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ESSAY

Bringing the Antiquities Act Into the Modern Age

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Abstract. The Antiquities Act empowers the President both to declare national monuments and to reserve the "smallest area" of land compatible with the preservation of such monuments. Modern Presidents have adopted expansive interpretations of those authorities—purporting, for example, to reserve entire "ecosystems" as national monuments, and to claim that the Act's reference to "land" includes state-sized swaths of the ocean floor. Until recently, Presidents' expansive readings of the Act have gone largely unchecked by courts. But in Massachusetts Lobstermen's Ass'n v. Raimondo, *Chief Justice Roberts expressed interest in reconsidering "[t]he scope of the objects that can be designated under the [Antiquities] Act, and how to measure the area necessary for their proper care and management." This Essay will respond to the Chief Justice's expression of interest by proposing how courts should review presidential declarations made pursuant to the Antiquities Act.*

In short, interpretations of the Antiquities Act should be brought into the modern age of statutory interpretation—an age dominated by the rise of textualism and widespread applications of the major questions doctrine. Interpreting the Act's provisions from the perspective of the ordinary reader (as textualists do), and asking whether the Act "clearly" gives the President "major" authority (as the major questions doctrine requires), would remedy the Chief Justice's concern that the Act "has been transformed into a power without any discernible limit."

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Introduction

Chief Justice Roberts began his statement in *Massachusetts Lobstermen's Ass'n v. Raimondo*[1] with a question: "Which of the following is not like the others: (a) a monument, (b) an antiquity (defined as a 'relic or monument of ancient times,' . . .), or (c) 5,000 square miles of land beneath the ocean?"[2] The question was, of course, rhetorical. "If you answered (c)," he explained, "you are not only correct but also a speaker of ordinary English."[3]

Why would the Chief Justice of the United States ask such an easy-to-answer question? Perhaps because Presidents have had difficulty answering it themselves. In particular, Presidents have offered some eyebrow-raising interpretations of the statutory power afforded to them by an important, but little-known, statute called the Antiquities Act.[4]

Consider, for example, the presidential declaration at issue in *Massachusetts Lobstermen's Ass'n*, in which the President designated "4,913 square miles of *waters and submerged* lands"[5] as a national monument.[6] Designating "submerged land" (or what ordinary English speakers might call it: "the Ocean") as a national monument is a rather fanciful interpretation of the Antiquities Act, which empowers the President to declare "historic landmarks," "structures," and "other objects . . . situated on *land*" to be "national monuments."[7] What's more, the interpretation is particularly questionable given that the "submerged land" at issue was "about the size of Connecticut,"[8] despite the fact that the Antiquities Act requires the President to limit declarations to "*the smallest area* compatible with the proper care and management of the objects to be protected."[9]

Since at least Paul Revere, ordinary English speakers have recognized a distinction between "land" and "sea."[10] Interpretations of the Antiquities Act that conflate those basic terms (among others), and which seem to erase the Act's "smallest area compatible" limitation, therefore call out for judicial review. And yet, as the Chief Justice explained, "[s]omewhere along the line" the Antiquities Act "has been transformed into a power without any discernible limit."[11]

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1 141 S. Ct. 979 (2021) (Roberts, C.J., statement respecting denial of certiorari).

2 *Id.* at 980.

3 *Id.*

4 Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 54 U.S.C. §§ 320301–320303)).

5 Proclamation No. 10287, 86 Fed. Reg. 57349, 57349 (Oct. 8, 2021) (emphasis added); *see also* Proclamation No. 9496, 81 Fed. Reg. 65161, 65163 (Sept. 15, 2016).

6 *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980.

7 54 U.S.C. § 320301(a) (emphasis added).

8 *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980.

9 54 U.S.C § 320301(b) (emphasis added).

10 HENRY WADSWORTH LONGFELLOW, PAUL REVERE'S RIDE 3, 5 (1907) ("[Revere] said to his friend, 'If the British march // By land or sea from the town to-night, // Hang a lantern aloft . . . . // One, if by land, and two, if by sea.'").

11 *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981.

There is reason to believe, however, that the Court is prepared to look at the President's Antiquities Act authority in a new light. In *Massachusetts Lobstermen's Ass'n*, the Chief Justice signaled interest in soon considering what the Antiquities Act "smallest area compatible" requirement means, as well as "what standard might guide [judicial] review of the President's actions in this area."[12] Should the Chief Justice's colleagues agree to take such a case in the future, it would enable the Court to consider "[t]he scope of the objects that can be designated under the [Antiquities] Act, and how to measure the area necessary for their proper care and management."[13] And it is in anticipation of that very sort of Supreme Court interest that this Essay proposes how courts should review presidential declarations made pursuant to the Antiquities Act.

The first step in identifying the proper role that courts should play in reviewing Antiquities Act declarations is to address the Court's decision in *Dalton v. Specter*.[14] In that case, the Court wrote, "Where a statute . . . commits decision-making to the discretion of the President, judicial review of the President's decision is not available."[15] Considered in *Dalton*'s shadow, the Antiquities Act, which speaks to "the President's discretion" to "declare . . . national monuments,"[16] might appear to leave little opportunity for meaningful judicial review. But it is a mistake to conclude that *Dalton* leaves courts unable to review Antiquities Act declarations. This is so for at least two reasons.

First, the statute at issue in *Dalton* is quite distinguishable from the Antiquities Act, because the statute in *Dalton* did "not *at all* limit the President's discretion."[17] By comparison, the Antiquities Act limits the President's discretion by mandating that the President "confine[]" the land reservations "to the smallest area compatible with the proper care and management of the objects to be protected."[18] Thus, while statutes such as the one in *Dalton* might vest the President with limitless discretion to make "political" decisions that are "beyond the competence of the courts,"[19] the Antiquities Act's "smallest area" requirement imposes on the President a *legal* restraint of the sort that courts can readily enforce.

Second, even if *Dalton* were applicable to the Antiquities Act, the case offers an outdated framework for statutory interpretation that is inconsistent with the Supreme Court's modern approach. In the modern era, textualism dominates,[20]

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12 *Id.*

13 *Id.*

14 511 U.S. 462 (1994).

15 *Id.* at 477.

16 54 U.S.C § 320301(a).

17 *Dalton*, 511 U.S. at 476 (emphasis added).

18 54 U.S.C § 320301(b).

19 *Dalton*, 511 U.S. at 475 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948)).

20 Textualists "understand courts to be faithful agents of 'the people'" who seek to interpret statutes as "an objective reader would . . . have at the time the text was enacted." Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 481–82 (2021).

and the Major Questions Doctrine ("MQD") is widely applied.[21] And although many scholars (including myself) have critiqued the MQD—including on the grounds that the MQD presents unique issues for textualists—the doctrine appears here to stay.[22] To bring interpretations of the Antiquities Act into the modern age of statutory interpretation, courts should therefore adopt a textualist perspective and at least consider whether an Antiquities Act declaration constitutes a "major" decision that requires clearer statutory authority than the Act can offer.

