STRUCTURAL TEXTUALISM AND MAJOR QUESTIONS

JONATHAN MEILAENDER*

INTRODUCTION

Can a textualist embrace the Major Questions Doctrine ("MQD")? If the MQD is a clear-statement rule, as Justice Gorsuch suggests in *West Virginia v. EPA,*[1] probably not: a clear-statement MQD will sometimes sacrifice the best reading of the text in favor of external values.[2] So Justice Barrett offers an alternative MQD formulation in *Biden v. Nebraska:*[3] maybe the MQD is actually a non-substantive canon that relies on the role of context in shaping textual meaning.[4] It rests on commonsense intuitions about both the broader concept of delegation and the specific relationship between Congress and agencies, and so functions as an aid to finding textual meaning, not a means of evading it. Justice Barrett calls this underlying set of presumptions about the Congress-agency relationship her "basic premise": the idea that statutory context includes an assumed congressional preference for answering major questions.[5]

This Note argues that Justice Barrett's method largely succeeds, but only because her *Biden v. Nebraska* concurrence offers a novel approach to textualism itself. It is an approach this Note calls

* J.D. Candidate, Harvard Law School 2025. The author thanks Professors Cass Sunstein and Jack Goldsmith for inspiring this Note; the JLPP notes team of Joel Erickson, Coy Ozias, and Christian Carson, for their careful edits and comments; the remainder of the JLPP editorial team for their editorial oversight and review; and Ben Rolsma, Maria Arcara, and Kelina Rodgers for their helpful feedback on early drafts.

1. 142 S. Ct. 2587 (2022).
2. *Id.* at 2619 (Gorsuch, J., concurring).
3. 143 S. Ct. 2355 (2023).
4. *Id.* at 2378 (Barrett, J., concurring).
5. *Id.* at 2380.

"structural textualism," an attempt to situate a structural argument within textual meaning.

That name arises from the nature of the "basic premise," Justice Barrett's background presumption that shapes textual meaning.[6] Justice Barrett repeatedly emphasizes her use of the usual textualist lens of a constructed, reasonably informed third-party interpreter.[7] In other words, what Congress *actually intends* is irrelevant to establishing textual meaning. Instead, what matters is what a reasonable third-party observer would *think Congress means*.[8] And that observer's assumptions about Congress-agency relationships do not originate from real-world activity, whether congressional action or the views of actual observers. Instead, the "basic premise" is a structural one—a premise derived from the structure of the constitutional text and the governing framework it creates. The Constitution logically compels Justice Barrett's "basic premise," in the sense that a rational third-party interpreter cannot escape it without ceasing to be rational. Justice Barrett's observer is not like a median or aggregate interpreter, who establishes a contextual norm by looking for widespread conventional agreement. Instead, Justice Barrett's observer establishes context by examining the Constitution in a way that is normatively rational.[9] The observer's premise embodies common sense in the sense that her conclusion is reasonable, not in the sense that it is common. Additional empirical context might rebut this structural premise, but it is not the starting point.

This structurally textualist concept of statutory interpretation allows Justice Barrett's MQD to overcome two recent critiques. First, Professor Cass Sunstein argues that the "basic premise" is empirically doubtful: Congress does often seem to delegate major questions.[10] So maybe the premise is not a statement about what Congress actually does in practice, but instead a "normative claim,"

---

6. *Id.*

7. *See, e.g., id.* at 2380–81.

8. *See id.*

9. *See id.* at 2381.

10. Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 258 (2024).

something like a "constitutionally motivated" "legal fiction" that rightly forms part of a statute's interpretive context.[11] But if that is true, then Justice Barrett's MQD no longer looks very different from Justice Gorsuch's—it too simply protects a normative value.[12] Professor Sunstein's account, though, does not recognize the way in which a third-party lens avoids empirical pitfalls. Professor Sunstein correctly intuits the eventual nature of Justice Barrett's "basic premise," but fails to discern the difference (for a textualist) between a rationally compelled structural premise and a "constitutionally motivated" legal fiction.

Second, Professors Benjamin Eidelson and Matthew Stephenson offer a critique similar in outline, though different in method.[13] They argue that Justice Barrett's basic presumption cannot alter the way a reasonable third-party interpreter perceives the text—a textualist's usual inquiry.[14] On their account, a presumption can be part of contextual "common sense" only if it is "genuinely common," so widely shared and pervasive as to form part of a statute's shared communicative backdrop.[15] But this one is not, they say. Not only does Congress fail to act like it believes this "basic premise," but there is also no general agreement among educated observers that the premise is right.[16] Professors Eidelson and Stephenson accurately describe the basic textualist project as applied to the MQD, but fall short because they suppose that Justice Barrett's common sense is mostly "common," not mostly "sensible."

This Note summarizes Justice Gorsuch's MQD in Section I, identifying the ways in which it might irk a textualist. Section II explains how Justice Barrett's MQD seeks to address these textualist misgivings. Section III demonstrates how Justice Barrett's use of a third-party interpreter limits recourse to actual Congressional activity or intent, and so avoids Professor Sunstein's empirical critique.

11. *Id.* at 260.

12. *Id.*

13. Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism,* 137 HARV. L. REV. 515, 540–44 (2023).

14. *Id.* at 521–26 (providing overview of textualist priors).

15. *Id.* at 543.

16. *Id.*

Section IV addresses the Eidelson-Stephenson challenge by invoking the third-party interpreter's normative rationality. Section V examines potential modifications to the "basic premise" to further assuage textualist objections. Finally, this Note will conclude with a general discussion of the value of Justice Barrett's innovative structural textualism.

I. JUSTICE GORSUCH'S MQD: PROTECTING THE CONSTITUTION

Justice Gorsuch's *West Virginia* concurrence begins with a general defense of clear-statement rules. Clear-statement rules, he argues, ensure that statutes comply with the Constitution.[17] That would seem to imply that all clear-statement rules are applications of the avoidance canon, and Justice Gorsuch goes on to defend the canon against retroactivity, and clear-statement rules favoring sovereign immunity, as doctrines that avoid constitutional problems.[18] The Major Questions Doctrine, Justice Gorsuch says, works the same way—it is a clear-statement rule that protects the separation of powers, especially the Article I Vesting Clause.[19] He then spends a number of paragraphs explaining the conceptual importance of the separation of powers, why the Founding generation cared about it, and why "[p]ermitting Congress to divest its legislative power to the Executive Branch" causes countless practical problems.[20] Interestingly, Justice Gorsuch does *not* say that the MQD enforces the nondelegation doctrine, but only that it protects the separation of powers generally—so his MQD might protect something like a

17. *See* 142 S. Ct. at 2616–17 (Gorsuch, J., concurring).

