NOTE

THE ANTIQUITIES ACT: A CASE OF NOMINATIVE DETERMINISM?

BY

AXEL JURGENS*

Last year, the Supreme Court denied petitions for writs of certiorari in two cases challenging the President's designation of lands already managed under a federal land management statute as part of a National Monument under the Antiquities Act of 1906. Conservative politicians and public interest groups have consistently taken aim at the Antiquities Act, with little success. Spurred on by an unusual statement issued by Chief Justice Roberts, a dramatic reconsideration of the scope of presidential power to unilaterally protect large swathes of federal land appeared to be taking its first steps. Instead, those who accepted the Chief Justice's invitation were left knocking at the door, raising further questions regarding the Court's motivations and its relationship with the Executive.

*J.D., Lewis & Clark Law School, expected 2025; B.S. Biochemistry and Molecular Biology, University of California, Santa Cruz.

I. INTRODUCTION

The Supreme Court of the United States has recently set a precedent for overturning precedent. From abortion[1] to affirmative action,[2] federal Indian law,[3] the Second Amendment,[4] the First Amendment,[5] *Miranda* rights,[6] and *Chevron* deference,[7] the Roberts Court has left law professors across the country frantically supplementing established case law and hedging their lectures with "unless something else changes."

On March 22, 2021, as part of this trend, Chief Justice Roberts issued an unusual statement regarding the denial of certiorari in *Massachusetts Lobstermen's Ass'n v. Raimondo*[8] and stoked an already smoldering fire.[9] *Massachusetts Lobstermen* concerned a challenge to the Northeast Canyons and Seamounts Marine National Monument, a 3.2

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[1] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 229–31 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

[2] Students for Fair Admissions, Inc. v. Harvard Coll., 600 U.S. 181, 287 (2023) (Thomas, J., concurring) (noting that Grutter v. Bollinger, 539 U.S. 306 (2003) is effectively overturned by the majority opinion).

[3] Oklahoma v. Castro-Huerta, 597 U.S. 629, 666–67 (2022) (Gorsuch, J., dissenting) (noting the majority opinion narrows McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) to allow states to exercise jurisdiction for crimes committed by non-Indians against tribal members within tribal reservations).

[4] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2020) (removing the second part of the approach in assessing Second Amendment claims as it was not supported by District of Columbia v. Heller, 554 U.S. 570 (2008) nor McDonald v. City of Chicago, 561 U.S. 742 (2010)).

[5] 303 Creative v. Elenis, 600 U.S. 570, 592 (2023) (broadening the First Amendment to forbid a state from using public accommodation statutes to limit free speech as supported from individual precedential cases such as Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995) and Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)).

[6] Vega v. Tekoh, 597 U.S. 134, 141 (2022) (narrowing Miranda v. Arizona, 384 U.S. 436 (1966) by disallowing *Miranda* violations as a per se violation of the Fifth Amendment).

[7] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[8] 141 S. Ct. 979, 980 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

[9] *Id.* at 981 (noting existence of five other cases pending in federal courts concerning the boundaries of national monuments).

million-acre protected area off the coast of New England, designated under the Antiquities Act of 1906.[10]

Chief Justice Roberts' statement opens with rhetorical flair: "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? If you answered (c), you are not only correct but also a speaker of ordinary English."[11] He goes on to describe the provisions of the Antiquities Act and contrasts the Act's language with the realities of its use:

> "A statute permitting the President in his sole discretion to designate as monuments 'landmarks,' 'structures,' and 'objects'—along with the smallest area of land compatible with their management—has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain above and below the sea."[12]

With these brief remarks, Chief Justice Roberts cast into doubt the designation of more than 850 million acres of protected areas.[13] In response to his call, two such cases were petitioned to the Supreme Court last year for writ of certiorari, *Murphy Co. v. Biden*[14] and *American Forest Resources Council v. United States*.[15] While these cases focused on a much narrower issue—an alleged conflict between a National Monument expansion under the Antiquities Act and the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act[16] (O&C Act)—their rejection illuminates the unitary strand of jurisprudence which has defined the Antiquities Act since its passage: that the Supreme Court has never overturned an Antiquities Act Proclamation.[17]

Fights over land conservation, especially in the context of the Antiquities Act where conservatives generally argue for judicial limitations on presidential power while liberals argue that the Act gives the president total discretion in designating Monuments, can produce an interesting game of ideological musical chairs. Sifting the motivations of individual Justices, try as they might to predict the actions of a volatile President Trump—who has recognized few limits on executive power—may be a futile endeavor in the age of the unitary executive. And yet, the inherent incongruities of judicial philosophy set

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[10] *Id.*; Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303 (2018).

[11] Mass. Lobstermen's Ass'n, 141 S. Ct. at 980 (citation omitted).

[12] *Id.* at 981.

[13] U.S. FISH & WILDLIFE SERV., STATISTICAL DATA TABLES FOR FISH & WILDLIFE SERVICE LANDS (AS OF 9/30/2018) 1 (2018).

[14] 65 F.4th 1122 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 1111 (2024).

[15] 77 F.4th 787 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 1110 (2024).

[16] Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act, 43 U.S.C. §§ 2601–2634 (2018).

[17] Murphy Co., 65 F.4th 1122, 1133.

up by the nature of the Antiquities Act will make future Supreme Court decisions addressing it all the more enlightening.

II. HISTORY OF THE ANTIQUITIES ACT

Originally passed in reaction to the widespread destruction of archeological remains in the Southwest, President Theodore Roosevelt took the theoretically narrowly-tailored power of the Antiquities Act and set a precedent of exercising pure executive discretion to declare expansive National Monuments to protect landscapes across the United States. In total, 163 National Monuments have been established under the Antiquities Act, ranging from the 0.34-acre Belmont–Paul Women's Equality National Monument to the 372,848,597-acre Papahānaumokuākea Marine National Monument, one of the largest protected areas on the planet.[18]

A. The Act's Passage

In late 1899, as the 19th century closed on a hundred years of conquest and westward settlement across the United States, a group of American archaeologists, museum curators, and lawyers coalesced to protect an unanticipated heritage—thousands[19] of pre-historic dwellings and artifacts.[20]

The population of the Southwest grew rapidly during the 1880s and 1890s. Ranchers and prospectors encountered monumental ruins many centuries old and began excavating them, sparking international fascination with the region's prehistoric artifacts and creating a corresponding market for such antiquities.[21] One Swedish scientist, Erik Adolf Nordenskjöld, was inspired by these discoveries and ventured to Colorado in 1891.[22] Allegedly spurred on by the rampant looting and black-market profiteering he witnessed, Nordenskjöld conducted his own archaeological excavation of a site now known as Cliff Palace.[23] He soon returned to Sweden with more than 600 artifacts that eventually became the heart of an exhibit on North American indigenous

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[18] CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 1 (2024); LAURA B. COMAY, CONG. RSCH. SERV., R42757, NATIONAL PARK SERVICE (NPS) APPROPRIATIONS: TEN-YEAR TRENDS 15 (2024); U.S. FISH & WILDLIFE SERV., STATISTICAL DATA TABLES FOR FISH & WILDLIFE SERVICE LANDS (as of 9/30/2017) 32 (2017), https://perma.cc/EZQ4-X72M.

[19] Mesa Verde National Park alone contains more than 4,000 pre-Columbian archeological sites. *Mesa Verde: Preservation of Archeological Sites*, NAT'L PARK SERV., https://perma.cc/NPX2-34RN (Aug. 19, 2015).

[20] RONALD F. LEE, THE ANTIQUITIES ACT OF 1906 47–48 (1970).

[21] *Id.* at 29, 30.

[22] *Id.* at 30.

