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Rescission of a Previously Designated National Monument: A Bad Idea Whose Time has Not Come

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Rescission of a Previously Designated National Monument:

A Bad Idea Whose Time has Not Come

Hope M. Babcock*

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I. INTRODUCTION

“Enlightened statesmen will not always be at the helm.”¹

Presidents cancel or modify executive orders and proclamations issued by prior Presidents all the time.² What is not so clear is whether this presidential discretion applies to orders or proclamations issued at

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¹ THE FEDERALIST No.10, at 57 (James Madison) (Clinton Rossiter, ed. 1961).

² For example, on March 27, 2017, President Trump issued an Executive Order titled “Revocation of Federal Contracting Executive Orders” rescinding the Executive Orders issued by President Obama (Exec. Order No. 13,673 of July 31, 2014, Exec. Order No. 13,738 of August 23, 2016, and Exec. Order 13,683, § 3, of December 11, 2014). Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (May 27, 2017).

the direction of Congress, as is the case with national monuments designated by presidential proclamation under the authority of the Antiquities Act.³ Section 431 of that Act authorizes the President to declare by public proclamation “historic landmarks, historic and prehistoric structures and other object of historic or scientific interest” on public land and to reserve sufficient public land to properly care for and manage the protected objects.⁴ While over the law’s 111 years, disgruntled states, interest groups, and individuals have challenged some of these proclamations, no President has ever rescinded a designation made by a prior President, let alone even threatened it, until President Trump proposed doing so this year.⁵

This Article suggest that the fact that Congress has placed its imprimatur on the designation process shields it from whimsical actions by later Presidents seeking to rescind or shrink the size of previously designated national monuments.⁶ To conclude otherwise would

³ 54 U.S.C. § 320301 (2014). See Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 159, 164-65 (2004) (“Whether the President may modify the size of a monument remains more of an open question in academic circles.”).

⁴ 54 U.S.C. § 320301 (2014).

⁵ President Trump issued an executive order, “Review of Designations under the Antiquities Act,” directing the Secretary of Interior to review monument designations made since 1996 that reserve over 100,000 acres “where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.” Exec. Order No. 13,792, 82 Fed. Reg. 20, 429 (Apr. 26, 2017). The Secretary is to write a report making recommendations for Presidential action, legislative proposals, or other action consistent with law as the Secretary may consider appropriate to carry out the policy” set out in the order. Mark Squillace, Eric Biber, Nicholas S. Bryner, Sean B. Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 55 n.2 (June 2017), <http://www.virginialawreview.org/volumes/content/presidents-lack-authority-abolish-or-diminish-national-monuments>. See Jennifer Yachnin, *Zinke could target any site he deems lacked ‘outreach,’* E&E NEWS (Apr. 26, 2017), <http://eenews.net/eenewspm/stories/1060053645/print> (listing twenty-four national monuments under review by Secretary Zinke).

⁶ Although some prior Presidents, especially during the early period of the Act’s implementation, reduced the size of previously designated monuments, including some large reductions like President Wilson halving the size of Mount Olympus National Monument established by President Teddy Roosevelt, these actions have never been reviewed by a court, let alone had their validity determined by a court. Additionally, all these actions occurred before the enactment of section 704(j) of

contradict the plain language of the statute, which would give Congress plenary power over the designation process and would aggregate to the President powers he does not have, thus creating separation of powers concerns. Nor can Presidents simply elect not to enforce a law because it is not to their liking. Allowing Presidents to revoke prior monument designations would create substantial uncertainty about the legal force and effects of such proclamations once made. This uncertainty, in turn, would affect expectations about how the designated land should be managed and inhibit future designations. It would also adversely affect local economic growth and regional adjustments in response to designations.

The article develops these observations in the following manner. Part II briefly sets out the legislative and judicial history of the Antiquities Act, its original purpose, its use over the years, and judicial decisions interpreting its text. This part also discusses prior attempts by Presidents to revoke or modify earlier designations. Part III contextualizes the current debate over the statute by examining the local controversy surrounding President Obama's designation of the Bears Ears National Monument in Utah. Part III tries to understand whether the animosity towards national monuments, as exemplified by the opposition to Bears Ears designation and before that to President Clinton's designation of the Grand Staircase-Escalante National Monument, is the last vestige of strong anti-federal government feelings in the Intermountain West.⁷ Such feelings may be weakening as the

the Federal Land Policy & Management Act, 43 U.S.C. § 1714(j), preventing the Secretary of Interior from modifying or revoking any reservation of land creating a national monument under the Antiquities Act. *See Squillace et al., supra* note 5, at 65. Presidents Taft and Eisenhower also reduced the boundaries of pre-existing monument and President Wilson added 900,000 acres to the system. Juliet Elperin, *Trump to ask for review of national monuments*, WASHINGTON POST, Apr. 25, 2017, at A3; *see also* Squillace et al, *supra* note 5, at 66-68 (discussing, more generally, the lack of Presidential authority to shrink national monuments, including various Solicitor Opinions issued by the Solicitor of the Department of the Interior in 1924, 1932, and 1935 on the topic of the President's lack of authority to do so).

⁷ That these anti-government sentiments are not only a western phenomenon is brought home by local opposition to President Obama's 2016 designation of Katahdin Woods and Waters National Monument (North Woods National Monument) in Maine, protecting 87,500 acres. Governor Paul LePage testified before the House Natural Resources Committee against the designation in April 2017 and has asked President Trump to reverse the order creating the monument, saying that the designation will "undermine the forest products industry by limiting

area's population changes from one that engages in traditional western industries, like ranching and mining, to one that relies on recreation and tourism.

Part III also sets out three over-arching criticisms of the statute, which have become manifest during the recent debates over the designation of Bear Ears National Monument in, namely that (1) the Act usurps congressional power, (2) the Act is undemocratic because neither the public nor any popularly elected legislator participates in the designation process, and (3) designations under the Act adversely affect the cultural salience and economic well-being of local communities. The Part includes a rejoinder to each of those arguments, including the results of recent reports showing that monument designations create positive economic and social impacts on host communities.

Part IV argues that Presidents have neither direct nor implied power to rescind or adjust the boundaries of previously designated national monuments. The part shows that the text of the Act unambiguously prohibits the President from changing in any way a prior President's designation of a national monument, reserving that power to Congress. Interpretive canons and other explanatory tropes are either irrelevant or confirm a limited view of the President's authority. Part V show how any contrary view of the President's authority under the Antiquities Act would violate the separation of powers doctrine and run counter to well-established norms governing the exercise of delegated power by Presidents. While Presidents retain some discretion to tinker with laws that require minor adjustments to respond to changed circumstances, Part V shows how the Take Care Clause prohibits a President from categorically waiving provisions of a law he does not like or with whose underlying policy he disagrees.

The article concludes by observing that allowing a President to revoke or alter the boundaries of a designated national monument, as President Trump is proposing to do with Bears Ears and several other monuments, would undermine the purpose of a 111-year old law and abolish an act of Congress by Presidential fiat. It may also invite public anger and reprisal, especially if the action is perceived as illegitimate.

