

# Testing the Major Questions Doctrine

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*The Supreme Court’s recent decision in West Virginia v. EPA, 142 S. Ct. 2587 (2022), announced the arrival of the major questions doctrine, a substantive canon of construction that bars agencies from resolving questions of “vast economic and political significance” without clear statutory authorization. While the contours of the doctrine are still murky, early predictions suggest it will function to substantially curtail the scope of the administrative state. Despite these significant implications, the Court has not been clear about the doctrine’s origins or purpose. Some defenses of the doctrine have sought to justify it as an intuition about how Congress*

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writes statutes, a kind of linguistic canon; others, including Justice Gorsuch, attempt to root the doctrine in the Constitution, grounding it in the nondelegation doctrine.

*The distinction matters because constitutionally inspired doctrines have more bite than linguistic canons. If the major questions doctrine is truly just another linguistic canon, it may fit within the Court's ordinary process of statutory interpretation and yield to other canons in any case; as a constitutional doctrine, by contrast, it allows the Court to deviate from the text and adopt narrower readings of otherwise unambiguous statutes. This Note considers and tests the major questions doctrine's link to the nondelegation doctrine, arguing that the major questions doctrine does not consistently serve to advance nondelegation.*

*The argument proceeds in three steps. First, this Note contends that the major questions doctrine must apply to the President, addressing a recent circuit split on that issue. Second, this Note explains why the major questions doctrine may function to bar the elimination of national monuments, taking as a case study President Trump's elimination of the Bears Ears National Monument in Utah. Notably, given the history of the statute and the textual authorization to create monuments, the major questions doctrine is far more likely to bar the elimination of a national monument than the creation of one. Finally, this Note turns to nondelegation, which is more likely to be used to challenge the creation of monuments. The nondelegation doctrine does not examine "majorness" or demand clear statutory authorization; as a result, its application bears little resemblance to the major questions inquiry, likely functioning to bar the creation as opposed to the elimination of monuments.*

*This case study shows that the major questions doctrine and nondelegation doctrine may, as applied to the same statute, produce opposing outcomes. If the major questions doctrine functions to advance the nondelegation doctrine, this disparity should give its defenders pause. Whatever the doctrine's merits as a linguistic canon, a doctrine so untethered from the constitutional values that ostensibly grant it its legitimacy has little merit as a substantive canon.*

## I. INTRODUCTION

In 2022's *West Virginia v. EPA*, the Supreme Court formally announced the arrival of the major questions doctrine, a principle of statutory interpretation that requires administrative agencies to be able to point to "clear congressional authorization" to justify their regulatory authority in "extraordinary cases" involving questions of vast "economic and political significance."<sup>1</sup> The *West Virginia* decision provoked an outcry: In the hands of a conservative Court, the doctrine appears as nothing more than a "judicial weapon against regulations and delegations,"<sup>2</sup> "fresh artillery to lower courts" to invalidate regulations,<sup>3</sup> and one of many "get-out-of-text-free cards" that the Court may invoke when textualism would frustrate its "anti-administrative-state" goals.<sup>4</sup> This Note advances those critiques, illustrating how the major questions doctrine can be applied in counterintuitive ways that unmoor it from its ostensible source, the nondelegation doctrine. Shorn of its pedigree, the major questions doctrine may stand on its own terms as a linguistic canon—but cannot be justified as a substantive constitutional doctrine.

Those critics of major questions often present the doctrine as nothing more than a stalking horse for the nondelegation doctrine, the principle that Congress may not excessively delegate its legislative power to agencies.<sup>5</sup> The major questions doctrine does not announce any hard limits on when Congress may delegate to agencies; as a tool of statutory interpretation, however, it may serve as a "more selective and targeted de-regulatory tool," allowing the Court to strike down particular policies to which it is politically opposed.<sup>6</sup> The Court's *West Virginia* opinion, admittedly, betrays a "lack of agreement or certainty . . . concerning the precise contours of the underlying doctrine of nondelegation that the new major questions doctrine is advertised as serving."<sup>7</sup> But there must be

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1. 142 S. Ct. 2587 (2022) (first quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); and then quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)); see KATE R. BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE I (2022).

2. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1094 (2023).

3. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 315 (2022).

4. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

5. See *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935).

6. Deacon & Litman, *supra* note 2, at 1088.

7. Sohoni, *supra* note 3, at 314.

some constitutional basis; the *West Virginia* majority's reference to "separation of powers principles" to justify the doctrine admits as much,<sup>8</sup> even if the underlying relationship to nondelegation is never quite spelled out by the majority.<sup>9</sup>

In the face of this withering criticism, a handful of defenses of the doctrine have emerged. They roughly fall into two camps, corresponding with the two rationales for the doctrine articulated by then-Judge Kavanaugh in his *United States Telecom Ass'n* dissent<sup>10</sup> and reiterated by the majority in *West Virginia*.<sup>11</sup> One camp seems to back away from the constitutional implications of the major questions doctrine, focusing on the validity of major questions as merely another linguistic canon. Ilan Wurman has marshalled a substantial body of evidence justifying the doctrine (or canon) as "an intuition about how people and lawmakers use language to delegate authority to others,"<sup>12</sup> and a handful of other scholars have also, in whole or in part, grounded their defenses of a major questions canon in principles of textualism.<sup>13</sup> Most notably, Justice Barrett has expressed a similar view, viewing the doctrine as a tool to "situate[] text in context."<sup>14</sup> At its most restrained, this form of the doctrine simply counsels courts to exercise "some degree of judicial skepticism" when confronted with broad claims of agency authority to ensure "that agencies only exercise those powers actually delegated to them."<sup>15</sup>

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8. *West Virginia*, 142 S. Ct. at 2609; cf. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (noting the doctrine is "grounded in two overlapping and reinforcing presumptions," one of which is "a separation of powers-based presumption against the delegation of major lawmaking authority").

9. *But see West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring) (arguing that "the Court routinely enforced 'the non-delegation doctrine' through . . . appl[ying] the major questions doctrine" (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989))).

10. *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (grounding the major questions doctrine in both "(i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies" (citation omitted)).

11. *West Virginia*, 142 S. Ct. at 2609 (justifying the major questions doctrine through "both separation of powers principles and a practical understanding of legislative intent").

12. Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 39),

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4381708](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708).

13. See Ilya Somin, *A Textualist Defense of the Major Questions Doctrine*, VOLOKH CONSPIRACY (Mar. 1, 2023, 4:27 PM), <https://reason.com/volokh/2023/03/01/textualist-defense-of-the-major-questions-doctrine/>.

14. *Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring).

15. See Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*,

Another camp of defenders, led by Justice Gorsuch, seeks to ground the major questions doctrine in more than linguistics. Under this view, the purpose of the major questions doctrine is to reinforce the constitutional separation of powers.<sup>16</sup> This view acknowledges that major questions is “nominally a canon of statutory construction,” but argues that it exists “in service of [a] constitutional rule,” namely nondelegation.<sup>17</sup>

This angle offers defenders of the doctrine two principal advantages: history and constitutionality. On the first point, although a linguistic major questions canon can only trace its roots to the mid-1980s,<sup>18</sup> the nondelegation doctrine at least arguably traces its roots back to the Founding.<sup>19</sup> Scholars like Louis Capozzi can thus rebut the claim that major questions is a recent fabrication by pointing to its “doctrinal sibling,” nondelegation. The Court’s uneven use of the two doctrines at different points throughout its history then appears as one continuous evolution, with nondelegation papering over the gaps in the major questions doctrine’s pedigree.<sup>20</sup> On the second, finding a constitutional basis for the major questions doctrine extends the range of cases in which it applies. As it stands, even post-*West Virginia*, the linguistic canon discussed above is just another tool in a vast arsenal that informs how courts read statutes.<sup>21</sup> As a constitutional doctrine, by contrast, “Congress could not even expressly empower courts to

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2021-2022 CATO SUP. CT. REV. 37, 39, 58 (noting that this reading “would not satisfy those hoping for a revival of the nondelegation doctrine”).

16. See Thomas A. Koenig & Benjamin R. Pontz, Note, *The Roberts Court’s Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL’Y 221, 230-34 (2023). The authors point out that major questions may be understood as reinforcing the constitutional separation of powers whether the doctrine is understood as a “more functionalist nondelegation test.” *Id.*; see also Randolph J. May & Andrew K. Magloughlin, *NFIB v. OSHA: A Unified Separation of Powers Doctrine and Chevron’s No Show*, 74 S.C. L. REV. 265, 293-94 (2022) (characterizing major questions as a complementary doctrine advancing “the same overall goal” as nondelegation).

17. *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

18. See *infra* Part I.A.

19. See generally Ilan Wurman, Feature, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (discussing and defending the idea that the Founders believed Congress could not delegate its legislative power).

20. Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 192, 197 (2023). See *id.* at 197-208 (pointing to a “rule against implied delegations” as a nineteenth-century precursor to the major questions doctrine). This is not, however, an intuition about how Congress writes statutes; instead, Capozzi suggests it developed because of “a formalist concern rooted in the nondelegation doctrine.” *Id.* at 206.

21. Cf. ANTONIN SCALIA & BRYAN R. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 59-62 (West Grp. 1st ed. 2012) (describing the principle of interrelating canons).

defer to agency resolutions of major questions when the relevant statutory authorization is ambiguous.”<sup>22</sup>

The focus of this Note is the second camp, both because advocates of this view appear to make up the majority of the doctrine’s advocates<sup>23</sup> and because the separation of powers justification for the major questions doctrine affords far greater power and legitimacy than the linguistic justification. If the major questions doctrine is a “super-canon,” sitting outside the conventional world of statutory interpretation,<sup>24</sup> it may more easily be applied in ways that its critics view as fundamentally illegitimate.<sup>25</sup> This second justification also presents a testable proposition: whether major questions and nondelegation will produce roughly the same results. If the major questions doctrine uniformly serves the same goals as the nondelegation doctrine, it should benefit from the additional legitimacy and power afforded constitutional rules. If its application may diverge, sometimes wildly, from the application of the nondelegation doctrine to the same set of facts, it should not be elevated above any other interpretive canon. The remainder of this Note demonstrates, through the example of the Antiquities Act, that the latter is true.

Commentators have criticized the fuzzy link between nondelegation and major questions, accusing the Court of “invok[ing] constitutional avoidance untethered to any constitutionally doubtful exercise of congressional power.”<sup>26</sup> This is undoubtedly correct, but the Court’s error goes beyond a failure to elucidate the link between nondelegation and major questions. As this Note will demonstrate by applying both doctrines to the Antiquities Act, the two doctrines can end up at cross purposes.

Litigants have previously invoked the nondelegation doctrine to (unsuccessfully) challenge the broad powers of the President to *create* monuments under the Act. The major questions doctrine

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22. Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1195 (2021).

23. See Beau J. Baumann, *Volume IV of the Major Questions Doctrine Reading List*, YALE J. ON REGUL. NOTICE & COMMENT (Aug. 14, 2023), <https://www.yalejreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann/> (characterizing the “strong” clear-statement rule as “the majority in the scholarship”).

24. Cf. Tom Merrill, *West Virginia v. EPA: Getting to Actual Delegation*, VOLOKH CONSPIRACY (July 29, 2022, 7:10 AM), <https://reason.com/volokh/2022/07/29/west-virginia-v-epa-getting-to-actual-delegation/> (criticizing *West Virginia* as departing from “the Court’s exercise of traditional statutory interpretation”).

25. See sources cited notes 2-4 *supra*.

26. Sohoni, *supra* note 3, at 300 (emphasis omitted).

would likely offer no more fruitful terrain on that front, as the Act's explicit grant of power to the President likely satisfies the "clear authorization" required to turn back a major questions challenge. When applied to presidential modifications of existing monuments, the major questions doctrine becomes relevant. Nowhere in the text of the statute is this power afforded the President, and—when a monument modification presents a question of vast economic and political significance—the major questions doctrine would bar that modification. The nondelegation doctrine, by contrast, has nothing to say about diminishing monuments, as it lacks the clear-authorization requirement that characterizes the major questions doctrine. The two doctrines thus end up pushing in opposite directions: nondelegation urges scrutiny of the President's expansive, albeit clearly delegated, power to designate new national monuments, while major questions could primarily function to block attempts to exercise the President's implied power to diminish or revoke monuments.

