordinary meaning of a federal statute is full of *law*."[49] It follows that "prominent textualists have long treated 'ordinary meaning' as a legal concept," and not solely an empirical fact.[50]

When viewed from within that textualist tradition, "ordinary meaning" is better understood as a "legal tool[]" that uses "the construct of a hypothetical reasonable person[] to identify the 'ordinary meaning' of statutory terms and phrases."[51] Put differently, "ordinary meaning" offers a "legal term of art that distinguishes a less technical understanding of statutory terms or phrases from a more 'technical meaning,' one that draws on a particular trade, science, or other specialty."[52]

Consider two cases, which demonstrate the difference between ordinary and technical meaning. In *McCaughn v. Hershey Chocolate Company*,[53] the Court considered whether chocolate was "candy."[54] As Professor Grove explains, "[t]he Hershey Company argued that chocolate was 'food,' not 'candy,' asserting that 'candy' had a specialized industry definition limited to 'confectionery, made principally of sugar or molasses, with or without the addition of coloring or flavoring matter.'"[55] But while "[t]he Court acknowledged that 'the word 'candy' . . . may be used in this narrower and more restricted sense,'" the Court "found that, in the context of the" relevant statute, the term "was used 'in a popular and more general sense'" that "embraced Hershey chocolate."[56]

Similarly, in *Nix v. Hedden*,[57] the Court considered "whether 'tomatoes' should be classified as 'vegetables' under the Tariff Act of 1883."[58] After first concluding that there was "no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce,"[59] the *Nix* Court considered competing arguments concerning ordinary meaning.[60] The plaintiffs "insisted that the ordinary meaning of 'fruit'—an edible plant with seeds—encompassed tomatoes."[61] By comparison, "[t]he government countered that the ordinary meaning of 'vegetables' was broad enough to include tomatoes."[62] In the end, "the [*Nix*] Court sided with the government, stating that although tomatoes are '[b]otanically speaking . . . the fruit of a vine, . . . in the common language of the people,'" tomatoes are "'vegetables.'"[63]

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[49] *Id.* at 689–90 (emphases added).

[50] Grove, *supra* note 5, at 1057. *But see* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015) ("Interpretation is an empirical inquiry.") (quoted in Grove, *supra* note 48, at 692 n.289).

[51] Grove, *supra* note 5, at 1057; *see also* Grove, *supra* note 48, at 669 (noting that prominent textualists have referred to "the statutory meaning derived by textualists" as "a construct") (citations omitted).

[52] Grove, *supra* note 5, at 1058; *see also* Grove, *supra* note 48, at 670 n. 160 ("[Linguistic] canons may be useful in interpreting legal instruments, whether or not they accurately depict ordinary conversation.").

[53] 283 U.S. 488 (1931).

[54] Grove, *supra* note 5, at 1060 (citation omitted).

[55] *Id.* (quoting *McCaughn*, 283 U.S. at 490–91).

[56] *Id.* (quoting *McCaughn*, 283 U.S. at 491).

[57] 149 U.S. 304 (1893) (cited in Grove, *supra* note 5, at 1060).

[58] Grove, *supra* note 5, at 1060 (citation omitted).

[59] *Nix*, 149 U.S. at 306 (cited in Grove, *supra* note 5, at 1060).

[60] Grove, *supra* note 5, at 1060–61.

[61] *Id.* at 1061 (citing *Nix*, 149 U.S. at 10–11, 20).

[62] *Id.* (citing Brief for the Defendant in Error, at 3, *Nix v. Hedden*, 149 U.S. 304 (1893) (No. 137)).

[63] *Id.* (citing *Nix*, 149 U.S. at 307).