[23] *Id.*; Kevin Simpson, *More than a Century Ago, a European Visitor Took more than 600 Native American Remains and Artifacts from Colorado's Mesa Verde*, COLORADO SUN (Oct. 10, 2019, 5:05 AM), https://perma.cc/39MK-CVWP.

civilization at the National Museum of Finland in Helsinki.[24] This event provoked deep resentment on the part of American archaeologists, who cited it, along with similar collection sprees that resulted in artifacts going to Russia and England, when impressing upon Congress the need for legislation protecting these ancient sites as the 20th century dawned.[25] A contemporary anthropologist, Jesse Walter Fewkes, described the situation in dire terms,

> If this destruction of the cliff-houses of New Mexico, Colorado, and Arizona goes on at the same rate in the next fifty years that it has in the past, these unique dwellings will be practically destroyed, and unless laws are enacted, either by states or by the general government, for their protection, at the close of the twentieth century many of the most interesting monuments of the prehistoric peoples of our Southwest will be little more than mounds of debris at the bases of the cliffs. A commercial spirit is leading to careless excavations for objects to sell, and walls are ruthlessly overthrown, buildings torn down in hope of a few dollars' gain. The proper designation of the way our antiquities are treated is vandalism. Students who follow us, when these cliff-houses have all disappeared and their instructive objects scattered by greed of traders, will wonder at our indifference and designate our negligence by its proper name. It would be wise legislation to prevent this vandalism as much as possible and good science to put all excavation of ruins in trained hands.[26]

It was in this context that academic societies, including the American Association for the Advancement of Science and the Archaeology Institute of America, set up joint committees to draft a comprehensive bill to protect American antiquities.[27] Their proposal, H.R. 8066, was introduced on February 5, 1900 and was nearly identical to the ultimate bill passed in 1906.[28] Two competing bills, H.R. 8195 and H.R. 9245, soon followed H.R. 8066, with the former making it a federal crime to damage antiquities on federal land and the latter requiring a survey of public lands and limiting reserves to protect prehistoric ruins to 320 acres.[29] Dissatisfied with all three bills, the Commissioner of the General Lands Office also proposed H.R. 11021, which gave the

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[24] Simpson, *supra* note 23 (chronicling Nordenskjöld's excavation and the subsequent exhibition in Helsinki); *see also Native American Ancestral Remains Repatriated from the National Museum of Finland to Mesa Verde*, U.S. EMBASSY IN FIN. (Sept. 17, 2020), https://perma.cc/VDP7-FMQC (announcing that in 2020, after 128 years, the 2020 the National Museum of Finland repatriated dozens of human remains and funerary objects collected by Nordenskjöld to the Hopi, Acoma, Zia, and Zuni tribes).

[25] LEE, *supra* note 20, at 31, 50.

[26] *Id.* at 32 (quoting J. Walter Fewkes, *Two Ruins Recently Discovered in the Red Rock Country, Arizona*, 9 AM. ANTHROPOLOGIST 263, 269–70 (1896)).

[27] *Id.* at 47–48.

[28] H.R. 8066, 56th Cong. (1900); Antiquities Act of 1906, 54 U.S.C. §§ 320301–320303 (2018).

[29] H.R. 8195, 56th Cong. (1900); H.R. 9245, 56th Cong. (1900).

President near carte blanche to reserve public lands.[30] The House Committee on Public Lands, to which these four bills were referred, was not impressed.[31] Many of the committee members were from western states that had been most impacted by the Forest Reserve Act of 1891 and would go on to see President Theodore Roosevelt use it to set aside 90 million acres of national forest.[32] Perhaps reluctant to untangle this mess of interests, the 56th Congress took no action on any of these proposals, and prehistoric antiquities on public lands remained unprotected until a young archaeologist, Dr. Edgar Lee Hewett, took the project upon himself.[33]

Well-connected with both politicians and scientists, Hewett's influence was critical to the eventual passage of the Antiquities Act.[34] In 1902, Rep. John F. Lacey, who chaired the House Committee on Public Lands and later introduced the bill that ultimately became the Antiquities Act, went on a fateful tour of the ruins of the Southwest guided by Dr. Hewett, which he ultimately credited for inspiring the legislation.[35] In 1904, Hewitt produced a memorandum for Congress detailing the region's many archeological sites and grouping them into twenty districts for protection.[36] Under the direction of the Commissioner of the General Land Office, he then drafted H.R. 11016, which was introduced by Rep. Lacey on Jan. 9, 1906.[37] The bill was passed without opposition, despite the legislature's resistance to the preceding proposals.[38] This difference in demeanor can most likely be attributed to Rep. Lacey's representation of the bill on the floor: Rep. John H. Stephens of Texas notably asked (1) how much land would be reserved by the bill, and (2) whether it "[w]ould . . . be anything like the forest-reserve bill, by which seventy or eighty million acres . . . have been tied up?"[39] Lacey was unequivocal in his response: (1) "Not very much. The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved," and (2)

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30 H.R. 11021, 56th Cong. (1900); Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 480 (2003).

31 LEE, *supra* note 20, at 55.

32 *Id.* at 55–56; Squillace, *supra* note 30, at 481–82.

33 LEE, *supra* note 20, at 57; *see* discussion *infra* Section II.A. (discussing Hewett's impact).

34 *See* LEE, *supra* note 20, at 68, 71 ("[Hewett's] revised draft of an antiquities bill . . . reconciled the conflicting interests that had plagued antiquities legislation for six years.").

35 *Id.* at 69.

36 DEP'T OF THE INTERIOR, CIRCULAR RELATING TO HISTORIC AND PREHISTORIC RUINS OF THE SOUTHWEST AND THEIR PRESERVATION 3, 5 (1904) (noting author as Edgar L. Hewett and listing archeological districts).

37 Squillace, *supra* note 30, at 483.

38 *See id.* at 484 ("[Hewett's] legislation passed both houses of Congress without change . . . ."); *see* LEE, *supra* note 19, at 55 ("Interior's proposed bill met with a cool response from the House Committee on Public Lands.").

39 40 CONG. REC. 7888 (1906).

"Certainly not. The object is . . . to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest."[40]

In light of the way the Antiquities Act has actually been implemented, however, various scholars have critiqued this anti-prophecy. Professor Mark Squillace has argued that the Act's language, in contrast to the earlier failed proposals that included acreage limits, and in consideration of the drafter Hewett's intentions, favors an interpretation providing for a broad power to reserve large areas of land.[41] Historian Hal Rothman has similarly expressed that "[t]he situation deceived both Lacey and Stephens."[42] Rothman has also noted a seemingly critical, although often overlooked, dynamic that might explain the Act's failure to be restrained by the intentions of the lawmakers who passed it.[43] At the time, the President already possessed unlimited authority to designate forest reserves under the Forest Reserve Act of 1891.[44] The Agriculture Appropriation Act of 1907,[45] however, through the Fulton Amendment, drastically limited the power of the President to designate National Forests without congressional approval.[46] Thus, President Theodore Roosevelt, who had himself under the Forest Reserve Act reserved the millions of acres complained about by Rep. Stephens, pivoted and began using the new Antiquities Act to set aside large areas of public land in much the same fashion.[47]

B. The Act's Implementation and National Monuments

President Roosevelt, not known for his timidity and incrementalism, started big. Devil's Tower, at 1,347 acres, was the nation's first National Monument.[48] In less than three years he had designated seventeen more, including the 800,000 acre Grand Canyon National Monument.[49] Of the twenty-one presidents that have held office since the Act's passage, only three have declined to exercise their

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[40] *Id.*

[41] Squillace, *supra* note 30, at 485.

[42] HAL ROTHMAN, AMERICA'S NATIONAL MONUMENTS 48 (1994).

[43] *Id.* at 47–48.

[44] *Id.* at 47.

[45] Agricultural Appropriation Act, ch. 2907, 34 Stat. 1256 (1907).

[46] *Id.* at 1271. The Fulton Amendment had other significant consequences on the history of land conservation in the United States. It changed the name of "Forest Reserves" to "National Forests" and prompted President Theodore Roosevelt to preemptively create the so-called "Midnight Reserves," 16 million acres of National Forest designated unilaterally, before signing the bill into law. *Id.* at 1269; *The Early Forest Service Organization Era (1905-1909)*, U.S. FOREST SERV. (Dec. 5, 2002), https://perma.cc/7LM6-J2GY.

[47] ROTHMAN, *supra* note 42, at 47–48.

[48] Proclamation No. 658, 34 Stat. 3236 (1906); *Wyoming: Devil's Tower National Monument*, NAT'L PARK SERV., https://perma.cc/7DJW-3PNP (Dec. 18, 2018).

[49] Squillace, *supra* note 30, at 490; Proclamation No. 794, 35 Stat. 2175 (1908).

Antiquities Act authority.[50] President Franklin D. Roosevelt issued the most Proclamations under the Act: eleven National Monuments, twenty enlargements, and four reductions in size.[51] By the end of his presidency, FDR had added 3.1 million acres to the National Monument system.[52] In comparison, President Obama holds the notable distinction of designating both the most new Monuments and the most total area.[53] With twenty-nine new Monuments established and 553.6 million acres added in total, his tenure saw a massive expansion of National Monument boundaries over the middle of the Pacific Ocean: the Pacific Remote Islands and Papahānaumokuākea Marine National Monuments, enlarging them by 261.3 million and 283.4 million acres respectively.[54] The sum total acreage of National Parks, by contrast, is a mere 52 million acres.[55]

Considering the problem Congress intended the Antiquities Act to address, and its significant contemporary concerns about the President unilaterally setting aside large areas of land, one may sincerely wonder how they ordered a mousse and received a moose. The rest of this Note will describe the current state of the law regarding the Antiquities Act and explore the tangled web of land-management interests and constitutional law currents which will, in all likelihood, be resolved in a partisan fashion.