Part I discusses the origins of the major questions doctrine and its relationship to nondelegation, in *West Virginia* and elsewhere. Part II then proceeds, in three steps, to test the link between major questions and nondelegation using the example of the Antiquities Act. As a preliminary matter, Part II.A discusses the new circuit split on whether the major questions doctrine applies when the President exercises delegated statutory authority, concluding that it does. Part II.B briefly recounts the history of nondelegation challenges to the creation of national monuments, which have alleged that the Antiquities Act grants impermissibly broad powers to the President. Part II.C then sketches out how the major questions doctrine would likely be similarly unsuccessful in challenging the creation of new monuments, but may have some purchase, through its requirement for clear congressional authorization, in challenging the diminishment of existing monuments. This creates a problem for those who seek to ground the major questions doctrine in nondelegation principles; namely, that applying the latter would suggest the President lacks broad powers to create national monuments, while applying the former suggests the President only lacks broad powers to *diminish* them. Part III considers the implication of the divergence between these applications for the future of the major questions doctrine.

## II. ORIGINS OF THE MAJOR QUESTIONS DOCTRINE

This Part traces the origins of the major questions doctrine and its relationship to the nondelegation doctrine throughout its development. It begins with an overview of the disputed origins of the doctrine; scholars have variously rooted it in the mid-nineteenth century, the 1980s, and 2014. Part I.B turns to how the doctrine was justified in the quartet of cases, as well as Justice Barrett’s perspective on the basis for the doctrine in the subsequent case of *Biden v. Nebraska*. Finally, Part I.C summarizes the link between the nondelegation doctrine and the major questions doctrine, as evidenced through this series of cases.

### A. *Seeds of the Doctrine*

The origins of the major questions doctrine trace back at least two decades and, in some accounts, much further. Some, including Justice Gorsuch, find the doctrine’s origins in a handful of nineteenth-century cases that, admittedly, can be squinted at and made to look something like the contemporary major questions doctrine.<sup>27</sup> Under this view, the doctrine’s dormancy during the middle half of the century can largely be accounted for by the rise of the nondelegation doctrine in the 1930s, thus making the doctrinal link between the two obvious.<sup>28</sup> Some find the doctrine’s seeds a little later in 1980’s *Benzene* case; there, in rejecting an agency’s claim to expansive statutory authority, the plurality opinion noted that the proposed rule was “expensive,” permitting the agency to impose hundreds of millions of costs on the regulated industry.<sup>29</sup> Notably, in a solo concurrence, Justice Rehnquist argued that the court should go one step further, urging his colleagues “not to shy away from our judicial duty to invalidate unconstitutional statutes”—an early illustration of the interplay between the nondelegation doctrine and the major questions doctrine.<sup>30</sup>

The contemporary form of the “major questions” doctrine discussed in this Note traces its origins only to 1986.<sup>31</sup> In a law

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27. *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022)). (Gorsuch, J., concurring) (citing *ICC v. Cincinnati, New Orleans & Tex. Pacific Ry.*, 167 U.S. 479 (1897)); see also Capozzi, *supra* note 20, at 209-211 (discussing *ICC* and similar cases).

28. Capozzi, *supra* note 20, at 209-211.

29. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 628 (1980).

30. *Id.* at 686 (Rehnquist, J., concurring in the judgment).

31. *E.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (citing Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363



review article, then Judge Stephen Breyer made what was nothing more than a fleeting observation: one of the factors to consider in deciding whether to defer to an agency's interpretation of the law, under *Chevron*, is "whether the legal question is an important one."<sup>32</sup> Congress therefore "is more likely to have focused upon, and answered, major questions."<sup>33</sup> Through this passing remark, Breyer unwittingly coined a new doctrine.<sup>34</sup>

From those origins, the Court took up a pair of early cases, *MCI Telecommunications Corp. v. AT&T Co.*<sup>35</sup> and *FDA v. Brown & Williamson Tobacco Corp.*<sup>36</sup> Both involved general statutory language that agencies then interpreted to promulgate sweeping regulations; in both cases, the Court referenced the "economic and political significance" of the decision as a reason to conclude Congress did not intend to delegate that decision-making power to the agency.<sup>37</sup> In this form, the major questions doctrine appears like little more than a linguistic canon functioning at step one of the *Chevron* inquiry.<sup>38</sup> If an agency unexpectedly promulgates a new regulation with vast economic and political significance, such as regulating a significant new industry in *Brown & Williamson* or eliminating a major statutory mandate as in *MCI*, this canon—one of many applicable at step one of *Chevron*—suggests courts should read the statutory language to prohibit that exercise of authority.

In *King v. Burwell*,<sup>39</sup> the Court took a slightly different tack. Noting that Congress is unlikely to delegate issues of "deep economic and political significance" to administrative agencies sub silentio, the Court concluded that statutory silence is not an implicit delegation of power to agencies to decide such issues.<sup>40</sup> Unlike *MCI* and *Brown & Williamson*, where major questions appeared as an interpretive canon that courts could use to

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(1986)).

32. Breyer, *supra* note 31, at 370.

33. *Id.*

34. *Cf.* Gabe Fleisher (@WakeUp2Politics), TWITTER (Mar. 16, 2023, 12:28 PM), <https://twitter.com/WakeUp2Politics/status/1636449468403929091> ("Justices can [add] as many capital letters as they want, but that doesn't mean there's a special capital letter power." (quoting Justice Stephen Breyer)).

35. 512 U.S. 218 (1994).

36. 529 U.S. 120 (2000).

37. *Id.* at 160 ("As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

38. *See supra* note 12.

39. 573 U.S. 473 (2015).

40. *Id.* at 486.

determine the meaning of the statutory text, *King v. Burwell* positioned the nascent doctrine as an exception to the *Chevron* framework.

The case closest to the modern version of the doctrine is *Utility Air Regulatory Group v. EPA (UARG)*, a 2014 case concluding that the EPA's reading of an ambiguous statute was unreasonable because of the "enormous and transformative expansion in EPA's regulatory authorization" that would result.<sup>41</sup> The *UARG* decision contains a host of language that the *West Virginia* majority would draw on to define the doctrine.<sup>42</sup> At the same time, *UARG* still applied the doctrine within the *Chevron* framework; only after considering the regulatory text and concluding it was ambiguous did the Court go on to apply the doctrine and conclude EPA's interpretation was unreasonable at step two of *Chevron*.<sup>43</sup>

### B. *The New Major Questions Doctrine*

In the 2021-2022 term, the Supreme Court formalized (and named) the new major questions doctrine. The doctrine, as Chief Justice Roberts wrote in *West Virginia v. EPA*, constitutes "an identifiable body of law that has developed over a series of significant cases."<sup>44</sup> That body of law instructs courts to look skeptically upon statutes that appear to delegate the power to answer anything the Court thinks constitutes a "major question."<sup>45</sup> Power to answer such a question may only be granted through "clear congressional authorization."<sup>46</sup> Absent such authorization, the agency may not act.

Left uncertain is what exactly makes a question "major." "[V]ast economic . . . significance" is clear enough, though the line-drawing problem remains; agency decisions that regulate a "significant portion of the American economy" are likely to satisfy this prong.<sup>47</sup> Less clear is "political significance," which the majority opinion does not address. Justice Gorsuch's concurrence, however, points to the presence of an "earnest and profound debate across the country," determined by reference to debates in Congress and in state legislatures, as another indicator of whether

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41. 573 U.S. 302, 322-24 (2014).

42. See *West Virginia*, 142 S. Ct. at 2609-10 (citing *UARG* six times).

43. *UARG*, 573 U.S. at 323-24.

44. *West Virginia*, 142 S. Ct. at 2609; see Part I.A *supra* (discussing this body of law).

45. *Id.*

46. *Id.* (quoting *UARG*, 573 U.S. at 324).

47. *Id.* at 2608 (quoting *UARG*, 573 U.S. at 324).

a question is major.<sup>48</sup> The majority opinion also referenced the fact that the agency's claim to "newfound power" was based on the "vague language" of a law that "had rarely been used in the preceding decades," suggesting the novelty of the interpretation was another indicator that the question was major.<sup>49</sup> Finally, the majority pointed to the implications of the agency's reading of the statute, which it concluded would offer the agency "unprecedented power over American industry."<sup>50</sup>

These indicia of majorness, although indeterminate, can all be traced to the Court's prior case law discussed in Part I.A above. The unique feature of the *West Virginia* major questions doctrine is that it functions not as a canon or a carveout to *Chevron* but as an aggressive clear statement rule—a "supercharged rule of interpretation" as opposed to a rule of statutory construction.<sup>51</sup> Although the majority did not explicitly require a "clear statement,"<sup>52</sup> it is apparent that even the plain text of the statute was not enough to justify the agency's claim to authority.<sup>53</sup> Instead, explicit congressional authorization was necessary and found lacking, though the Court declined to spell out how explicit that authorization needed to be to satisfy this requirement. As applied in *West Virginia*, the doctrine is the "strong form" of the major questions doctrine identified by Cass Sunstein, a clear statement rule that bars certain agency interpretations: "When an agency is seeking to assert very broad power, it will lose."<sup>54</sup>

The next chapter in the doctrine's evolution was written in the Court's 2023 opinion in *Biden v. Nebraska*, striking down the Biden administration's attempt to discharge student loan debt as exceeding the bounds of statutory authorization.<sup>55</sup> The majority opinion dutifully applied the indicia of "majorness" developed in

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48. *Id.* at 2620-21 (Gorsuch, J., concurring) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006)).

49. *Id.* at 2610 (majority opinion).

50. *Id.* at 2612 (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion)).

51. See Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 467-68 (2023).

52. Compare *West Virginia*, 142 S. Ct. at 2614 (referring to "the sort of clear authorization required by our precedents") with *id.* at 2616 (Gorsuch, J., concurring) (framing the major questions doctrine as applying "absent a clear statement otherwise").

53. *Id.* at 2614 (admitting that the agency's interpretation fell within the plain text of the statute); *id.* at 2627 (Kagan, J., dissenting).

54. See Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021).

55. 143 S. Ct. 2355 (2023).

prior major questions cases, but offered little guidance on the doctrine's origins.<sup>56</sup> More interesting was a concurrence by Justice Barrett, which laid out her view of the doctrine as an “interpretive tool.”<sup>57</sup> Barrett's concurrence acknowledged that “some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.”<sup>58</sup> But she ultimately rejected Justice Kagan's characterization of the doctrine as a get-out-of-text-free card, arguing instead that it aligns with “how we communicate conversationally,” or, in other words, a linguistic canon.<sup>59</sup>

Barrett's concurrence staked out one side of the debate—but she was joined by none of her colleagues. And her view of the basis for the doctrine explicitly contrasts with Justices Gorsuch's view of the doctrine as a substantive canon.<sup>60</sup> While *Biden v. Nebraska* thus offers another example of the doctrine's application, its basis and future remains as murky as before.

### C. *The Nondelegation Link*

The nondelegation doctrine suggests that the Constitution places certain hard limits on delegations of Congress's legislative power to the executive branch.<sup>61</sup> On its face, it is easy to see how this doctrine functions similarly to major questions, constraining the scope of permissible delegations to the executive in one way or another.<sup>62</sup> Justice Gorsuch, concurring in *West Virginia*, made this connection explicit,<sup>63</sup> and Sunstein has articulated the same rationale: rather than a presumption about how Congress writes law, the strong version of the doctrine “is rooted in the

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56. *See id.* at 2372-74.

57. *Id.* at 2377-78 (Barrett, J., concurring).

58. *Id.* at 2376.

59. *See id.* at 2380; *see also* Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. Cal. L. Rev. (forthcoming 2024) (manuscript at 38-44) (presenting empirical data that partially supports and partially undermines Barrett's linguistic justification).

60. *Compare id.* at 2378 (rejecting the view of the major questions doctrine as “a true clear-statement rule”) with *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (characterizing the major questions doctrine as a clear-statement rule). Justice Alito joined Justice Gorsuch's concurrence, while Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh did not join either opinion.

61. *See* *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935).

62. *See* Sohoni, *supra* note 3, at 290 (pointing out that both commentators and various justices have found overlap between nondelegation and major questions).

63. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

nondelegation doctrine,” drawing its justification not from an assumption about congressional intent but from “the separation of powers” and the role of courts “as a vital check on . . . assertions of executive authority.”<sup>64</sup>

This assertion is a necessary one: there is no reason the “majorness” of a question should otherwise constrain an agency’s ability to regulate, and “the [*West Virginia*] majority does not ever articulate any other legal ground that might justify the Court’s direction to courts to ignore plausible, but majorness-implicating, readings of statutory text offered by agencies.”<sup>65</sup> To justify a clear-statement rule that bars otherwise-plausible textual interpretations, over and above principles of statutory interpretation, some link to authoritative constitutional law is necessary.<sup>66</sup> A “constitutionally inspired clear statement rule,” in other words, may only be imposed in service of some specific constitutional justification.<sup>67</sup> The majority declines to find any such justification, but Justice Gorsuch does, and it is difficult to identify any other constitutional basis for the doctrine other than nondelegation.<sup>68</sup>

But the tension between the two is also obvious: one constrains Congress’s *ability* to delegate power to the executive, while the other merely requires Congress to speak clearly in doing so; sufficiently clear language would permit the agency to exercise the power.<sup>69</sup> In other words, major questions functions as an avoidance canon that does not actually avoid any constitutional problem.<sup>70</sup> Left unclear is “what theory of nondelegation, if any, underlies and justifies” the doctrine.<sup>71</sup>

This contradiction may be seen as an advantage of the doctrine, offering “a more selective and targeted deregulatory tool.”<sup>72</sup> Instead of defining and implementing a revived nondelegation

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64. Sunstein, *supra* note 54, at 478 (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

65. See Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2023) (manuscript at 44).

66. See *id.* (manuscript at 42-45).

67. See Sohoni, *supra* note 3, at 309.

68. But see Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1980 (2017).

69. See Deacon & Litman, *supra* note 2, at 1046 (noting that the major questions doctrine “would not satisfy proponents of a reinvigorated nondelegation doctrine”).