What's more, applying the MQD and a textualist lens to Antiquities Act declarations may be in less tension with *Dalton* than one might otherwise presume. That is because the Court in *Dalton* was clear to state that presidential actions taken pursuant to statutory authority could be challenged on the grounds that the relevant statute ran afoul of the Constitution's nondelegation principle (which limits Congress's ability to delegate authority to the President).[23] Thus, if the MQD is a method of enforcing the Constitution's nondelegation principle (as at least some Justices appear to think it is),[24] then the MQD could be understood as a logical outgrowth of the special solicitude that *Dalton* offers to nondelegation challenges.

Part I of this Essay offers a brief overview of the Antiquities Act as well as the Court's past reluctance—announced most prominently in *Dalton*—to review presidential claims to statutory authority. Part II then explains how courts should review presidential declarations made pursuant to the Antiquities Act. In particular, Section II.A first identifies the legal limitations that the Antiquities Act places on the President's discretion, and then explains why courts can enforce those legal limitations without running afoul of *Dalton*. Section II.B then turns to the MQD and explains first why the MQD is applicable to presidential actions, and then second how at least one version of the MQD is in less tension with *Dalton* than one might otherwise presume. Finally, Part III concludes by outlining how the MQD might apply to some of the more fanciful claims to Antiquities Act authority.

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21 The MQD requires courts to identify "clear congressional authorization" before concluding that a statute grants the statutory authority to answer questions of "major" importance. *See infra* Section II.B.

22 *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1092 (2023); Squitieri, *supra* note 20, at 465. I have elsewhere proposed how the MQD could be reworked as to be consistent with textualism in my opinion. *See* Chad Squitieri, *"Recommend . . . Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 BAYLOR L. REV. 706, 708 (2023) (proposing that "the major questions doctrine can be reformulated into a new substantive canon that textualists can embrace"). In an effort to respond adequately to the Chief Justice's call in *Massachusetts Lobstermen's Ass'n*, this Essay does not work within the reformulated MQD that I have proposed but instead works within the MQD as it exists at the Court.

23 Squitieri, *supra* note 20, at 469.

24 *See infra* Section II.C.

I. Legal Background

Section I.A offers a brief overview of the Antiquities Act. Section I.B then offers a brief overview of key precedent outlining the Supreme Court's historical reluctance to review presidential claims to statutory authority.

A. *The Antiquities Act*

At its core, the Antiquities Act of 1906 empowers the President to "declare" certain objects to be national monuments,[25] and to "reserve" land as part of such monuments.[26] More particularly, the Act provides:

> The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.[27]

The Act then provides:

> The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[28]

In addition, the Act empowers various executive officials to grant permits for "the examination of ruins, the excavation of archeological sites, and the gathering of objects of antiquity," so long as the examination, evacuation, and gathering satisfy various criteria.[29]

Although the Antiquities Act "originated as a response to widespread defacement of Pueblo ruins in the American Southwest,"[30] it has been used by Presidents to do more than protect "ancient dwelling site[s]" from being "vandalized by pottery diggers for personal gain."[31] Consider, for example, the Northeast Canyons and Seamounts Marine National Monuments. As Chief Justice Roberts explained in *Massachusetts Lobstermen's Ass'n*, the "'objects' to be protected'" in that so-called monument are the "'canyons and seamounts themselves,' along with 'the natural resources and ecosystems in and around them.'"[32] This meant reserving approximately "3.2 million acres of submerged land," which included "three underwater canyons and four undersea volcanoes," to be a "National Monument."[33]

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25 54 U.S.C § 320301(a).

26 *Id.* § 320301(b).

27 *Id.* § 320301(a).

28 *Id.* § 320301(b).

29 *Id.* § 320302(a)–(b). The Act also empowers the officials to "make and publish uniform regulations for the purpose of carrying out this chapter." *Id.* § 320303.

30 Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979, 980 (2021).

31 *Id.* (citation omitted).

32 *Id.* at 981 (citation omitted).

33 *Id.*

That sort of expansive reading of the Antiquities Act is at least in part a result of the Supreme Court having "*suggested*" (to use the Chief Justice's terminology) "that an 'ecosystem' and 'submerged lands' can, under some circumstances, be protected under the Act."[34] The Chief Justice's use of the term "suggested" might have been overly generous; Justice Scalia referred to the majority opinion in question as offering only "a dictal feint toward the Antiquities Act."[35] But regardless of how aggressively one reads the Court's past encounters with the Antiquities Act—all of which predate textualism's modern dominance at the Court[36]—it seems reasonable to conclude that modern Presidents have offered aggressive readings of the Antiquities Act at least in part because the Court has been reluctant to give the Act much bite. And that reluctance is simply evidence of a broader phenomenon: a judicial reluctance to second-guess presidential claims to statutory authority—at least when the statute in question purports to vest the President with significant discretion. This broader reluctance to review the President's statutory powers will now be explored in Section I.B.

B. *Reviewing the Legality of Presidential Action*

How do courts review the legality of presidential action? Justice Jackson offered seminal guidance in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[37] There, Justice Jackson categorized presidential conduct into three categories. The first covers "[w]hen the President acts pursuant to an express or implied authorization of Congress."[38] The second, "[w]hen the President acts in absence of either a congressional grant or denial of authority."[39] And the third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress."[40] Presidents who purport to act pursuant to statutory authority (as President's invoking the Antiquities Act do) fall within Justice Jackson's first category. But it is here that Justice Jackson's three-part framework fails to offer

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[34] *Id.* (citing Alaska v. United States, 545 U.S. 75, 103 (2005)) (emphasis added); *see also* United States v. California, 436 U.S. 32, 36 n.9 (1978) ("Although the Antiquities Act refers to 'lands,' this Court has recognized that it also authorizes the reservation of waters located on or over federal lands."); *id.* at 36 ("There can be no serious question, therefore, that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts as a national monument . . . .").

[35] Alaska v. United States, 545 U.S. at 113 (Scalia, J., concurring in part). *But see* Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535, 541 (D.C. Cir. 2019) (concluding that the *Alaska* Court's analysis of the Antiquities Act constituted more than dicta).

[36] In the modern era it was not until Justice Kagan's confirmation in 2010 that a majority of the Court could even *arguably* be referred to as textualist. *Infra* note 67. But a more obvious date signaling a clearer start of textualism's modern dominance on the Court was either 2018, when Justice Kavanaugh was confirmed, or 2020, when Justice Barrett was confirmed. *Id.*

[37] 343 U.S. 579, 634–67 (1952) (Jackson, J., concurring); Kevin M. Stack, *The Statutory President*, 90 IOWA LAW REV. 539, 557 (2005).