III. OVERVIEW OF ANTIQUITIES ACT JURISPRUDENCE

For such an impactful statute, the Antiquities Act is remarkably succinct. In line with this brevity, judicial decisions interpreting the Act are similarly scant. The general line taken by courts has been very consistent, holding that the President's power under the Antiquities Act is nigh unlimited. Originally intended to protect archeological objects, the judiciary has invariably taken the position that mountains, canyons, vast stretches of open water, and entire ecosystems are all objects suitable for protection under the Act. The petitioners in *Murphy Co.* and *American Forest Resources Council* sought to test a narrower proposition: whether the President can also use this power to counteract the authority of other federal land management statutes.[56]

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[50] VINCENT, *supra* note 18, at 16 tbl.B-I (noting Presidents Nixon, Reagan, and G.H.W. Bush as making no monument proclamations).

[51] *Id.*

[52] *Id.* at 15 tbl.A-I.

[53] *Id.* at 15 tbl.A-I, 16 tbl.B-I.

[54] *Id.* at 15, 5.

[55] NAT'L PARK. SERV. ACREAGE REP. (Dec. 31, 2023).

[56] Petition for a Writ of Certiorari at 2–3, Murphy Co. v. Biden, No. 23-525 (U.S. Nov. 15, 2023); Petition for a Writ of Certiorari at 2–3, Am. Forest Res. Council v. United States, No. 23-524 (U.S. Nov. 14, 2023).

A. The Act's Provisions

Originally enacted as a single sentence at 16 U.S.C. § 431, in 2014 Congress recodified the Antiquities Act at 54 U.S.C. § 320301 and split the operative clause into three sentences. It reads:

> (a) 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.
>
> (b) 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.

Codified in less than a hundred words, the extensive swath of National Monuments is supported by this brief yet impactful statute. Through litigation, two primary points of contestation have been derived from these provisions, both of which have been summarily interpreted to not limit the President's authority. First, courts and presidential proclamations focus on the kinds of objects which may qualify as being "of historic or scientific interest" and thus serve as the centerpiece of the Monument.[57] Second, proclamations almost always state that the boundaries of the Monument are "the smallest area compatible with the proper care and management of the objects to be protected," and courts have declined to examine those determinations.[58] Presidential Proclamations under the Antiquities Act, therefore, are generally explicit about identifying the objects to be protected, followed by an assertion that the boundaries set by the Proclamation are consistent with the "smallest area" requirement.

For example, Proclamation No. 10285, by which President Biden restored Bears Ears National Monument to its original size after President Trump reduced it, states that "[t]he Bears Ears landscape . . . is not just a series of isolated objects, but is, itself, an object of historic and scientific interest."[59] Similarly, regarding the second requirement, it explains,

> [a]s a result of the distribution of the objects across the Bears Ears landscape, and additionally and independently, because the landscape itself is an object in need of protection, the boundaries [of the Monument]

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[57] *See infra* notes 64–74 and accompanying text (the subsequent sources exemplify the lack of limitations on Presidential authority under the Antiquities Act when proclamations recognize objects as being historic or of great scientific interest).

[58] *See infra* notes 78–82 and accompanying text (the following sources demonstrate the President's expanded authority under the Antiquities Act when proclamations state the boundaries of a given object).

[59] Proclamation No. 10285, 3 C.F.R. 236, 237–38 (2022).

> are confined to the smallest area compatible with the proper care and management of the objects of historic or scientific interest identified above . . . .[60]

Presidents have been even more conclusory than that in Monument Proclamations. Proclamation No. 6920, President Clinton's establishment of Grand Staircase-Escalante National Monument, goes on at length about the diverse geological "objects," paleontological sites, and prehistoric cultural remnants in the area, then concludes, "[t]he Federal land . . . reserved consist[s] of approximately 1.7 million acres, which is the smallest area compatible with the proper care and management of the objects to be protected."[61]

As a final example, Proclamation No. 9478, by which President Obama expanded Papahānaumokuākea Marine National Monument, identifies the objects of historic and scientific interest as the "geological and biological resources that are part of a highly pristine deep sea and open ocean ecosystem."[62] Concerning the smallest area requirement, the Proclamation merely asserts that "[t]he Federal lands and interests in lands reserved consist of approximately 442,781 square miles, which is the smallest area compatible with the proper care and management of the objects to be protected."[63]

B. Landmark Cases

The first case to directly challenge a Presidential Proclamation under the Antiquities Act was *Cameron v. United States*.[64] The holder of a mining claim on land designated as part of Grand Canyon National Monument asserted that there was no authority for the creation of the Monument.[65] The Court emphatically disagreed. "The Grand Canyon, as stated in [the President's] proclamation, 'is an object of unusual scientific interest.' It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, [and] has attracted wide attention among explorers and scientists."[66] Notably, while the Court cited the language of the Proclamation, it remained ambiguous whether the Court merely accepted the President's conclusion regarding the canyon as being within presidential discretion, or made an independent determination that the canyon qualified as an object of scientific interest.

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60 *Id.* at 248.
61 Proclamation No. 6920, 3 C.F.R. 64, 67 (1997).
62 Proclamation No. 9478, 3 C.F.R. 231, 231 (2017).
63 *Id.* at 234.
64 252 U.S. 450 (1920).
65 *Id.* at 455.
66 *Id.*

The district court in *Wyoming v. Franke*[67] took a different line. Facing a challenge to the designation of Jackson Hole National Monument on the twin bases that the area contained no objects of historic or scientific interest[68] and that it was not confined to the smallest area compatible with the protection of those objects,[69] the court made several unique statements in resolving the conflict in the President's favor. First, the court explained that

> "if a monument were to be created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose of the Monument Act."[70]

Given any evidence of a substantial character, however, the court found itself unable to question the President's exercise of discretion in determining both that objects of scientific or historic interest exist, and that the designated area was in fact the smallest area compatible with the protection of those objects.[71] Second, in light of the limited reviewability of the President's discretion, the court shifted the burden onto Congress to curtail the Antiquities Act's power, holding that when Congress delegates its inherent authority over land management to the Executive, it is Congress' responsibility to pass remedial legislation in the case that the President abuses that delegation of power.[72]

Cappaert v. United States[73] did not take the same line; rather than stating that the identification of objects of historic or scientific interest was a matter of Presidential discretion, the court followed *Cameron* and made its own finding that the objects named in the Proclamation at issue (namely, the Devil's Hole and its eponymous pupfish) were clearly objects of scientific interest.[74] The Court also held that the Antiquities Act extends to the reservation of water rights as well as land, given that maintaining the water level of Devil's Hole was necessary to protect the objects of scientific interest.[75]

United States v. California[76] was even more conclusory. There, the Court presumed that the Antiquities Act delegation includes the power to reserve submerged lands: "[t]here can be no serious question . . . that the President had power . . . to reserve the submerged lands and waters . . . since they were then controlled by the Government of the United

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67 58 F. Supp. 890 (D. Wyo. 1945).
68 *Id.* at 892.
69 *Id.*
70 *Id.* at 895.
71 *Id.* at 896.
72 *Id.*
73 426 U.S. 128 (1976).
74 *Id.* at 140.
75 *Id.* at 146.
76 436 U.S. 32 (1978).

States."[77] One wonders, almost fifty years later, whether this statement remains the most candid summary of Supreme Court precedent in this area: the President can designate whatever lands and waters they want, as long as the federal government has control of those areas.[78]

Finally, a pair of D.C. Circuit cases represent the latest significant consideration of broad challenges to the Antiquities Act power. *Tulare County v. Bush*[79] held that 1) there is no requirement for the President to make detailed statements of their findings in Proclamations, 2) ecosystems and "scenic vistas" are acceptable objects for protection under the Antiquities Act, 3) there is no obligation for the President to make any particular investigation regarding the smallest area compatible with protecting with protecting those objects, and 4) that the statute includes intelligible principles sufficient to avoid a separation of powers or non-delegation doctrine challenge.[80] The companion case, *Mountain States Legal Foundation v. Bush*,[81] further held that while review of the President's actions under the Antiquities Act is available as implied in *California, Cappaert,* and *Cameron*, as long as the Proclamation merely recites the statutory requirements of 1) objects to be protected and 2) the land designated being the smallest area compatible with their protection, then the President is acting properly within their Antiquities Act authority.[82]

This body of precedent, certainly sufficient to make the aforementioned Rep. Stephens of Texas roll in his grave, severely hamstrings any attempt to legally oppose National Monument designations. That reality has not stopped litigants from trying, however, and Roberts's statement in *Raimondo* calling for well-pled challenges has already garnered responses.