70. See Heinzerling, *supra* note 68, at 1975-76, 1979.

71. Sohoni, *supra* note 3, at 267 (emphasis omitted).

72. Deacon & Litman, *supra* note 2, at 1088.

doctrine, the Court can simply say Congress was not clear enough in any particular case—and Congress is never clear enough.<sup>73</sup> That may be well and good for the Supreme Court, but, as Mila Sohoni explains, it effectively creates a doctrine just for the Supreme Court—without knowing what the “separation of powers principles” that purportedly justify the doctrine actually are,<sup>74</sup> it “becomes much harder to accurately apply” the doctrine in a way that serves those principles.<sup>75</sup> Agencies are left to wonder what regulations may or may not run afoul of the doctrine,<sup>76</sup> Congress is left to figure out how clear a clear authorization must be, and lower courts are left to muddle through the difference between the two.<sup>77</sup>

### III. TESTING THE LINK: THE ANTIQUITIES ACT

In this Part, I argue that the Antiquities Act challenges any link between the major questions doctrine and the nondelegation doctrine. The Antiquities Act authorizes the President to “declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments.”<sup>78</sup> Pursuant to this declaration, the President may reserve “parcels of land,” which must be limited to “the smallest area compatible with the proper care and management of the objects to be protected.”<sup>79</sup> The act is silent as to whether this grant of power carries with it the power to modify or abolish existing national monuments; President Trump’s controversial decision to effectively eliminate the Bears Ears National Monument in Utah, while deeply cutting the Grand Staircase–Escalante National Monument, sparked significant debate on this question in recent years.

Opponents of the elimination of Bears Ears<sup>80</sup> argued that the

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73. See Sohoni, *supra* note 3, at 266.

74. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

75. Sohoni, *supra* note 3, at 300.

76. See *id.* at 314 (noting the doctrine “will cause both an actual and an *in terrorem* curtailment of regulation”).

77. See, e.g., *United States v. Rhine*, 652 F.Supp.3d 38, 56 n.5 (D.D.C. 2023) (characterizing *West Virginia* as “relevant to the nondelegation analysis”).

78. 54 U.S.C. § 320301(a).

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

80. The Trump proclamation on Bears Ears reduced the size of the monument from roughly 1.3 million acres to just 228,000, or about 15% of its original size. See Jason Mark, *Trump Slashes Two National Monuments in Utah*, SIERRA MAG. (Dec. 4, 2017), <https://www.sierraclub.org/sierra/trump-slashes-two-national-monuments-utah>. This

Antiquities Act did not grant the President the power to eliminate or severely diminish a national monument. The text of the Act does not commit that power to the President; instead, it suggests that it was retained by Congress.<sup>81</sup> Responding to this argument, a handful of scholars have contended that, although the statute is silent, there is a strong background presumption that a statutory grant of affirmative power includes an implied power to revoke or diminish exercises of that power,<sup>82</sup> and that the history of presidential modifications to monuments establishes this implied power to eliminate monuments.<sup>83</sup>

This Note reassesses the Bears Ears debate in light of the rise of the major questions doctrine. Nondelegation, for its part, has routinely been invoked to argue against the creation of new national monuments,<sup>84</sup> and many opponents of Bears Ears framed their arguments in the language of nondelegation.<sup>85</sup> But the creation of Bears Ears likely does not raise major questions concerns—the language of the Antiquities Act is clear. On the other hand, effectively eliminating a national monument—at least one with the size and religious significance of Bears Ears—could present a question of vast economic and political significance.<sup>86</sup> The major questions doctrine’s demand for “clear congressional authorization,” rather than a “gap, ambiguity, or doubtful expression” in statutory language,<sup>87</sup> would likely not be satisfied by the argument that the power to revoke is implied in the statute. First, however, this Part considers the standard of review for presidential proclamations, such as those used to create and eliminate national monuments, and whether the major questions doctrine can apply to presidential actions.

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Note refers to the Bears Ears action, which functionally terminated the monument, as an “elimination” and the Grand Staircase–Escalante action, which was cut roughly in half, as a “cut.”

81. See, e.g., Mark Squillace, Eric Biber, Nicholas S. Bryner & Sean B. Hecht, Essay, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 64 (2017).

82. See John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617, 639-47 (2018).

83. See Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 584-86 (2018).

84. See *infra* Part II.C.

85. See *infra* notes 147-150 and accompanying text.

86. See *infra* Part II.B.

87. *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (Gorsuch, J., concurring).

A. *Judicial Review of Presidential Proclamations*

The Antiquities Act authorizes the President to “declare” national monuments “by public proclamation.”<sup>88</sup> No court has yet had occasion to directly address whether legal challenges alleging the President has exceeded his statutory authority under the Antiquities Act are justiciable. The barriers to suit appear daunting, given the lack of either a waiver of sovereign immunity or a cause of action to challenge monument proclamations. The most obvious source of both would be the Administrative Procedure Act (APA), but this avenue has been foreclosed by the Supreme Court’s conclusion that the President is not an “agency” subject to the APA.<sup>89</sup> Instead, the critical language of the Antiquities Act commits the decision to declare a national monument to “the President’s discretion,”<sup>90</sup> and review of claims that the President has “violated a statutory mandate” is “not available when the statute in question commits the decision to the discretion of the President.”<sup>91</sup>

Nevertheless, a handful of courts have had occasion to address the reviewability of monument designations, and most have suggested that a loose form of *ultra vires* review is available. The Ninth Circuit in *Murphy Co. v. Biden* permitted a litigant to challenge a presidential proclamation expanding the Cascade-Siskiyou National Monument.<sup>92</sup> Drawing on the Supreme Court’s practice of “assum[ing] without deciding” that *ultra vires* review of presidential actions is available, even absent express statutory authorization of that review,<sup>93</sup> the court concluded that “precedent and principle point in favor of jurisdiction here.”<sup>94</sup> The opinion notes that the Ninth Circuit takes “an expansive view of the constitutional category of claims” that justify review, explaining that a claim that the President has violated “separation of powers principles” by exceeding both statutory authority and “background

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88. 54 U.S.C. § 320301(a).

89. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); *see also Alaska v. Carter*, 462 F. Supp. 1155, 1160 (D. Alaska 1978) (concluding that the President is not subject to the National Environmental Policy Act “when exercising his power to proclaim national monuments under the Antiquities Act”).

90. *See Alaska v. Carter*, 462 F. Supp. 1155 at 1159.

91. *Dalton v. Specter*, 511 U.S. 462, 474 (1994).

92. 65 F.4th 1122, 1125 (9th Cir. 2023); *see also Am. Forest Res. Council v. United States*, 77 F.4th 787, 796-97 (D.C. Cir. 2023) (same).

93. *Murphy Co.*, 65 F.4th at 1130 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018)).

94. *Id.* at 1129.



constitutional authority” would justify review.<sup>95</sup> Notably, however, the plaintiff in *Murphy Co.* also pled that the Antiquities Act proclamation directly conflicted with another statute, the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act,<sup>96</sup> presenting a “specific allegation[] regarding separation of powers” that may not be present in a more generic challenge to a monument proclamation.<sup>97</sup>

In a more direct line of cases, the D.C. Circuit has concluded that allegations of ultra vires presidential monument proclamations are justiciable. The cases begin with *Chamber of Commerce v. Reich*, in which the court concluded that it could review an executive order issued under the President’s Procurement Act authority for a “palpable violation” of another statute.<sup>98</sup> In the Antiquities Act context, in *Mountain States Legal Foundation v. Bush*, the court concluded that the Antiquities Act itself “places discernible limits on the President’s discretion,”<sup>99</sup> justifying judicial review of “whether statutory restrictions have been violated,” though the allegations in that case were insufficient to state a claim.<sup>100</sup> Most recently, in *Massachusetts Lobstermen’s Ass’n v. Ross*, the court again exercised jurisdictions over claims that a monument designation exceeded the President’s Antiquities Act

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95. *Id.* at 1130 (quoting *Sierra Club v. Trump*, 929 F.3d 670, 696-97 (9th Cir. 2019)). In addition to separation of powers principles, the plaintiffs in *Murphy Co.* briefly raised issues relating to the Take Care Clause and the Property Clause, which could provide additional constitutional angles for future Antiquities Act litigation. See Opening Brief at 1-2, *Murphy Co.*, 65 F.4th 1122 (No. 19-35921), 2022 WL 518886, at \*34 (quoting U.S. CONST. art. II, § 3; U.S. CONST. art. IV, § 3, cl. 2).

96. 43 U.S.C. ch. 44.

97. *Murphy Co.*, 65 F.4th. at 1130.

98. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996).

99. *Mountain States*, 306 F.3d 1132, 1136 (D.C. Cir. 2002). Notably, one district court has held that the Antiquities Act includes “such a broad grant of discretion” as to limit the judicial role to “ascertaining that the President in fact invoked his powers under the Antiquities Act.” *Utah Ass’n of Cntys. v. Bush*, 316 F. Supp. 2d 1172, 1184 (D. Utah. 2004). The D.C. Circuit, by contrast, permitted review to ensure the President “has not exceeded his statutory authority.” *Mountain States*, 306 F.3d at 1136.

100. *Mountain States*, 306 F.3d at 1136; see also *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002) (holding, on the same day, that “Congress has entrusted the courts with responsibility for determining the limits of statutory grants of authority” (citing *Mountain States*, 306 F.3d at 1132)). The *Mountain States* opinion cited three Supreme Court cases involving the Antiquities Act, which it concluded “indicated generally that review is available to ensure . . . that the President has not exceeded his statutory authority.” *Mountain States*, 306 F.3d at 1132 (citing *United States v. California*, 436 U.S. 32, 35-36 (1978); *Cappaert v. United States*, 426 U.S. 128, 141-42 (1976); *Cameron v. United States*, 252 U.S. 450, 455-56 (1920)).

authority.<sup>101</sup>

In sum, although the precise contours of that review are hazy, courts will generally review presidential proclamations under the Antiquities Act to determine whether those proclamations “are consistent with constitutional principles and that the President has not exceeded his statutory authority.”<sup>102</sup> As a tool of statutory interpretation, this level of review would likely permit applying the major questions doctrine to determine the meaning of the statute and the permissible scope of presidential action under the authority conferred by Congress. The Ninth Circuit has, however, recently concluded that the major questions doctrine can *never* apply to the President, creating a circuit split on the doctrine’s relevance to executive orders and presidential proclamations. This circuit split is considered below.

### 1. *Applying major questions to the President.*

Last month, the Ninth Circuit concluded that President Biden possessed the authority, under the Procurement Act of 1949, to require federal contractors to mandate vaccines for their employees.<sup>103</sup> To justify its decision, the Ninth Circuit created a categorical rule that the major questions doctrine does not apply to presidential actions.<sup>104</sup> The court cited differences in how case law treated exercises of power by the President and by federal agencies, such as how agency actions are reviewable under the Administrative Procedure Act but presidential actions are not.<sup>105</sup> In the Ninth Circuit’s view, “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.’”<sup>106</sup> The justifications for applying the major questions doctrine, in other words, simply do not apply to actions taken by a democratically accountable executive.

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101. *Mass. Lobstermen’s Ass’n v. Ross*, 945 F.3d 535, 540 (D.C. Cir. 2019).

102. *Mountain States*, 306 F.3d at 1136. One paper has suggested presidential actions under the Antiquities Act may be reviewed under the public trust doctrine, see Samuel H. Ruddy, Note, *Finding a Constitutional Home for the Public Trust Doctrine*, 43 ENVIRONS 139, 158 (2020), and one district court has asserted monument designations are subject to substantial evidence review. *Wyoming v. Franke*, 58 F. Supp. 890, 895-96 (D. Wyo. 1945). The dominant standard, however, is the *ultra vires* review advanced in *Mountain States*.

103. *Mayes v. Biden*, 67 F.4th 921, 926 (9th Cir. 2023).