As Professor Grove explains, cases like *McCaughn* and *Nix* demonstrate that "[t]o determine the ordinary meaning of a term or phrase in a federal statute," courts "must conduct a *legal* analysis."[64] This includes deciding "questions of law," such as "what evidence is relevant to a statutory interpretive inquiry," as well as "what to make of the surrounding statutory structure."[65] For that reason, "there is a strong basis for treating 'ordinary meaning' as primarily a legal concept."[66] And it is this understanding of "ordinary meaning" that textualists have traditionally embraced.[67]

To be sure, "ordinary meaning" may not be an "entirely legal" matter.[68] That is because "[l]anguage … depends on conventions that one learns in using the language over time," which "likely explains why we do not see legal disputes over, for example, whether chocolate is a 'vegetable' or tomatoes are 'candy.'"[69] But closer questions—such as whether tomatoes are a "vegetable" or "fruit"—often are a subject of legal debate. And when tasked with ruling in those cases, textualist interpreters often turn to *legal* tools to uncover a term's ordinary meaning, rather than *empirical* surveys.

Justice Barrett—who served as a leading textualist scholar prior to taking the bench—should be read with this broader textualist tradition in mind. As a scholar, then-Professor Barrett endeavored to explain shortcomings in earlier academic attempts to undercut textualism on empirical grounds.[70] And in that earlier work, then-Professor Barrett posited that "[w]hether the canons actually capture patterns of ordinary usage is an empirical question," and she stated further that "[i]f the[canons] do not track common usage, then the textualist rationale for using the[canons] is undermined."[71] Statements such as those signal (at minimum) that textualists have not always been consistent when discussing the contours of "ordinary meaning." But then-Professor Barrett's statements need not be read as authoritative departures from the broader textualist tradition catalogued by Professor Grove. Instead, one might (with an admitted bit of elbow grease) seek to harmonize then-Professor Barrett's statements with the traditional textualist view, which (as noted above) recognizes that "ordinary meaning" may not be an "*entirely* legal" matter, given that "[l]anguage … depends on conventions that one learns in using the language over time."[72]

To be sure, Justice Barrett might indeed understand "ordinary meaning" in way that is distinguishable from textualists' traditional understanding of the term. If she does, a more thorough defense of that position is called for. But there is reason to pause before reading Justice

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[64] *Id.* at 1063 (emphasis added).

[65] *Id.* (emphasis added).

[66] *Id.*

[67] *Id.* at 1064–65 (referring to "Justice Scalia, Justice Gorsuch, Judge Easterbrook, and John Manning," who each "focus on 'the understanding of the objectively reasonable person'"). To be sure, "[t]extualists disagree about how 'well-informed' this reasonable reader should be—that is, which evidence may be presumptively considered in conducting a statutory analysis." *Id.* at 1066. But intra-textualist debates concerning "what context a hypothetical reasonable reader may consider[] depend largely on normative considerations, not an empirical investigation." *Id.* at 1073.

[68] *Id.* at 1063.

[69] *Id.*

[70] Barrett, *Congressional Insiders and Outsiders*, *supra* note 16, at 2204 (contending that "the textualist rationale for using" interpretive canons "is not undermined by [empirical] evidence that Congress rejects them as linguistic defaults").

[71] *Id.*

[72] Grove, *supra* note 5, at 1063 (emphasis added).

Barrett as having fully committed herself to charting an entirely distinct course. In particular, Justice Barrett's *Nebraska* concurrence offers at least one piece of evidence indicating that her understanding of "ordinary meaning" could be read in harmony with the traditional textualist understanding of the term.

In her concurrence, Justice Barrett is careful to explain that "our constitutional structure, which is itself part of the *legal context* framing any delegation," indicates that a "major" policy is one that a "reasonable interpreter would expect" for Congress to make itself.[73] Given her explicit reference to "legal context," her presumption that the "ordinary meaning" of a delegation would not include "major" authority need not be understood as offering an empirical argument concerning how "ordinary" people might answer a survey. Instead, her presumption regarding the "ordinary meaning" of a delegation can be understood as being based upon the idea that the hypothetical "ordinary reader" (*i.e.*, the product a legal construct) would look to the Constitution's legal structure and conclude that administrative agencies do not ordinarily receive the statutory authority to answer "major" questions.