II. THE TEXT OF THE ANTIQUITIES ACT, ITS LEGISLATIVE AND

timber harvest." *Maine Governor to testify against Katahdin Woods designation*, GREENWIRE (April 25, 2017), <http://www.eenews.net/greenwire/stories/1060053544/print>. Maine's congressional delegation supports the designation. *Id.*

IMPLEMENTATION HISTORY, AND JUDICIAL INTERPRETATIONS

In the realm of historic and natural preservation on the nation's public lands, no law has ever approached the scope of the 1906 Antiquities Act.⁸

Section 431 of the Antiquities Act authorizes the President of the United States to protect by proclamation “historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest” located on federal lands. The section also authorizes the President to reserve “parcels of land” of a size sufficient to allow for the proper care and management of the protected objects. Originally intended to protect ruins in the Southwest, Presidents have used the section to protect large areas of land, in which objects of historical and scientific interest are housed—so-called landscape designations. Today there are 170 national monuments, thirteen of which have been designated by Congress, including monuments that protect marine resources.⁹ They range in size from 1,700,000 acres (Grand Staircase-Escalante National Monument in Arizona) to 0.01 acres (Father Millett Cross in New York).¹⁰ Only three Presidents since the passage of the Act in 1906, Presidents Nixon, Reagan, and George H.W. Bush did not designate any monuments.¹¹

Devils Tower, in Wyoming, is “America’s first national

⁸ Richard West Sellars, *A Very Large Array: Early Federal Historic Preservation - The Antiquities Act, Mesa Verde, and the National Park Service Act*, 47 NAT. RESOURCES. J. 267, 293 (2007). See also John D. Leshy & Mark Squillace, *The Endangered Antiquities Act*, N.Y. TIMES, Apr. 1, 2017, at A23 (“a good argument can be made that this brief law . . . has done more than any other to shape our nation’s conservation legacy.”); see also *id.* (“Five of the nation’s 10 most-visited national parks—Grand Canyon, Zion, Olympic, Teton, and Acadia, each attracting millions of people a year—were first protected by presidents using the Antiquities Act.”).

⁹ Tatiana Schlossberg, *What is the Antiquities Act, and Why Does the President Want to Change It*, N.Y. TIMES, Ap. 27, 2017, at A15. See Matthew J. Sanders, *Are National Monuments the Right Way to Manage Federal Public Lands?*, 31 NAT. RESOURCES & ENVT. 3, 4 (2017) (saying there are 147 national monuments); Leshy & Squillace, *supra* note 8, at A23 (pegging the number at 150).

¹⁰ Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVT’L L. REV. app. A at 585-87 (2001). President Coolidge who established the Father Millet Cross National Monument, also designated the Statue of Liberty, protecting 2.50 acres; he was capable of creating large monuments, setting aside 1,164,800 acres for Glacier Bay National Monument in Alaska. *Id.*

¹¹ Elperin, *supra* note 6, at A3.

monument.¹² Currently, there are national monuments in thirty-one states.¹³ “The number of national monuments designated by each President has varied wildly, from one each for Presidents Truman and Johnson to nineteen each for Presidents Clinton and Obama.”¹⁴ Of land-based national monuments, President Carter designated the largest combined area, nearly 56 million acres, mostly in Alaska. President George W. Bush designated more than 147 million acres of marine national monuments. President Obama surpassed both Presidents Bush and Clinton by protecting 265 million acres, mostly by enlarging President Bush’s network of marine national monuments.¹⁵ The last three Presidents have designated nearly a third of the national monuments created up until the present, “and they are responsible for an even higher percentage of the total number of acres included within national monuments over time.”¹⁶ Only Presidents Nixon, Reagan, and George H.W. Bush failed to use their power under the Antiquities Act to designate any national monument.¹⁷

Most of this has happened by Presidential fiat, often late in their Administrations with little correction by the courts or Congress.¹⁸ The section’s legislative history is sparse and sheds little light on key terms, like what constitutes an object of historic or scientific interest or what is “the smallest area” that a President may reserve to assure the proper care and management of the designated objects.¹⁹ Attempts by Presidents and Congress to revoke or modify previously designated monuments have come to naught, creating an inference that at least up until now, the Act has been working as it was intended to.

¹² Sellars, *supra* note 8, at 294; *see also* Arnold & Porter, Kaye Scholer, *The President Has No Power Unilaterally to Abolish a National Monument under the Antiquities Act of 1906* (Feb. 8, 2017), 2 (in possession of author) (“President Theodore Roosevelt was the first to use that Act, establishing 18 National Monuments, including Devil’s Tower, Muir Woods and the Grand Canyon.”).

¹³ Arnold & Porter, *supra* note 12, at 9.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Elperin, *supra* note 6, at A3; *see also* Albert Lin, *Clinton’s National Monuments: A Democrat’s Undemocratic Acts?*, 29 *ECOLOGY L. Q.* 707, 714 (2002), but he mistakenly says President George W. Bush did not designate any monuments.

¹⁸ Leshy & Squillace, *supra* note 8, at A23 (citing President Theodore Roosevelt’s protection of the “core” of what today is Olympic National Park two days before he left office or President Eisenhower’s protection of what became the Chesapeake and Ohio National Historical Park two days before Kennedy’s inauguration).

¹⁹ *See infra* at Part II.B (discussing the statute’s legislative history).

A. *The Antiquities Act and the process for designating a National Monument.*

Section 431 of the Antiquities Act reads as follows:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.²⁰

In 155 words, section 431 of the Antiquities Act sets out a process for the President of the United States to identify and protect “historic and prehistoric structures and other objects of historic or scientific interest” on federal lands and simultaneously reserve sufficient lands for their “proper care and management.”

This is not done by executive order, the usual tool that the President uses to announce some policy or action, but by proclamation.²¹ However, that the President proceeds by proclamation rather than executive order to designate national monuments has no relevance to the question whether the President has the power to rescind or otherwise amend a monument designation.²² But, the fact that presidential proclamations designating national monuments are issued under the authority of the Antiquities Act gives them more than the usual hortatory

²⁰ 16 U.S.C. § 431 (2000).

²¹ STAFF OF H. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF USE OF PRESIDENTIAL POWERS, at vii (Comm. Print 1957).

²² PAMELA BALDWIN, CONG. RESEARCH SERV., RS20647, AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT, at 1 n.7 (2000) (One congressional study noted that executive orders relate to intra-executive branch actions, while “a proclamation typically affects citizens” more broadly.).

power with respect to the general public.²³

There is no requirement for public notice of any designation either before or after the fact, and no opportunity for comment or any other form of participation by the public or its elected representatives in the designation process.²⁴ While the statute “authorizes” the President to set aside land, it does not “require” that he do this.²⁵ But once the land is reserved, the designated monument becomes the dominant use of that land in the face of competing land uses, and the land management agencies must manage “the objects” and reserved lands as necessary to fulfill the purposes of the designation proclamation.²⁶

Site examination and excavation on monument grounds as well as removal and collection of objects is controlled through a permitting system that restricts these activities to qualified representatives of museums, universities or other recognized educational institutions, where the removed objects are to be permanently curated.²⁷ The Act criminalizes disturbing protected sites without a permit and imposes fines and penalties on those who violate the law.²⁸

The Department of Interior, or occasionally the Department of Agriculture if the future monument is on national forest lands, generates a proposal to create a new national monument, sometimes at the suggestion of a grassroots coalition, sometimes at the suggestion of a

²³ PAMELA BALDWIN, CONG. RESEARCH SERV., RS20647, AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT, at 1 n.7 (2000) (“the President’s proclamations are at best hortatory so far as the general public is concerned unless they are based on statutory or Constitutional authority.”), citing Executive Orders and Proclamations: A Study of a Use of Presidential Powers, Committee on Government Operations, 85th Congress, 1st Sess. at vii (Dec. 1957).”).