104. *Id.* at 933.

105. *Id.* at 934 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992)).

106. *Id.* at 933 (quoting *Georgia v. President*, 46 F.4th 1283, 1313 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part)).

The Ninth Circuit's opinion, by its own admission, creates a circuit split with the Fifth, Sixth, and Eleventh Circuits,<sup>107</sup> all of which have held that the major questions doctrine applies to presidential actions. Of the three, the Fifth Circuit's opinion provides the most developed defense of the doctrine's applicability, referring to Article II's vesting of executive power in "a single President."<sup>108</sup> This vesting, the Court's logic goes, suggests that "delegations to the President and delegations to an agency" should face the same scrutiny. The Eleventh Circuit embraced similar logic, reasoning that an interpretive canon that "has been applied in 'all corners of the administrative state'" should likewise apply to the executive atop the administrative state.<sup>109</sup>

The Fifth, Sixth, and Eleventh Circuits ultimately have the better of this contest. Both justifications for the major questions doctrine—an intuition about congressional drafting and underlying separation of powers principles—apply equally to the President as to executive agencies. The Ninth Circuit's error comes in citing *UARG* for the doctrine's purpose, and reasoning solely from *UARG* to conclude that the doctrine should not apply to the President.<sup>110</sup> The opinion characterizes of *UARG* as the "current form" of the major questions doctrine,<sup>111</sup> without engaging with *West Virginia v. EPA*, which "announce[d] the arrival of the 'major questions doctrine.'"<sup>112</sup> *UARG*, unlike *West Virginia*, limited its terms to "regulatory authority,"<sup>113</sup> and a "lack of political accountability," which may make agency assertions of expansive authority more concerning than the same assertions by the President.<sup>114</sup>

When the Ninth Circuit framed the rationale for the major questions doctrine around *UARG*, it implicitly situated the doctrine within the *Chevron* framework, when the doctrine was still somewhat tethered to how courts review agency interpretations of statutory ambiguity. The citation to *Franklin*, an APA case, makes

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107. *Id.*

108. *Louisiana v. Biden*, 55 F.4th 1017, n.40 (5th Cir. 2022) (quoting *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020)).

109. *Georgia v. President*, 46 F.4th 1283, 1295-96 (11th Cir. 2022) (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022)).

110. *Mayes*, 67 F.4th at 933 (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

111. *Id.* at 932 (citing *Util. Air Regul. Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014)).

112. *West Virginia*, 142 S. Ct. at 2633-34 (Kagan, J., dissenting).

113. *UARG*, 573 U.S. at 324.

114. *Mayes*, 67 F.4th at 933.

sense in that context. But centering the court's analysis around *UARG* ignores that the doctrine has since been "canonized" in *West Virginia*, breaking free of its roots in *Chevron*.<sup>115</sup> If major questions is a canon of statutory interpretation, the court's agency-action logic and comparison to *Franklin* makes less sense. But regardless of whether a presidential action is reviewable under the APA, it still must conform to the limits of the statute, which may be determined through interpretive canons (including major questions).<sup>116</sup>

There is, admittedly, some language in *West Virginia* that could provide some support for the Ninth Circuit's position. The majority opinion speaks in terms of powers delegated to administrative agencies,<sup>117</sup> and Justice Gorsuch's concurrence specifically mentions the "worse" evil of legislative powers in the hands of "unelected officials barely responsive to [the President]."<sup>118</sup> But the majority opinion ultimately finds its justification not in accountability but in "both separation of powers principles and a practical understanding of legislative intent."<sup>119</sup> For Justice Gorsuch's part, while legislative power in the hands of unelected bureaucrats may be a "worse" evil, that power in the hands of the President is still an evil.<sup>120</sup> Both justifications apply equally to claims of authority by the President and by executive agencies. Whether the President or an agency is seeking to exercise "legislative Powers" is immaterial, as all such powers "shall be vested" in Congress.<sup>121</sup> Likewise, courts apply canons of statutory interpretation to determine the scope of authority delegated by Congress in a particular statute; whether an agency or the President ultimately exercises that authority should not change the interpretive process, nor the ultimate conclusion as to whether the executive's exercise of power exceeded the statutory framework. Applying the major questions doctrine to the President more effectively serves the purposes of the doctrine, as laid out by the

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115. See Nathan Richardson, Essay, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 182-85 (2022) (arguing that the *UARG* court "did not canonize major questions," as it was "not enough to resolve the statutory interpretation inquiry" in that case).

116. Cf. Blake Emerson, "Policy" in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy, 97 CHI.-KENT L. REV. 113, 134 (2022) (describing the major questions canon as "inconsistent" with the text and legislative history of the APA).

117. See *West Virginia*, 142 S. Ct. at 2608-09 (majority opinion).

118. *Id.* at 2618 (Gorsuch, J., concurring).

119. *Id.* at 2609.

120. See *id.* at 2618 (Gorsuch, J., concurring).

121. U.S. CONST. art. I, § 1.

*West Virginia* Court.

To the extent *West Virginia* transformed major questions into a constitutional separation of powers doctrine, exempting the President makes little sense. Under this justification, the doctrine serves to prevent the executive, whether through agencies or the President, from claiming powers not actually granted by statute—or, in simpler terms, legislating. From this perspective, agencies making new law may be particularly egregious, but an arrangement where legislation is “nothing more than the will of the current President” nevertheless runs afoul of the constitutional design.<sup>122</sup> And past major questions cases, including *UARG*, make clear that the doctrine aims to reinforce a system of separation of powers where “Congress makes laws and the President, acting at times through agencies . . . ‘faithfully execute[s] them.’”<sup>123</sup> This concern is particularly acute if major questions ultimately traces its roots to the nondelegation doctrine,<sup>124</sup> which has its origins in cases challenging delegations to the President alone.<sup>125</sup> Indeed, delegating power to the President may raise *greater* constitutional concerns than delegations to executive agencies.<sup>126</sup> Whether through agencies or by direct action, this view of the major questions doctrine aims to “prevent Presidents from snatching powers they were not given.”<sup>127</sup>

Second, the *West Virginia* Court grounds the doctrine in a “practical understanding of legislative intent.”<sup>128</sup> To the extent the major questions doctrine is an “independent, substantive canon of statutory construction,”<sup>129</sup> instructing courts how to read the limits of authority granted by statute, exempting the President from its scope makes even less sense. “The responsibility of determining the limits of statutory grants of authority . . . is a judicial function

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122. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

123. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014) (quoting U.S. CONST. art. II, § 3).

124. *See supra* Part I.C.

125. *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 415, 541-42 (1935).

126. *See* David Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 *YALE J. ON REGUL.* (forthcoming 2024) (manuscript at 24-32) (arguing that delegations to the President are uniquely susceptible to abuse and thus raise greater nondelegation concerns).

127. Daniel Farber, *The Major Question Doctrine, Nondelegation, and Presidential Power*, *YALE J. ON REGUL. NOTICE & COMMENT* (Nov. 2, 2022), <https://www.yalejreg.com/nc/synposium-shane-democracy-chief-executive-07/>.

128. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

129. Richardson, *supra* note 115, at 176.

entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.”<sup>130</sup> Whether these limits apply to the President or to an executive agency is likewise immaterial; concluding otherwise would “permit the President to bypass scores of statutory limitations on governmental authority.”<sup>131</sup> As a canon, therefore, the major questions doctrine is just one of many tools that may be useful in determining whether the President has exceeded a statutory limit on his authority, an interpretive exercise that does not consider democratic accountability.

Finally, the sharp line that the Ninth Circuit draws between presidential action and agency action makes little sense in the major questions context. On 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. The best example is the Biden administration’s student loan forgiveness plan, currently pending in the Supreme Court in a case likely to be decided on major questions grounds.<sup>132</sup> In describing the plan, the Department of Education has labeled it “The Biden-Harris Administration’s Student Debt Relief Plan,” and explained that the plan was created by “President Biden, Vice President Harris, and the U.S. Department of Education”—relegating the agency actually responsible for taking the action to third place.<sup>133</sup> The White House announcements of recent major questions cases follow the same pattern: The full name of the Clean Power Plan challenged in *West Virginia v. EPA* was, per the White House, a component of “President Obama’s Action Plan.”<sup>134</sup> Likewise, the CDC only merited brief mention in the announcement of the eviction moratorium ultimately struck down in *Alabama Ass’n of Realtors*; in the White House’s telling, “President Donald J. Trump [was] taking action to put a temporary halt to evictions,” with the fact that this was not, technically, a presidential action only mentioned in a

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130. *Stark v. Wickard*, 321 U.S. 288, 310 (1944).

131. *Chamber of Comm. v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996).

132. See *supra* notes 55–**Error! Bookmark not defined.**

133. *The Biden-Harris Administration’s Student Debt Relief Plan Explained*, FEDERAL STUDENT AID, <https://studentaid.gov/debt-relief-announcement> (last visited Nov. 14, 2023).

134. *Climate Change and President Obama’s Action Plan*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/president-obama-climate-action-plan> (describing “the President’s Clean Power Plan”) (last visited Nov. 14, 2023).

subsidiary bullet point.<sup>135</sup> In all of these cases, the line between presidential and agency action seems an exceptionally fragile foundation on which to determine whether or not a particular doctrine should apply.

In concluding that the President “does not get a ‘blank check,’”<sup>136</sup> the Ninth Circuit in *Mayes* referred to two constraints on presidential power: “First, the President’s actions must be authorized by and consistent with [statute]. Second, the Constitution always provides checks on all branches of government.” Despite the Ninth Circuit’s characterization of the doctrine as serving a separate goal of political accountability, the doctrine’s purpose—as expressed by the *West Virginia* majority—is to reinforce both of these constraints. As a canon of statutory interpretation, the major questions doctrine applies to ensure presidential actions are “authorized by and consistent with” statutory constraints,<sup>137</sup> determined by reference to “practical understanding[s] of legislative intent.”<sup>138</sup> As a separation of powers principle, major questions acts to check presidential (and agency) encroachment on legislative powers.<sup>139</sup> The Ninth Circuit’s decision is founded on an outdated version of the purposes of the doctrine, as expressed in *UARG*, while missing the justifications discussed in *West Virginia*. Under the current version of the major questions doctrine, it makes little sense to exempt the President.

#### B. Major Questions and National Monument Designations

Whether the major questions doctrine can limit presidential eliminations or modifications of national monuments hinges on whether such actions are “major.” At least one scholar has suggested that designations can never be “questions of major political or economic import,” because the effects are always “highly localized.”<sup>140</sup> But the Bears Ears diminishment

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135. *President Donald J. Trump Is Working to Stop Evictions and Protect Americans’ Homes During the COVID-19 Pandemic*, WHITE HOUSE (Sept. 1, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-working-stop-evictions-protect-americans-homes-covid-19-pandemic/> (“I want to make it unmistakably clear that *I’m* protecting people from evictions.” (emphasis added)).

136. *Mayes v. Biden*, 67 F.4th 921, 933 (9th Cir. 2023).

137. *Id.*

138. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

139. *See supra* Part I.C.

140. Hope M. Babcock, *Rescission of a Previously Designated National Monument: A Bad Idea Whose Time Has Not Come*, 37 STAN. ENV’T. L.J. 3, 58 (2017). *But see* Michael Sebring, Note, *The Major Rules Doctrine: How Justice Brett Kavanaugh’s Novel Doctrine Can Bridge the Gap*

demonstrates how even a localized action may present a politically and economically significant question, justifying the application of the major questions doctrine. The history of presidential power under the Antiquities Act further confirms that the Bears Ears Act diminishment was unprecedented, suggesting a reviewing court could apply the doctrine to bar presidential efforts to diminish national monuments.

The legal controversy over the elimination of Bears Ears is difficult to understand without a brief overview of the origins of the monument. In December 2016, as President Obama neared the end of his term, he invoked the Antiquities Act to create the Bears Ears National Monument in Utah.<sup>141</sup> On its own, this action was not out of the ordinary; presidents often use the lame-duck period following an election to create new national monuments.<sup>142</sup> These monuments often provoke at least some local opposition, as the monument designation is typically accompanied by “myriad restrictions on public use,”<sup>143</sup> including limits on mineral development and commercial timber cutting.<sup>144</sup> Bears Ears, however, was notable from the start, both for its size—at 1.35 million acres, the fourth-largest national monument ever created in the lower forty-eight<sup>145</sup>—and the role Native nations would play

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*Between the Chevron and Nondelegation Doctrines*, 12 N.Y.U. J.L. & LIBERTY 189, 227-29 (2018) (observing that Trump’s cut to the Grand Staircase–Escalante National Monument may violate the major questions doctrine).

141. Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017).