18. *Id.* But is it true that the Constitution prohibits retroactive legislation, or is that prohibition really just an ancient common-law prohibition, one which Congress might consider when legislating, and so one that might affect a statute's communicative content? If it is the latter, it no longer looks like a clear-statement rule. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (noting merely that "[r]etroactivity is not favored in the law"); William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 135–36.

19. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

20. *Id.* at 2617–18.

general constitutional norm.[21] Thus, Professor Sunstein helpfully dubs Justice Gorsuch's MQD "Lockean": it is enforcing a substantive norm that echoes Locke's description of the separation of powers.[22] In fact, Justice Gorsuch quoted Locke's description in his call for a revived nondelegation doctrine in his dissent in *Gundy v. United States,*[23] which he cites in *West Virginia.*[24]

That Lockean norm, though, is not free-floating. Instead, it is tethered to a presumption about congressional intent. Clear-statement rules "assume that. . . Congress *means* for its laws to operate in congruence with the Constitution."[25] The MQD "protects against 'unintentional, oblique, or otherwise unlikely'" delegations (and in this way differs from the nondelegation doctrine, which prevents deliberate, though unconstitutional, delegations).[26] It prevents "'agencies [from] asserting highly consequential power beyond what Congress could reasonably be understood to have granted.'"[27] Justice Gorsuch does not say exactly what kind of presumption about congressional intent this is: it could be the kind of "objectified" intent Scalia thinks is appropriate for textualists.[28] But Justice Gorsuch also proceeds to examine failed legislation (a kind of legislative intent) in deciding whether a question is major because it may show "that an agency is attempting to '"work [a]round"' the legislative process to resolve for itself a question of great political

21. *See id.* at 2619 (observing that the MQD protects the Article I Vesting Clause). Justice Gorsuch distinguishes the non-delegation doctrine from the MQD more precisely in his earlier concurrence in *Nat'l Fed'n of Indep. Bus. v. OSHA,* 142 S. Ct. 661 (2022). There, he explains that the nondelegation doctrine prevents Congress from delegating its own power deliberately, while the MQD prevents the executive from seizing power Congress never intended to grant. *Id.* at 668–69 (Gorsuch, J., concurring).

22. *See* Sunstein, *supra* note 10, at 251–52.

23. 139 S. Ct. 2116 (2019).

24. *West Virginia,* 142 S. Ct. at 2619 (Gorsuch, J., concurring) (citing *Gundy,* 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting)).

25. *Id.* at 2616 (emphasis added).

26. *Id.* at 2620 (citing *Nat'l Fed'n of Indep. Bus.,* 142 S. Ct. at 669 (Gorsuch, J., concurring)).

27. *Id.*

28. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION 3, 17 (new ed. 2018).

significance."[29] That sounds like ordinary intent, not objectified intent. Justice Kagan's dissent objects—that is not textualist, she argues.[30] Justice Gorsuch responds in a footnote, explaining that he (and the majority) has used such failed legislation only to figure out *whether a major question exists*, not to "resolve what a duly enacted statutory text means."[31] But that is an odd response. True, if legislative failures merely trigger a clear-statement rule, they do not play a direct role in discerning what the text means—but now their presence can *override* the text's best meaning, since that is what a clear-statement rule does (or can do). It would seem less offensive to textualism to simply acknowledge that legislative failure does play a role in finding textual meaning. Justice Gorsuch's precise response does not really matter, though, because failed legislation influences the result either way, whether by triggering the doctrine or by guiding its application.

Reliance on failed legislation combined with a focus on *unintentional* delegations also opens an empirical Pandora's Box: what if Congress does routinely intend to delegate major questions? Justice Gorsuch could have cited empirical research suggesting that Congressional staffers do hope to answer major questions when drafting legislation, and hope that agencies will refrain from doing so.[32] At least one study has attempted to measure congressional intent with respect to major questions in just this way, and it favors him. Abbe Gluck and Lisa Schultz Bressman surveyed 137 congressional staffers, focusing on those responsible for drafting legislation.[33] They asked about the MQD, among other things (though of course the doctrine was less developed then). "More than 60% of respondents" agreed that "drafters intend for Congress, not agencies, to resolve [major questions]," but "[o]nly 28% of our respondents

29. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (citing *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667 (Gorsuch, J., concurring)).

30. *See id.* at 2641 (Kagan, J., dissenting).

31. *Id.* at 2621 n.4 (Gorsuch, J., concurring) (emphasis added).

32. *See, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside —- An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003 (2013).

33. *See id.* at 919–20.

indicated that drafters intend for agencies to fill ambiguities or gaps relating to major policy questions[.]"[34]

But Justice Gorsuch does not cite those studies, and many statutes do unambiguously task agencies with major policy choices. As Professor Sunstein points out, Congress frequently passes statutes whose text seems to require agencies to answer major questions.[35] We need look no further than the Clean Air Act, the statute at issue in *West Virginia*. Section 112(n), for example, requires the EPA to regulate hazardous pollutants from power plants upon a finding that such regulation is "appropriate and necessary."[36] Section 109(b)(1) requires the EPA to promulgate national ambient air quality standards at levels "requisite to protect the public health."[37] Those sections seem to require EPA to resolve major questions. And the Act's legislative history, especially the goals of Senator Ed Muskie, who spearheaded it, strongly supports an intent to delegate major decisions.[38] So an honest Congressional-intent investigation might well show that most delegations Justice Gorsuch would call "unintentional" are, in fact, deliberate.

But suppose Justice Gorsuch eliminates the references to failed legislation—they are not essential to his argument. Does not the mere use of a clear-statement rule still offend textualism because it risks overriding the best meaning of the text? Justice Gorsuch is

34. *Id.* at 1003.

35. *See* Sunstein, *supra* note 10, at 259.

36. 42 U.S.C. § 7412(n)(1)(A).

37. 42 U.S.C. § 7409(b)(1). One might even argue that § 108(a)(1)(C) allows EPA total discretion in deciding whether to regulate any pollutants as "criteria pollutants" in the first place, though this argument has not yet found favor with the courts. *See* Nat. Res. Def. Council, Inc. v. Train, 545 F.2d 320, 324 (2d Cir. 1976).