²⁴ Iraola, *supra* note 3, at 163 (“The plain language of the Act confers upon the President the authority to designate national monuments without public participation, congressional review, or any other procedural prerequisite.”); *see also* David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 300 (1982) (“The Antiquities Act gave the President authority to withdraw lands with no limits on duration, unhindered by any procedural requirements, with no provision for congressional review, and with no fixed acreage limitation.”).

²⁵ Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 514 (2003).

²⁶ *Id.* at 515-16.

²⁷ 16 U.S.C. § 433 (1906); *see* Sellars, *supra* note 8, at 294.

²⁸ 16 U.S.C. Preamble (1906); *see* Sellars, *supra* note 8, at 294.

member of Congress.²⁹ In more recent times, like with the Bears Ears designation, there are stakeholder meetings with federal and local officials and local communities,³⁰ even though the Act does not require this step. Generally the relevant land management agency, i.e. the Bureau of Land Management (BLM), the National Park Service (NPS), the Fish and Wildlife Service (FWS) in the Department of the Interior, or the Forest Service (FS) in the Department of Agriculture, drafts the Presidential proclamation and assembles supporting background information and maps for the President's review.³¹

The last step in the process calls upon the Council on Environmental Quality to review the proposal and make a recommendation to the President about whether the monument should be designated. If the President accepts the recommendation to designate the monument, he issues a proclamation to that effect.³² The President can change the proposed size of the monument, add or remove conditions on use of the land within the monument's boundaries, and otherwise revise the recommendation—after all, the designation is his.

The proclamation goes into effect when it is published in the Federal Register, usually within a week of presidential issuance.³³ The proclamation is not issued for public comment, nor is there any other federal, state, local or tribal agency involvement in the designation process.

Section 431 contains no guidance on the meaning of its key terms. For example, the statute is silent as to what qualifies as a structure or object of scientific interest to warrant protection or the amount of land

²⁹ Sanders, *supra* note 9, at 4 (“The most successful proposals are often those that begin as legislation but fail to receive sufficient traction, such as President Obama’s three most recent national monuments (originally the subject of conservation bills sponsored by Senator Dianne Feinstein).”).

³⁰ *Id.*; see also Elperin, *supra* note 6, at A3 (reporting on Interior Secretary Sally Jewell’s “lengthy public hearing”).

³¹ Exec. Order No. 11,030, 1 C.F.R. § 19.2, *reprinted as amended in* 44 U.S.C. § 1505 (2015) (identifying “the Director of Office of Management and Budget as the person responsible for” the routing and approval of drafts); see also Sanders, *supra* note 9, at 4; Iraola, *supra* note 3, at 167 n.30 (explaining in detail this process).

³² Sanders, *supra* note 9, at 4.

³³ *Id.* “In 1936, Congress passed the Federal Register Act, legislation requiring executive orders and presidential proclamations ‘of general applicability and legal effect’ to be published in the Federal Register unless the President concludes otherwise on account of national security or other specified reasons.” Iraola, *supra* note 3, at 166.

sufficient for their protection. Nor does the section's legislative history shed much light on those terms. Their meaning becomes apparent only through their application under the watchful eyes of the courts and Congress. Like section 102(2)(C) of the National Environmental Policy Act,³⁴ another famously short and controversial statutory provision, the meaning of section 431 has been made clear over time by the courts, although with many fewer decisions than those interpreting NEPA, which has not made its use any less controversial.

B. Legislative History of the Act

1. Enactment.³⁵

In 1889, Congress signed an Act to repair and protect Casa Grande, a large, multi-level earthen structure in south-central Arizona Territory and directed the President to “reserve [the site] from settlement and sale.”³⁶ The Act also authorized the President “to include in the reserve as much of the adjacent public lands ‘as in his judgment may be necessary’ for protecting the major structure and its associated village.”³⁷ President Benjamin Harrison's issuance of an executive order in 1892, that created a 480-acre reservation in accordance with the Act, marked the beginning of federal conservation of historic structures in the southwest.³⁸ However, this was a one-time only authorization and did not grant the President broad powers to protect other historic or archaeological sites on public lands.³⁹

Prior to passage of the act protecting and repairing Casa Grande, Congress had passed the Forest Reserve Act, which authorized Presidents “to establish forest reserves on public lands by

³⁴ 42 U.S.C. § 4332.

³⁵ See generally Squillace, *supra* note 25, at 476-86 (discussing the Antiquities Act's legislative history); Sellars, *supra* note 8, at 267 (giving thorough discussions of the enactment legislative history of the 1906 Antiquities Act).

³⁶ Sellars, *supra* note 8, at 275. Sellars also notes that “[a] small group centered in Boston and including such prominent figures as jurist Oliver Wendell Holmes, historian Francis Parkman, and poet John Greenleaf Whittier,” petitioned Congress to preserve the area, which may have helped secure the Act's passage. *Id.*

³⁷ *Id.*

³⁸ *Id.* at 275-76.

³⁹ *Id.* at 276 (noting that “[t]his one-at-a-time approach suggested that the preservation community, which included Interior Department officials, especially in the General Land Office, could well face lengthy legislative struggles in seeking to set aside permanently other important sites.”).

proclamation.”⁴⁰ Presidents used the law “aggressively,” setting aside approximately 151 million acres by 1907.⁴¹ Reacting to this Presidential exuberance, in that same year, Congress rescinded the President’s authority to set aside forest reserves in several states with a lot of public lands and also curtailed the use of proclamations by Presidents.⁴²

Feeling stymied by Congress’ nervousness about excessive withdrawals of national forest lands, yet worried about vandalism and looting at sites of archaeological importance, and only having as a model for congressional action the piecemeal, single site at a time approach of the Casa Grande law, the Department of Interior’s General Land Office in the 1890s, on its own, began to withdraw from “sale or other disposition” lands containing valuable archaeological and natural sites.⁴³ Examples of such withdrawals include Chaco Canyon, in New Mexico, Mesa Verde, in Colorado, the Petrified Forest, in the Arizona Territory, and Devils Tower, in Wyoming.⁴⁴

In 1890, an early version of the Antiquities Act was introduced in Congress. It included all the elements that would appear in the 1906 law as well as the principal elements of the 1916 National Park Services Act.⁴⁵ “Much more broadly than with individual national park enabling legislation, the Act made explicit that preservation of historic, archeological, and other scientific sites on lands controlled by the federal government was indeed a federal responsibility.”⁴⁶ However, the bill was a compromise: it included not just historic landmarks and structures, but also “other objects of historic or scientific interest,” while at the same time it required the President to limit the size of monuments “to the smallest area compatible with the proper care and management of the protected objects.”⁴⁷ The ways in which the law was crafted to

⁴⁰ Sellars, *supra* note 8, at 276. The Forest Reserve Act was codified at 16 U.S.C. §§ 471 *et seq.* (1897).

⁴¹ Sellars, *supra* note 8, at 276.

⁴² *Id.* at 276-77.

⁴³ *Id.* at 279.

⁴⁴ *Id.*

⁴⁵ *Id.* at 281-82. This bill, H.R. 11021, 58th Cong. § 1 (1900), “would have authorized the president to ‘[s]et apart and reserve tracts of public land, which for their scenic beauty, natural wonders or curiosities, ancient ruins or relics, or other objects of scientific or historical interest, or springs of medicinal properties it is desirable to protect and utilize in the interest of the public.’” Sanders, *supra* note 9, at 4.

⁴⁶ Sellars, *supra* note 8, at 295.