[38] *Youngstown*, 343 U.S. at 635.

[39] *Id.* at 637.

[40] *Id.*

dispositive insight—as the framework "is silent on how a court is to judge when a president acts 'pursuant to' a statute.'"[41] A court considering whether a President's reading of a statute is correct must therefore look beyond *Youngstown* for guidance.

Where might a court look for such guidance? One natural place to look would be the Administrative Procedure Act ("APA"). After all, courts routinely invoke the APA when reviewing executive branch agencies' interpretations of statutory provisions. But the Supreme Court closed the door to APA review of the President in *Franklin v. Massachusetts*.[42] In that case, the Court reasoned that, although *agencies'* claims to statutory authority can be reviewed under the APA, the *President's* claims to the same are not.[43]

The *Franklin* Court was clear to state, however, that Presidents acting pursuant to statutory authority were not totally immune from judicial review. As the *Franklin* Court explained, although "the President's actions" are "not reviewable . . . under the APA," those same presidential actions "may still be reviewed for constitutionality."[44] To establish that point, the Court cited two cases: *Youngstown* and *Panama Refining Co. v. Ryan*.[45] As noted above, *Youngstown* offers seminal guidance regarding the scope of the President's authority. The citation to *Youngstown* was therefore rather predictable—perhaps even obligatory. Less predictable was the *Franklin* Court's citation to *Panama Refining*, a case which involved one of the rare instances in which the Supreme Court enforced the Constitution's nondelegation principle (which limits Congress's ability to delegate authority to the President).[46] The citation to *Panama Refining* was thus a clear indication that courts may review the President's claims to statutory authority on the grounds that the exercise of such authority violates the Constitution's nondelegation principle.

Two years after *Franklin*, in *Dalton v. Specter*, the Court sought to clarify its "statement in *Franklin* that presidential decisions are reviewable for constitutionality."[47] In doing so, the Court rejected the argument that "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution."[48] The Court thus drew a distinction "between claims of constitutional violations and claims that an official has acted in excess of his statutory authority."[49] Pursuant to that distinction, "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review under the

41 Stack, *supra* note 37, at 541.

42 505 U.S. 788 (1992).

43 *Id.* at 800–01.

44 *Id.* at 801.

45 293 U.S. 388 (1935).

46 Squitieri, *supra* note 20, at 469.

47 Dalton v. Specter, 511 U.S. 462, 471 (1994).

48 *Id.* at 472.

49 *Id.*

exception recognized in *Franklin*."[50] And because "claims that the President has violated a statutory mandate" were not subject to judicial "review . . . when the statute in question commits the decision to the discretion of the President," the Court concluded that judicial review was not available in *Dalton*.[51]

As in *Franklin*, the Court in *Dalton* gave special attention to the Constitution's nondelegation principle. In particular, the *Dalton* Court distinguished the statutory claim at issue (which could not be subjected to judicial review) from a hypothetical, *judicially reviewable* claim alleging that the relevant statute "itself amounts to an unconstitutional delegation of authority to the President."[52] By noting that the nondelegation challenge in *Panama Refining* was the only "other case (along with *Youngstown*) cited in *Franklin* . . . as an example of when we have reviewed the constitutionality of the President's actions,"[53] the Court again signaled quite strongly that courts could review presidential actions for their conformity to the Constitution's nondelegation principle—even when (and perhaps especially when) a statute in question commits a decision to the President's discretion.

II. Reviewing Antiquities Act Declarations

Part II now explains how courts should review presidential declarations made pursuant to the Antiquities Act. In particular, Section II.A highlights the legal limitations that the Antiquities Act places on the President's discretion, and then explains why courts can enforce those legal limitations without running afoul of *Dalton*. Section II.B then explains why the MQD is applicable to presidential actions. Section II.C then explains how at least one version of the MQD is in less tension with *Dalton* than one might otherwise presume.

A. *Legal Limitations*

1. Smallest Area

As an initial matter, the type of statute at issue in *Dalton* is quite distinguishable from the Antiquities Act. The statute at issue in *Dalton* did "not *at all* limit the President's discretion."[54] Given as much, the *Dalton* Court reaffirmed prior precedent describing exercises of presidential discretion as "political matters beyond the competence of the courts to adjudicate."[55] It

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[50] *Id.* at 473–74.

[51] *Id.* at 474, 477. The Court left open the possibility "that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA," although those claims were distinguished from instances in which "the statute in question commits the decision to the discretion of the President." *Id.* at 474.

[52] *Id.* at 473 n.5.

[53] *Dalton*, 511 U.S. at 473 n.5.

[54] *Id.* at 476 (emphasis added).

[55] *Id.* at 475 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948)).

followed that, "[w]here a statute, such as the" statute at issue in *Dalton*, "commits decision-making to the discretion of the President, judicial review of the President's decision is not available."[56]

The Antiquities Act, by comparison, does not purport to give the President limitless discretion. To the contrary, the Antiquities Act mandates that the President "confine[]" land reservations "to the smallest area compatible with the proper care and management of the objects to be protected."[57] To be sure, a *different* provision of the Antiquities Act does give the President certain "discretion."[58] But that different provision does not give the President unreviewable discretion to determine the "smallest area compatible with proper care and management." Instead, the provision of the Antiquities Act speaking to the President's discretion states (as was quoted in Section I.A above):

> The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.[59]

The "smallest area" limitation imposed on the President's authority comes in a *different* provision of the Antiquities Act, which (as was also quoted in Section I.A above) states:

> The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[60]

Together, these two distinct provisions indicate that, although the President has the discretion to determine which "landmarks," "structures," and "other objects" should be "declare[d] . . . national monuments,"[61] the President is *legally required* to limit land reservations regarding those monuments to the "smallest area compatible with the proper care and management of the objects."[62] And that legal requirement does not state *anything* about presidential discretion.

To be sure, the President may have more knowledge than the courts as to the appropriate area of land to reserve—and that knowledge may entitle the President to judicial respect.[63] But the Antiquities Act need not be read as suggesting that the President has anything approaching the final word on the issue. To the contrary, parties who purport to be injured by an overly large land declaration may be able to provide their own evidence of the proper area. Such

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56 *Id.* at 477.

57 54 U.S.C § 320301(b).

58 *Id.* § 320301(a).

59 *Id.*

60 *Id.* § 320301(b).

61 *Id.* § 320301(a).

62 *Id.* § 320301(b).