142. See Robin Bravender, *Even Lame Ducks Have Wings*, E&E NEWS (Nov. 8, 2016, 1:00 PM EST), <https://www.eenews.net/articles/even-lame-ducks-have-wings/>.

143. *Mass. Lobstermen’s Ass’n v. Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

144. See CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 9 (2022).

145. The only three larger national monument proclamations are the neighboring Grand Staircase–Escalante National Monument (1.7 million acres), the Mojave Trails National Monument (1.6 million acres), and President Hoover’s proclamation designating what is now Death Valley National Park (1.6 million acres). See *National Monument Facts and Figures*, NAT’L PARK SERV., <https://www.nps.gov/subjects/archeology/national-monument-facts-and-figures.htm> (last updated Mar. 27, 2023). Like Bears Ears, Grand Staircase–Escalante was dramatically shrunk by the Trump administration. See *infra* note 152. Mojave Trails was placed “under review,” Press Release, Dep’t of the Interior, Interior Department Releases List of Monuments Under Review, Announces First-Ever Formal Public Comment Period for Antiquities Act Monuments (May 5, 2017), <https://www.doi.gov/pressreleases/interior-department-releases-list-monuments-under-review-announces-first-ever-formal>, but ultimately not modified despite lobbying from California Republicans. Sammy Roth, *Republicans to Trump: Shrink Mojave Trails National Monument, Leave Sand to Snow Alone*, PALM SPRINGS DESERT SUN (July 13, 2017, 5:34 PM), <https://www.desertsun.com/story/news/environment/2017/07/14/republicans-trump-shrink-mojave-trails-national-monument-leave-sand-snow-alone/475838001/>.



in co-managing the site.<sup>146</sup>

Perhaps inevitably, the proclamation sparked controversy: Even before the monument was formally declared, Utah's congressional delegation pledged to fight against what they described as "abuse" of the Antiquities Act.<sup>147</sup> Senator Orrin Hatch, who cut his political teeth as an opponent of public lands,<sup>148</sup> argued the Act was intended to "give presidents only limited authority to designate special landmarks," not create million-acre monuments.<sup>149</sup> The Trump administration responded by signaling its willingness to amend the designation.<sup>150</sup>

In December 2017, President Trump did exactly that, asserting his authority under the Antiquities Act to shrink Bears Ears to just 15 percent of its original area.<sup>151</sup> Along with a 51 percent cut to the nearby Grand Staircase–Escalante National Monument on the same day,<sup>152</sup> these reductions constituted the largest "downsides" of protected areas in U.S. history<sup>153</sup> and were part of a broader effort to open more national monuments to extractive uses.<sup>154</sup> Although a flurry of litigation followed the Trump administration's proposal,

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This list does not include the seventeen Alaskan national monuments created or enlarged by Jimmy Carter on December 1, 1978, which collectively totaled fifty-six million acres. See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 502-07 (2003). It also excludes the vast oceanic national monuments. See Alison Rieser, *The Papahānaumokuākea Precedent: Ecosystem-scale Marine Protected Areas in the EEZ*, 13 ASIAN-PAC. L. & POL'Y J. 210, 237-38 (2012).

146. See Samuel Lazerwitz, Note, *Sovereignty-Affirming Subdelegations: Recognizing the Executive's Ability to Delegate Authority and Affirm Inherent Tribal Powers*, 72 STAN. L. REV. 1041, 1064-68 (2020) (discussing the origins and uncertain future of the Bears Ears Commission); see also Sam Metz, *Tribal Leaders and Feds Reestablish Bears Ears Commission*, AP (June 21, 2022), <https://apnews.com/article/biden-travel-donald-trump-df1001411f59843d4b8e74c5fa7d05eb>.

147. Brian Maffley, *Top Utah Leaders Vow to Use Whole 'Arsenal' to Fight Bears Ears Monument*, SALT LAKE TRIB. (Dec. 19, 2016, 7:55 AM), <https://archive.sltrib.com/article.php?id=4730722&city=CMSID>.

148. Jonathan Thompson, *The First Sagebrush Rebellion: What Sparked It and How It Ended*, HIGH COUNTRY NEWS (Jan. 14, 2016), <https://www.hcn.org/articles/a-look-back-at-the-first-sagebrush-rebellion>.

149. Courtney Tanner, *Utah Sens. Orrin Hatch, Mike Lee Push to Rein in Presidential Power in Wake of Bears Ears*, SALT LAKE TRIB. (Jan. 9, 2017, 3:54 PM), <https://archive.sltrib.com/article.php?id=4790531&city=CMSID>.

150. See Thomas Burr, *Interior Nominee: President Has Power to Amend, Maybe Remove Monument Designation*, SALT LAKE TRIB. (Jan. 18, 2017, 9:10 AM), <https://archive.sltrib.com/article.php?id=4830270&city=CMSID>.

151. Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017).

152. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 8, 2017).

153. Rachel E. Golden Kroner et al., *The Uncertain Future of Protected Lands and Waters*, 364 SCIENCE 881, 882 (2019).

154. See Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017).

none of it ever produced a final opinion on the legality of the administration's actions.<sup>155</sup> President Biden took office in 2021, and his administration quickly restored the monument's original boundaries.<sup>156</sup>

Legal scholars challenged Trump's efforts to diminish Bears Ears as exceeding the bounds of the President's delegated authority under the Antiquities Act.<sup>157</sup> The Act, they noted, specifies that the President has the power, "in [his] discretion, [to] *declare . . . national monuments.*"<sup>158</sup> It says nothing about the power of the President to diminish or revoke monuments, a power they argue Congress retained for itself.<sup>159</sup> Scholars also cited the Federal Land Management & Policy Act of 1976, which further limited the President's authority over land withdrawals.<sup>160</sup>

Notably, despite dozens of examples of presidents relying on the Act to protect vast landscapes,<sup>161</sup> there are fewer examples of presidents seeking to diminish or revoke national monuments under the Act, particularly on the landscape scale. As a question of statutory interpretation, it is unclear whether the President possesses that power; in 1938, the Attorney General concluded that the President could not revoke previously proclaimed monuments.<sup>162</sup> The opinion did clarify whether a President may modify existing monuments, but it rejected the idea that a President had the "power to abolish a monument entirely."<sup>163</sup> Presidents have unilaterally shrunk monuments on a handful of

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155. See Order Granting Joint Motion to Stay, *Hopi Tribe v. Trump*, No. 17-CV-2590 (D.D.C. Mar. 8, 2021); Order Granting Joint Motion to Stay, *Wilderness Soc'y v. Trump*, No. 17-CV-2587 (D.D.C. Mar. 8, 2021).

156. Proclamation No. 10,258, 86 Fed. Reg. 157,321 (Oct. 15, 2021).

157. Letter from 121 Law Professors to Ryan Zinke, Sec'y of the Interior, and Wilbur Ross, Sec'y of Com. (July 6, 2017), [http://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors\\_as-filed.pdf](http://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors_as-filed.pdf); see also ROBERT ROSENBAUM, ANDREW SHIPE, LINDSEY BECKETT, ANDREW TREASTER & JAMEN TYLER, ARNOLD & PORTER KAYE SCHOLER LLP, THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH A NATIONAL MONUMENT UNDER THE ANTIQUITIES ACT OF 1906 3-7 (2017), <https://democrats-naturalresources.house.gov/imo/media/doc/Arnold%20%20Porter%20Legal%20Memo%20on%20Revocation%20of%20National%20Monuments.pdf>.

158. 54 U.S.C. § 320301(a) (emphasis added).

159. Letter from 121 Law Professors, *supra* note 157, at 2.

160. E.g., Babcock, *supra* note 140, at 53-56.

161. See *infra* notes 230-236 and accompanying text.

162. Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

163. *Id.*

occasions, though none did so between 1963 and 2017.<sup>164</sup>

A handful of scholars, by contrast, argued that the Bears Ears diminishment fell within the President's Antiquities Act power. John Yoo and Todd Gaziano pointed to the general principle that a grant of power implies the power to rescind previous executive actions, a principle they argue applies to the Antiquities Act.<sup>165</sup> Richard Seamon has likewise argued that the power to functionally eliminate can be implied from the President's powers under the Act, as a logical extension of the long-accepted power to make minor (and occasionally substantial) modifications to monument boundaries.<sup>166</sup>

Subpart II.B.1 will argue that the elimination of Bears Ears presented a novel question of vast economic and political significance, justifying the application of the major questions doctrine. Such a question can only be permissible given clear and explicit statutory authorization to eliminate monuments, which is absent from the text of the Antiquities Act. The lack of clear statutory authorization here would likely lead a reviewing court to conclude that the elimination of monuments exceeds the scope of the President's powers under the Antiquities Act.

Subpart II.B.2 will argue that, by contrast, creating a new monument is much less likely to present a major question than eliminating an existing monument. While new monuments can spark political controversy, some of the unique features that made the Bears Ears elimination particularly controversial are unlikely to apply to monument creation. The long history of creating monuments would likewise weigh against the conclusion that the creation of any particular monument creates a major question. Finally, even if creating a monument presents a major question, the clear textual authorization in the Antiquities Act likely satisfies the major questions doctrine.

1. *Major questions about diminishing monuments.*

The major questions doctrine acts only on questions of vast economic and political significance, which the Court often determines by exploring both the history of similar executive actions under the statutory provision at issue and the broader implications of the administration's reading of the statute. This

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164. Seamon, *supra* note 83, at 575-78.

165. See Yoo & Gaziano, *supra* note 82, at 639-47.

166. Seamon, *supra* note 83, at 584-86.

Subpart will discuss whether and how the elimination of Bears Ears presented a question of economic and political significance. Although the overall economic effects of a national monument designation, while regionally significant, are limited, the political controversy that accompanied the Bears Ears elimination was likely sufficient to qualify it as a major question. The limited history of large-scale modifications to existing national monuments under the Antiquities Act and the implications of the administration's reading of the statute confirm the relevance of the major questions doctrine, and the absence of any clear statutory authorization in the Antiquities Act suggests that the doctrine would apply to block the attempted elimination of Bears Ears.

a. *Political significance.*

One of the hallmarks of a major question is political controversy. Executive action on an important issue that “has been the subject of an earnest and profound debate across the country” is more likely to face major questions problems.<sup>167</sup> As Deacon and Litman have explained, the political controversy prong is an “overtly values-based” and “anti-formalist” element of the doctrine, offering courts a free hand to weigh in on executive policies that provoked widespread opposition.<sup>168</sup>

There is no question that the Bears Ears diminishment meets this standard. The land contained within the national monument was the subject of congressional debate even before the diminishment: Rep. Rob Bishop's “Utah Public Lands Initiative” proposed to convert the monument into a National Conservation Area, opening the area to the same extractive uses that motivated the Trump administration to diminish the monument.<sup>169</sup> Following the diminishment, Congress considered legislation that would affirm that the President lacks the power to diminish national monuments,<sup>170</sup> as well as legislation that would have expanded the monument's boundaries.<sup>171</sup> Rep. John Curtis of Utah also introduced legislation that would have codified

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167. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022); *see also id.* at 2620 (Gorsuch, J., concurring).

168. Deacon & Litman, *supra* note 2, at 34-38.

169. Utah Public Lands Initiative Act, H.R. 5780, 114th Cong. §§ 101-10 (2016).

170. ANTIQUITIES Act, H.R. 6410, 115th Cong. (2018); H.R. 1050, 116th Cong. (2019).

171. Bears Ears National Monument Expansion Act, H.R. 4518, 115th Cong. (2017); H.R. 871, 116th Cong. (2019).

President Trump's diminishment of the monument and established a new management council for the park.<sup>172</sup> With lawmakers from Texas, Iowa and Utah introducing yet another effort to amend the Antiquities Act in the fall of 2023,<sup>173</sup> the continuing national political debate demonstrates the political significance of the Bears Ears revocation.

Furthermore, the Bears Ears declaration and diminishment sparked debate in multiple states, another important indicator of nationwide political controversy.<sup>174</sup> Utah's state legislature repeatedly adopted resolutions opposing the initial designation,<sup>175</sup> but the debate also spread to other state legislatures, several of which considered,<sup>176</sup> and passed,<sup>177</sup> legislation that would discourage similar diminishments in their states. Several Native American tribes also approved resolutions supporting the initial designation,<sup>178</sup> with further resolutions adopted opposing the diminishment.<sup>179</sup> Less officially, nearly 300,000 people from all fifty states signed petitions supporting the monument,<sup>180</sup> and columns opposing the diminishment appeared in newspapers from Florida to Alaska.<sup>181</sup> By any standard, although Utah was most

172. H.R. 4532, 115th Cong. (2017); see Brian Maffly, *Tribal Leaders Slam Utah Rep. Curtis's Bill to Redraw Bears Ears, Say Management Plan Is Tribal 'In Name Only'*, SALT LAKE TRIB. (Jan.31, 2018, 8:42PM), <https://www.sltrib.com/news/environment/2018/01/30/tribal-leaders-slam-utah-rep-curtis-bill-to-redraw-of-bears-ears-say-his-management-plan-is-tribal-in-name-only/>.