⁴⁷ Sanders, *supra* note 9, at 4.

resolve conflicting views of the Act's scope and purpose are set forth below.

During the crafting of the Antiquities Act, the extent of land to be reserved to protect a designated object was controversial.⁴⁸

An open discussion about size occurred on June 5, 1906 just before the bill passed the House of Representatives. Congressman John Stephens of Texas, apprehensive that too much public land would be, as he stated, "locked up" by the Act, asked Congressman John Lacey if the antiquities bill would, like the Forest Reserves Act, keep large tracts of public land under permanent federal control. Essentially avoiding the question, Lacey replied, "Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest."⁴⁹

"The final version of the bill [Rep. Hewett's bill] established a middle ground between the 'postage stamp' archaeological sites favored by western legislators, and the large scale reservations that could be designated solely for their scenic beauty, as was favored by the Department of Interior" by avoiding setting any acreage limit at all.⁵⁰

Also at issue was what could be considered "objects of scientific interest." In an unpublished opinion in a challenge to President Carter's designation of various Alaska monuments the District Court for Alaska, in the only judicial opinion that actually looked at the legislative history of the Antiquities Act, reviewed various bills pending in Congress while the Antiquities Act was being considered. This review included a proposal by Senator Henry Cabot Lodge of Massachusetts to protect only "historic and prehistoric ruins, monuments, archaeological objects, and antiquities on the public lands." However, the court, "[n]oting the broader language that Congress ultimately approved, concluded that the

⁴⁸ Sellars, *supra* note 8, at 295.

⁴⁹ *Id.* at 295-96.

⁵⁰ Squillace, *supra* note 25, at 485; *see also id.* at 484 ("There was very little debate over Hewett's bill, and thus Congress's understanding of what Hewett intended is not entirely clear. Those commentators who claim that Hewett's proposed legislation was designed to encompass only small tracts of public lands frequently cite a colloquy between Congressman Lacey and Congressman John H. Stephens of Texas. The House Report on the legislation further seems to support a narrow reading of the law. But the compromise language proposed by Hewett does not reflect an intent to limit the President's authority as Lacey and others may have assumed. On the contrary . . . Hewett . . . had specifically avoid the acreage limits of the earlier bills.").

phrase ‘objects of historically scientific interest . . . , was indeed intended to enlarge the authority of the President.’”⁵¹

When Congress enacted the Antiquities Act, there were no other laws that “specifically authorized the President to set aside lands for preservation purposes,” other than the Yellowstone National Park Act, which reserved and withdrew approximately two million acres in Wyoming, Montana, and Idaho “as a pleasuring ground for the benefit and enjoyment of the people.”⁵² The Forest Reserves Act of 1891, which authorized Presidents to set aside and protect forests on public lands from among other things entry by homesteaders, did not protect them from mining.⁵³ While the Antiquities Act was “not necessarily designed as a vehicle for public land preservation, it has carried much of that burden for many years, and it has performed remarkably well in that role, perhaps because the chief executive is in the best position to give voice to national preservation goals.”⁵⁴

This quick review of the legislative history of the Antiquities Act shows that it was a product of compromise between those who had a narrow purpose in mind—the protection of historical artifacts—and those with something grander in mind—the protection of large beautiful areas. Also unresolved in the text and unexplained in the legislative history was the amount of land necessary to protect whatever it was that was to be protected. Concerns about under-protecting and over-protecting, which animated the bill’s drafting and passage, continue to this day.

2. *Prior attempts to repeal or amend the Antiquities Act.*

At various points in the 111-year history of the Antiquities Act, legislation has been introduced to repeal or amend the law, usually in reaction to a Presidential designation. For example, in 1943, several bills were introduced to repeal or alternatively amend section 431 of the Act in response to President Roosevelt’s establishment of the Jackson Hole National Monument in Wyoming.⁵⁵ None of these bills passed

⁵¹ *Id.* at 485 (citing *Anaconda Copper Co. v. Andrews*, 14 Env’tl. Rep. Cas. (BNA) 1853 (D. Alaska 1980)).

⁵² Yellowstone Park Act, 16 U.S.C. § 21 (2015). Squillace, *supra* note 25, at 487.

⁵³ Squillace, *supra* note 25, at 487.

⁵⁴ *Id.* at 488.

⁵⁵ Justin James Quigley, *Grand Staircase-Escalante Nation Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 84 (1999) (“Wyoming Representative Frank A. Barrett introduced House Bill 2591211 and

Congress.⁵⁶ Again, in 1976, in response to President Carter’s “creation of seventeen national monuments encompassing 56 million acres in Alaska,” Senator Mike Gravel of Alaska introduced a bill to amend the Act that would have limited its scope to specific types of historic or prehistoric specimens or structures, such as pottery, dwellings, rock paintings, carvings, graves, and paleontological specimens “when found in an archaeological context.”⁵⁷ To warrant protection, those objects had to be “directly associated with human behavior and activities.”⁵⁸ Senator Gravel’s bill also provided that any reservation that exceeded 5,000 acres required congressional approval within sixty days to become effective.⁵⁹ It also did not pass.⁶⁰

Then, in September 1996, the day after President Clinton designated the Grand Staircase-Escalante National Monument, Representative Hansen of Utah introduced House Bill 4118 to amend the Antiquities Act by requiring that any national monument in excess of 5,000 acres could only be designated by act of Congress with the concurrence of the affected state’s governor and state legislature.⁶¹ A week later, Representative William Orton of Utah introduced a bill “to require that any national monument designated by proclamation be approved by Congress within 180 days.” Later that same month, Senator Frank Murkowski of Alaska introduced Senate Bill 2150, requiring congressional approval of any extension or establishment of a national monument and that the designations fully comply with NEPA and the Endangered Species Act.⁶² In February, Senator Bennett introduced a bill, the “sole purpose” of which was “to codify the promises . . .

Senator Edward V. Robertson, also from Wyoming, introduced Senate Bill 1056212 which proposed to amend the Antiquities Act by rescinding the President’s power to establish national monuments and vest such power in Congress. Furthermore, to repeal section 2 of the Antiquities Act, Colorado Representative J. Edgar Chenoweth introduced House Bill 388423 and Wyoming Senator Joseph C. O’Mahoney introduced Senate Bill 1046.”). None of these bills was enacted. *Id.*

⁵⁶ *Id.* at 84.

⁵⁷ *Id.* at 84-85.

⁵⁸ *Id.*

⁵⁹ *Id.* at 85.

⁶⁰ *Id.*

⁶¹ *Id.* at 93.

⁶² *Id.* “In an apparent attempt to protect California from suffering a similar fate as Utah, on January 7, 1997, Representative Wally Herger of California introduced House Bill 193 to prohibit designation of the Mt. Shasta area in California as a national monument under the Antiquities Act.” *Id.* at 94.

President Clinton made when he created the monument.”⁶³ Among those promises were that the protected area would be managed under multiple use principles; that valid existing rights would be honored; that grazing could continue; that no federal water rights either express or implied would be part of the reservation; that the state’s jurisdiction over fish and wildlife would be untouched by the designation; and that an advisory committee and planning team for management purposes would be established—a veritable litany of local and interest groups concerned about federal control over monument lands.⁶⁴ Further bills were introduced requiring congressional approval with the concurrence of or consultation with the governor of the state where the proposed monument was located.⁶⁵ One bill required the concurrence of state legislatures,⁶⁶ reflecting concerns about state non-involvement in the process.