63 Something akin to *Skidmore* deference, in which a court "defer[s]" to the President to the extent the court finds the President's explanation "persua[sive]," might be appropriate. *See* Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

parties might, for example, offer testimony from forestry, archeological, or other relevant experts who contend that a smaller land reservation is appropriate. Courts could then exercise what the Supreme Court has referred to as "independent judgment" by weighing the competing evidence and coming to an adjudicated conclusion as to how the Antiquities Act "smallest area" mandate applies to the facts concerning particular national monuments.[64]

2. Landmarks, Structures, and Other Objects

Even if the President has statutorily afforded discretion to determine which "historic landmarks," "historic and prehistoric structures," and "other objects of historic or scientific interests" should be "declare[d] . . . national monuments,"[65] a court need not conclude that the President has the authority to redefine what those terms mean. Put differently, while the President has the discretion to determine, for example, *which* "historic landmark[s]" should be declared a national monument, the President need not be understood as having the unlimited discretion to determine whether something *is* a "historic landmark."

Consider an analogous (hypothetical) statute granting the President the authority to "declare, in the President's discretion, historical chocolate candies as official national snacks." Such a statute might give the President the authority to determine whether Snickers bars or Reese's Peanut Butter Cups should, or should not, be declared an "official national snack." But such authority would not empower the President to declare iceberg lettuce or marinara sauce to be an "official national snack" because iceberg lettuce and marinara sauce are not "historical chocolate candies." Similarly, a President who declared "the second oldest blue whale swimming in the Atlantic," or "all French fries sold on Wednesdays," to be a "historic landmark" under the Antiquities Act would no doubt be seeking to change what the term "historic landmark" means.[66]

Under standard textualist methodology—of the sort that has become dominant on the Supreme Court relatively recently[67]—it is the ordinary meaning

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[64] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024). To be sure, the *Loper Bright* Court grounded its decision in the APA. *Id.* The Court's earlier refusal to apply the APA to the President in *Franklin* would therefore suggest that the Court's holding in *Loper Bright* does not apply to presidential declarations. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

[65] 54 U.S.C § 320301(a).

[66] A President making such declarations may also, of course, run into issues with ensuring those "historic landmarks" need to be "situated on land owned or controlled by the Federal Government." *Id.* § 320301(a).

[67] It is difficult to identify when, precisely, textualism became the dominant method of interpretation at the Supreme Court—in part because jurists do not always fall into cleanly identified categories of interpretive methods. In the modern era, it was not until the 2010 appointment of Justice Kagan that a majority of the Court could even *arguably* be considered textualists. That majority consisted of Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kagan. But it was not until 2015 that Justice Kagan famously declared that "we're all textualists now." Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:29, YOUTUBE (Nov. 25, 2015), perma.cc/VX32-RB3J. And even if an arguable majority of the Court was textualist with the addition of Justice Kagan, textualism did not become more obviously dominant until the

of statutory terms that controls, not the President's understanding of those terms.[68] Applying textualist methodology to the Antiquities Act would lead one to conclude that the Act no doubt grants the President the discretion to determine *which* "historic landmarks," "historic and prehistoric structures," and "other objects of historic or scientific interests" (as defined by ordinary meaning) should be "declare[d] . . . national monuments."[69] But the same methodology would restrict the President to using those statutory terms *as defined by ordinary meaning*. The upshot is that presidential efforts to declare things like "ecosystems" or "submerged land" to be "historic landmarks . . . situated on land,"[70] should be reviewable by courts who must ensure that "ecosystems" or "submerged land" fall within the ordinary meaning of the statutory terms that the President invokes.

Because the Antiquities Act gives the President the discretion to determine only *which* "landmarks," *etc*. to designate as national monuments—but *no* power to redefine whether the ordinary reader would conclude something *is* an "historic landmark," *etc.*—*Dalton*'s lesson that judicial "review is not available when the statute in question commits the decision to the discretion of the President" is inapplicable to arguments concerning whether a particular object qualifies as an "historic landmark," *etc*.[71] But that still leaves courts with the difficult question of determining whether various things—such as ecosystems and submerged land—fall within the ordinary meaning of "historic landmarks," *etc.* Section II.B will therefore introduce a key pillar of modern statutory interpretation—the MQD—which can assist courts in elucidating statutory meaning.

B. *The Major Questions Doctrine*

The Major Questions Doctrine requires administrative agencies to identify "clear congressional authorization" to support their efforts to answer a "major"

2018 appointment of Justice Kavanaugh (who replaced the non-textualist Justice Kennedy) and the 2020 appointment of Justice Barrett (who replaced the non-textualist Justice Ginsburg). *See also* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1614 (2023) (noting that "textualist momentum is not slowing," and that "[t]he Supreme Court is now dominated by devoted textualists").

68 "[T]extualist jurists are faithful agents of the People, not" faithful agents of either Congress or the President. Chad Squitieri, *Placing Legal Context in Context*, 19 HARV. J.L. & PUB. POL'Y: PER CURIAM 1, 2 (2024) (emphasis omitted). Federal statutes are the end-product of "various intra- and inter-branch political negotiations that make up the federal lawmaking process," within which the President and Congress play important functions. *Id.* As faithful agents of the people, textualist jurists "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." *Id.* at 2 n.9; *cf.* Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535, 541 (D.C. Cir. 2019) (deciding that the court need not consider the "ordinary meaning" of the Antiquities Act because "[o]n-point Supreme Court precedent resolves this claim").

69 54 U.S.C § 320301(a).

70 *Id.*

71 Dalton v. Specter, 511 U.S. 462, 474 (1994); *see also id.* (citing Dakota Cent. Tel. Co. v. South Dakota *ex rel.* Payne, 250 U.S. 163, 184 (1919) (distinguishing "a want of [Presidential] power" from "a mere excess or abuse of discretion in exerting a power given")).

question—that is, a question of "economic and political significance."[72] While early forms of the MQD can be traced back several decades, a majority of the Supreme Court did not invoke the MQD by name until *West Virginia v. EPA*.[73] In *West Virginia*, the Court justified the MQD as follows:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[74]

Although the precise contours of the MQD are still to be determined, the doctrine is widely applicable. As one scholar writes, "By its own terms, the major questions doctrine has an extraordinarily broad possible reach, potentially touching every statutory interpretation case that might arise."[75] To use the Supreme Court's own words: "experience shows that major questions cases 'have arisen from all corners of the administrative state.'"[76]

A brief overview of MQD cases decided at the Supreme Court will suffice to demonstrate the MQD's broad scope. The Supreme Court has applied the MQD to the Food and Drug Administration's efforts to regulate tobacco products,[77] the Centers for Disease Control and Prevention's ("CDC's") efforts to institute a nationwide eviction moratorium in response to the COVID-19 pandemic,[78] the Environmental Protection Agency's efforts to regulate greenhouse gasses,[79] the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide,[80] the Occupational Safety and Health Administration's effort to mandate that 84 million Americans either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense,[81] the Environmental Protection Agency's effort to "substantially restructure the American energy market,"[82] and the Department of Education's efforts to forgive student loan debt.[83]

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72 West Virginia v. EPA, 142 S. Ct. 2587, 2613–14 (2022) (citation omitted).