38. Professor Richard Lazarus put it this way: "Congressional intent in the context of federal environmental law may be fairly equated with the intent of Senator Ed Muskie of Maine. Federal courts in their opinions have cited to the views of Senator Muskie in the enactment of federal environmental statutes in at least 293 separate cases." Richard J. Lazarus, *Senator Muskie's Enduring Legacy in the Courts*, 67 MAINE L. REV. 239, 242 (2015) (emphasis omitted). Professor Lazarus further explains that the EPA relied on Muskie twice in its Clean Power Plan rulemaking proposal and five more times in the accompanying legal memorandum, mostly to show that § 111(d) would, in Muskie's mind, have encompassed generation-shifting. *Id.* at 249.

aware of that problem, too.[39] We might expect him to respond like Justice Scalia, who once suggested that textualism could tolerate some clear-statement rules as "exaggerated statement[s] of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation."[40] Perhaps Justice Gorsuch agrees—he never explicitly claims to be overriding the best meaning of the text, and Justice Scalia's explanation matches Justice Gorsuch's assumptions about Congressional intent.[41] But he does not respond with the Justice Scalia view. Instead, he looks to history: "[O]ur law is full of clear-statement rules and has been since the Founding."[42] The dissenters rely on clear-statement rules too, he says.[43] Then he drops the point and moves on. It is not clear how this perfunctory response quiets textualist concerns. Maybe the historical reference could, if expanded, justify clear-statement rules under a kind of original-methods originalism: perhaps the Article III judicial power simply

39. *West Virginia,* 142 S. Ct. at 2625 (Gorsuch, J., concurring). Oddly, Gorsuch claims to be responding to Kagan's dissent in defending clear-statement rules, but Kagan never explicitly attacks them. *Id.*

40. Scalia, *supra* note 28, at 29.

41. Justice Barrett describes substantive canons as imposing a "'clarity tax' on Congress[.]" *Biden,* 143 S. Ct. at 2376–77 (Barrett, J., concurring) (quoting John Manning, *Clear Statement Rules and the Constitution,* 110 COLUM. L. REV. 399, 403 (2010)). Justice Gorsuch never uses that sort of language to describe clear-statement rules. He does, however, open by citing then-Professor Barrett to argue that "clear-statement rules help courts 'act as faithful agents of the Constitution.'" *West Virginia,* 142 S. Ct. at 2616 (Gorsuch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency,* 90 B.U. L. REV. 109, 169 (2010)). In the quoted passage, Justice Barrett argued that clear-statement rules might indeed strain textual meaning, or impose a clarity tax, and in that sense clash with the view that federal judges are faithful agents of *Congress.* Perhaps, though, when enforcing constitutional boundaries, judges are faithful agents of the *Constitution,* rather than Congress. If Justice Gorsuch meant to import that meaning, he may well agree that clear-statement rules sometimes strain the text itself, and instead think they are best justified on other grounds (like constitutional fidelity).

42. *West Virginia,* 142 S. Ct. at 2620 (Gorsuch, J., concurring).

43. *Id.*

includes the power to establish clear-statement rules. Whatever his precise rationale, Justice Gorsuch seemingly thinks that clear-statement rules and textualism can coexist. The judiciary is ultimately charged with making sure that Congress does not violate the Constitution, and clear-statement rules help to keep it from doing so—as they always have.[44]

In short, Justice Gorsuch's MQD might irk a textualist for two basic reasons. First, as a clear-statement rule, it prioritizes a structural norm over the best reading of the text. Second, it relies upon a presumption about congressional intent, which is not merely uncomfortable for a textualist but also (arguably) empirically wrong. And Justice Gorsuch does not attempt any serious textualist defense of this apparent departure from basic textualist procedure, instead falling back on history, tradition, and (perhaps) the original meaning of the Article III judicial power.

II. JUSTICE BARRETT'S MQD: STRUCTURAL CONTEXT

Justice Barrett's *Biden v. Nebraska* concurrence begins with a frank acknowledgement: substantive canons expressed as clear-statement rules pose grave problems for an honest textualist.[45] Textualism seeks the meaning of a text—but with a clear-statement MQD, "a plausible antidelegation interpretation wins even if the agency's interpretation is better."[46] But the MQD *is* acceptable, she argues, if it simply yields a text's actual meaning. Textual meaning always depends on context, both linguistic context and "common sense."[47] A word's communicative content depends on who speaks it and who hears it: it depends on shared meaning.

Justice Barrett offers her now well-known example of a parent and a babysitter.[48] It is an example that leads Professor Sunstein to call her MQD "Wittgensteinian," for it is resembles an illustration

44. *See id.* at 2616–17 (observing that judiciary is charged with ensuring constitutional fidelity and uses clear-statement rules as a tool for doing so).

45. 143 S. Ct. at 2377 (Barrett, J., concurring).

46. *Id.*

47. *Id.* at 2378.

48. *Id.* at 2379.

from Ludwig Wittgenstein's *Philosophical Investigations*.[49] Wittgenstein proposes the following thought experiement to illustrate how a word may denote a greater or lesser category of items according to context:

> Someone says to me: "Shew the children a game." I teach them gaming with dice, and the other says "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?[50]

The implication, of course, is that it must *not* have come before his mind to limit the meaning of "game" in this context, because shared societal linguistic understanding suggests that "game" does not include gambling when joined with "children." Likewise, Justice Barrett's hypothetical parent hands over her credit card and tells the babysitter, "Make sure the kids have fun."[51] Absent additional context, this command does not allow the babysitter to take the kids on an expensive overnight trip, even though such a trip will probably ensure a good time for the kids.[52] The delegation, though literally inclusive of amusement park trips, cannot be reasonably read to encompass them. On the other hand, additional contextual information about the parents and the babysitter will change the delegation's meaning.[53] If the babysitter is a grandparent, the amusement park trip might be fine.[54] If the parents are billionaires, the "fun" can be more expensive. If the parent "mentioned that she had budgeted $2000 for weekend entertainment," then $2000 is probably acceptable, even if that information arises from context, rather than the words of the delegation itself.[55] In short, "[s]urrounding circumstances, whether contained within the

49. Sunstein, *supra* note 10, at 251, 254.

50. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (G.E.M. Anscombe trans., 3d ed. 1986); Sunstein, *supra* note 10, at 254.

51. *Biden,* 143 S. Ct. at 2379 (Barrett, J., concurring).

52. *Id.* at 2379–80.

53. *Id.* at 2380.