III. MISSING LEGAL CONTEXT

Although Justice Barrett's linguistic conception of the MQD is not necessarily subject to an empirical criticism, her conception of the MQD is still subject to criticism on the grounds that it fails to account for relevant legal context. Indeed, Part III will argue that the linguistic MQD fails to account for the specific way in which the Constitution separates and vests lawmaking authority in both the President and Congress.

A. The President's Lawmaking Authority

Fearful that an overly powerful legislature could prove tyrannical,[74] the Framers were careful in how they vested federal legislative power—indeed, the Constitution does not vest "the legislative power" at all.[75] Instead, Article I first ensures that the federal Congress would be split into two chambers accountable to different constituencies,[76] and then vests that bicameral legislature with an enumerated subset of legislative powers. To wit, Article I only vests Congress with "all legislative powers herein granted."[77] The enumerated list of powers that follow that

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[73] *Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring); *see also id.* at 2378 (stating that "[t]o strip a word from its context is to strip that word of its meaning," and explaining that "[c]ontext is not found exclusively within the four corners of a statute. . . . Background *legal* conventions, for instance, are part of the statute's context") (emphasis added) (internal quotation marks omitted) (citations omitted).

[74] Judith A. Best, *Legislative Tyranny and the Liberation of the Executive: A View from the Founding*, 17 PRESIDENTIAL STUDIES Q. 4 (Fall 1987), at 697 ("An overriding fear . . . of legislative tyranny . . . informed the Founders' conception of the presidency and its proper role in the whole governmental solar system.").

[75] *See* Rob Natelson, *How to Correct the Context of the "Non-delegation" Debate*, THE ORIGINALISM BLOG (Jan. 20, 2020), *available at* https://originalismblog.typepad.com/the-originalism-blog/2020/01/how-to-correct-the-context-of-the-non-delegation-debaterob-natelson.html ("It is fundamental that the Constitution does not delegate to Congress 'the legislative power.'").

[76] U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives").

[77] *Id.*; *see also* Natelson, *supra* note 75 (The Constitution "delegates about thirty discrete legislative powers—seventeen (clarified by the Necessary and Proper Clause) in Article I, Section 8, and others scattered throughout the document.").

vesting clause offer a list of the limited subset of legislative powers that Congress are entitled to exercise.[78]

As a textual matter, something special can be observed in the manner in which federal legislative authority is vested. While Article II vests all of "[*t*]*he* executive power" in the President,[79] and Article III vests all of "[*t*]*he* judicial power of the United States" in federal courts,[80] Article I only vests "all legislative powers herein granted."[81] What's more, the Constitution vests other aspects of federal lawmaking authority in the President via two constitutional provisions.

The first provision vesting the President with federal lawmaking authority is Article I, Section 7, which empowers the President to veto legislation.[82] The mere threat of a veto enables the President to shape federal legislation long before it is sent to the President for formal consideration.[83] Congresspeople, familiar with the President's views, often have a good idea as to what sorts of policies will be found acceptable to a President whose veto pen is never too far from reach. And even though Congress can override a President's veto, the attendant super-majority requirement can influence proposed legislation. That is because legislative language that may be acceptable to a simple majority of Congress may not be palatable to a super-majority of Congress, which includes members whose political views may be further from the congressional mean, as well as members who may see an opportunity to secure legislative compromises that might not have otherwise been obtainable.

The second constitutional provision vesting the President with lawmaking authority is the Recommendation Clause of Article II, Section 3.[84] That provision vests the President with a power (and duty) to "recommend to [Congress's] consideration such measures as [the President] shall judge necessary and expedient."[85] As Justice Story recognized, Article II, Section 3 enables the President "to point out the evil, and . . . suggest the remedy."[86]

The President's power to start the legislative process gives the President a first-mover advantage that can influence legislation. Consider what occurs in the wake of the President's State of the Union Address (a common time to offer presidential proposals), in which legislative debate often centers around the perceived virtues and vices of the President's legislative agenda. When this power to recommend legislation is considered alongside the power to veto legislation,

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[78] *See, e.g.*, U.S. CONST. art. I, § 1, cl. 8 (referring to the powers to, *inter alia*, "lay and collect taxes," "regulate commerce . . . among the several states," and "coin money"). Congress is also vested with authority outside of Article I. *See, e.g.*, U.S. CONST. art. IV, § 2 (Territorial Clause).