173. See Carter Williams, *Romney, Lee, Curtis Seek to Amend Antiquities Act Amid State's Lawsuit Appeal*, KSL NEWS (Sept. 15, 2023, 8:55 PM), <https://www.ksl.com/article/50730939/romney-lee-curtis-seek-to-amend-antiquities-act-amid-states-lawsuit-appeal>.

174. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (noting "robust debates" in "Congress and state legislatures" as indicating political significance).

175. H.R. 201, 2016 Leg., 2d Special Sess. (Utah 2016); H.R. 11, 2017 Leg., Gen. Sess. (Utah 2017).

176. E.g., S. Con. Res. 1014, 53rd Leg., 2d Reg. Sess. (Ariz. 2018) (expressing "opposition to further reducing national monuments"); S. 6103, 65th Leg., 2018 Reg. Sess. (Wash. 2018) (discouraging repeal of designations under the Antiquities Act).

177. E.g., A.J. Res. 15, 2017-18 Leg., Reg. Sess. (Cal. 2017) (urging the President to "honor and protect the integrity of all national monuments as they have been designated"); A.J. Res. 13, 79th Leg., 2017 Sess. (Nev. 2017) (urging Congress to oppose any efforts "to reverse the designation of any national monument").

178. NABIJA-01-17, 23rd Navajo Nation Council (2017); Joint Inter-Tribal Res. No. 16-001, Tri-Ute Council (2016); Res. No. 06-2015, Hualapai Tribal Council (2015); Res. No. MKE-17-057, Nat'l Cong. of Am. Indians (2017).

179. E.g., Res. 2018-01, All Pueblo Council of Governors (2018). [CC] [BB]

180. Heather Herold, *Bears Ears Support from Coast to Coast*, GRAND CANYON TR. (Apr. 5, 2017), <https://www.grandcanyontrust.org/blog/bears-ears-support-coast-coast>.

181. Kevin Proescholdt, Opinion, *Secretary of Interior Zinke Attacks America's Wilderness*,

affected by the diminishment, the resulting political controversy was nationally significant.

b. *Economic significance.*

The Court has not established a clear standard for the economic impact necessary to make a question major. In the *Benzene* case, arguably an early forerunner of the major questions doctrine, the Court subjected an OSHA regulation to quasi-major questions analysis because the regulation required \$266 million in capital investments and \$34 million in recurring annual costs.<sup>182</sup> In *Brown & Williamson*, another early case, the Court spoke more generally about how the tobacco industry constituted “a significant portion of the American economy.”<sup>183</sup> In recent vaccine mandate litigation, by contrast, economic significance does not appear in the Court’s assessment of the merits.<sup>184</sup> Whether economic significance is understood in reference to a fixed number, such as the \$100 million threshold for economically significant regulations,<sup>185</sup> or as a more malleable factor (possibly balanced with political significance) is not apparent from the Court’s major questions decisions.

In the case of Bears Ears, economic estimates are scattered and imprecise. National monument designations are known to increase the number of businesses and jobs in nearby areas, and the Bears Ears diminishment was estimated to eliminate more than 700 jobs.<sup>186</sup> As a dollar figure, one consulting firm estimated the value of ecosystem goods and services produced by Bears Ears at over \$1 billion annually.<sup>187</sup> Other studies, however, have found little effect

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JUNEAU EMPIRE (Mar. 6, 2018), <https://www.juneauempire.com/opinion/secretary-of-interior-zinke-attacks-americas-wilderness/>; Javier Sierra, Opinion, *La Zozobra de los Monumentos Nacionales*, EL NUEVO HERALD (Dec. 24, 2017), <https://www.elnuevoherald.com/opinion-es/article191322264.html>.

182. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 628-29 (1980).

183. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000).

184. The only mention of costs is a reference to “billions” in compliance costs in balancing the equities. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 666 (2022).

185. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

186. Margaret Walls, Patrick Lee & Matthew Ashenfarb, *National Monuments and Economic Growth in the American West*, 6 SCI. ADVANCES aay8523, at 6 (2020).

187. Cyrus Philbrick, *Bears Ears and the Value of Public Lands*, EARTH ECON. (June 5, 2017), <https://www.eartheconomics.org/newsroom/2017/6/5/bears-ears-and-the-value-of-public-lands>; see also Chris Mehl, *The Economic Importance of National Monuments to*

of monument designations on local incomes,<sup>188</sup> while still others have found a negative effect.<sup>189</sup> Those opposed to the monument have focused on its mineral resources; the designation effectively made the area off-limits to mining, while the diminishment opened the area for energy leasing and uranium mining.<sup>190</sup>

None of these estimates attempt to put a dollar value on the designation itself, which would not only involve weighing the value of tourism against mining, but would also require developing monetary estimates of the archaeological, religious, and cultural value of the site to Native tribes.<sup>191</sup> It is unclear whether the existing scattered estimates satisfy the “economic significance” trigger for the major questions doctrine, but at a minimum, significant economic interests are at stake on both sides of the Bears Ears designation. When considered alongside the nationwide political debate, these interests may satisfy the economic significance prong.

*c. Unprecedented exercise of statutory authority.*

The Court has also pointed to the novelty of a policy as indicating that it presents a major question. If a statute has “rarely been used in the preceding decades” but is now being cited to advance an “unprecedented” view of the agency’s authority,<sup>192</sup> that amounts to a “telling indication” that the challenged action “extends beyond the agency’s legitimate reach.”<sup>193</sup> This analysis hinges not only on whether a statute has been used historically, but *how* it has been invoked. If “no regulation premised on [the statute] has even begun to approach the size or scope” of the challenged action, the Court treats that as evidence that the challenged action exceeds the agency’s statutory authorization.<sup>194</sup>

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*Communities*, HEADWATERS ECON. (Aug. 2017), <https://headwaterseconomics.org/public-lands/protected-lands/national-monuments/>.

188. See Paul M. Jakus & Sherzod B. Akhundjanov, *The Antiquities Act, National Monuments, and the Regional Economy*, 95 J. ENV’T ECON. & MGMT. 102, 114 (2019).

189. Ryan M. Yonk, Randy T. Simmons & Brian C. Steed, *Politics, Economics, and Federal Land Designation: Assessing the Economic Impact of Land Protection – Grand Staircase-Escalante National Monument*, 14 MTN. PLAINS J. BUS. & TECH. 18, 28 (2013).

190. See Jonathan Thompson, *At Bears Ears, Trump and Zinke Ignored Everyone but Industry*, HIGH COUNTRY NEWS (Mar. 13, 2018), <https://www.hcn.org/articles/bears-ears-national-monument-trump-and-zinke-ignored-everyone-but-industry>.

191. See generally EDGE OF MORNING: NATIVE VOICES SPEAK FOR THE BEARS EARS (Jacqueline Keeler ed., 2017) (collecting accounts of Bears Ears’ cultural significance from members of different tribes).

192. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610, 2612 (2022).

193. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 666 (2022).

194. *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485,

The historic use of the Antiquities Act may initially appear to support a broad claim of executive authority. Presidents relied on the Act throughout the first half of the twentieth century to alter or diminish the boundaries of national monuments more than ninety times, though no Presidents did so between Kennedy and Trump.<sup>195</sup> Defenders of presidential authority point to this history of substantial reductions in monument size,<sup>196</sup> as well as the history of congressional acquiescence to such modifications, to read a broad power to diminish monuments into the Act.<sup>197</sup>

In response, John Ruple has reviewed that history of boundary modifications and classed them into three categories: correcting mapping errors, reductions in response to new information, and reductions made under authority other than the Antiquities Act.<sup>198</sup> While Congress may have acquiesced to these types of changes, the reductions Ruple catalogues bear little resemblance to Bears Ears; he identifies only two similarly large reductions, both of which were carefully drawn to ensure the monument would continue to protect the objects for which it was created.<sup>199</sup>

None of the major questions cases considered statutory powers that had been historically exercised fairly frequently but had subsequently been abandoned for decades. Complicating matters further is the fact that Congress effectively rewrote public lands law in 1976,<sup>200</sup> a development that some scholars contend fundamentally altered presidential authority under the Antiquities Act.<sup>201</sup> Whether a court would even consider this early history of presidential modifications, either simply because of their age or because they predate the 1976 changes, is an open question.

In the Bears Ears case, the novelty of the action likely weighs in favor of finding a major question here. While Presidents have historically modified monument boundaries, none did so since President Kennedy adjusted the boundaries of Bandelier National

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2489 (2021).

195. BENJAMIN HAYES, CONG. RSCH. SERV., R45718, *THE ANTIQUITIES ACT: HISTORY, CURRENT LITIGATION, AND CONSIDERATIONS FOR THE 116TH CONGRESS* 9 (2019).

196. See Yoo & Gaziano, *supra* note 82, at 659-61.

197. See Seamon, *supra* note 83, at 575-82.

198. John C. Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARV. ENV'T L. REV. 1, 39-40 (2019).

199. See *id.* at 75-76.

200. See generally Eleanor R. Schwartz, *A Capsule Examination of the Legislative History of the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 285 (1979) (recounting the drafting of the "organic act" of the Bureau of Land Management).

201. E.g., Babcock, *supra* note 140, at 53-56.



Monument in 1963.<sup>202</sup> And none, as Ruple explains, have ever done so at the scale of Bears Ears.<sup>203</sup> Given that the Court has indicated it is willing to consider the “size or scope” of actions,<sup>204</sup> as well as whether the asserted authority rests on a “little-used” statute,<sup>205</sup> the lack of any recent examples of a diminishment of this scale suggests the Bears Ears action presents a major question.

d. *Implications for executive authority.*

Finally, the Court also considers the implications of defining executive authority to include the challenged action. In *West Virginia*, for example, the Court considered whether EPA’s view of its authority could permit it to “go further,” enacting sweeping (hypothetical) policies that the Court thought would clearly exceed its statutory authority.<sup>206</sup> Likewise, the eviction moratorium case considered whether the CDC’s asserted authority would allow it to “mandate free grocery delivery” or require “free high-speed Internet service.”<sup>207</sup> If it is not obvious whether a challenged policy is a major one, in other words, the Court will consider other actions that could be justified under the same reading of the statute and assess whether *those* actions are major.

It is not clear how this aspect might play out in the Antiquities Act context. Some scholars have suggested that the power to revoke and diminish monuments might be grounded in a general “background principle” that any grant of power necessarily contains the power to rescind such actions.<sup>208</sup> A court could therefore look at how this principle applies to other grants of power to determine whether adopting this reasoning would impermissibly expand executive power.

But very few statutes employ the ambiguous “one-way ratchet” design of the Antiquities Act. Some, like the Clean Water Act, explicitly limit the power of the executive through “anti-backsliding” provisions,<sup>209</sup> while many others (particularly in the

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202. HAYES, *supra* note 195, at 9; Proclamation No. 3539, 77 Stat. 1006 (May 27, 1963).

203. See Ruple, *supra* note 198, at 75-76.

204. *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021).

205. *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022).

206. *Id.* at 2612.

207. *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489.

208. Yoo & Gaziano, *supra* note 82, at 639-41.

209. 33 U.S.C. § 1342(o).

context of federal land management) explicitly include provisions permitting the President to modify or revoke previous actions.<sup>210</sup> The most similar statute is the Outer Continental Shelf Lands Act,<sup>211</sup> and at least one scholar has argued these two statutes have a unique relationship to the common law public trust doctrine.<sup>212</sup> A court's ability to assess the implications of this assertion of authority may likewise be limited, and whether a given diminishment is major would likely be decided on the other factors.

## 2. *The problem of clear statutory authorization.*

That an executive action is major does not, in principle, doom it under the major questions doctrine (even if the doctrine is always invoked to invalidate the action). The challenged action may pass muster if permitted by “clear congressional authorization.”<sup>213</sup> Although it is unclear precisely how clear Congress must be,<sup>214</sup> this appears to be a demanding requirement: a “vague statutory grant” or an “empty vessel” does not suffice to meet it.<sup>215</sup> Though the Court has not yet adopted this principle in the major questions context, similar rules of interpretation, such as the federalism canon, require “unambiguous statutory text targeted at the specific problem.”<sup>216</sup>

The Antiquities Act likely satisfies that standard for the creation of new national monuments, as it clearly permits a President to “reserve parcels of land” as national monuments.<sup>217</sup> It does not,

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210. *E.g.*, 16 U.S.C. § 473 (authorizing the President to “reduce the area or change the boundary lines or . . . vacate altogether any order creating a national forest”).