54. *Id.*

55. *Id.*

statutory scheme or external to it, can narrow or broaden the scope of a delegation."[56]

All this applies to statutory interpretation, too. Just as we expect the parent to authorize a weekend trip clearly, we expect Congress to authorize major policy choices clearly. And "[t]his expectation of clarity is rooted in the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decision to agencies.'"[57] The expectation is a matter of "common sense."[58]

But hold on—that "basic premise" looks familiar. It sounds very much like Justice Gorsuch's presumptions about Congressional intent. Thus, as Professor Sunstein points out, it opens Justice Barrett to the same empirical problems: what if Congress *does* frequently intend to leave major policy decisions to agencies?[59] Now even this reworked, textualist MQD seems to be relying on Congressional intent.

III. THE THIRD-PARTY OBSERVER: AVOIDING CONGRESSIONAL INTENT

Justice Barrett's solution comes from the way she phrases the "basic premise" elsewhere in the opinion. In the same paragraph that introduces the "basic premise," Justice Barrett observes that "a reasonable interpreter" would expect Congress to answer major policy questions.[60] In the next paragraph, she explains it like this: "My point is simply that in a system of separated powers, a *reasonably informed interpreter* would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"[61] As a dedicated textualist, Justice Barrett reads the text through a third-

56. *Id.*

57. *Id.* (citing U.S. Telecomm. Ass'n. v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc)).

58. Barrett repeats that description in numerous places. *See, e.g., Biden,* 143 S. Ct. at 2378, 2379, 2384 (Barrett, J., concurring).

59. Sunstein, *supra* note 10, at 258–59.

60. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring).

61. *Id.* at 2380–81 (emphasis added) (citing Wayman v. Southard, 10 Wheat. 1, 43 (1825)).

party lens. Thus, it simply does not matter, at least initially, whether Congress does or does not routinely intend to delegate major questions. Justice Barrett is not asking what Congress *actually does or intends:* she is asking what a reasonable third-party interpreter would *think* it does or intends.

Justice Barrett's third-party interpreter approach makes a difference, both in practice and in theory. In practice, this approach may well create interpretive outcomes that diverge from actual congressional intent. It is very possible that Senator Muskie intended the Clean Air Act to grant EPA the broadest latitude possible to regulate substances newly discovered to possess dangerous properties, like carbon emissions, thereby covering the Clean Power Plan at issue in *West Virginia.*[62] It might well follow that he, and other drafters of the Clean Air Act, did want EPA to make major policy decisions. If so, Justice Gorsuch has a problem: his fundamental assumption about congressional intent turned out to be wrong. But Justice Barrett is fine, because it is still possible that a third party, looking on from the outside and declining to inquire into *actual* Congressional intent, would observe a mismatch between "best system of emission reduction" [63] and EPA's generation-shifting scheme for carbon emissions. What counts is not what Congress actually intended, but what a reasonable observer would *think* it intended on the basis of constitutional context. It is the reasonable observer's "practical understanding of legislative intent"—which really relies on a commonsense understanding of the Constitution—that matters.[64] Legislators might well possess private intentions that a reasonable reader of the text would not uncover. Suppose the parent really *had* secretly hoped her babysitter would venture upon a wild escapade. It would be no less absurd for a reasonable observer, knowing what reasonable people know about babysitting in general, to suppose

62. *See* Lazarus, *supra* note 38, at 242–43; *see also Fact Sheet: Overview of the Clean Power Plan,* ENVIRONMENTAL PROTECTION AGENCY (August 2015), https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html [https://perma.cc/FL6F-C8HV] (describing the Clean Power Plan).

63. 42 U.S.C. § 7411(a)(1).

64. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring) (quoting *West Virginia,* 142 S. Ct. at 2609).

that "go and have fun" includes amusement parks.[65] Our observer could *ask* the parent for clarification if she suspected a secret meaning. But if the parent says, "Yes, I did really mean for the kids to visit an amusement park," then the clarification has formed part of the command. In the context of statutory interpretation, this is like asking Congress to clarify its intent by expressing that intent in law. And this is exactly what every variant of the MQD demands.

Justice Barrett's approach makes a theoretical difference, too, because an empirical inquiry into an *observer's* state of mind with respect to congressional intent is not offensive to textualism, unlike an empirical inquiry into congressional intent *per se.* Asking how some third party would understand the text *is* the textualist inquiry—not just for the MQD, but in general. It is this understanding that forms a text's meaning. And a reasonable interpreter might have contextual views about congressional intent in general—that is, views about what Congress generally does, or what would be commonsensical for Congress to do, or the like. Judge Easterbrook, for example, notes that "Language takes meaning from its linguistic context, but historical and governmental contexts also matter."[66] Justice Scalia is willing to consider "a sort of 'objectified' intent."[67]

---

65. Has the reasonable observer any duty to inquire into *actual* Congressional intent? An observer who failed to do so might arguably be unreasonable. And it is probably true that absolute certainty about intent would alter the meaning of a delegation. The problem, of course, is that no such inquiry is practically possible: there is no such thing as a deliberative body's uniform intent. Besides, the inquiry is highly specialized, which makes it especially challenging for ordinary regulated parties. So a reasonable observer with such a duty would no longer be a textualist reasonable observer, to the extent that textualism rests on an ontological definition of "law" from the viewpoint of regulated persons. Even if an inquiry into actual intent is necessary to establish the absolute best textual meaning, textualism as a legal methodology must settle for the best textual meaning available without that inquiry.

66. Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited,* 112 HARV. L. REV. 1876, 1913 (1999).

67. Scalia, *supra* note 28, at 17; *see also* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 354 (2005). This notion of "objectified" intent may be justified by thinking of the Constitution as a contract, as originalists generally do. In evaluating consent, the ordinary common-law rules of contract interpretation seek the intent of the parties. But this is not subjective intent: instead, it is the intent a document objectively manifests to a reasonable observer.

But a reasonable interpreter could not inquire into *actual* congressional intent: that would defeat the whole textualist project of positing a third-party interpreter in the first place. That is why Justice Barrett's observer draws contextual information from the Constitution. She is "treating the Constitution's structure as part of the context in which a delegation occurs,"[68] as Justice Barrett explains. It is "[b]ecause the Constitution vests Congress with '[a]ll legislative powers'"—not because Congress does this, that, or the other thing—that her interpreter "would expect it to make the big-time policy calls itself."[69] What Justice Barrett is trying to show is that, absent additional information, a reasonable third party would not take a passage ostensibly delegating a major question to actually encompass that delegation. And that reasonable observer (a good textualist) does not get there by troubling herself about the empirical niceties of what Congress actually does. Instead, the observer looks to constitutional context, learning from the Constitution what kind of thing Congress is, and what kind of thing an agency is, and what kind of relationship they should therefore have.