[79] U.S. CONST. art. II, § 1 (emphasis added) ("The executive power shall be vested in a President of the United States of America.").

[80] U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish").

[81] U.S. CONST. art. I, § 1; *see also* Natelson, *supra* note 75.

[82] U.S. CONST. art. I, § 7.

[83] *See* MEGHAN M. STUESSY, CONG. RSCH. SERV., R46338, VETO THREATS AND VETOES IN THE GEORGE W. BUSH AND OBAMA ADMINISTRATIONS, at 3 (Apr. 30, 2020), *available at* https://www.everycrsreport.com/files/20200430_R46338_a7b4e73fb8350e2a0aa2bc91991a656a644656c9.pdf (cited in Squitieri, *supra* note 10, at 715, 758).

[84] U.S. CONST. art. II, § 3.

[85] *Id.*

[86] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1555 (1833) (cited in Squitieri, *supra* note 10 at, 716, 751–53, 757–58).

it becomes clear that the Constitution works to ensure that federal legislation can be shaped by a President from start to finish.

B. Securing Major Authority

Given the President's constitutional authority to shape legislation, federal jurists should expect for the President (and/or the President's congressional allies) to sometimes secure "major" statutory authority for the administrative agents that exercise executive authority on the President's behalf.[87] In particular, a President might recommend that Congress grant the President's administrative agents "major" authority, or might threaten to veto legislation that does not grant those administrative agents the same.

To be sure, the federal lawmaking process is "complicated and chock-full of political bargains that cannot (and need not) be fully understood by individual legislators, let alone politically insulated jurists."[88] Federal jurists should therefore also expect that the various intra- and inter-branch political negotiations that make up the federal lawmaking process will enable an institutionally jealous Congress to *sometimes* refuse to vest the President's administrative agents with "major" statutory authority. But it is precisely because the federal lawmaking process will sometimes favor the President and sometimes favor Congress that textualists jurists should avoid adopting an interpretive canon that stacks the deck in favor of either political branch.

Because textualist jurists are faithful agents of *the People*, textualist jurists should seek to neutrally interpret the final legislative compromise that was hammered out by *both* of the political branches that the People's Constitution tasks with creating federal statutes. Faithful agents of the People should therefore avoid adopting an interpretive canon that purports to favor Congress's legislative preferences by requiring the President to utilize *extra* political capital in order to secure *extra*-clear statutory language speaking to "major" authority. In other words, the political actors who wish to grant the President's agents with major authority, as well as the political actors who wish to avoid granting such authority, should be held to the same interpretive standard.

Once one is reminded that the Constitution vests federal lawmaking authority in *both* the President and Congress, it becomes clear that Justice Barrett's linguistic conception of the MQD does not fully account for all of the "legal context framing any delegation."[89] While her linguistic canon focusses on the legal context concerning Congress's lawmaking authority, it does not account for the broader legal context which ensures that Congress can only exercise its lawmaking authority in concert with the President.

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[87] When referring to "the President's administrative agents," this Essay is referring to administrative officials who exercise executive authority. Because all of "the executive power" is vested in the President, U.S. const. art. II, § 1, this Essay takes the position that all officials exercising executive power should be understood as reporting to the President. Other scholars disagree, and contend that federal officials can exercise executive authority outside of the executive branch. Responding to the conception of executive power relied upon by those scholars is outside the scope of this Essay.

[88] Squitieri, *supra* note 11, at 482 (citation omitted).

[89] *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring) *see also id.* at 2378 (stating that "[t]o strip a word from its context is to strip that word of its meaning," and explaining that "[c]ontext is not found exclusively within the four corners of a statute. . . . Background *legal* conventions, for instance, are part of the statute's context") (emphasis added) (citations omitted) (internal quotation marks omitted).