211. *See* Christian Termyn, *No Take Backs: Presidential Authority and Public Land Withdrawals*, 19 SUSTAINABLE DEV. L. & POL'Y, Spring 2019, at 4, 5 (“[The Antiquities Act and OCSLA] share a structural similarity in granting the President a unilateral authority to withdraw land from the public domain without saying anything about a corresponding authority to reverse the withdrawal”).

212. *See* Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENV'T L. 125, 157-61 (2018). *But see* Alexandra L. St. Romain, Note, *Distinguishing the Antiquities Act and OCSLA*, 28 N.Y.U. ENV'T L.J. 149, 160 (2020) (noting differences in the withdrawal authority under both statutes).

213. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

214. *See* Deacon & Litman, *supra* note 2 (manuscript at 24-25).

215. *Id.*

216. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612 (1992).

217. 54 U.S.C. § 320301(b).

however, contain a clear statement authorizing the President to diminish or revoke such monuments, which is why proponents of such a power necessarily argue that “textual silence implies the power to revoke as well as act,”<sup>218</sup> or that the Act “impliedly authorize[s] abolition” of previously designated monuments.<sup>219</sup> But arguments from implication, whatever their merits otherwise, are unlikely to satisfy the major questions doctrine and its demand for clear congressional authorization.

The lack of any clear authorization to modify or revoke national monument designations is evident from contemporaneous land management statutes. As Mark Squillace has explained, other statutes explicitly gave the President broad authority “to designate, repeal, or modify” federal lands for specific purposes.<sup>220</sup> At least one court has considered this question in the similar context of the Outer Continental Shelf Lands Act and concluded that Congress’s silence “was likely purposeful,” given that it had previously granted this authority explicitly in other statutes.<sup>221</sup> The Antiquities Act is no different: Congress knew how to explicitly authorize this power and chose not to do so.

Further muddling any possible clear authorization is the Federal Land Policy and Management Act (FLPMA) of 1976.<sup>222</sup> FLPMA states that the Secretary of the Interior may not “modify or revoke any withdrawal creating national monuments,” which Squillace suggests may be a drafting error; his account of FLPMA’s legislative history suggests the law was intended to reserve the power to modify or revoke monument designations to Congress alone.<sup>223</sup> At the very least, FLPMA’s provision that the Secretary of the Interior may not “modify or revoke any withdrawal creating national monuments,”<sup>224</sup> combined with the Antiquities Act’s silence, cannot be construed to explicitly grant the President an implied power to modify or revoke monument designations. Eliminating a national monument thus lacks clear statutory authorization and, under the Antiquities Act, does not constitute a

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218. Yoo & Gaziano, *supra* note 82, at 640.

219. Seamon, *supra* note 83, at 584.

220. Squillace et al., *supra* note 81, at 58-59 (discussing the Pickett Act and the Forest Service Organic Act).

221. *League of Conservation Voters v. Trump*, 363 F. Supp. 3d 1013, 1027 (D. Alaska 2019), *vacated as moot sub nom. League of Conservation Voters v. Biden*, 843 Fed. App’x 937 (2021) (mem.).

222. 43 U.S.C. § 1714.

223. *See* Squillace et al., *supra* note 81, at 60-64 (quoting 43 U.S.C. § 1714(j)).

224. 43 U.S.C. § 1714(j).

permissible exercise of presidential authority.

### 3. *Creating monuments.*

Accepting, as discussed in Part II.C.1 above, that eliminating a monument can present a question of vast economic and political significance, creating a monument may likewise present a major question. This is, however, much less likely than the elimination of a monument. While the economic effects of creating a monument can be significant, those factors, as discussed in Part II.B1.b above, are the least likely to implicate the doctrine in the first place. What made Bears Ears unique was the political significance of the elimination, given the religious and cultural significance of the lands affected, and the limited history of eliminating or modifying monuments. Neither of these factors would apply to creating a new monument.

National monument designations, like diminishment or revocations, can certainly produce political and economic controversy,<sup>225</sup> and this Subpart does not argue that a monument declaration could *never* present a question of economic or political significance. Perhaps the best example is President Carter's controversial designation of fifty-six million acres in Alaska as national monuments under the Antiquities Act, made in the context of "national controversy" between environmental groups and oil and mining interests over the future of development in Alaska.<sup>226</sup> Carter's designation "set off a series of protests," and Congress ultimately responded by passing the Alaska National Interest Lands Conservation Act.<sup>227</sup> But a run-of-the-mill monument designation with broad support among local communities, such as the recent designation of Avi Kwa Ame National required in southern Nevada,<sup>228</sup> is unlikely to spark the

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225. *E.g.*, Maffley, *supra* note 147.

226. Margot Hornblower, *Carter Sets Aside 56 Million Acres of Alaska Lands*, WASH. POST (Dec. 2, 1978), <https://www.washingtonpost.com/archive/politics/1978/12/02/carter-sets-aside-56-million-acres-of-alaska-lands/c3d130ae-22d2-47e6-aacc-1ba1b0ef0348/>.

227. *See* Russ Lumpkin, *An Interview with President Carter*, ALASKA MAG. (June 15, 2017), <https://alaskamagazine.com/authentic-alaska/an-interview-with-president-carter/2/> (explaining that "[s]omebody on [Secretary of the Interior Cecil] Andrus's staff found the ancient law . . . intended to apply to a courthouse or cemetery or Civil War battleground or something like that, but when he pointed it out to me, I decided to expand it . . . to broad areas of land").

228. *See, e.g.*, Jessica Hill, *'Place of Healing': Avi Kwa Ame Named Nevada's 4th National Monument*, LAS VEGAS REV.-J. (updated Mar. 21, 2023, 8:15 PM),

sort of national political controversy required to justify invoking the major questions doctrine.

Moreover, even if a national monument designation presents a question of economic or political significance, there is an unbroken history of Presidents invoking the Act to create new national monuments from the very beginning.<sup>229</sup> This practice has included “relatively large monument proclamations,” including several of America’s iconic landscapes.<sup>230</sup> Shortly after the Act’s passage, President Roosevelt wielded it to protect vast swaths of the country from development, declaring “the slopes of Mount Olympus and the adjacent summits” in Washington,<sup>231</sup> “an extensive growth of redwood trees” north of San Francisco,<sup>232</sup> and sixteen other sites as “objects of scientific interest” worthy of preservation.<sup>233</sup> The Supreme Court in 1920 blessed this interpretation,<sup>234</sup> and Presidents have repeatedly asserted this authority to create dozens more monuments,<sup>235</sup> some encompassing vast marine ecosystems.<sup>236</sup> There is nothing novel

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<https://www.reviewjournal.com/news/politics-and-government/nevada/place-of-healing-avi-kwa-ame-named-nevadas-4th-national-monument-2748042/> (noting that local tribes, the state’s congressional delegation, local governments and recreational interests all supported the monument designation); Jennifer Rokala, *Listen to the Mountain: Protect Avi Kwa Ame as a National Monument*, NEV. INDEP. (Aug. 19, 2022, 2:00 AM), <https://thenevadaindependent.com/article/listen-to-the-mountain-protect-avi-kwa-ame-as-a-national-monument> (reporting that an “overwhelming majority” of Nevada voters, including 77% of independents and 66% of Republicans, support the monument designation); *March 10 Marks 100 Days Since Biden Commitment to Protect Avi Kwa Ame*, INDIAN COUNTRY TODAY (Mar. 13, 2023), <https://ictnews.org/the-press-pool/march-10-marks-100-days-since-biden-commitment-to-protect-avi-kwa-ame> (announcing that monument supporters gathered over 160,000 unique signatures in support of the designation).

229. See *Monuments Protected Under the Antiquities Act*, NAT’L PARKS CONSERVATION ASS’N, *Monuments Protected Under the Antiquities Act* (June 8, 2021), <https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act>.

230. See VINCENT, *supra* note 144, at 5.

231. Proclamation No. 869, 35 Stat. 2247 (Mar. 2, 1909).

232. Proclamation No. 793, 35 Stat. 2174 (Jan. 9, 1908).

233. See HAYES, *supra* note 195, at 1, 5, 8.

234. *Cameron v. United States*, 252 U.S. 450, 456 (1920) (concluding the Grand Canyon, as “one of the great natural wonders,” is an object of scientific interest under the Antiquities Act). The Court reaffirmed this authority in *Cappaert v. United States*, 426 U.S. 128, 141-42 (1976) (concluding that “[t]he pool in Devil’s Hole and its rare inhabitants [the Devil’s Hole pupfish] are ‘objects of historic or scientific interest’”).

235. See WILDERNESS SOC’Y, *THE ANTIQUITIES ACT: PROTECTING AMERICA’S NATURAL & CULTURAL TREASURES* 12-21 (2011).

236. See Mary Gray Davidson, Note, *Protecting Coral Reefs: The Principal National and International Legal Instruments*, 26 HARV. ENV’T L. REV. 499, 514-16 (2002). Challenges to the President’s authority to designate marine monuments have been unsuccessful. See *Mass. Lobstermen’s Ass’n v. Ross*, 945 F.3d 535, 540-41 (D.C. Cir. 2019).

about this exercise of authority.

Finally, even if these obstacles are overcome and a court decides a monument designation presents a major question, it still must contend with the clear textual authorization to create monuments contained in the Antiquities Act. The statute explicitly confers the power to create monuments on the President: “The President may, in the President’s discretion, declare . . . national monuments.”<sup>237</sup> Although the Act originally sought to respond to the indiscriminate looting of ancient pueblos and other Indian archaeological sites in the Southwestern United States,<sup>238</sup> the text of the law imposes no numerical limit on the area that may be reserved, leaving the determination of the “smallest area compatible” exclusively to the President.<sup>239</sup> While the Court has never spelled out what kind of clear authorization is necessary to defeat a major questions challenge, the Antiquities Act likely satisfies that requirement.

### C. *Nondelegation and the Antiquities Act*

Nondelegation, in the national monuments context, looks nothing at all like the application of major questions described above. A statute runs afoul of the nondelegation doctrine when the authority it affords the executive is “so extensive and so unconstrained that Congress has in effect delegated its legislative power.”<sup>240</sup> In contemporary law, statutes are considered to violate the doctrine where they impermissibly delegate powers to the President without an “intelligible principle” to guide the exercise of that power.<sup>241</sup> Although this standard may be revisited or strengthened in the near future,<sup>242</sup> the underlying theory of

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237. 54 U.S.C. § 320301(a).

238. For a history of the Act’s development, see RONALD F. LEE, *THE ANTIQUITIES ACT OF 1906* (1970), reprinted in 42 J. SW. 197, 213-16, 236-42 (2000). One unfortunate consequence of the Act was the classification of Native remains as “archaeological resources” that could legally be exhumed. See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative*, 24 ARIZ. ST. L.J. 35, 42 (1992).

239. Earlier drafts had sought to limit Antiquities Act withdrawals to 320 or 640 acres. See LEE, *supra* note 238, at 241.

240. *Loving v. United States*, 517 U.S. 748, 777 (1996) (Scalia, J., concurring in part and concurring in the judgment).

241. See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

242. See *Gundy v. United States*, 139 S. Ct. 2116, 2135-42 (2019) (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J., concurring in the judgment); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); Amy

nondelegation is likely to remain the same: there are some powers that Congress cannot permissibly designate to the President. Because nondelegation speaks only in terms of the powers delegated, it is difficult to imagine a nondelegation challenge coming out differently based on whether the challenged action was the creation or elimination of a monument.

Several monument delegations have been challenged on nondelegation grounds in the past, though they have never succeeded.<sup>243</sup> In *Mountain States Legal Foundation v. Bush*, the D.C. Circuit concluded, without further analysis, that the Antiquities Act “includes intelligible principles to guide the President’s actions.”<sup>244</sup> These principles are clear: the statute defines both the types of objects that may be protected—“historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest” located upon lands controlled by the United States—and the amount of land that the President may set aside—“the smallest area compatible with the proper care and management of the objects to be protected.”<sup>245</sup> These standards are at least as intelligible as those approved by the Court in previous cases, which have approached standards as vague as “generally fair and equitable,” regulation in the “public interest,” and “necessary to avoid an imminent hazard to public safety.”<sup>246</sup>

The same intelligible principles govern the creation and the elimination of national monuments. When the Trump administration sought to eliminate Bears Ears, the proclamation doing so explicitly identified some of the objects within the monument as “not of significant scientific or historic interest,” invoking the intelligible principle defining the permissible categories of objects to be protected.<sup>247</sup> The proclamation went on

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Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014).

243. See Mark C. Rutzick, *Modern Remedies for Antiquated Laws: Challenging National Monument Designations Under the 1906 Antiquities Act*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GRPS. 29, 31 (2010) (recommending that national monument opponents decline to pursue nondelegation claims against monument delegations).