In the spring of 1997, Senator Murkowski introduced another bill, this one to “ensure that the public and Congress have both the right and a reasonable opportunity to participate in decisions that affect the use and management of all public lands owned or controlled by the Government of the United States.”⁶⁷ This would be achieved by creating notice and comment opportunities in the monument designation process for the public as well as for federal, state and local governments.⁶⁸ A year later, a Utah Congressman introduced a bill to modify the monument’s boundaries to remove four towns, a producing oil field, and a highway, with a caveat that the proposal should not be “construed as constituting congressional approval, explicit or implicit” of the monument’s establishment.⁶⁹

These bills are interesting to the extent that they reflect many of the objections that critics of the law have—that designating a monument would harm existing economic interests, lock up important resources, and be a showcase for federal excesses, and oust existing state jurisdiction over important resources like wildlife, and that the process excludes any input from state and local governments as well as the affected public. Yet despite the concerns animating these bills, none of

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 95.

⁶⁸ *Id.*

⁶⁹ *Id.* Although the bill did not pass, President Clinton accepted the boundary changes in a later bill when he signed that bill into law. *Id.*

them was enacted. Although Congress clearly has this power, it chose not to exercise it, perhaps because of the low likelihood that a President would sign into law legislation that would constrain or revoke the broad discretion given to Presidents under the Antiquities Act.”⁷⁰ Even more unlikely would be the ability of western states, which are most directly affected by the Antiquities Act, to secure the approval of eastern states for such a bill when a vote would be perceived by their electorates as anti-environmental and might jeopardize their seats on a matter of no particular concern to them.⁷¹

C. Statutory Purpose and Uses Over Time

The primary purpose animating passage of the Antiquities Act was the “desire of archaeologists to protect aboriginal objects and artifacts.”⁷² Contrary to most European countries at the time, United States laws granted little protection to archaeological and historic objects prior to the Act.⁷³ Before President Theodore Roosevelt protected 800,000 acres by designating the Grand Canyon National Monument,⁷⁴ Presidents “used the Act only for small areas of federal land that were of either historical or archeological interest.”⁷⁵ Presidential designations protected “specific objects of unusual historical or scientific value that [stood] out from the landscape by virtue of their extraordinary beauty.”⁷⁶

⁷⁰ *Id.* at 95-96.

⁷¹ *Id.* at 96.

⁷² Squillace, *supra* note 25, at 477; *see also* Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument—A Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 413-14 (1998) (“The Act’s passage was the culmination of more than six years of lobbying by archeologists and scientific institutions who were working to protect important archeological and historical sites in the newly-settled western United States. The main purpose behind the Act was to protect specific items of antiquity, such as ruins, pottery, and picture graphs.”); Iraola, *supra* note 3, at 162 (“In 1906, Congress passed the Antiquities Act, both to respond to concerns over damage to archaeological sites and provide a swift means to safeguard federal resources and lands.”).

⁷³ Lin, *supra* note 17, at 713. *See also id.* at 721 (“In most instances, however, presidential designation followed Congressional inaction or failed attempts to reach consensus.”).

⁷⁴ Harrison, *supra* note 72, at 416.

⁷⁵ *Id.* at 417.

⁷⁶ Ranchod, *supra* note 10, at 569.

One of the original sponsors of the Antiquities Act, Congressman John Lacey, however, worried about “waste and misuse of natural resources—about, as he put it, mankind’s ‘omnidestructive’ ways. If such destruction continue[d], he warned, the world would become ‘as worthless as a sucked orange.’”⁷⁷ In this way, he said, the “Antiquities Act is a counterweight to the pressures that drive us toward expediency. The Act forces us to think in the long term and on a large scale, to occasionally make the choice to leave our children and their Earth more than a series of small, isolated parks.”⁷⁸

It took over half a century to have Congressman Lacey’s concern acted on in a grand way by a President using his authority under the Antiquities Act. President Clinton’s national monument designations shifted the focus of the Act from protecting structures and scientific objects to protecting entire ecosystems from threats to those landscapes. These Clinton monuments protect lands that were part of a major river’s drainage basin, a forest, or a desert ecosystem,⁷⁹ regardless of whether there was a discernible natural feature, like Devils Tower. They were very large, much larger in size than those that protected single structures or individual objects of scientific interest.⁸⁰ For example, Grand Staircase-Escalante National Monument encompasses 1.9 million acres of BLM lands in southern Utah:⁸¹ a size equivalent to the states of Delaware and Rhode Island combined, and covers most of two large Utah counties.⁸² It is one of the “largest national monuments located

⁷⁷ Sellars, *supra* note 8, at 286-87.

⁷⁸ Sanders, *supra* note 9, at 7.

⁷⁹ Ranchod, *supra* note 10, at 569 (“Most of the landscape monuments protect natural ecosystems. The Grand Canyon-Parashant National Monument was created, for example, to protect lands that are part of the drainage basin for the Colorado River and the Grand Canyon. Other landscape monuments protect canyonlands, coastal areas, and forest, shrub-steppe, marine, riparian, and desert ecosystems.”).

⁸⁰ Squillace, *supra* note 25, at 513 (“The vast literature that has developed in recent years describing landscape ecology and ecosystem management offers strong support for the claim that a landscape or ecosystem is a legitimate object of scientific interest.”).

⁸¹ Thomas Cannon, *Utah Association of Counties v. Bush: A Look at How the Federal District Court of Utah Upheld the Creation of the Grand Staircase-Escalante National Monument Through the Antiquities Act*, 25 J. LAND RESOURCES & ENVTL. L. 63, 63 (2005).

⁸² Harrison, *supra* note 72, at 410.

within the continental United States.”⁸³ By doing this, President Clinton “reestablished the Antiquities Act as one of the most powerful conservation tools available to the executive.”⁸⁴

Although not a declared purpose, an indirect benefit of the Act’s application has been to protect lands surrounding the monument that otherwise might have been vulnerable to development because protective legislation was languishing in Congress.⁸⁵ An example of this was President Carter’s designation of 19 monuments in Alaska that protected fifty-six million acres of land from development while legislation to protect these areas was stymied in Congress.⁸⁶ National monument proclamations layer on additional protections to federal lands “by withdrawing them from entry, location, sale, or other disposition under the public land laws—that is, from mining, logging, oil and gas production, grazing, off-road vehicles, and other such uses.”⁸⁷ “These restrictions are effectively permanent,”⁸⁸ disrupting settled expectations of individuals and companies whose livelihoods had depended on extracting renewable and nonrenewable resources from these lands.

The allowable uses of lands reserved to protect a designated monument vary monument to monument according to the purposes for

⁸³ Ranchod, *supra* note 10, at 570. “Clinton established five of the ten largest monuments established by presidential proclamation in the lower forty-eight states.” *Id.*

⁸⁴ *Id.* at 582; *see also id.* (“[T]his executive leadership was justified and proper given the history of congressional acquiescence to expansive use of the Act, judicial interpretation of the Act, and political considerations.”).

⁸⁵ Lin, *supra* note 17, at 736 (“Nevertheless, given the sometimes glacial progress of proposed legislation, there is some value to a process that can react seasonably to time-sensitive, though not ‘emergency,’ matters.”); *see also* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 684 (2015) (“The veto-gates; second, third, and *n*th opinions; and interbranch checks and balances that, in a Madisonian system, are intended to promote reasoned deliberation, and launder out passion and interest, together ensure that legislatures will ‘come too late’ to the resolution of an increasing fraction of policy problems.”); *id.* (“Even so, Congress’s agenda is so radically compacted and constrained that it is routine for critical policy problems to languish indefinitely on the congressional docket even as extant law becomes risibly maladapted to the relevant problems as the policy environment changes over time.”).