73 142 S. Ct. 2587 (2022).

74 *Id.* at 2609 (citation omitted).

75 Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV., 465, 511 (2024).

76 Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023) (quoting West Virginia v. EPA, 142 S. Ct. at 2608).

77 *Id.* at 2381–82 (Barrett, J., concurring) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

78 *Id.* at 2373 (majority opinion) (citing Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

79 *Id.* at 2383 (Barrett, J., concurring) (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 310 (2014)).

80 *Id.* at 2382 (citing Gonzales v. Oregon, 546 U.S. 243, 275 (2006)).

81 *Id.* at 2383 (citing Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety and Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam)).

82 West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

83 Biden v. Nebraska, 143 S. Ct. at 2375.

Despite the Supreme Court having applied the MQD to issues arising across the administrative state, at least one court has concluded (in a since-vacated opinion) that that MQD should not apply to the President.[84] Specifically, in *Mayes v. Biden*,[85] the Ninth Circuit reasoned that the MQD is "not implicated" when the President is exercising statutory power because "the President 'does not suffer from the same lack of political accountability that agencies may, particularly when the President acts on a question of economic and political significance.'"[86] At least one commenter,[87] and two federal judges from other federal circuits,[88] have offered similar arguments.

By comparison, majority opinions in three federal circuits have applied the MQD to the President.[89] The Sixth Circuit, for example, applied the MQD to the President's reliance on statutory authority to mandate COVID-19 vaccines for federal contractors.[90] Reviewing the same presidential mandate, the Eleventh Circuit similarly "relie[d] on the major questions doctrine"[91] to conclude that the President "likely exceeded his [statutory] authority."[92] Likewise, the Fifth Circuit concluded that the President's vaccination mandate was unlawful.[93] In doing so, the Fifth Circuit used the occasion to explicitly reject the argument that the MQD

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84 Mayes v. Biden, 67 F.4th 921, 933 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023). The *Mayes* case concerned an executive order; the Ninth Circuit vacated the opinion following President Biden's rescission of the relevant executive order. 89 F.4th at 1188; *see also* Samuel Buckberry Joyce, *Testing the Major Questions Doctrine*, 43 STAN. ENV'T L.J. 50, 67 (2024) (identifying "a circuit split" regarding whether the MQD applies to the President).

85 67 F.4th 921 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023).

86 *Mayes*, 67 F.4th at 933 (quoting Georgia v. President of the U.S., 46 F.4th 1283, 1313 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part) (emphasis omitted).

87 Comment, *Administrative Law—Major Questions Doctrine—Eleventh Circuit Applies the Major Questions Doctrine to a Delegation to the President:* Georgia v. President of the United States, 136 HARV. L. REV. 2020, 2026 (2023) (arguing that "[a]pplying the major questions doctrine to the President as if the President were an agency ignores the President's heightened political accountability and Congress's intent to delegate to the President in light of that accountability").

88 Louisiana v. Biden, 55 F.4th 1017, 1038 (5th Cir. 2022) (Graves, J., dissenting) ("[T]he major questions doctrine is only invoked when there are potential anti-delegation issues to agencies, and that is not the situation here."); Georgia v. President of the U.S., 46 F.4th at 1313–14 (Anderson, J., concurring in part and dissenting in part) (noting that "we are . . . dealing with . . . [a] delegation . . . to the President who does not suffer from the same lack of political accountability that agencies may, particularly when the President acts on a question of economic and political significance," but nonetheless "assum[ing] that the [MQD] does apply" to "the exercise of power by the President").

89 Kentucky v. Biden, 23 F.4th 585, 606–08 (6th Cir. 2022); Louisiana v. Biden, 55 F.4th at 1029–31; Georgia v. President of the U.S., 46 F.4th at 1295.

90 Kentucky v. Biden, 23 F.4th at 589, 606–08.

91 Georgia v. President of the U.S., 46 F.4th at 1313–14 (Anderson, J., concurring in part and dissenting in part) (describing the "lead opinion"); *id.* at 1296 (majority opinion) ("A deeper dive into the statutory parameters for contracting proves the point—the 'highly consequential power' asserted here lies 'beyond what Congress could reasonably be understood to have granted.'" (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022))).

92 Georgia v. President of the U.S., 46 F.4th at 1297.

93 Louisiana v. Biden, 55 F.4th at 1033 ("Executive Order 14042 is unlawful.").

"'is only invoked when there are potential anti-delegation issues to agencies' rather than the President."[94]

As the Fifth Circuit explained, "the Supreme Court has never explicitly limited the major questions doctrine to delegations to agencies rather than to the President."[95] The Fifth Circuit further defended its decision to apply the MQD to the President by noting that because "Article II of the Constitution 'makes a single President responsible for the actions of the Executive Branch,' delegations to the President and delegations to an agency should be treated the same under the major questions doctrine."[96]

The Sixth, Fifth, and Eleventh Circuits were correct to conclude that the MQD applies to the President. Because the Constitution vests "the Executive Power" in the President alone,[97] administrative officials exercising executive power should be understood as exercising *the President's* executive power on *the President's* behalf. Understood in such terms, *every* MQD case to date has involved an application of the doctrine to the President's authority.

To be sure, some jurists might maintain that administrative officials can exercise power that is not vested in the President. This might be because the jurists believe that administrative officials can exercise executive power that is not vested in the President, or because administrative officials do not exercise executive power at all.[98] Responding to those theories of federal power—which are at odds with the current Supreme Court's consistent commitment to ensuring presidential oversight of exercises of administrative power[99]—would require more room than can be offered in this Essay (which is focused on addressing the current Court on its own terms). But it is worthwhile to explain, however briefly, why even jurists who disagree with the current Court's understanding of the President's role in the administrative law context should nonetheless conclude that the MQD applies to the President.

For one thing, both of the Court's existing justifications for the MQD support applying the MQD to the President. As stated, the Court has justified the MQD on "both separation of powers principles and a practical understanding of legislative intent."[100] As one commenter has written in regards to the separation-of-powers justification: "To the extent *West Virginia* transformed major questions into a constitutional separation of powers doctrine, exempting the President

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94 *Id.* at 1031 n.40 (quoting Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020)).

95 *Id.*

96 *Id.* (citations omitted).

97 U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

98 *See, e.g.*, EMILY S. BREMER, *Power Corrupts*, *in* REVITALIZING AMERICAN INSTITUTIONS: LEGITIMACY OF ADMINISTRATIVE LAW8 (2023), https://perma.cc/SK55-TYWW (referring to "quasi-legislative and quasi-judicial" power).

99 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010); *Seila Law*, 140 S. Ct. at 2192; United States v. Arthrex, Inc., 141 S. Ct. 1970, 1983 (2021); *see also* Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 4 n.6 (2023) (collecting cases).