IV. THE EIDELSON-STEPHENSON CHALLENGE: CAN A SUBSTANTIVE CANON BE RENDERED NON-SUBSTANTIVE?

Justice Barrett's structure-first approach also helps counter one of the latest, and most sophisticated, objections to her MQD formulation. Professors Benjamin Eidelson and Matthew Stephenson argue convincingly that substantive canons and textualism cannot coexist.[70] But Professors Eidelson and Stephenson also argue that Justice Barrett's attempt to turn the MQD into a non-substantive canon is not textualist, either. That argument is less convincing.

68. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring).

69. *Id.*

70. Eidelson & Stephenson, *supra* note 13, at 516–21.

A. The challenge: Does a shared anti-major-delegations norm really shape statutory meaning?

Professors Eidelson and Stephenson aptly describe the basic distinction between textually permissible and impermissible canons. A canon is substantive (and thus impermissible for a textualist) only when "it purports to speak to a statute's proper legal effect in a way that is not mediated by its evidentiary bearing on what a reasonable reader would take a lawmaker to have said in enacting the statute."[71] By contrast, a textualist may consider canons "that are justified by their probative value with respect to a statute's *communicative content*—that is, by the light that they cast on what a reasonable reader would understand a lawmaker to have said."[72] Professors Eidelson and Stephenson agree there is nothing "inherently improper" in Justice Barrett's attempt to use congressional purpose in a general, contextual sense, as part of a reasonable third party's interpretive backdrop.[73] But they nevertheless think her argument is flawed. They do not think a "reasonable interpreter" would agree that Congress generally does intend to answer major questions. A reasonable interpreter would not be justified in treating that premise as the kind of shared presumption that affects the communicative content of language.

First, they echo Professor Sunstein's concerns: they worry that Congress does often delegate major questions and that Justice Barrett's "baseline assumptions" might be normative in the sense that they "reflect her sense of what 'the Constitution's structure contemplates—namely, a regime in which Congress make[s] the big-time policy calls itself'—rather than even her own sense of what Congress actually does."[74] More importantly:

> In order for a textualist interpreter to be justified in drawing the sort of inference about statutory meaning that we have described [in favor of a presumption that Congress generally intends to

71. *Id.* at 533–34.
72. *Id.* at 533.
73. *Id.* at 541.
74. *Id.* at 541–42.

> answer major questions itself], it is not enough for them to be correct in endorsing the premises of a given canon—for example, correct in the belief that Congress rarely makes major delegations—or even to be correct in thinking that the lawmaker shares their perspective on that point. What matters, really, is whether the interpreter thinks that the lawmaker knows that this same perspective is widely shared among the audience by whom they intend to be understood. Only then would a reasonable reader expect the lawmaker to take their (presumed) knowledge of some proposition into account in shaping a message to them[.][75]

In other words, Professors Eidelson and Stephenson argue, a reasonable interpreter would not merely need to be *right* that Congress generally intends to answer major questions on its own, but would also need to also be justified in supposing that Congress thought readers would agree, and drafted statutes with that assumption in mind.[76] But this anti-major-delegations perspective is hardly a matter of common knowledge, or even one upon which most educated observers agree. If we polled lawyers or members of Congress, for example, we might well find that majorities think either that Congress *does* frequently intend to delegate major questions, or else that the Constitution allows such delegations. It makes little sense to suppose that Congress took this premise for granted in the minds of its readers and legislated accordingly. Thus, this premise is not something a reasonable interpreter could honestly take to be part of a statute's communicative backdrop, and therefore not something that genuinely modifies textual meaning.[77]

B. The response: Yes, because the "basic premise" is a normatively rational structural premise, not a shared background convention.

Professors Eidelson and Stephenson object that any anti-major-delegations presumption is neither obvious enough nor widely shared enough to modify textual meaning. But that objection

75. *Id.* at 542.
76. *Id.*
77. *Id.* at 543.

misallocates the burden of proof and misunderstands Justice Barrett's structural emphasis. The *first* context Justice Barrett's interpreter sees is the Constitution's Congress-agency relationship—just as someone looking in on the parent and babysitter would first identify them as parent and babysitter before parsing their words. Thus, it does not really matter whether a shared anti-major-delegations supposition is common knowledge, or is widely shared by actual observers, or indeed whether it reflects an underlying reality. What matters is whether a reasonable interpreter would *look at the Constitution and say it exists.*

Professors Eidelson and Stephenson must be thinking of the reasonable observer as something like an aggregate of actual observers—one whose rationality rests, in part, on what actual observers think.[78] That is why they care whether Congress actually does delegate major questions, and that is why they ask whether Congress actually shares the relevant presumptions.[79] The answers to those questions might well affect shared interpretive background, and so modify the views of a third-party observer who operates like an amalgamation of actual observers. But Justice Barrett's reasonable observer seems to emphasize *normative or pure* rationality, relying on what is reasonable *per se,* not what most people *say* is reasonable. Not once does Justice Barrett's opinion in *Biden v. Nebraska* refer to actual Congressional practice, or widespread agreement about a non-delegation norm, or anything like that. Instead, a contextual no-major-delegations premise "makes eminent sense in light of our *constitutional structure,* which is itself part of the legal context framing any delegation."[80] That is a logical judgement about what kind of principal-agent context the Constitution creates.[81]

---

78. Thanks to Bill Watson for first suggesting this idea.

79. Eidelson & Stephenson, *supra* note 13, at 541–42 (noting that the authors "see little reason to think that" delegations of major questions really are "anomalous").

80. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring) (emphasis added).

81. At the root of confusion about how to define a reasonable, third-party interpreter lies a difficulty that extends beyond the scope of this Note: the concept of "faithful agency" is sometimes at odds with the quest for textual meaning. Textualists usually describe judges as faithful agents of Congress. *See, e.g.,* Barrett, *supra* note 41, at 109;

Even our intuitions about parents and babysitters do not arise merely from cultural convention. Instead, "[o]ur expectation of clearer authorization for the amusement-park trip . . . reflects the intuition that the parent is in charge and sets the terms for the babysitter."[82] "If, by contrast, one parent left the children with the other parent for the weekend, we would view the same trip differently because the parents share authority over the children. The balance of power between those in a relationship inevitably frames our understanding of their communications."[83] These are logical deductions—logical deductions that rely on shared cultural practice, but also abstract assessments of the balance of power in a relationship.