⁸⁶ Presidential Statement on Designation of National Monuments in Alaska, *in* 1978 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, Jimmy Carter (1980).

⁸⁷ Sanders, *supra* note 9, at 4.

⁸⁸ *Id.*

which each monument is created.⁸⁹ These uses are set forth in a land-use management plan prepared by the agency with jurisdiction over the land housing the monument.⁹⁰ The new large landscape monuments shifted management from the National Park Service (NPS), which traditionally had managed national monuments, to land management agencies like Bureau of Land Management (BLM) and the Forest Service (FS) because the protected lands fell within their jurisdictions.⁹¹ Grand Staircase-Escalante National Monument is the first monument BLM has managed; Giant Sequoia National Monument is the first one the FS has managed.⁹²

One effect of shifting management from NPS to BLM and FS is the application of a less protective management standard, which allows “compatible uses.”⁹³ This more forgiving standard is different than the requirement in the National Park Service Organic Act that lands in that system be left “unimpaired for the enjoyment of future generations,”⁹⁴ a management mandate that is not specifically stated in the Antiquities

⁸⁹ Squillace, *supra* note 25, at 519 (“[N]ational monuments are a bit like snowflakes, each with a character of its own.”).

⁹⁰ Sellars, *supra* note 8, at 282. Seven of the twenty World Heritage sites, places considered to have “outstanding international significance,” were initially protected under the Antiquities Act. *Id.*

⁹¹ One interesting feature of BLM-managed monuments is that they are “managed in partnership with the surrounding communities. This arrangement means that BLM has no public facilities on its monuments’ grounds, which forces visitors to patronize local communities.” Ranchod, *supra* note 10, at 572. National monuments managed by the BLM are to be managed in partnership with the surrounding communities. To this end, the BLM will not provide major facilities for food, lodging, or visitor services within landscape monuments. Rather, visitors will be encouraged to see the lands in their primitive states, and access will be limited to certain areas. Visitor contact and information facilities may be located in adjacent communities or on the periphery of units. “For example, the Grand Staircase-Escalante National Monument management plan limits visitor development to peripheral land on the outer four percent of the monument.” *Id.* This may explain the economic uptick in these communities after the enthusiasm of monument designation.

⁹² *Id.* at 570. Ten other monuments created by Clinton are also managed exclusively by BLM. *Id.*

⁹³ *Id.* at 571; *see also* Sanders, *supra* note 9, at 5 (“The BLM and the Forest Service come at land management from a ‘multiple use’ perspective that tends, on paper and in practice, to be more permissive than the Park Service’s clear preservation mandate.”).

⁹⁴ 16 U.S.C. § 1 (current version at 54 U.S.C. § 100101(a)).

Act.⁹⁵ While existing commercial activities are permitted on national parkland, subject to “valid existing rights,”⁹⁶ new ones, like mining, oil and gas development, and logging, are generally prohibited by the nonimpairment standard.⁹⁷ Thus, Clinton and Obama’s designations of monuments on multi-purpose federal land (public domain and national forest lands) actually weakened protection for them, even though each President withdrew an enormous amount of land from new extractive uses.⁹⁸

D. *Judicial Interpretation of the President’s Authority under the Act*

Courts provide almost no check on the President’s authority under the Antiquities Act. Judges limit their review of presidential designations to the question of whether “the President has facially exercised his discretion in accordance with the Act’s standards,” and generally broadly interpret the President’s authority under the Act.⁹⁹ This judicial deference extends to whether the geographic area protected by the designation is properly sized and whether the objects qualify for protection.¹⁰⁰

⁹⁵ Sellars, *supra* note 8, at 317. However, while Sellars notes that the NPSOA “did not alter the authorization and facilitation of professional research in the monuments . . . it did specifically authorize public use and enjoyment to take place on site in the monuments, a mandate that differed from the Antiquities Act’s emphasis on education through universities and museums. Thus, like the national parks, the national monuments would themselves become outdoor education centers.”)

⁹⁶ Sanders, *supra* note 9, at 5.

⁹⁷ See National Park Service Organic Act, 16 U.S.C. § 1 (current version at 54 U.S.C. § 100101(a)) (“The service thus established shall promote and regulate the use of the federal areas known as national parks, monuments, and reservations hereinafter specified . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them *unimpaired* for the enjoyment of future generations.”) (emphasis added); see also Ranchod, *supra* note 10, at 572; *id.* (“All Clinton-created monuments have been withdrawn from disposition under the Mining Act of 1872.”).

⁹⁸ Ranchod, *supra* note 10, at 573.

⁹⁹ Iraola, *supra* note 3, at 184.

¹⁰⁰ *Id.* at 185-86 (“With respect to the second substantive requirement, that the designation of the national monument ‘be confined to the smallest area compatible with the proper care and management of the objects to be protected[,]’ courts

[W]here a claim concerns not a want of [presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.¹⁰¹

Thus, the Court in *Cameron v. United States*¹⁰² quickly dispatched an argument by petitioner that the Grand Canyon lacked any historical or scientific interest.¹⁰³ While the Court does not directly address the language in the Act requiring that the monument's size should be the "smallest area compatible with the proper care and management of the objects to be protected," the "clear implication of the Court's decision was that the size of the monument was not disqualifying if the 'protected object' was otherwise of 'scientific interest.'"¹⁰⁴

In *Cappaert v. United States*, the United States sought to enjoin groundwater pumping by a local farmer, which lowered the water level in Devil's Hole, an important feature in Death Valley National Monument.¹⁰⁵ The Court dismissed an argument challenging the historical and scientific value of Death Valley National Monument, explaining that while the Act allows for areas to be designated that have either historical or scientific value, because the Death Valley National Monument had *both* historical and scientific interests, the President acted within his delegated authority when he designated the monument.¹⁰⁶ In *Tulare County v. Bush*,¹⁰⁷ relying on *Cappaert*, the D.C. Circuit Court of Appeals also inferentially supported the concept of landscape or ecosystem designations to the extent that the decision held that the President's authority under the Act was "not limited to protecting only archaeological sites"; nor did the Act "impose upon the

generally accord to the President's factual determinations substantial judicial deference.").

¹⁰¹ Cannon, *supra* note 81, at 67 (quoting *Dalton v. Specter*, 511 U.S. 462, 474 (1994)).

¹⁰² 252 U.S. 450 (1920).

¹⁰³ Harrison, *supra* note 72, at 418.

¹⁰⁴ Squillace, *supra* note 25, at 492.

¹⁰⁵ 426 U.S. 128 (1976); Harrison, *supra* note 72, at 418.

¹⁰⁶ Harrison, *supra* note 72, at 418.

¹⁰⁷ 306 F.3d 1138 (D.C. Cir. 2002).