100 West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

[from applications of the MQD] makes little sense" because under the separation-of-powers "justification, the [MQD] serves to prevent the executive, whether through agencies or the President, from claiming powers not actually granted by statute—or, in simpler terms, legislating."[101]

It is perhaps the second justification for the MQD (i.e., the justification invoking a "practical understanding of legislative intent") that offers more favorable grounds for inferior courts wishing to curtail the MQD by reasoning that the MQD does not apply to the President. That is because an inferior court operating on a clean state might conclude (as the Ninth Circuit did) that the MQD is designed to address political accountability issues of the sort that are not at issue when the President is involved. But inferior courts are *not* operating on a clean slate. Instead, the Supreme Court has already demonstrated—repeatedly—that the MQD is applicable even when the politically accountable President shaped the challenged administrative action.

More directly, the President appears to have been integrally involved in many (if not all) of the Supreme Court's seminal MQD cases to date. That makes sense, as presidential involvement can be presumed in "major" cases given that, "[o]n questions of major economic and political significance, presidents are often closely involved in initiating and directing their administration's policy decisions, even when the final name on the executive action is that of a cabinet secretary or other executive officer."[102]

Consider, for example, the situation presented by *Biden v. Nebraska*,[103] where the Court applied the MQD to agency action that was labeled "The Biden-Harris Administration's Student Debt Relief Plan," and which was purportedly "created by 'President Biden, Vice President Harris, and the U.S. Department of Education.'"[104] Similarly, "The full name of the Clean Power Plan challenged in *West Virginia* was, per the White House, a component of 'President Obama's Action Plan.'"[105] And in another seminal MQD case involving an eviction mortarium action put forward formally by the CDC, "the CDC only merited brief mention in the announcement of the eviction moratorium ultimately struck down" by the Court.[106] By comparison, "in the White House's telling, 'President Donald J. Trump [was] taking action to put a temporary halt to evictions.'"[107] The presidential involvement in these seminal MQD cases demonstrates that the Court has not hesitated to apply the MQD to scrutinize the legality of administrative actions seeking to carry out the President's policy goals.

Perhaps even more notable is the fact that the Supreme Court has already implicitly rejected the argument (of the sort put forward in the Ninth Circuit's since-vacated opinion) that the President's democratic accountability presents

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101 Joyce, *supra* note 84, at 70.

102 *Id.* at 71.

103 143 S. Ct. 2355 (2023).

104 Joyce, *supra* note 84, at 71 (citation omitted).

105 *Id.* (citation omitted).

106 *Id.* (citation omitted).

107 *Id.* (alteration in original) (citation omitted). "[T]he fact that" the CDC action at issue "was not, technically, a presidential action" was "only mentioned in a subsidiary bullet point." *Id.* at 71–72.

special reason to not apply the MQD. In *FDA v. Brown & Williamson Tobacco Corp.*,[108] the Court applied an early version of the MQD to hold unlawful the FDA's effort "to regulate tobacco under statutory references to 'drugs' and 'devices.'"[109] In invoking that early version of the MQD, the Court explained that "regulating tobacco was a matter of major 'economic and political significance.'"[110]

Writing in dissent in *Brown & Williamson*, Justice Breyer reasoned that the "very importance" of the FDA's tobacco decision, "as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable."[111] Noting that "the President and Vice President are the *only* public officials whom the entire Nation elects," Justice Breyer did "not believe that an administrative agency decision of this magnitude . . . can escape the kind of public scrutiny that is essential in any democracy," regardless of "whether it is the Congress or the Executive Branch that makes the relevant decision."[112] A majority of Justices Breyer's colleagues disagreed, however, and thus applied an early version of the MQD to the FDA's effort to regulate tobacco—despite the FDA's regulatory decision having potentially been subject to the sort of public scrutiny that Justice Breyer identified. Arguments that the MQD should apply to administrative agencies, but not the President, thus seem to turn on a political accountability argument of the sort that the Court was aware of, but nonetheless found immaterial, in *Brown & Williamson*.

In sum, jurists who conclude that *all* executive power flows from the President should have little difficulty recognizing that the MQD has long applied to the President's executive authority (albeit authority exercised by the President through one of his administrative agents). And jurists who have a different understanding of executive power should recognize that the Court has already demonstrated that the MQD applies even when the politically accountable President has been involved in shaping the challenged administrative action.

C. *Nondelegation Canon*

Section II.B demonstrated why the MQD applies to the President. Section II.C now addresses a secondary question—whether an application of the MQD to the President requires an overruling of *Dalton.* The short answer might be yes: because the MQD is a tool of statutory interpretation, and *Dalton* drew a distinction between a President acting without statutory authority and a President otherwise acting unconstitutionally.[113] But if the MQD is indeed an effort to enforce the Constitution's nondelegation principle, then the MQD may be in less tension with *Dalton* than one might otherwise presume. This is because

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108 529 U.S. 120 (2000).

109 Squitieri, *supra* note 20, at 474 (quoting *Brown & Williamson*, 529 U.S. at 126).

110 *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

111 *Brown & Williamson*, 529 U.S. at 190 (Breyer, J., dissenting).

112 *Id.* at 190–91.

113 Dalton v. Specter, 511 U.S. 462, 472 (1994) (distinguishing "between claims of constitutional violations and claims that an official has acted in excess of his statutory authority"); *see also id.* at 473–74.

Dalton (and *Franklin*) gave special solicitude to nondelegation challenges.

To dive into the weeds a bit more, there are at least two competing conceptions of the MQD at the Supreme Court.[114] Justice Barrett understands the MQD to be "a linguistic canon (*i.e.*, a canon of interpretation that applies grammatical rules or speech patterns to discern a statute's meaning)."[115] A competing view is offered by Justices Gorsuch and Alito, who view the MQD "as a substantive canon (*i.e.*, a canon of statutory interpretation that promotes a value existing external to a statute)."[116] In particular, Justices Gorsuch and Alito have suggested that the MQD serves to promote a unique conception of the Constitution's nondelegation principle—a conception which requires Congress to answer the "important" policy questions themselves, while leaving Congress able to delegate the authority to fill in mere "details."[117]

To the extent that the MQD is indeed a means of enforcing the Constitution's nondelegation principle,[118] the MQD would seem to be in less tension with *Dalton* and *Franklin*. To be sure, an application of the MQD would technically be a form of statutory interpretation. And recognizing as much might therefore counsel in favor of overruling *Dalton* (or at least relaxing its rationale) to permit litigants to bring forth *statutory* interpretation arguments that seek to enforce a *constitutional* principle. But such a ruling would not be a drastic departure from the special solicitude that both *Dalton* and *Franklin* gave to the Constitution's nondelegation principle. Since *Dalton* and *Franklin*, an arguably new means of enforcing the Constitution's nondelegation principle (i.e., the MQD) is now available to courts. In bringing interpretations of the Antiquities Act into the modern age of statutory interpretation, courts might account for as much.