The legal context concerning statutory delegations is therefore more akin to the alternative hypothetical that Justice Barrett mentions elsewhere in her *Nebraska* concurrence: where "one parent left the children with the other parent for the weekend," in which "we would view the same [amusement park] trip differently because the *parents share authority over the children*."[90] Like how parents share authority over the children, the President (who supervises executive branch officials and who helps shape federal legislation empowering those officials) shares authority with Congress over administrative agencies. And so, much like a babysitting-parent can be expected to secure major babysitting authority in the ordinary course, so can the President be expected to secure major statutory authority in the ordinary course. This broader legal context demonstrates why a faithful agent of the People (who should not favor either the President or Congress) should resist supporting a MQD that elevates the decisions of one "parent" (*i.e.*, Congress) over those of another "parent" (*i.e.*, the President).[91]

C. The Reformulated MQD

To say that the linguistic conception of the MQD offered by Justice Barrett in *Nebraska* does not account for all of the relevant legal context is not to say that textualists cannot embrace something like that linguistic conception. To the contrary, and as I explain elsewhere,[92] textualists can embrace a reformulated MQD that borrows from much of the existing MQD caselaw.

The reformulated MQD would work to prevent the President's agents from squeezing (to borrow terminology from existing MQD caselaw) an "unheralded power" from a "long-extant statute."[93] To do so, the reformulated MQD would use the President's Recommendation Clause duty as sort of constitutional tripwire. Specifically, a challenger invoking the reformulated MQD would first allege that a regulatory measure is the type of "necessary and expedient" measure (to borrow a term from the Recommendation Clause) that the President is required to "recommend" for Congress's "consideration."[94] When faced with that allegation, the President (or perhaps more likely, one of the President's agents) could defeat the challenge by proving one of two things. First, that the regulatory measure was not a "necessary and expedient" measure within the meaning of the Recommendation Clause (*i.e.*¸ that the regulatory measure was not the type of measure that the Recommendation Clause requires the President to bring to Congress).[95] Or second, that the President had no duty to recommend the measure for Congress's consideration because the President already had "clear statutory authorization" to take the measure in question.[96]

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[90] *Id.* at 2381 (emphases added).

[91] Squitieri, *supra* note 10, at 748. The fact that "majorness" might influence the context of real-world babysitting authority, but not the legal authority vested by a federal statute, is not surprising, given that "once we consider federal statutes as distinctively legal documents, it is not at all surprising that . . . legal rules and presumptions may not translate to ordinary conversation." Grove, *supra* note 48, at 670.

[92] Squitieri, *supra* note 10.

[93] *West Virginia*, 142 S. Ct. at 2610 (citation omitted).

[94] U.S. CONST. art. II, § 3 (stating that the President "shall . . . recommend to [Congress's] [c]onsideration such measures as [the President] shall judge necessary and expedient").

[95] Squitieri, *supra* note 10, at 754–57.

[96] *Id.* at 762–63.

In short, the focus of the reformulated MQD would be temporal (*i.e.*, focus on deciding whether a new power was part of a particular legislative compromise agreed upon at a particular moment in time). That focus distinguishes the reformulated MQD from the current MQD, which focuses on the political consequences of a claimed power (*i.e.*, which focuses on deciding whether a regulation seeks to answer a question of "major" political importance of the sort thought reserved for Congress). Readers interested in additional detail concerning that reformulated approach should refer to my earlier work.[97] For the present, it will suffice to note that a reformulated MQD can be embraced by textualists like Justice Barrett (among others) who appear uneasy with administrators' claims to find "unheralded power" in "long-extant" statutes.

CONCLUSION

Justice Barrett's unique conception of the MQD has been subject to unique critiques. But one of those critiques—that empirical evidence demonstrates that the MQD cannot serve as a linguistic canon—does not account for the broader textualist tradition of treating "ordinary meaning" as primarily a legal concept. Nonetheless, the linguistic conception of the MQD does not itself account for legal context concerning the President's role in the federal lawmaking process. Textualist jurists in favor of the MQD should therefore consider reconceptualizing the MQD into a new substantive canon that more fully accounts for the precise way in which the Constitution assigns federal lawmaking authority.

[97] Squitieri, *supra* note 10.