C. Recent Litigation

Murphy Co. v. Biden[83] and *American Forest Resources Council v. United States*[84] were two such challenges to the president's Antiquities Act power. They presented identical issues, coming from the Ninth Circuit and D.C. Circuit respectively. In 2017, President Obama issued Proclamation 9564, expanding Cascade-Siskiyou National Monument by

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77 *Id.* at 36.

78 For a detailed discussion of the geographical limits of the President's Antiquities Act power, see Massachusetts Lobstermen's Ass'n v. Ross, 945 F.3d 535, 537–38 (D.C. Cir. 2019) (holding that National Monuments may extend hundreds of miles off the coast to the boundaries of the U.S.'s exclusive economic zone). *See also* Levi Tenen, *How Much Land Can Be Included in a National Monument?—Analyzing the "Smallest Area Compatible" Requirement in the Antiquities Act*, 53 ENV'T L. 707, 709 (2023).

79 306 F.3d 1138 (D.C. Cir. 2002).

80 *Id.* at 1141–43.

81 306 F.3d 1132 (D.C. Cir. 2002).

82 *Id.* at 1136–37.

83 65 F.4th 1122 (2023).

84 77 F.4th 787 (2023).

48,000 acres.[85] 40,000 of those acres are within the jurisdiction of a different federal land management statute, the O&C Act.[86] The O&C Act covers 2.9 million acres of federal land (O&C lands) centered in southwestern Oregon.[87] The O&C Act requires that O&C lands classified as timberlands be managed for permanent forest production, and the timber be produced, cut, and sold in conformity with the principle of sustained yield.[88] Therefore, plaintiffs alleged that when President Obama designated 40,000 acres of O&C lands as part of Cascade-Siskiyou National Monument and prohibited the commercial harvest of timber within its borders, he violated the above provision of the O&C Act.[89]

The D.C. District Court agreed and entered summary judgement for the plaintiffs on the basis that the O&C Act prevented the President from reserving O&C lands from timber production as part of a National Monument, making the expansion invalid.[90] On appeal, the D.C. Circuit Court reversed, holding that the Monument's restrictions on timber harvest were compatible with the O&C Act, and, in keeping with *Morton v. Mancari*,[91] interpreted the statutes in concert to best give effect to both. The D.C. Circuit held that several features of the O&C Act permitted this reconciliation: (1) the discretionary nature of the designation of O&C lands as "timberlands," (2) the Monument's expansion affected only 2% of O&C lands, (3) provisions of the Act calling for "protecting watersheds," "regulating streamflows," and "providing recreational facilities," and (4) the legislative history of the Act showing an intention by Congress to provide for conservation and scientific management that was compatible with the Monument's expansion onto O&C lands.[92] Notably, in contrast, the court declined to also consider the legislative history of the Antiquities Act in interpreting the legality of the expansion.[93]

In the Ninth Circuit, *Murphy Co. v. Biden* followed the same formula, with one notable caveat: the dissent of Judge Richard Tallman.[94] Judge Tallman wrote, in strong opposition:

> "The conflict between the O&C Act and Proclamation 9564 could not be more self-evident. The O&C Act requires sustained yield calculation for all O&C timberlands. Proclamation 9564 removes O&C timberlands from the sustained

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85 *Id.* at 795.
86 *Id.*
87 *Id.* at 790.
88 *Id.* at 791–92.
89 *Id.* at 802.
90 *Id.* at 798.
91 417 U.S. 535, 551 (1974).
92 Am. Forest Res. Council, 77 F.4th at 801–03.
93 *Id.* at 798–99. One also might reasonably think that if the Monument before the expansion was the smallest area compatible with the proper care and management of the objects to be protected, can it then still the smallest area so compatible now?
94 65 F.4th 1122, 1138 (2023) (Tallman, J., dissenting).

> yield calculation if they fall within the monument. Although the Antiquities Act does grant the President broad authority to establish national monuments, nowhere does it remotely purport to grant him authority to suspend the operation of another act of Congress."[95]

Judge Tallman also took significant issue with the majority's contention that reclassifying 2% of O&C lands does not impair the statute, while expanding the Monument to cover all O&C lands certainly would, responding "[b]y accepting that argument, the majority engages in a brand of incrementalism perilous to constitutional principles that are absolute."[96] Finally, Judge Tallman argued that the majority decision interprets the Antiquities Act as to allow the President to unilaterally nullify by Proclamation every federal land management law not explicitly protected from the Antiquities Act.[97] Under the majority's reading of the Antiquities Act, Judge Tallman reasoned, the President could designate Crater Lake National Park as a National Monument and ban all visitors or prohibit public entrance to the Park.[98]

Typically one would not spend so much time explaining the rationale of a dissent, but Judge Tallman's objections may well be shared by Chief Justice Roberts and the Supreme Court's other conservative members.[99] *Murphy Co.* and *American Forest Resources Council* concerned the expansion of a Monument conflicting with another federal land management statute and thus do not squarely allege the issues Roberts describes in his statement in *Raimondo*.[100] That fact weighed against granting writ of certiorari in these cases, and, indeed, both petitions were denied.[101] But *contra*, Tallman's dissent raised significant issues with the D.C. and Ninth Circuits' holdings which the Supreme Court may not be willing to let stand in the future. In that line, both Justice Gorsuch and Justice Kavanaugh voted to grant the petitions.[102] That the Chief Justice did not join in their enthusiasm for addressing his pet issue is not easily explained, mainly due to the number of factors acting on the Court. Perhaps Chief Justice Roberts thought other cases on the docket were more deserving of or presented more pressing issues for review. Perhaps he took issue with some technical deficiency in the record developed in the lower courts or, as discussed in his *Raimondo* statement, is less concerned by the conflict of laws issue presented in these cases than he is by the issue of the

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[95] *Id.* at 1139.

[96] *Id.* at 1144.

[97] *Id.* at 1141.

[98] *Id.* at 1142.

[99] Tallman's dissent in fact quotes Roberts' statement regarding the denial of certiorari in *Raimondo*. *Id.* at 1443–44.

[100] *See supra* notes 8–12 and accompanying text (discussing Chief Justice Robert's statement denying certiorari in *Raimondo*).

[101] 144 S. Ct. 1110 (2024); 144 S. Ct. 1111 (2024)

[102] *Id.*

unfettered scope of the law which originally drew his attention. Or, perhaps, he agreed with Justices Gorsuch and Kavanaugh that review was warranted and yet reserved his vote for some tactical purpose internal to the Court's decision-making dynamics. Whatever the reason, three members of the Court have now expressed official interest in reconsidering the Antiquities Act. Given the current, seemingly boundless state of the law, one can presume such an examination could only be intended to reverse standing precedent and impose some limitation on the president's power under the Act. In that light, a discussion of the current Court's jurisprudence and its potential application to the Antiquities Act remains.

IV. A NEW ERA FOR THE ANTIQUITIES ACT?

As noted in the introduction, many areas of law have been shaken to their foundations by the Roberts court in the past half decade. New law has been created through the exercise of a jurisprudential style which, while not novel, has now attained power and influence not known in recent memory. The Court's new conclusions are thus necessarily justified by reevaluations of fundamental guiding principles, the discussion of which appears in these groundbreaking decisions. Applying the Court's current perspective on statutory construction and stare decisis to the established law regarding the Antiquities Act, there are significant incongruities between contemporary jurisprudence and the rationales relied upon in the precedents discussed above.

A. Textualism

In 2015, Justice Kagan made the oft-quoted statement that "[w]e're all textualists now."[103] Notably, in the same lecture, after avowing herself as a textualist, she describes her belief that good textualist analysis requires looking at the structure of the statute as a whole and distilling what it is trying to accomplish.[104] In light of this approach, a provision of the Antiquities Act, 54 U.S.C. § 320302, which has so far escaped this discussion, is drawn to the forefront.

The National Monuments described above were all passed under § 320301; in comparison, § 320302 might well be an artifact packed up in the back warehouse of a museum for all the attention it receives. Where § 320301 provides that the President can declare "objects of historic or scientific interest" and "reserve parcels of land confined to the smallest area compatible with the proper care and management of the objects to be protected," § 320302 provides, in relevant part, that "[t]he

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[103] Harvard L. Sch., *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), https://perma.cc/XW5W-3HTL.