The point is even clearer in the context of a constitutional command than a parental one. "[W]hen it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore."[84] The Constitution is a text susceptible to logical analysis—a kind of authoritative manual for

---

John Manning, *Textualism and the Equity of the Statute,* 101 COLUM. L. REV. 1, 5, 127 (2001) (arguing that the original meaning of the Article III "judicial power" requires or at least allows faithful agency); Manning, *Clear Statement Rules and the Constitution, supra* note 41, at 428–30. But consider another example Barrett offers in *Biden v. Nebraska*. Suppose a grocer tells his clerk to "go the orchard and buy apples for the store." *Id.* at 2379. Context implies limits to the clerk's "apple-purchasing authority;" he cannot buy far more apples than the grocer usually stocks, for example. *Id.* But this limit, from the agent's (the clerk's) point of view, is less one of context than presumed subjective intent. The clerk, as a good servant, will ask himself what his boss really had in mind, because he knows that he will be rewarded or punished based on whether he did what his boss really wanted, not based on whether his interpretation of the command was reasonable in light of all the surrounding circumstances. A good servant (or a faithful agent) would never, in other words, ask how a reasonable third-party observer might interpret his command, but would always try to guess his master's secret wishes, and would rely on inside information about his relationship to his master—exactly the kinds of things textualist judges try to avoid. Perhaps, therefore, it makes more sense to describe a textualist judge—one interested in justice and fair notice to regulated parties—as a faithful agent *of the statutory text itself,* not a faithful agent of the legislature. Faithful agency to text is also more democratic than faithful agency to the legislature *per se.* Voters can pass judgement on the meaning of a statutory text and adjust their votes accordingly, but cannot very well police legislative intent.

82. *Id.* at 2381.

83. *Id.*

84. *Id.*

the Congress-agency relationship, one that shapes an interpreter's common sense before the introduction of any other evidence.

Think of it this way: suppose all parents started letting all their babysitters go on weekend trips, and said "have fun" with the expectation of fancy trips; and suppose all babysitters understood this. But imagine also a kind of "owner's manual" that delineated the Platonic roles of parents and babysitters: we might call it "The Constitution of Parents and Babysitters." Justice Barrett's reasonable interpreter is like an observer who has the owner's manual and who reads that manual before turning to any information about this novel set of cultural conventions. She does not decode the manual's meaning by conducting a poll of experts—even if, as discussed below, those experts might offer some value *after* she has finished reading the manual.[85] The owner's manual establishes an authoritative structural premise for interpreting parent-babysitter delegations, just as the Constitution establishes an authoritative structural premise for interpreting Congress-agency delegations.

With that structural premise in mind, a reasonable observer would probably be justified in concluding "that the lawmaker," or the parent, "knows that this same perspective is widely shared among the audience by whom they intend to be understood," and had shaped his statutory message accordingly.[86] But in fact even that conclusion is now unnecessary, because the statutory message,

85. But linguistic meaning is conventional, and the Constitution consists of words. So is it even possible to interpret the Constitution with an emphasis on "pure reason"? Is that even a coherent idea? Undoubtedly some resort to shared linguistic meaning is necessary: that is the whole point of the original public meaning project. But linguistic meaning relies on both logic and convention, and the ratio of logic to convention increases as complexity and length increase. Consider a word or a phrase: these things mean whatever we all agree they mean. But if a phrase contains a logical deduction or statement, then the meaning of that deduction or statement is not conventional. Every term it employs might have a meaning that arises from social conventions, but once all those meanings have been established the deduction remains, and must be performed by logic alone. And logic itself is not capable of social construction, but rather depends upon the structure of the human mind: our minds cannot evade basic logical rules while continuing to "think" in any coherent sense. So one can think of textual meaning as a set of conventions connected by logic. And the longer and more complicated the text grows, the more logical connections predominate in establishing meaning.

86. Eidelson & Stephenson, *supra* note 13, at 542.

read in its constitutional context, now excludes major delegations by default, without any intermediate step of presumed message-shaping. Given the owner's manual, the parent's command excludes long trips, whether she ever thought about the meaning of "have fun" or not. Or, to return to the Wittgenstein example, "Shew the children a game" excludes gambling by default; the whole point of the example is that the possibility of gambling must *not* have come before the mind of the game-demander.[87] We can assume that the parent would exclude long trips *if asked,* and assume that the game-demander would exclude gambling *if asked,* but must not assume that either one has given any actual thought to the matter. Those assumptions do not even need to be correct—they just need to be reasonable.

All this does not render shared communicative presumptions or the views of actual interpreters irrelevant: perhaps they come into play after the reasonable observer has reasonably consulted the Constitution. Maybe the observer polls the experts after reading the manual. But Justice Barrett's observer clearly starts with the Constitution to find an initial, rationally derived structural context, which might then be rebuttable by other means.[88] As Justice Barrett puts it, "[i]n some cases, the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing."[89]

Professors Eidelson and Stephenson would demand a clear, shared anti-major-delegation understanding to override a text's apparent major delegation.[90] Starting from this structural premise, though, the Eidelson-Stephenson test might be restated to say that a textualist interpreter can draw from statutory text an inference *in favor* of a major delegation only if she can find a shared

87. WITTGENSTEIN, *supra* note 50, at 33.

88. When is a shared understanding between Congress and agencies sufficient to override the structural premise? A bright-line answer extends well beyond the scope of this Note, but most likely the line is one for elucidation through judicial and congressional practice. That practice, after all, itself helps shape the shared background assumptions that create shared meaning.

89. *Biden,* 143 S. Ct. at 2381 (Barrett, J., concurring).

90. Eidelson & Stephenson, *supra* note 13, at 543.

presumption between Congress and the agencies (and maybe regulated parties) that delegations are to be read with the strictest literalism, even when they encompass major matters. Only then has the communicative content of language changed to favor a delegation.

C. Can textualism accommodate a structure-first observer?

But does this structure-first approach to the third-party interpreter make sense? In truth, any hypothetical "reasonable" observer needs both a little pure rationality and a little empiricism. An observer who disregarded the views of all actual observers probably would not be "reasonable," since language is ultimately a social construct. But an observer who lacks *any* normative priors is not reasonable, either, because reasonability is itself a normative prior. And there might be good reasons for a textualist to emphasize a logic-first, constitutional-structure-first approach.