President an obligation to make any particular investigation' regarding the scope and size of the designated memorial."¹⁰⁸

In a 1978 case involving a jurisdictional dispute between California and the United States over the waters and submerged lands in the Channel Islands National Monument,¹⁰⁹ the Supreme Court continued an expansionist view of the Antiquities Act's scope by affirming President Truman's earlier reservation of submerged lands and the waters over those lands as part of a national monument.¹¹⁰ "[T]he Court recognized that, although the Act refers to "lands," it authorizes the reservation of waters located on or over federal lands."¹¹¹

U.S. district courts, for the most part, have followed the Supreme Court's lead. In *Wyoming v. Franke*,¹¹² involving a challenge to President Franklin Delano Roosevelt's designation of 220,000 acres as the Jackson Hole National Monument, the U.S. District Court of Wyoming found "sufficient evidence of historic and scientific interest to uphold the basic designation of the national monument,"¹¹³ saying, "if there be evidence in the case of a substantial character upon which the President may have acted in declaring that there were objects of historic of [sic] scientific interest included within the area, it is sufficient upon which he may have based a discretion."¹¹⁴ The District Court Judge added:

[T]his seems to be a controversy between the Legislative and Executive Branches of the Government in which, under the evidence presented here, the Court cannot interfere. Undoubtedly great hardship and a substantial amount of injustice will be done to the State and her citizens if the Executive Department carries out its threatened program, but if Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not

¹⁰⁸ Iraola, *supra* note 3, at 178.

¹⁰⁹ *United States v. California*, 436 U.S. 32 (1978).

¹¹⁰ Iraola, *supra* note 3, at 174. Those lands and waters were eventually conveyed to California. *Id.*

¹¹¹ *Id.*

¹¹² 58 F. Supp. 890 (D. Wyo. 1945).

¹¹³ Harrison, *supra* note 72, at 420-21.

¹¹⁴ *Id.* at 421 (quoting *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945)). Harrison noted, however that the court "refused to determine whether the national monument designation was the smallest area compatible to protect the legitimate interest," considering that "that this question was outside the court's jurisdiction. It further refused to determine whether the president's designating the national monument were arbitrary or capricious . . ." *Id.*

actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative Branch. What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.¹¹⁵

For the court, as long as there was “evidence ‘of a substantial character’” supporting the President’s determination that there were objects of scientific or historic interest on the withdrawn public lands, which also supported the determination that the withdrawn acreage was compatible with the care and management of those objects, “any further judicial review with respect to the President’s exercise of discretion under the Act was not permitted.”¹¹⁶

In *Mountain States Legal Foundation v. Bush*,¹¹⁷ petitioners challenged President Clinton’s designation of six New Mexico national monuments on *ultra vires* grounds, among other claims.¹¹⁸ The basis of the *ultra vires* challenge was that only Congress had the power to make rules affecting public lands.¹¹⁹ The Court of Appeals for the District of Columbia Circuit affirmed the lower court’s dismissal of the *ultra vires* claim on the ground that President Clinton “exercised his delegated

¹¹⁵ Franke, 58 F. Supp. at 896; see also Harrison, *supra* note 72, at 422.

¹¹⁶ Iraola, *supra* note 3, at 182. “The court further noted that given the nature of the controversy, the ‘burden [wa]s on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch.’” *Id.*; see also *id.* at 171 (“In the case of the Antiquities Act, while it grants the President broad discretion, and separation of powers concerns are present, the statute also contains some restrictions. Judicial review ‘is available to ensure that the Proclamations are consistent with constitutional principles and that the President has not exceeded his statutory authority.’”); Cannon, *supra* note 81, at 70 (describing the court’s decision in *Utah Association of Counties*, and saying “[t]he court continued what has become the tradition in preventing parties from bringing any causes of action against the President for a violation of the Antiquities Act.” In deciding that it would not decide on the exercise of the President’s discretion, the court quoted Justice Scalia’s concurrence in *Franklin v. Massachusetts*, 505 U.S. 788, 827 (1992), who said, “I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before the court.”).

¹¹⁷ 306 F.3d 1132 (D.C. Cir. 2002), *cert. denied*, 124 S.Ct. 61 (2003).

¹¹⁸ Iraola, *supra* note 3, at 176.

¹¹⁹ *Id.*

powers under the Antiquities Act, and that statute include[d] intelligible principles to guide the President's action."¹²⁰

The one potential caveat to this unbroken chain of court decisions affirming Presidential authority to designate national monuments is an unpublished bench ruling in a case challenging President Carter's designation of nineteen monuments in Alaska. In that case, the U.S. District Court for Alaska indicated that there might be limits to the amount of acreage that a President could withdraw under the Act.¹²¹ The judge found that the land President Carter reserved "was more than necessary" to protect objects identified as having historic or scientific interest,¹²² and that the withdrawn lands exceeded the amount of land necessary to fulfill the purpose of the designations.¹²³ But, the judge admitted that "while the 'outer parameters' of presidential discretion under the Act had 'not yet been drawn by judicial decision,'" President Carter's proclamations at issue did not exceed his authority under the Act.¹²⁴ In the wake of President Carter's action, Congress enacted strict procedural limitations on the future use of the Antiquities Act in Alaska, preventing any future designations of "large tracts of federal lands as national monuments" in Alaska.¹²⁵

Congress appears to have delegated to the President fairly unbounded authority to protect lands and the structures and objects on them, if they hold any archaeological or scientific interest. For over 111 years, Presidents of both political parties have exercised their authority under the Act to protect small plots of land like President Lincoln and Soldiers' Home National Monument (2.3 acres), in Washington D.C. protected by President Clinton, or Cabrillo National Monument

¹²⁰ *Id.* at 176 (quoting *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002)).

¹²¹ *See* *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980) (challenging President Carter's use of the Antiquities Act to establish fifteen new national monuments, expand two existing ones, and withdraw more than fifty-six million acres in Alaska); *see also* Harrison, *supra* note 72, at 430.

¹²² *Id.* at 430-31.

¹²³ *Id.* at 431.

¹²⁴ Iraola, *supra* note 3, at 184.

¹²⁵ Harrison, *supra* note 72, at 431 n.148 (discussing 16 U.S.C. §3213(a) (1994) ("The Land Conservation Act provided a procedural limitation that any future national monument designations in Alaska would not be allowed without a congressional hearing and approval of the national monument within a certain time period."); *see also* Lin, *supra* note 17, at 716 ("ANILCA also made potential future withdrawals in Alaska under the Antiquities Act of more than 5,000 acres subject to congressional approval.")).

protected by President Taft (0.50 acres) in California and huge landscapes, like Grand Staircase-Escalante National Monument protected by President Clinton (1,700,000 acres) in Arizona or Glacier Bay protected by President Coolidge (1,164,800 acres) in Alaska.¹²⁶ Congress, with rare exception, has not intervened; the courts not at all. By statutory design, neither the public nor its elected officials play any official role in the designation process, a process that often ends with a land use decision disrupting prior uses of the land. At least one sponsor of the legislation, Congressman Lacey had that result in mind even though it appears to have caught succeeding generation of legislators by surprise as they react to more expansive uses of the Act in an era of legislative stalemate.

The next Part of the article uses this background information as a platform from which to observe some of the modern controversies generated by the Act's application as well as more general criticisms of its provisions.

III. CONTROVERSIES ASSOCIATED WITH SPECIFIC MONUMENT DESIGNATIONS AND GENERAL CRITICISM OF THE ACT

In one form or another, there are Boston Tea parties still going on every day in some part of America in infinite varieties of the constitutional right to seek a redress of grievances.¹²⁷

Individual monument designations have incited opposition from local communities surrounding the monuments. Local disapproval generally focuses on anticipated adverse economic impacts and lifestyle changes caused by designation of a national monument, loss of revenue from traditional sources like ranching and mining, and federal over-regulation of the protected area. Western lawmakers and extractive industries, like mining, oil, and gas, "resent" orders emanating from Washington that restrict their operations on public lands.¹²⁸ More generally, the Act is criticized for the undemocratic nature of the designation process, the President's usurpation of congressional

¹²⁶ Ranchod, *supra* note 10, at app. A at 585-88.