[104] *Id.* at 19:15.

Secretary [of the Interior] . . . may grant a permit for the examination of ruins, the excavation of archeological sites, and the gathering of *objects of antiquity* . . . to an institution . . . properly qualified to conduct the examination, excavation, or gathering . . . ."[105] No Supreme Court or other case has considered the implications of this statutory context on the construction of the big brother provisions of § 320301.

Even less commonly mentioned is 18 U.S.C § 1866, which punishes violations of 54 U.S.C. Chapter 3201:

> "A person that appropriates, excavates, injures, or destroys any historic or prehistoric ruin or monument or any other *object of antiquity* that is situated on land owned or controlled by the Federal Government . . ., shall be imprisoned not more than 90 days, fined under this title, or both."[106]

Facing a controversy in which the Court reconsiders 54 U.S.C. § 320301 authority, perhaps the Court would note that, while 18 U.S.C § 1866 and 54 U.S.C. § 320302 refer to "objects of antiquity,"[107] § 320301 refers to "objects of historic or scientific interest."[108]

This incongruity lends itself to a binary of interpretations. The Court may apply the common canon that Congress means different things when it uses different words. Or, the Court could decide, like it did in *County of Maui v. Hawaii Wildlife Fund*,[109] and as Justice Kagan might also endorse in a different context, that "[t]he statute's words reflect Congress' basic aim" and thus decide that "those circumstances in which Congress intended" the statute to be applied was to objects of antiquity.[110] This same line of thinking was invoked by Chief Justice Roberts in *West Virginia v. EPA*,[111] stating "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[112] Roberts writes "[where] the statute at issue is one that confers authority upon an administrative agency, that inquiry must be—'shaped, at least in some measure, by the nature of the question presented'—whether Congress in fact meant to confer the power the agency has asserted."[113] While *West Virginia* concerned the delegation of legislative power to an agency, and not the President, the same principles ought to apply to this context. Whether Congress meant to confer to the President authority to designate sweeping National Monuments, the Antiquities Act's sponsor Rep. Lacey, along with the

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105 54 U.S.C. §§ 320301–320302 (2018) (emphasis added).
106 18 U.S.C. § 1866 (2018) (emphasis added).
107 *Id.*; 54 U.S.C. § 320302.
108 54 U.S.C. § 320301(a).
109 590 U.S. 165 (2020).
110 *Id.* at 183–84.
111 597 U.S. 697 (2022).
112 *Id.* at 721 (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).
113 *Id.* at 721 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

statutes notable use of the phrase "smallest area," both weigh towards the answer being no.[114] Given that that controversial phrase is, in full, "historic landmarks, historic and prehistoric structures, and other objects of scientific and historic interest," the canon *ejusdem generis* also weighs in favor of a circumscribed "object of antiquity" interpretation.[115]

Such considerations go far beyond the potential influence of the context provided by related statutes and the other objects listed in § 320301. In *Gundy v. United States*,[116] Justice Kagan, writing for Justices Ginsberg, Breyer, and Sotomayor, certainly considered the text of the statute at question, but interpreted it "alongside its context, purpose, and history."[117] Writing for the majority in *Bostock v. Clayton County*,[118] joined by the Justices he dissented from in *Gundy*, Justice Gorsuch took a similar perspective.

> "[W]hile legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context."[119]

In dissent, Justices Alito and Kavanaugh took the exact same perspective, that the relevant consideration is "[h]ow would the terms of a statute have been understood by ordinary people at the time of enactment?"[120] "Put in slightly different terms, a judge interpreting a statute should ask[,] what one would ordinarily be understood as saying, given the circumstances in which one said it."[121]

Applying these rationales to § 320301, the idea that entire ecosystems are "objects of historic or scientific interest" under the meaning of the word "object," it seems highly unlikely that "ordinary Americans"[122] in 1906 would have understood things that way. The Court's decision in *Cameron*, conclusory though it was, may withstand this analysis due to the singular nature of the Grand Canyon. But the D.C. Circuit Court's decisions in *Tulare County* and *Mt. States Legal Foundation*, among other cases declaring the qualification of ecosystems as suitable objects under § 320301, are wholly inapposite to the Supreme Court's current brand of statutory construction. The District

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114 For a more generous reading of the "smallest area" requirement and an in-depth discussion, see Tenen, *supra* note 78.

115 It seems the Chief Justice, at least, agrees. *See* Mass. Lobstermen's Ass'n, 141 S. Ct. 979, 980–81 (2021).

116 588 U.S. 128 (2019).

117 *Id.* at 136.

118 Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

119 *Id.* at 674–75.

120 *Id.* at 704 (Alito, J., dissenting); *id.* at 784–85 (Kavanaugh, J., dissenting).

121 *Id.* at 705 (Alito, J., dissenting) (internal quotation marks omitted).

122 *Id.* at 713–14.

Court of Wyoming's dismissive reference in 1945 to "a bare stretch of sage-brush prairie" as being outside the scope of the Antiquities Act power appears primed for reanimation.[123]

Even more recently (and germanely) in *Sackett*,[124] Justice Alito, writing for the conservative bloc including Justice Barrett but without Justice Kavanaugh, quoted *Bond v. United States*:[125] "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition."[126] Here, where the ordinary meaning of the word "object" and the reach of the judicially constructed definition exist in stupendous starkness, one can only imagine that a textualist Court would take issue with the current state of jurisprudence. Indeed, the majority in *Sackett* also noted, "construing statutory language is not merely an exercise in ascertaining 'the outer limits of a word's definitional possibilities,'" which appears to be precisely what *Cameron, Tulare County, Mt. States Legal Foundation*, and *Wyoming*, all did.[127]

To be fair to Justice Kagan, dissenting in *West Virginia*, she recanted her well-known aphorism;

> "Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when it suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free-cards."[128]

Accepting her criticism that Supreme Court jurisprudence has become ends-based rather than means-based, the operative concern guiding those engaged in prediction must thus be the identification of those ends. Yet here such ends are difficult to determine due to the conflicting nature of the problem. Whether the conservatives on the Court are more interested in increasing the president's power or in decreasing the environmental protections on federal lands is not a determination which is made clear by a noticeably unequal distribution of evidence on either side. The same could be said for the Court's liberals; is limiting the president's power worth limiting the president's power to create protected areas? The question itself is an oversimplification which presumes that the two are inextricably joined. Applying such ends-based rationale in the coming Section, it is likely that both the Court's textualism and its application of the major questions doctrine will be subject specific; that the enabling statute needs to speak explicitly when the President seeks to do something the members of the Court

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123 58 F. Supp. 890, 895.
124 Sackett v. EPA, 598 U.S. 651 (2023).
125 572 U.S. 844 (2014).
126 Sackett, 598 U.S. at 672 (quoting Bond, 572 U.S. at 861).
127 *Id.* at 676.
128 West Virginia, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting).

disapprove of, but, when the President seeks to exercise power towards a preferred course, the Court will instead emphasize the President's latent authority and immunity to judicial review.

B. The Major Questions Doctrine

In applying the contemporary trends of Supreme Court jurisprudence to a reconsideration of Antiquities Act precedent, a textualist reinterpretation appears almost obligatory. Yet, the recent surge of the major questions doctrine has placed a significant check on power delegated to the executive by statute. Essentially, the major questions doctrine counsels a lower level of deference to expansive interpretations of ambiguous statutory language when the power claimed is of significant scope and importance.

West Virginia v. EPA remains the seminal case ushering in the major questions doctrine era. As Justice Kagan notes in dissent, "[t]he Court has never even used the term 'major questions doctrine' before."[129] The major questions doctrine, as articulated in *West Virginia*, applies when the "breadth of the authority . . . asserted," and the "economic and political significance of that assertion, provide reason to hesitate before concluding that Congress meant to confer such authority."[130] The Court went on to say that if "Congress could not have intended to delegate such a sweeping and consequential authority in so cryptic a fashion," then it must reject such an "expansive construction of the statute."[131] Other factors include whether a government action is "unprecedented," and Congress' acquiescence to or rejection of a policy.[132] Finally, the extent to which an "[e]xtraordinary grant[] of regulatory authority" is being claimed through "modest words, vague terms, or subtle devices" also guides the Court in considering the proper construction of statutory delegations of power.[133]

Therefore, when confronted with ambiguous statutory text, "separation of powers principles and a practical understanding of legislative intent" guide the Court to apply increased scrutiny to the textual basis for an alleged delegation of power.[134] Sometimes characterized as a strong "clear statement rule," if the Court deems that a question of statutory delegation concerns the regulation of a major question, then there must be "clear congressional authorization" for the claimed power.[135]

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129 *Id.* at 766.
130 *Id.* at 721.
131 *Id.*
132 *Id.* at 721–22.
133 *Id.* at 723.
134 *Id.*
135 *Id. But see* Natasha Brunstein & Donald L.R. Goodson, *To Be Clear, the Major Questions Doctrine Is Not a Clear-Statement Rule*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 21, 2022), https://perma.cc/2SAX-B3U7.