First, the Congress-agency relationship *does have* an owner's manual. It is the Constitution. Indeed, that is why the Congress-agency relationship is a little different from the parent-babysitter relationship, and why it is more like a parent-babysitter relationship that comes with a "Constitution of Parents and Babysitters." Absent that document, a reasonable interpreter will rely largely on shared societal conventions about what parents and babysitters do. But it makes perfect sense for an interpreter who has the manual to check the manual first.

Second, common sense and abstract rationality become more important as empirical evidence diminishes. Our interpreter is more likely to check the owner's manual if she does not know anything about what babysitters and parents usually do, or if public opinion is hopelessly muddled on the subject. Maybe parenting experts disagree about how often parents do let their babysitters go on weekend trips. In that case, even an interpreter *without* an owner's manual will be left to rely more heavily on abstract deductions about the Platonic nature of parents and babysitters. And the empirical

evidence about what Congress does, and what actual observers *think* it does, is debatable and inconclusive.[91]

Finally, a pure-reason, structure-first inquiry into objectified congressional intent has, for a textualist, the advantage of minimizing the use of *actual* intent. The problem of reliance on actual intent will almost certainly arise if the third-party observer is something like an aggregate of actual observers, since the views of many actual observers probably do depend, at least indirectly, on actual congressional practice. (That is probably why Professors Eidelson and Stephenson mention actual congressional practice.)[92] A structure-first inquiry minimizes the awkward problems of distilling unitary intent from a multi-member body or examining legislative history or otherwise relying on information probably unknown to regulated parties.[93] In short, it minimizes the problems that lead textualists to eschew congressional intent in the first place. The "basic premise" is less awkward for textualism if it is mostly an abstract endeavor rather than an attempt to aggregate presumptions commonly shared among legislative drafters, lawyers, law professors, or regulated parties.[94] And it fits the spirit of textualism, too: that spirit, insofar as an interpretive methodology can have a spirit, is that Congress could mean something, could expect regulated parties to agree with its own priors, could shape its message accordingly, and be wrong anyway, because the text just does not say that.[95]

---

91. *See* Gluck & Bressman, *supra* note 32, at 1003.

92. *See* Eidelson & Stephenson, *supra* note 13, at 541.

93. Are normative priors unknown to regulated parties? If they are truly matters of "common sense" or basic reasonableness, they ought to be more easily ascertained than legislative intent.

94. Barrett's MQD is less an attempt to integrate Congressional intent into textualism than an attempt to integrate structuralism into textualism.

95. *See, e.g.*, Justice Scalia's opinion in *City of Chicago v. Env't Def. Fund,* 511 U.S. 328, 335–37 (1994). There Congress had attempted to create a complete exclusion from hazardous waste requirements for certain kinds of waste incinerators. Everyone knew what Congress meant, and why it had chosen the language it did: it was trying to codify a pre-existing EPA regulation that did create this kind of complete exclusion. But the language it chose simply did not create the exclusion it wanted to create. *Id.*

V. SMUGGLING IN SUBJECTIVITY?

But all this raises one more hurdle: if Justice Barrett's "basic premise" is not empirical, it has another problem, Professor Sunstein argues.[96] Yes, maybe Justice Barrett is relying on the Constitution, not actual Congressional practice, and so escaping any empirical difficulties.[97] But now she seems to be making a normative claim—the same kind of "Lockean" normative claim Justice Gorsuch was making! Her linguistic argument "starts to converge with the Lockean argument."[98] So perhaps Justice Barrett is just smuggling in her preferences under the guise of a linguistic canon. Professors Eidelson and Stephenson worry about the same thing, too—and point to Justice Barrett herself, who, in her academic career, objected to the "'temptation to rationalize ostensibly substantive canons' in nonsubstantive terms."[99]

The objection is a severe one. Justice Barrett might offer two kinds of defenses. She might begin by agreeing that her MQD is Justice Gorsuch with extra steps, but she might say that the extra steps really matter. By claiming that her structural premise shapes the meaning of a delegation, she is claiming that a hypothetical third-party interpreter who disagreed would be not merely wrong but *unreasonable or irrational.* She must show that her proposition is not merely *correct* but required by common sense. Normative rationality must compel it. That higher standard stops her from smuggling in mere personal preferences, at least in theory. Of course that distinction might grow weaker in practice, since there is room for debate about which Constitutional interpretations are so false as to be irrational.[100]

---

96. Sunstein, *supra* note 10, at 260.

97. *Id.*

98. *Id.*

99. Eidelson & Stephenson, *supra* note 13, at 543 (quoting Barrett, *supra* note 41, at 120–21).

100. This "rationality barrier" would be a necessary implication even if Justice Barrett's reasonable interpreter relied on an empirical assessment of shared conventions, as Professors Eidelson and Stephenson suppose, but in that case "irrationality" would

Then Justice Barrett might also try a defense that applies equally to Justice Gorsuch: the substantive norm or position they are both defending is very different from a preference or a policy view. Professor Sunstein describes the Lockean argument as "normative," and suggests that Justice Barrett's "basic premise," if not empirical, might be something like "a legal fiction, or an article of faith, grounded on Article I, Section I."[101] But those terms do not adequately describe Justice Barrett's premise (and they probably do not describe Justice Gorsuch's, either). Both Justice Gorsuch and Justice Barrett are offering a structural claim about the Constitution—a legal argument about what the Constitution says. It is falsifiable or at least contestable, like any structural argument. A dissenter could argue that the Constitution does not rely on such a rigid separation; that delegations of major questions occurred even in the early Republic; or that delegations will not "dash [the] whole scheme," as Justice Gorsuch puts it.[102] Indeed, accumulating originalist evidence against a strong nondelegation doctrine is perhaps the greatest threat to Justice Gorsuch's separation-of-powers project, and that evidence makes it harder to say that an interpreter would start with Justice Barrett's structural premise as a matter of common sense.[103] Maybe Justice Barrett (and Justice Gorsuch) think the Constitution *should* protect the separation of powers by limiting major delegations. But their respective structural premises are each, in different ways, not about whether it *should,* but about whether it *does.*

---

have different, and perhaps more stringent, implications. It is probably very clear, in many cases, that a premise is not so widely shared as to constitute a background presumption that shapes communicative content. That judgement is probably more obvious and less subjective than a judgement about whether a rational person can rationally adopt only one particular view of the Constitution.

101. Sunstein, *supra* note 10, at 260.

102. *West Virginia,* 142 S. Ct. at 2618 (Gorsuch, J., concurring) (citing *Dep't of Transp. v. Ass'n of Am. R.R.,* 575 U.S. 43, 61 (2015) (Alito, J., concurring)).