III. Major Antiquities Act Declarations

Having explained above why the MQD is applicable to presidential actions, Part III now outlines how the MQD would apply to Antiquities Act declarations. In particular, Part III focuses on the presidential declarations of the sort that were at issue in *Massachusetts Lobstermen's Ass'n*. As a reminder, that case concerned the creation of the Northeast Canyons and Seamounts Marine National Monument, pursuant to which the "'objects' to be 'protected' are the 'canyons and seamounts themselves,' along with 'the natural resources and ecosystems in and

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114 Squitieri, supra note 22, at 732.

115 *Id.* at 707–08.

116 *Id.* at 707.

117 *Id.* at 736 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring)).

118 To be sure, legitimate exercises of the Antiquities Act might not present a nondelegation issue. That is because the nondelegation principle might apply with less force to congressional exercises of the Article IV Property Clause. *See* Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1270–73 (2022); Eli Nachmany, *The Irrelevance of the Northwest Ordinance Example to the Debate About Originalism and the Nondelegation Doctrine*, 2022 U. ILL. L. REV. ONLINE 17, 18–19 (2022).

around them.'"[119]

A. *Political and Economic Significance*

The MQD requires agencies to identify clear congressional authorization to answer a question of "major" importance.[120] Although "majorness" does not have a clear definition, the term encompasses questions of "economic and political significance."[121] Presidential attempts to declare vast swaths of the ocean floor as a "national monument" would seem to qualify as both politically and economically significant.

As to political significance, declarations such as those made for the Northeast Canyons and Seamounts Marine National Monument can "frustrate efforts to manage" fisheries encompassed within the Monument, and can "shift fishing effort to less sustainable practices."[122] These sort of environmental concerns are the subject of political debate at both the national and state level.[123] What's more, presidential efforts to regulate part of the ocean floor can present obvious issues of international politics. The Northeast Canyons and Seamounts Marine National Monument, for example, was located in "Exclusive Economic Zone," within which "sovereign rights to exploit, manage, and conserve natural resources and authority to regulate some activities affecting the marine environment" is a matter of "international law."[124] It is therefore not difficult to imagine how a President's unilateral decision to claim state-sized swaths of the ocean-floor could raise significant political questions of both domestic and international components.[125]

As to economic significance, "[c]ommercial fishing generates approximately $1 billion in annual income in the United States," and "[o]ffshore oil production produces $6 billion in federal revenue, in addition to significant private

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119 Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979, 981 (2021) (quoting Proclamation No. 9496, 3 C.F.R. 262).

120 *See* Squitieri, *supra* note 20, at 472 ("The major questions doctrine is said to be a statutory canon assisting courts in determining whether Congress has delegated to agencies the authority to decide major questions.").

121 West Virginia v. EPA, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

122 Petition for Writ of Certiorari at 10–11, *Mass. Lobstermen's Ass'n,* 141 S. Ct. 979 (No. 20-97).

123 *Id.* at 10 ("When the monument was proposed, commercial fishermen, the Atlantic States Fisheries Commission, the eight Regional Fishery Management Councils, and the Governor of Massachusetts expressed concern that the monument would be illegal, would frustrate efforts to manage the fishery, or both.").

124 *Id.* at 6.

125 Interestingly, the international components of Antiquities Act declarations might highlight tension between (i) a conception of the nondelegation principle that understands the principle to apply less stringently in areas where the President has existing authority, such as foreign affairs authority, *see, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2143–44 (2019) (Gorsuch, J., dissenting), and (ii) an understanding of the MQD that views the MQD as a tool for enforcing the nondelegation doctrine, but which makes no exception for international "majorness."

income."[126] These sorts of industries, among others, can be "majorly" affected depending on the precise presidential declaration at hand. The "Connecticut-sized monument" at issue in *Massachusetts Lobstermen's Ass'n*, for example, "contain[ed] a lucrative fishery."[127] And although "[t]he Court has not established a clear standard for the economic impact necessary to make a question major,"[128] the economic significance of Antiquities Act declarations could rise to similar levels of economic significance that the Court has looked to in the past.[129]

B. *Clear Congressional Authorization*

Of course, even if an Antiquities Act declaration were found to present a "major" question, it would not mean that the declaration was unlawful. Instead, it would simply mean that the President would have to identify "clear congressional authorization" to make the major declaration.

Although the Court has not offered definitive guidance as to the meaning of "clear congressional authorization," the Court in *West Virginia* made clear that it requires "something more than a merely plausible textual basis" for the action in question.[130] In his concurring opinion, Justice Gorsuch offered four factors that can assist courts in identifying clear congressional authorization. Although those factors are neither dispositive nor authoritative, it is worthwhile to address how each factor might apply in the Antiquities Act context.

Drawing on *Brown & Williamson*, Justice Gorsuch's first factor provides that "courts must look to the legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme.'"[131] The text of the Antiquities Act is itself relatively slim. But when discussing the importance of a "statutory scheme" in *Brown & Williamson*, the Court explained that "the meaning of one statute may be affected by *other Acts*, particularly where Congress has spoken subsequently and more specifically to the topic at hand."[132] Applying that rationale to the context at issue in this Essay: After the Antiquities Act, Congress has spoken subsequently and more specifically to the topic of reserving portions of both land and sea. "Under the National Marine Sanctuaries Act, for example, the Secretary of Commerce can designate an area of the marine environment as a marine sanctuary, *but only after* satisfying rigorous consultation requirements

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126 Petition for Writ of Certiorari, *supra* note 122, at 35.

127 *Id.* at 10.

128 Joyce, *supra* note 84, at 79.

129 *Id.* (noting that in what was "arguably an early forerunner of the major questions doctrine, the Court subjected [a] . . . regulation to quasi-major questions analysis because the regulation required $266 million in capital investments and $34 million in recurring annual costs," and that "[i]n *Brown & Williamson*, another early [MQD] case, the Court spoke more generally about how the tobacco industry constituted 'a significant portion of the American economy'").

130 West Virginia v. EPA, 142 S. Ct. at 2609 (citation omitted).

131 *Id.* at 2622 (Gorsuch, J., concurring) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

132 *Brown & Williamson*, 529 U.S. 133 (emphasis added).

and issuing findings on 12 statutory criteria."[133] And "[t]he President is even more constrained when it comes to National Parks, which may be established only by an Act of Congress."[134] Viewing the Antiquities Act in context with those subsequent and more specific statutes—which impose stringent requirements on the President—suggests that the authority vested via the Antiquities Act is much more modest than Presidents might wish it to be. The upshot is that this first factor would suggest that the President does *not* have clear congressional authorization to make the sort of presidential declarations at issue in *Massachusetts Lobstermen's Ass'n*.