Beyond Roberts' majority opinion in *West Virginia*, Justice Gorsuch, joined by Justice Alito, wrote in concurrence to provide additional factors that may indicate a statutory delegation of authority warrants reconsideration under the major questions doctrine.[136] First, the power to "resolve a matter of great political significance or end an earnest and profound debate across the country" weighs in favor of applying the doctrine.[137] Justice Gorsuch also notes that situations in which Congress has considered authorizing a power but rejected doing so call for increased scrutiny regarding clear congressional authorization.[138] In the context of the Antiquities Act, a conservative perspective may consider Congress' use of the Fulton Amendment within the Agricultural Appropriations Act of 1907 to remove the President's power of unilateral land designation, only one year after the passage of the Antiquities Act, to be such a rejection.[139] A liberal perspective, however, might point out how Congress rejected earlier versions of the Antiquities Act that included acreage limits on the President's power to designate protected areas.[140] Second, regulation of a "significant portion of the American economy," such as requiring "billions of dollars in spending by private persons or entities" could indicate a major question.[141] Third, an intrusion into "an area that is the particular domain of state law," such as when the Executive "claims the power to regulate vast swaths of American life" may trespass on powers reserved to both Congress and the States.[142] Therefore, it seems Justices Gorsuch and Alito see the major questions doctrine as a clear-statement rule designed to ensure that the government does not violate separation of powers principles.

The concurrence also provides factors for identifying whether statutory language is a sufficiently clear congressional statement to authorize the exercise of a claimed power.[143] First, the empowering legislative provisions must be interpreted "with a view to their place in the overall statutory scheme."[144] This factor does not bode well for the current interpretation of § 320301 if read in the context of the other provisions of the Antiquities Act.[145] Second, the age and regulatory purpose of the statute may indicate that using an old and established statute "focused on one problem to solve a new and different problem" is not compatible with the statute's actual grant of power.[146] This factor, however, weighs somewhat in favor of upholding the Antiquities Act power as it stands. The statute is certainly old, and its usage well-

136 West Virginia, 597 U.S. at 743 (Gorsuch, J., concurring).
137 *Id.* (citation omitted).
138 *Id.*
139 *See supra* note 46 and accompanying text.
140 *See supra* note 29 and accompanying text.
141 West Virginia, 597 U.S. at 744 (Gorsuch, J., concurring).
142 *Id.*
143 *Id.* at 746–48.
144 *Id.* at 746.
145 *See supra* notes 105–110 and accompanying text.
146 West Virginia, 597 U.S. at 744.

established. Whether it was ever enacted in line with its original intention, however, is doubtful.[147] The third factor, similar as it is to the second, may weigh most strongly towards the current state of the law being acceptable.[148] It is the "contemporaneous and long-held Executive branch interpretation of a statute," which is "entitled to some weight as evidence of the statute's original charge."[149] The Antiquities Act's continued use by both Democratic and Republican presidents to designate National Monuments, wholly disconnected from the original problem of protecting archeological artifacts from looters, is certainly a heavy weight to overcome for those seeking to reevaluate this precedent.[150] While the delineation of these two sets of factors certainly results in greater insight into the application of the doctrine by Justices Gorsuch and Alito, neither are they particularly illuminating or useful to the task of prognosticating future applications—which, as many scholars and dissenting liberal justices of the Court have pointed out, may be the point of the doctrine itself.[151]

Biden v. Nebraska[152] also saw an application of the major questions doctrine, in which an executive assertion of authority to discharge hundreds of billions of dollars of student loans was deemed to be beyond the authorization of the empowering statute.[153] Notably, Justice Barrett wrote a solo concurrence describing a view of the major questions doctrine which differed from Justice Gorsuch's.[154] Justice Barrett sees the major questions doctrine as a tool for applying textualism most accurately as an "interpretive tool reflecting common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude."[155] Justice Barrett rests this conclusion, at least partially, "in the basic premise that Congress normally intends to make major policy decisions itself . . . ."[156] Which is not to say, despite her concurrence, that Justice Barrett would apply the major questions doctrine differently to the Antiquities Act than her conservative fellows on the court. There is yet no evidence that such a

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147 *See supra* notes 28–40 and accompanying text.

148 West Virginia, 597 U.S. at 744.

149 *Id.*

150 To the contrary, Justice Thomas believes that erroneous decisions of law were erroneous on the day they were made and deserve no deference. *See* discussion *infra* Section IV.C.

151 *See, e.g.*, Biden v. Nebraska 143 S. Ct. 2355, 2398–99 (2023) (Kagan, J., dissenting); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1056–69 (2023); *See also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 287–88 (2022).

152 143 S. Ct. 2355 (2023).

153 *Id.* at 2362.

154 *Id.* at 2376 (Barrett, J., concurring).

155 *Id.* at 2378 (Barrett, J., concurring) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

156 *Id.* at 2380 (Barrett, J., concurring) (citing U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017)).

difference of practical opinion exists, despite Justices emphasizing different philosophical rationales for the doctrine.

At this point, there remains an important caveat: the above cited cases regarding the major questions doctrine all concern statutory delegations or authorizations to agencies, but does the doctrine also apply to delegations to the President? There is currently a circuit split between the Ninth Circuit and the Fifth, Sixth, and Eleventh Circuits regarding this question.[157] At least one scholar has argued that the doctrine does, in fact, apply to the President and that the Ninth Circuit ought to reconsider, noting the lack of justification for applying different interpretive canons to delegations of power to the president versus delegations of power to executive agencies.[158] The Court's justifications for the major questions doctrine, separation of powers and applying statutory constraints accurately, are relevant with equal force to every actor of the Executive branch.[159]

The Antiquities Act may not have seemed ambiguous when it was passed, and, indeed, President Roosevelt certainly did not consider its grant of power to be ambiguous.[160] The question of statutory ambiguity is, however, necessarily considered within the context of the scope of the power asserted. The first hurdle in applying the major questions doctrine is determining whether the scope of authority being exercised constitutes a major question. Applying the enumerated factors, the designation of National Monuments individually—and the whole practice in its entirety—has clearly been subject to significant political controversy.[161] Similarly, while the Court has not set a bar for economic importance, National Monuments cover hundreds of millions of acres of lands and oceans and have a substantial impact on rural economies.[162] There is little doubt that the designation and maintenance of the country's National Monuments is of substantial economic importance. The precedent of the exercise of the claimed statutory power factor, on the other hand, weighs strongly in favor of this not being a major

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157 Mayes v. Biden, 67 F.4th 921, 933–34 (9th Cir. 2023); Louisiana v. Biden, 55 F.4th 1017, n.40 (5th Cir. 2022); Kentucky v. Biden, 23 F.4th 585, 606–08 (6th Cir. 2022); and Georgia v. President of the United States, 46 F.4th 1283, 1295–97 (11th Cir. 2022). *See also* Samuel Buckberry Joyce, Note, *Testing the Major Questions Doctrine*, 43 STAN. ENV'T L. J. 50, 68 (2024) (offering a different view of the application of the major questions doctrine to the Antiquities Act).

158 *Id.* at 72.

159 *Id.* at 69–70

160 *See* Squillace, *supra* note 49, at 478, 481–82.

161 *See, e.g.*, *Arizona Republicans Challenge Biden's Designation of a National Monument Near the Grand Canyon*, U.S. NEWS & WORLD REP. (Feb. 12, 2024), hhttps://perma.cc/6RET-CBT8; *A Monumental Legal Challenge*, DESERET NEWS (Sept. 5, 2000, 8:57 AM), https://perma.cc/KQ7A-FJPF; *Jackson Hole Bill Urged; Law is Held Way Out to Dispute on Wyoming Monument*, N.Y. TIMES, Apr. 16, 1949, at 10.