103. *See, e.g.,* Ilan Wurman, *Nondelegation at the Founding,* 130 YALE L.J. 1288 (2021), for an account favorable to the nondelegation doctrine that still falls well short of establishing the version Justice Gorsuch has advocated.

VI. STREAMLINING THE "BASIC PREMISE"

All this may serve to render Justice Barrett's MQD textualist, but not, perhaps, to render it convincing. The whiff of subjective judgement lingers. The "basic premise" might be structural, but it could be a bad structural premise. Or perhaps the notion of a normatively rational third-party interpreter just will not do. Perhaps the "basic premise" is more trouble than it is worth.

Actually, as Professor Sunstein points out, Justice Barrett might not need the "basic premise" at all.[104] The mere fact that most of the delegations the MQD fells are novel or surprising or bad fits for a statutory scheme might be enough to render them textually impermissible without any underlying assumptions about the nature of Congress or the separation of powers.[105] Perhaps she keeps it, Professor Sunstein suggests, because she does believe that something about the modern administrative state cuts a deep gash into the design of our constitutional order, and she thinks the point is an important one to remember.[106]

Justice Barrett's "basic premise" might be placed on firmer textual footing, while retaining some of its separation-of-powers flavor, if the structural norm is scaled back slightly, rendering it less categorical. As it stands, the "basic premise" says that a reasonably informed interpreter would assume that Congress "intends to make major policy decisions itself, not leave those decision to agencies."[107] Suppose the premise is reworded like this: "A reasonably informed interpreter will assume that Congress does not usually want agencies to make policy decisions that are novel, strange, or unexpected." This sort of phrasing, though still vague, is a more precise and more nuanced substitute for "majorness" alone. It is probably easier to see that an agency action is strange or statutorily unexpected than to decide whether it has major economic or political implications, and the standard might, in practice, prove more

104. Sunstein, *supra* note 10, at 258.
105. *Id.*
106. *Id.*
107. *Biden,* 143 S. Ct. at 2380 (Barrett, J., concurring).

neutral.[108] Economic or political majorness is closely tied to political preferences about the proper size of government in a way novelty alone is not. That phrasing allows for the possibility that Congress sometimes does want to delegate a lot of *power*, but assumes that Congress, when it does delegate substantial power, wants that power to be used in predictable ways, probably ones related to agency expertise. Congress might tell the EPA, "Go ahead and use your expertise to come up with clever ways to reduce air pollution—just do not frighten me!" The nice thing about this kind of supposition is that it could rest on many different foundations. It could rely upon a real concern about separation-of-powers (and thus upon a structural, Constitutional norm, like Justice Barrett's "basic premise"). It could also rely on institutional jealousy, or even notions of efficient technocracy and the division of labor. It is a premise that *could* be justified in a structure-first way, but it is maybe also a premise that is empirically true and widely shared by actual observers. That would make it acceptable in Professors Eidelson and Stephenson's account of a third-party observer, too: this kind of norm *might* actually be part of a statute's communicative backdrop.[109]

---

108. Consider *Texas v. EPA*, a challenge, now pending before the D.C. Circuit, to the Biden Administration's Clean Air Act motor vehicle standards. State and private petitioners have tried to argue "majorness" by noting potential impacts on foreign policy, electricity consumption, state energy grids. Final Opening Brief for State Petitioners at 22–24, Texas v. EPA (No. 22-1031) (D.C. Cir. argued Sept. 14, 2023) The EPA responded by arguing that the rule is *good* for national security and disputing the other alleged impacts. EPA's Final Answering Brief at 57–59, Texas v. EPA (No. 22-1031) (D.C. Cir. argued Sept. 14, 2023). That is a pure policy debate. (Besides, alleged national security effects should render an MQD argument less plausible. A foreign-affairs delegation is less novel or surprising than any other kind.)

109. Eidelson and Stephenson, *supra* note 13, at 542 (asking whether a legislator would shape language in expectation of a reasonable reader's interpretive lens). Of course, if watered down too far, the basic premise eventually just looks like the absurdity canon. Perhaps Justice Barrett's MQD could even be described as a structural twist on the absurdity canon—a suggestion that some structural assumptions are absurd, and that some structural premises are necessary to avoid absurdity. The question is how far beyond the absurdity canon structural textualism can go (or how much structure the concept of "absurdity" can accommodate). Is it "absurd" to omit a rationally compelled premise? Or is "irrational" a lower bar than "absurd"?

It is very possible that lower courts will water down the MQD this way, using what Professor Sunstein calls an "incompletely theorized" presumption against novel or astonishing statutory language, with an occasional reach for structural principles (assuming they gravitate toward Justice Barrett's version, eschewing Justice Gorsuch's more rigid framework).[110] The idea that novel and surprising agency action lies outside the scope of statutory text is intuitively appealing, and perhaps an occasional reach for a structural norm makes sense when a court can't otherwise explain why a particular agency action is odd or textually off in some way—or when a court wants to make a point about the separation of powers.

CONCLUSION

Justice Barrett's MQD is not so much a textualist stretch, a desperate attempt to transform a substantive canon into a nonsubstantive one, as it is a thoroughly novel way of integrating constitutional structure into textual meaning. The idea that a third-party interpreter's rationality and common sense is not just "commonness," but instead normative reasonableness, serves as a check to an account of linguistic meaning that sacrifices logic to convention. "Logic" can serve as a vehicle for smuggling in judicial preference—but shared meaning can do the same, when the inquiry into sharedness becomes an inquiry into actual Congressional practice, or an inquiry only into what Congress thought its audience thought it was going to mean, on the basis of what most people think it usually means. Perhaps more importantly, though, Justice Barrett's MQD helps create a logical home for structuralism, an ill-defined method of constitutional interpretation that hovers awkwardly around the edges of a first-year law student's introduction to legal interpretation, never quite fitting into the simplified "originalist"

110. Sunstein, *supra* note 10, at 263 (citing Cass R. Sunstein, *Incompletely Theorized Agreements,* 108 HARV. L. REV. 1733, 1735–36 (1995)).

and "living constitutionalist" binary.[111] It is most valuable, in the end, not because it renders the MQD textualist, though this Note has argued that it does. It is valuable because it probes the nature of textualism itself.

111. Even though Justice Barrett's MQD applies to statutes, not constitutions, the structural logic can be transposed: the Constitution might establish structural premises logically evident to a reasonable third-party interpreter, and so ones that modify what specific passages actually mean.