244. 306 F.3d 1132, 1137 (D.C. Cir. 2002); see also *Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 26 (D.D.C. 2001) (noting the Act sets forth “clear standards and limitations,” thus satisfying the nondelegation doctrine); *Utah Ass’n of Cntys. v. Bush*, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004) (same).

245. 54 U.S.C. § 320301(a)-(b).

246. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473-74 (2001) (collecting cases); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. STATE L.J. 941, 985 (2000) (describing the Antiquities Act as “mid-range on the ‘intelligible principles’ scale.”).

247. Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,081 (Dec. 8, 2017).

to discuss existing protections for other objects within the national monument boundaries, concluding that “the area of Federal land reserved in the Bears Ears National Monument . . . is not confined to the smallest area compatible with the proper care and management of those objects.”<sup>248</sup> Instead, the proclamation defined two small areas that included “[t]he important objects of scientific or historic interest,” a revision that ensured that the monument “is no larger than necessary for the proper care and management of the objects to be protected.”<sup>249</sup> The proclamation modifying the Grand Staircase–Escalante National Monument likewise refers to “objects of historic and scientific interest” eight times, while mentioning the “smallest area compatible” standard six times.<sup>250</sup>

A nondelegation challenge to a monument elimination is almost as unlikely to succeed as a challenge to its creation.<sup>251</sup> Although the text of the Act does not grant a power to revoke or diminish monuments, scholars who read in such a power typically tie it to the “smallest area compatible” requirement.<sup>252</sup> Under this reading, diminishing monuments serves merely to bring them in line with the principle laid out in the statute—a reasoning that the Trump administration embraced at Bears Ears.<sup>253</sup> The fact that this power is implied, rather than explicitly stated in the statute, does raise the issue of whether the principles meant to guide monument designations are as well-fitted to guiding modifications or eliminations of existing monuments, or even whether such principles apply to constrain executive discretion at all.<sup>254</sup> But given the extensive reliance on these principles in the withdrawal proclamations, the answer to whether or not that language provides a sufficiently intelligible principle to guide the exercise of

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248. *Id.* at 58,082.

249. *Id.*

250. Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,089-95 (Dec. 8, 2017).

251. *But see* Bruce Fein & W. Bruce DeValle, *New Wine in Old Bottles: Distorting the Antiquities Act to Aggrandize Executive Power*, 48 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,300, 10,305 (Apr. 2018) (“[A] presidential power to revoke or materially alter a national monument . . . would be limitless.”).

252. *E.g.*, Seamon, *supra* note 83, at 582-83 (citing official opinions tying the power to diminish monuments to the smallest area requirement).

253. Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,085 (Dec. 8, 2017) (“[T]he boundaries of the monument reservation should therefore be reduced to the smallest area compatible . . .”).

254. *See* Termyn, *supra* note 204, at 9; Fein & DeValle, *supra* note 251, at 10,305; Noah Greenstein, Note, *America’s Big League National Monuments: Can President Trump Make Them Smaller?*, 43 *VT. L. REV.* 153, 182-83 (2018).



the challenged power will likely be the same for both withdrawals and designations.

There is, it is worth noting, an unsettled question as to whether the same nondelegation standard should apply to the Antiquities Act.<sup>255</sup> Unlike most laws, which are justified under Congress's Article I powers,<sup>256</sup> the Antiquities Act derives from Congress's Article IV power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>257</sup> Courts have interpreted this as a plenary power over the public lands, "to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them."<sup>258</sup> The text does not make clear whether this power is a "legislative Power" subject to the vesting clause of Article I,<sup>259</sup> which is the traditional justification for the nondelegation doctrine, or if its placement in Article IV somehow modifies the nondelegation analysis. Here, the long Founding-era history of congressional delegations of authority over the public lands to the President may counsel in favor of a more restrained approach to nondelegation in this area.<sup>260</sup> On the other hand, the wide-ranging powers afforded the President under the Antiquities Act may be viewed as impermissibly intruding on Congress's plenary authority over the public lands.<sup>261</sup>

That aside, it is a fair question, post-*Gundy*, whether the power afforded the President under the Antiquities Act falls within any of the three categories laid out by Justice Gorsuch in his dissent:

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255. See generally Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 U. PA. J. CONST. L. 761 (2019) (suggesting that the separation of powers concerns underlying the nondelegation doctrine are not applicable to non-legislative powers like the Property Clause).

256. See, e.g., Act of Aug. 11, 1992, Pub. L. No. 102-339, § 1(4), 106 Stat. 869, 869 ("The Congress has authority to enact this legislation under the Indian Commerce Clause and the Interstate Commerce Clause of the Constitution; and the Department of Justice concurs in this construction of Article I of the Constitution.").

257. U.S. CONST. art. IV, § 3, cl. 2.

258. *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). (citations omitted).

259. U.S. CONST. art. I, § 1.

260. CHARLES F. WHEATLEY, JR., GRACE POWERS MONACO, WILLIAM T. MILLER & STANTON G. DARLING II, *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* (1969), reprinted in 1 U.S. PUB. LAND L. REV. COMM'N, *BACKGROUND STUDIES* 55-62 (1969) (collecting examples of congressional delegations of its Property Clause authority "[f]rom the establishment of the Government to date").

261. See Matthew J. Sanders, *Are National Monuments the Right Way to Manage Federal Public Lands?*, NAT. RES. & ENV'T, Summer 2016, at 3, 6 (noting that formalist critics of the Antiquities Act have raised this objection).

“fill[ing] up the details,” “executive fact-finding,” or “non-legislative responsibilities.”<sup>262</sup> The third category, given the placement of the Property Clause, may be the most likely explanation, but a revived nondelegation doctrine may still threaten the Antiquities Act. If it does, however, it would do so either wholesale or not at all; nondelegation cannot replicate the major questions doctrine’s diverging results between creation and elimination.

#### IV. THE FUTURE OF MAJOR QUESTIONS

Grounding the major questions doctrine in the nondelegation doctrine is an easy way to provide it with both a well-established pedigree and the extra heft afforded to constitutional doctrines relative to mere canons. A cursory look at the cases in which the modern Court has invoked the major questions doctrine seems to bolster this origin story. The Occupational Safety and Health Act’s grant of power to the executive to create “occupational safety and health standard[s]” may,<sup>263</sup> for example, run afoul of the nondelegation doctrine if the statute is read to confer a power to regulate “universal risk.”<sup>264</sup> Justice Gorsuch, for one, has done his utmost to draw this connection in these cases.<sup>265</sup>

But this origin story, so appealingly straightforward, risks missing the fact that there is quite a bit of daylight between the two doctrines. As applied to the Antiquities Act, as discussed above, the two doctrines end up weighing in opposite directions; strictly applying nondelegation would suggest the broad power to create national monuments is unconstitutional, while applying major questions would mean only the power to *eliminate* monuments is impermissible. If the major questions doctrine exists in service of the same separation of powers values that underlie the nondelegation doctrine, the two should produce the same outcome. The fact that they do not—that, moreover, they produce opposing outcomes—suggests the constitutional justification for the major questions doctrine is quite attenuated.

So, if not a constitutionally derived doctrine, what is major

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262. 139 S. Ct. 2116, 2136-42 (2019) (Gorsuch, J., dissenting).

263. 29 U.S.C. § 655(a).

264. *See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022) (implying that such a grant of power would permit the agency to regulate “crime, air pollution, or any number of communicable diseases”).

265. *See id.* at 668-69 (Gorsuch, J., concurring) (“for decades courts have the nondelegation doctrine as a reason to apply the major questions doctrine”).

questions? One answer, most comprehensively put forward by Ilan Wurman in a forthcoming piece in the *Virginia Law Review*,<sup>266</sup> is that the major questions doctrine is still defensible as a linguistic canon. Under this view, the major questions doctrine should stand or fall as a claim about how Congress operates and writes rules. Wurman, to his credit, marshals a great deal of evidence that this is a credible claim.<sup>267</sup> But adopting this view of the doctrine requires abandoning, as Wurman acknowledges, the view of major questions as a substantive canon motivated by constitutional values.<sup>268</sup> As a quasi-linguistic canon, major questions would not merit any respect above and beyond that owed to other canons, which means, of course, that it may be canceled out by other canons.<sup>269</sup> This version of the doctrine would allow the Court to revert to a more traditional mode of statutory interpretation, with major question one of the “traditional tools” applied at Step One of the *Chevron* analysis,<sup>270</sup> rather than a free-standing clear statement rule serving unclear constitutional values.

An alternative possibility would be to replace major questions with an “as-applied” nondelegation doctrine. This approach would allow for a case-by-case application of the nondelegation doctrine to cases of latent statutory ambiguity,<sup>271</sup> likely allowing for the Court to reach the same result in the major-questions cases under a different name. This different name would, however, have a clear benefit: the Court would have to state explicitly that it was relying on nondelegation, instead of relying on a vague quasi-constitutional doctrine that has already begun to produce confusion in the lower courts. Applying this doctrine would also side-step the issues of determining a question’s “majorness” and the search for clear statutory authorization that contributed to producing different outcomes in the Antiquities Act case study.

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266. Wurman, *supra* note 12.

267. *Id.* (manuscript at 39-43). *But see* Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2024) (manuscript at 56-58) (arguing that the Bressman and Gluck survey of congressional staffers on which Wurman relies does not justify the major questions doctrine in its current form).

268. *See* Wurman, *supra* note 12 (manuscript at 30-35) (acknowledging that the major questions doctrine is “difficult to defend” as a substantive canon justified on nondelegation grounds).

269. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

270. *See* Wurman, *supra* note 12 (manuscript at 10-15) (situating the early major questions doctrine within the *Chevron* framework).

271. *See* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 977-78 (2018) (proposing said doctrine as a workable alternative to major questions).

Instead, courts would simply have to decide whether an implicit delegation of authority, and the resulting regulation, presents a nondelegation problem or not.<sup>272</sup>

If the Court is unwilling to revise the major questions doctrine in either direction, the current form of the doctrine prevents a tantalizing possibility for future legislation. The unusual “one-way ratchet” structure of the Antiquities Act, as discussed above, can produce the diverging results of applying the major questions doctrine. While only the Outer Continental Shelf Lands Act currently employs a similar structure to the Antiquities Act,<sup>273</sup> Jonathan Gould has argued that Congress could employ similar statutory design in other areas of law to reinforce separation of powers norms by limiting the scope of delegations to the executive.<sup>274</sup> Under this view, Congress might pass laws that permit changes “only in a favored direction—say, by delegating to agencies the power to expand (but not contract) the coverage of a given benefits program.”<sup>275</sup>

The major questions doctrine, by empowering courts to then block efforts to contract (but not expand) that benefits program, would serve to reinforce that legislation against executives perhaps less committed to its goals. Not every action contracting the coverage of a benefits program, of course, would create the economic and political controversy necessary to present a major question. But some likely would, and for those that do, opponents could invoke the major questions doctrine to argue that a lack of clear statutory authorization should bar the move. The major questions doctrine would thus, despite its shaky connection to the nondelegation doctrine, actually work to limit the scope of the delegation. And, despite its critics coming primarily from the left, the major questions doctrine would, in that case, serve primarily to fortify expansive government programs against executives seeking to shrink the scope of government. A doctrine that, so far, has primarily served to invalidate major national regulations may thus be turned to serve pro-regulatory ends. If nothing else, and adopting the most cynical view of the doctrine and of the Court that employs it,<sup>276</sup> seeing the doctrine twisted to serve pro-regulatory

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272. *See id.* at 989-90.

273. *See* Termyn, *supra* note 204, at 4.

274. Jonathan S. Gould, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2053, 2106-07 (2022) (book review).

275. *Id.*

276. *See* sources cited *supra* notes 2-4.

ends may give an anti-administrative Court good reason to rein it in.

#### V. CONCLUSION

That the major questions doctrine is merely the nondelegation doctrine by another name is an appealing explanation, and one that's easy to accept—the former certainly feels like it is nothing more than a malleable tool by which the Court can accomplish the substantive aims of the latter. But the Antiquities Act complicates this account. The major questions doctrine takes the form of a clear statement rule, encouraging greater scrutiny of implied powers with limited historical backing like the diminishment of monuments, while the nondelegation doctrine focuses its scrutiny on the initial delegation to the executive to create monuments. This conceptual gap between the two doctrines suggests the major questions doctrine lacks any solid foundation in the constitutional values it purportedly serves to reinforce. The doctrine should thus, if anything, be treated as a linguistic canon, but should not be afforded the heightened significance of a constitutional doctrine. This divergence also suggests that the Antiquities Act may offer a model for future legislation, using the major questions doctrine to ensure statutes that include one-way ratchets are enforced to advance the goals for which they were written.