162 *See* U.S. FISH & WILDLIFE SERV., *supra* note 13, at 1 (noting 146.4 million acres of land falling under the category of national wildlife refuges); HEADWATERS ECONS., UPDATED SUMMARY: THE ECONOMIC IMPORTANCE OF NATIONAL MONUMENTS TO LOCAL COMMUNITIES 1 (2017).

question. If it is a major question that must be expressly delegated, it has been for the 116 years since President Roosevelt designated Devil's Tower National Monument in 1908.[163]

A final consideration, which both Chief Justice Roberts and Judge Tallman vigorously raise, is whether the current state of the law leaves the President's power so unconstrained that the theoretical extent of it becomes itself diagnostic of a major question.[164] In *West Virginia*, the majority explained that accepting the EPA's interpretation of its power would also enable the agency to force coal plants to shut down altogether, an untenable position from their perspective.[165] Similarly in *National Federation of Independent Business v. Department of Labor*,[166] Justice Gorsuch, writing a concurrence joined by Justices Thomas and Alito, criticized OSHA's interpretation of its statutory empowerment as "affording it almost unlimited discretion."[167] "OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate."[168] In the Antiquities Act context, at least one author has endorsed the idea that the major questions doctrine would not limit the President's authority to designate National Monuments, as the Antiquities Act's language explicitly empowers the President to do so as an exercise of discretion.[169] This Note, however, disagrees with that interpretation.

In the Antiquities Act's language, there is certainly a congressional authorization, but the scope of that authorization is ambiguous. If Judge Tallman's criticisms of the Ninth and D.C. Circuits' holdings are correct and the President can unilaterally designate every federal land as a National Monument, that is most likely a major question which requires clear congressional authorization, and nowhere does the Act clearly extend authority to such a monumental power as that.[170] If the Ninth and D.C. Circuits are wrong however, and the President's power is limited to some boundary, it is still unclear if that authorizes all the National Monuments currently in existence. If that power is less than a major question, clear congressional authorization would no longer be required, and that power therefore could be expanded to the unclear limits of qualifying as a major question. Thus the ouroboros has firmly grasped its own tail: the standard of statutory construction applied depends on a presupposed understanding of the meaning of the statute. Despite the whole major questions doctrine hurdle, we must return

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163 *See* Proclamation No. 658, *supra* note 48 (establishing the Devils Tower National Monument).

164 *See* Murphy Co. v. Biden, 65 F.4th 1122, 1143–44 (9th Cir. 2023) (Tallman, J., dissenting).

165 West Virginia v. Env't Prot. Agency, 597 U.S. 697, 728 (2022).

166 595 U.S. 109 (2022).

167 *Id.* at 123 (Gorsuch, J., concurring).

168 *Id.* at 166.

169 Joyce, s*upra* note 157, at 55–56.

170 Murphy Co., 65 F.4th 1122, 1139, 1140, 1143–44 (9th Cir. 2023) (Tallman, J., dissenting).

unaided to basic textualist statutory construction and plain meaning. Decide the limits of the statute's authorization first, and then decide whether the power exercised by the President exceeds those limits.

C. Stare Decisis

Stare decisis is the major jurisprudential doctrine weighing in favor of maintaining Antiquities Act law as it has stood since *Cameron*. First, all the Justices on the Court agree with Justice Brandeis' declaration that "[s]tare decisis is not . . . a universal, inexorable command."[171] Similarly, there also appears to be consensus that stare decisis "is at its weakest when [the Court] interpret[s] the Constitution."[172] The Court has recently set various factors for determining the power of stare decisis in guiding its decision-making. In *Janus v. AFSCME*,[173] the Court noted five factors: (1) the quality of the precedent's reasoning, (2) the workability of the rule established by precedent, (3) consistency of the precedent with other related decisions, (4) developments since the precedent, and (5) the extent of reliance on the precedent.[174] *Dobbs v. Jackson Women's Health Org.*[175] and *Ramos v. Louisiana*[176] considered the same factors in determining the proper application of stare decisis. Between these three cases, and others, different Justices rise in dissenting and concurring opinions to provide deeper insights into their individual views on the value and applicability of stare decisis.

Beginning with Justices Sotomayor, Kagan, and Jackson as a group, these Justices are most likely to look at the long history of precedent upholding the President's unfettered Antiquities Act power and vote in favor of applying stare decisis. In *Dobbs*, these Justices wrote in dissent claiming adherence to the traditional stare decisis factors first distilled in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[177] which barely differ from the factors cited by the majority.[178] These factors are: (1) the workability of the precedent's rule, (2) the reliance interests potentially affected inequitably by repudiation of the precedent, (3) the development of related principles of

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171 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting); *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 264, 388 (2022) (showing both the majority and the dissent endorsing this language).

172 Dobbs, 597 U.S. at 264; *See* Ramos v. Louisiana, 590 U.S. 1, 3 (2020) (Sotomayor, J., concurring) (noting that, compared to constitutional interpretations, stare decisis applies most strongly in cases involving property and contract rights).

173 585 U.S. 878 (2018).

174 *Id.* at 917; *See also* Ramos v. Louisiana, 590 U.S. 1, 20–21 (2020) (considering the same factors).

175 597 U.S. 215, 267–68 (2022).

176 590 U.S. 1, 7 (2020) (Kavanaugh, J., concurring).

177 505 U.S. 833 (1992).

178 597 U.S. at 390 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

law in conflict with the precedent, and (4) whether the facts have so changed as to rob the precedent of justification.[179]

Applying these factors to the Antiquities Act, the liberal bloc of the Supreme Court is likely to uphold precedent. Regarding the first, Antiquities Act doctrine as it currently stands is certainly workable (which is to say that unlimited discretion limits problems with judicial review), and, in the view of many on the left, has been remarkably successful. As in *Dobbs*, the liberal Justices would likely strongly question the workability of a substitute standard.[180] Indeed, this Note has largely avoided discussion of what a reinterpretation of the Antiquities Act would look like due to the difficulty of that question. Most tepidly, the Court could side with the plaintiffs in *Murphy Co.* and *American Forest Resources Council* and hold that the President does not have the authority to unilaterally contradict another federal land management statute while leaving the rest of the doctrine unchanged. Alternatively, the Court could narrow the scope of either of the two statutory provisions, and apply more judicial oversight to the President's determination of "the smallest area compatible . . . ."[181] Limiting the scope of "objects of historic or scientific interest" would be more likely and more workable, as the appropriateness of designating specific objects is inherently more discrete and facile to judicial review than the endless permutations of lines on a map implicated by the former provision.[182] In this avenue, the Court could uphold *Cameron* and the ruling that the Grand Canyon is a unitary object of scientific interest qualified for designation under the Antiquities Act, while amorphous "objects" of unknowable boundaries like ecosystems would be out of bounds. The liberal Justices are however unlikely to accept those new interpretations as more workable than the status quo.

Regarding the second stare decisis factor, Justices Sotomayor, Kagan, and Jackson would likely strongly argue that significant reliance interests have been created in more than 100 years of National Monument designations. This question goes back to retroactive workability. Namely, if the Court does reconsider Antiquities Act jurisprudence, the nation's dozens of National Monuments, and with them the associated tourism infrastructure, recreation interests, and significant impact on the land value of nearby properties, would all be on precarious ground. Justice Sotomayor has specifically noted that stare decisis applies most strongly to holdings concerning property.[183]

On the third and fourth factors, the liberal Justices are not likely to find that changes in law or fact compel overruling this precedent. While the conservatives certainly will take issue with the major questions doctrine and recently revived concerns about non-delegation and the

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179 505 U.S. at 854–55.

180 597 U.S. at 390 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

181 54 U.S.C. § 320301(b) (2018).

182 54 U.S.C. § 320301(a) (2018).

183 Ramos v. Louisiana, 140 S. Ct. 1390, 1409 (2020) (Sotomayor, J., concurring).

separation of powers, along with a general antipathy to environmental concerns, the liberals, now a minority, have addressed those theories only reluctantly. On this issue, they are surely all in agreement that the Antiquities Act should stand as it has in perpetuity.

The conservative Justices are a more interesting case, varied as they are. Beginning with Justice Thomas, he has made his views on stare decisis abundantly clear. Writing only for himself, concurring in *Gamble v. United States*,[184] Justice Thomas rejected the factor based balancing tests laid out *supra* as contrary to the judicial duties under Article III of the Constitution.[185] Rather, he believes that applying stare decisis factors to avoid overturning a "demonstrably erroneous" precedential decision is, in essence, allowing judge-made law to triumph over the judiciary's obligation to maintain the judicial supremacy of the Constitution.[186] Therefore, one can be relatively certain that Justice Thomas would extend no precedential deference to a reconsideration of *Cameron* and *Cappaert*. Rather, his commitment to *de novo* statutory construction might well obligate his rejection of those landmark decisions.