Under Justice Gorsuch's second factor, "courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address."[135] This factor is relevant because "deploy[ing] an old statute focused on one problem to solve a new and different problem may . . . be a warning sign that [an agency] is acting without clear congressional authority."[136] Because the Antiquities Act "originated as a response to widespread defacement of Pueblo ruins in the American Southwest,"[137] this factor would seem to undermine presidential claims of authority that stray too far from protecting "ancient dwelling site[s]" from being "vandalized by pottery diggers for personal gain."[138] To be sure, the "problem" addressed by the Antiquities Act might have been a bit broader than that. But the upshot of this second factor is that, as modern Presidents seek to invoke the Act to do things that seem less and less related to the initial problem the Act was enacted to resolve, a court is more likely to conclude that the President lacks clear congressional authorization.

Under Justice Gorsuch's third factor, "past interpretations of the relevant statute" are relevant.[139] In particular, "'contemporaneous' and long-held Executive Branch interpretation[s] of a statute [are] entitled to some weight," whereas claims to have found "a previously 'unheralded power'" in an old statute are viewed more skeptically.[140] Of all the factors, this factor offers what is perhaps the strongest argument in favor of major presidential authority.[141] That is because Presidents have, for some time, relied on the Antiquities Act to make significant declarations.

President Theodore Roosevelt, for example, relied on the Act to declare the

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133 Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979, 980 (2021) (emphasis added).

134 *Id.*

135 West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J, concurring).

136 *Id.*

137 *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 980.

138 *Id.* (citation omitted).

139 West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

140 *Id.* (first quoting United States v. Philbrick, 120 U.S. 52, 59 (1887); and then quoting Util. Air Regul. Grp., 573 U.S. 302, 324 (2014)).

141 Indeed, the claim to identify an "unheralded power" in a "long-extant" statute is a telltale sign of a major questions case. *See id.* at 2610 (majority opinion).

Grand Canyon to be a national monument.[142] And "[b]eginning in 1935, Presidents have designated and expanded numerous monuments situated on submerged land in oceans."[143] What's more, for "more than a century" Presidents have "protected natural resources and particular ecosystems as objects of scientific interest under the Act."[144] To the extent that a court concludes that the ordinary meaning of the Antiquities Act's reference to "land" includes something akin to "land located underwater," or that the ordinary meaning of the Antiquities Act's references to "landmarks," "structures," and "other objects" includes something as "imprecisely demarcated . . . as an ecosystem,"[145] then historical presidential declarations could prove quite favorable to modern Presidents' positions. On the other hand, those historical declarations might be discounted as little more than the self-interested products of presidential power that was left unchecked by past eras of statutory interpretation. If so, past interpretations offered by Presidents may be of minimal interest to courts focused on elucidating ordinary (as compared to presidential) meaning.

Finally, Justice Gorsuch's fourth factor maintains that courts may be "skeptic[al] . . . when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[146] That is because "[w]hen an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not task it with doing so."[147] When it comes to the Antiquities Act, it is the President who is himself making declarations—not one of the President's administrative agents, who might have a narrower range of substantive expertise. In contrast to particular administrative agents, the President could be presumed to have a broad range of expertise because the President can engage with experts across the administrative state. Thus, to apply this factor to the President, a court might look for clues as to the substantive area of expertise that the Antiquities Act seems to presume that the President would rely on when making national monument declarations. To the extent that a particular declaration seems consistent with that presumed expertise, it would weigh in the President's favor (and *vice versa*).

What type of expertise might the Antiquities Act presume the President to rely upon? Today, the Antiquities Act is codified in Title 54 of the U.S. Code, which relates to the "National Park Service And Related Programs."[148] And

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142 *See* Mass. Lobstermen's Ass'n v. Ross, 945 F.3d 535, 538 (D.C. Cir. 2019) (citing Proclamation No. 794, 35 Stat. 2175, 2175 (Jan. 11, 1908)).

143 Brief for the Federal Respondents in Opposition at 2–3, *Mass. Lobstermen's Ass'n,* 141 S. Ct. at 979 (No. 20-97) (citing Proclamation No. 2112, 49 Stat. 3430 (Jan. 4, 1935)).

144 *Id.* at 21 (citing Proclamation No. 1733, 43 Stat. 1988, 1989 (1925); Proclamation No. 1339, 39 Stat. 1785, 1791 (1916); and Proclamation No. 869, 35 Stat. 2247, 2248 (1909)).

145 *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981.

146 West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

147 *Id.* (alteration in original).

148 Office of Legal Revision Counsel, *United States Code*, perma.cc/672M-LCSJ.

today,[149] like in 1906,[150] the Antiquities Act gives special attention to the Secretary of the Interior. When the Department of the Interior was created in 1849, the Department was tasked with a variety of responsibilities—all of which, "[i]n one way or another . . . had to do with the internal development of the Nation or the welfare of its people."[151] And today, the Department's stated mission includes the "protect[ion] and manage[ment of] the Nation's natural resources and cultural heritage" and the "provi[sion of] scientific and other information about those resources."[152]

To the extent that Antiquities Act declarations relate to purported monuments found out in the ocean—far outside of what could be reasonably thought of as the Nation's *interior*—the declarations would seem to signal mismatched expertise. But to the extent that Antiquities Act declarations relate to the "Nation's natural resources and cultural heritage,"[153] then it would seem the President is indeed relying upon the type of expertise envisioned by the Act. In the end, this fourth factor—which Justice Gorsuch stressed is not dispositive[154]—might be something of a wash.

Conclusion

Presidential declarations made pursuant to the Antiquities Act have gone largely unchecked by courts. The Chief Justice has recently expressed interest in changing that dynamic, and thus this Essay has proposed how courts should review Antiquities Act declarations. By interpreting the Act according to its ordinary meaning (as textualists do) and asking if the Act offers "clear" authorization to make "major" declarations (as the MQD requires), courts can bring their interpretations of the Antiquities Act into the modern age of statutory interpretation, and thus ensure that Presidents do not treat the Act as "a power without any discernible limit."[155]

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149 54 U.S.C §§ 320301(c), 320302, 320303; *id.* § 100102(3) (defining "Secretary" as "the Secretary of the Interior").

150 Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 54 U.S.C. §§ 320301–320303)).

151 *History of the Department of the Interior*, U.S. DEP'T OF THE INTERIOR, perma.cc/G7FY-PLK2.

152 *About Interior*, U.S. DEP'T OF THE INTERIOR, perma.cc/Z5TZ-U2V2.

153 *Id.*

154 West Virginia v. EPA, 142 S. Ct. 2587, 2623 n.5 (2022) (Gorsuch, J., concurring) ("The dissent not only agrees that a mismatch between an agency's expertise and its challenged action is relevant to the major questions doctrine analysis; the dissent suggests that such a mismatch is necessary to the doctrine's application. But this Court has never taken that view." (citation omitted)).

155 Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979, 981 (2021).