Justice Kavanaugh, on the other hand, at least believes in stare decisis. His concurrence in *Ramos* distinguished between applying stare decisis to questions of statutory interpretation as opposed to questions of constitutional interpretation.[187] He argued that because Congress can alter a statutory precedent by enacting new legislation, stare decisis can safely be applied more strictly to that context than the constitutional context.[188] Like the other Justices except Thomas, Kavanaugh believes that a precedent must be more than just wrong to warrant overruling it.[189] In his *Ramos* concurrence, he identified three primary questions which guide his decision making in regards to overruling precedent: (1) is the prior decision egregiously wrong; (2) has the prior decision significant negative jurisprudential or real-world consequences; and (3) would overruling the prior decision upset reliance interests?[190] The main issue with these factors is that the first and second factors are based in a textualist, fact-specific, perspective-specific context which is difficult to extrapolate from. Only the third factor is somewhat discrete, and yet, like in *Ramos*, the Justices still disagree about the importance of the supposed reliance interests.[191]

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184 Gamble v. United States, 587 U.S. 678, 710 (2019) (Thomas, J., concurring).

185 *Id.* at 711.

186 *Id.* at 718–19 ("If a prior decision demonstrably erred in interpreting such a law, federal judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error."); *see also* Ramos, 140 S. Ct. at 1421 (Thomas, J., concurring) (referring to past opinions to affirm stare decisis construction).

187 Ramos, 140 S. Ct. at 1412–13 (Kavanaugh, J., concurring).

188 *Id.* at 1413.

189 *Id.* at 1414.

190 *Id.* at 1414–15.

191 *See id.* at 1425–26 (Alito, J., dissenting) (discussing how the majority's decision has elicited reasonable and enormous reliance).

Justices Alito and Gorsuch are also well-differentiated by *Ramos* in terms of applying stare decisis. Justice Alito, in dissent, argued strongly that overruling precedent in *Ramos* would substantially harm those parties with substantial reliance interests.[192] Justice Gorsuch, writing for the majority, considered (1) the quality of the precedent's reasoning, (2) the precedent's consistency with related legal decisions and recent developments, and (3) reliance interests.[193] Justice Gorsuch found that the precedent was clearly wrong—akin to Justice Kavanaugh's first question—and that the reliance interests were not particularly compelling.[194] And yet it is important to note, despite the significant ink spilled over the application of stare decisis in *Ramos*, the votes to overrule precedent line up perfectly with their views on the rightness or wrongness of the precedent itself.[195] This may demonstrate some disingenuity in the Court's treatment of stare decisis, which creates substantial uncertainty in applying these supposed viewpoints to future cases.

Chief Justice Roberts, however, is not of that sort. In *June Medical Services LLC v. Russo*,[196] Chief Justice Roberts voted to uphold, on stare decisis grounds, precedent from which he himself had dissented.[197] Rather than follow the philosophy of Justice Thomas and disregard precedent, he concurred and laid out his own view of stare decisis.[198] He wrote that stare decisis requires the Court, absent special circumstances, to uphold precedent, and that nothing in this case justified such a departure.[199]

With all this information, there does not seem to be any background principle of law protecting Antiquities Act jurisprudence from radically changing. Of the six Justices likely to vote to upend a hundred years of precedent, the Justice most likely to respect longstanding precedent, Chief Justice Roberts, himself endeavored to make a statement expressing a desire to reconsider that precedent.[200]

V. CONCLUSION

The Antiquities Act is a remarkable statute, one with a life, power, and legacy that Senator Lacey and Dr. Hewett could not have

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192 *Id.*

193 *Id.* at 1405–08.

194 *Id.*

195 *See, e.g.*, *id.* at 1433–36 (Alito, J., dissenting) (discussing the underlying viewpoints as to whether the Sixth Amendment incorporates the common law jury trial right).

196 591 U.S. 299 (2020).

197 *Id.* at 345 (Roberts, C.J., concurring); Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (Roberts, C.J., dissenting).

198 June Med. Servs., 591 U.S. at 345 (Roberts, C.J., concurring); Morgan Johnson, Note, *Conservative Stare Decisis on the Roberts Court: A Jurisprudence of Doubt*, 55 U.C. DAVIS L. REV. 1953, 1965 (2022).

199 June Med. Servs., 591 U.S. at 345, 358.

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

anticipated. It is very possible that, if President Roosevelt had not first taken up and used it as expansively as he did, the presidents that followed him would have been much more modest in their National Monument designations. While pottery and artifacts have been protected, so too have biodiversity, geology, and recreational opportunities. National Monuments are home to redwoods, cougars, whales, petroglyphs, volcanoes, fossils, rock climbing, white-water rafting, and billions of fish.[201] These "objects of scientific or historical interest" represent a collective heritage of existence for Americans and all of humanity. Refreshingly, the Supreme Court precedent in this area currently embraces the inherent romanticism of using a statute from 1906 to protect an ecosystem, declaring broadly the integrated nature of nature itself. Indeed, where else does one get the privilege of reading the President of the United States wax on about songbirds and trees and pristine mountain streams in an official proclamation?[202]

The future of the Antiquities Act is uncertain, and, given current jurisprudence, in many ways pessimism is indistinguishable from realism. And yet that same capriciousness with which the Court flits from precedent to precedent, from life-saving healthcare to crushingly prevalent private debt to a climate crisis which will torment the children of today, leaves some window of hope that in their cruel[203] crusade some victims will be blindly overlooked.

There are more considerations necessarily left unexamined here upon which the Supreme Court could alight in deciding the future of the Antiquities Act. Perhaps Congress has implicitly acquiesced to the President's precedent of power in this area, either by not amending the law when other amendments have been added to it or by declining to do so when such bills have been introduced.[204] Or perhaps that acquiescence can be derived from the Act's re-codification in 2014.[205] But, as the Court said in *Bostock*, quoting Justice Scalia, "[a]rguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote."[206] Perhaps the Court will find the way the Antiquities Act has been utilized to be exactly in line with its text,

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[201] *Things to Do & Trip Idea Search*, NAT'L PARK SERV., https://perma.cc/BAC3-K37K (last visited Apr. 4, 2024).

[202] *See, e.g.*, Establishment of the Cascade-Siskiyou National Monument, Proclamation No. 7318, 65 Fed. Reg. 37249 (June 13, 2000).

[203] *See* Bennett L. Gershman, *Cruel Justice: Gratuitous Cruelty in Justice Thomas's Jurisprudence*, N.Y.L.J. (Aug. 25, 2022, 9:00 AM), https://perma.cc/L993-94A5.

[204] Carter Williams, *Romney, Lee, Curtis Seek to Amend Antiquities Act Amid State's Lawsuit Appeal*, KSL (Sept. 15, 2023, 8:55 PM), https://perma.cc/F22V-Y9GL.

[205] *See What is the Antiques Act? Short Answer: Depends Who You Ask (Part 1)*, CAUSE OF ACTION INST. (May 15, 2017), https://perma.cc/KC3A-FHRN (discussing how the Antiquities Act in 2014 was recodified, not to change the meaning or effect of the existing law, but to turn it into a "National Preservation Programs," leading to the assumption that it is a historic preservation law, and not an environmental law to curb climate change).

[206] Bostock v. Clayton Cnty., 590 U.S. 644, 670 (2020) (quoting Scalia's concurring opinion in Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990)).

although reconciling such a finding with their past statutory constructions is, as has been shown here, difficult. Any forthcoming developments in this area will depend largely on President Trump and the future of National Monument designations. There is a good argument that the smartest thing a pro-environmental president could do to preserve the Antiquities Act would be to stop making proclamations and hope to limit the rounds in the chamber while waiting this Court out. Coping, however, with the Trump Administration, should the trend towards the unitary executive ever be remedied, perhaps a limitation on the Antiquities Act power would be a small price to pay.

If the above analysis is correct, the best that one can hope for at the moment is that there are simply bigger fish to fry. While the Court declined to take up *Murphy Co.* and *American Forest Resources Council*, three Justices now have signaled their interest in reconsidering the century-old precedent of the Antiquities Act's use. Should a more sweeping challenge come its way, there is a very serious possibility that *California* does not remain intact. The Court's textualism does not support it, the major questions doctrine in light of that textualism does not support it, and stare decisis certainly is not an impenetrable wall to protect it. The Antiquities Act, and the millions of acres of federal land protected by it, could very well go the way of its namesakes and be left in the dust.