¹²⁷ Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525, 526 (1994).

¹²⁸ Ranchod, *supra* note 10, at 584 ("Although the American public generally supports greater protection of unique federal lands, western lawmakers and politically powerful extractive industries resent orders from Washington, D.C., restricting the use of federal lands.").

authority to manage the public lands, and ineffective judicial review of presidential actions under the Act.¹²⁹ Some of these criticisms dovetail with the less focused economic and cultural criticisms.

As made clear below, the criticisms of the Antiquities Act and of specific designations like Bears Ears reflect the general anti-federal feelings in the Intermountain West. As those feelings modulate and the specific complaints about the negative effects of designation prove to be untrue over time, the resistance to both the law and specific designations should disappear, and, in fact, is already lessening.

A. The Political and Cultural Firestorms around Bears Ears and Grand Staircase-Escalante Designations

San Juan County, the site of both Bears Ears and Grand Staircase-Escalante national monuments is the largest county in Utah.¹³⁰ The federal government manages 61.4% of the land in the county and Indian tribes, principally the Navajo Nation, governs 25.2% of the land, leaving the state, controlling only 5.3%, and private and local governments controlling a mere 8.1% of the land.¹³¹ The County is also the least populous in the state and has the lowest per-capita income.¹³² Not surprisingly, given these statistics, the County is also ground zero for opposition to the Antiquities Act and the designation of national monuments under that statute.

The over-heated rhetoric employed, and subsequent flurry of bills introduced by Utah's congressional delegation after President Obama's designation of Bears Ears in San Juan County illustrate this opposition. For example, U.S. Representative Rob Bishop, chair of the House Committee on Natural Resources, "called President Obama's monuments a 'surreptitious land grab' and an 'authoritarian act' of 'presidential bullying,'" and "vowed to push legislation" to "right size"

¹²⁹ See Lin, *supra* note 17, at 725 ("the anti-monument discourse advocating local governance and democratic participation potentially reveals itself as no more than a rhetorical front for interest groups seeking to achieve particular policy outcomes.").

¹³⁰ JOHN C. RUPLE, ROBERT B. KEITER & ANDRE OGNIBENE, NATIONAL MONUMENTS AND NATIONAL CONSERVATION AREAS: A COMPARISON IN LIGHT OF THE BEARS EARS PROPOSAL, Stegner Center, White Paper No. 2016-02 (2016) at 2.

¹³¹ *Id.*

¹³² *Id.*

the monument.¹³³ Other members of Congress share Representative Bishop's outrage and have consequently introduced twelve bills to curtail or revoke Presidential authority under the Antiquities Act, carrying titles like the Preserving State Rights Act (H.R. 4132, 114th Cong. (2015)) and Protecting Local Communities from Executive Overreach Act (H.R. 3946, 114th Cong. (2015)).¹³⁴ Among the list of things these bills would do is to

require advance approval from states or local communities or both; limit new monuments to 5,000 acres; require Congress and the affected state to approve any new monument either before or within three years of its designation; preclude new monuments in certain counties, states, or off-road vehicle areas; prohibit the reservation of federal water rights; preclude the restriction of allowable uses absent public comment and congressional approval; require public hearings; and subject new designations to review under the National Environmental Policy Act (NEPA).¹³⁵

The response to Grand Staircase-Escalante National Monument serves as a helpful model for understanding many of the criticisms levelled against Presidential use of the Antiquities Act. President Clinton's designation of that monument, its size and the lack of consultation with state and local officials, and complete absence of public participation during the designation process created significant opposition to the monument.¹³⁶ Critics additionally complained that it "was not within the spirit of the law" because it was "a leap from protecting the large ruins of the southwest as contemplated by the Antiquities Act to protecting 'packrat middens,' that were identified in

¹³³ Corbin Hlar, et al., *Bishop vows bills aimed at Bears Ears, 'damn' Antiquities Act*, E & E NEWS (April 26, 2017), <http://www.eenews.net/eedaily/stories/1060053590/print>.

¹³⁴ Sanders, *supra* note 9, at 5.

¹³⁴ Sanders, *supra* note 9, at 5.

¹³⁵ *Id.*

¹³⁶ Cannon, *supra* note 81, at 65 ("President Clinton's action created heavy controversy, which was exacerbated by the lack of advance consultation with Utah's federal and state officials. Of particular insult to these officials was the fact that the Grand Staircase announcement was made in Arizona at the Grand Canyon, not in Utah. Part of the controversy came because the federal royalties from the Smokey Hollow Coal Mine would have been around twenty billion dollars, half of which would have gone to Utah.").

the GSENM's proclamation."¹³⁷ They also argued that the creation of the monument was purely for "political not preservation reasons" and barred development of the Kaiparowits coal field, one of the "nation's most precious coal resource."¹³⁸ State and local officials were concerned about the effect of the Grand Staircase-Escalante National Monument on 176,000 acres of Utah's school trust lands in the designated area and the revenues the state might otherwise receive from mining on those lands, estimated to be around \$300 billion in total, of which \$2 billion would go into the state's school trust fund.¹³⁹ Local communities adjacent to the monument feared its designation would chill new employment, slow economic growth, and lead to over-regulation of the public lands that surround them.¹⁴⁰ While a similar uproar followed President Obama's designation of Bears Ears National Monument,¹⁴¹ President Obama, unlike President Clinton, gave fair warning of his interest in preserving the core of what became the national monument when it included Cedar Mesa on a 2010 list of candidate sites for protection under the Antiquities Act.¹⁴² This action precipitated both formal and informal discussions on how the area might be preserved, which, in 2015, led to a formal request from a coalition of local Indians to President Obama to designate a 1.9 million acre monument.¹⁴³ In contrast, President Clinton held no public meetings and arguably "hid the ball" from the public as well as state and local officials until he announced the Grand Staircase-Escalante monument's designation from the rim of the Grand Canyon.¹⁴⁴

Many of the complaints voiced following both designations are easily responded to. For example, money raised from school trust lands make up only a small proportion of a school district's overall budget—in

¹³⁷ Quigley, *supra* note 55, at 101.

¹³⁸ *Id.*

¹³⁹ Harrison, *supra* note 72, at 410-11.

¹⁴⁰ *Id.* at 411. In fact, Utah's Office of Tourism is spending millions of dollars promoting the state's five national parks and "boasting" that they attract several million visitors a year from all over the world, four of which were first protected under the Antiquities Act. John D. Leshy & Mark Squillace, *The Endangered Antiquities Act*, N.Y. TIMES, Apr. 1, 2017, at A23.

¹⁴¹ See generally Julie Turkewitz, *A Vast Divide, Fight Intensifies as Trump Rethinks Monument Status for Utah Expanse*, N.Y. TIMES, May 15, 2017, at A11 (recounting many of the local objections to the monument designation).

¹⁴² Jonathan Thompson, *Fact-checking Trump's Antiquities Act order*, HIGH COUNTRY NEWS 2 (April 26, 2017), http://www.hcn.org/articles/fact-checking-hatch-trump-on-bears-ears-national-monument/print_view.

¹⁴³ *Id.*

¹⁴⁴ Cannon, *supra* note 81, at 65.

San Juan County, one percent of its school budget—and are distributed statewide.¹⁴⁵ In addition, the state retains control over school trust lands and the schools received \$50 million from the federal government from the Grand Staircase-Escalante monument designation in a land exchange with the federal government.¹⁴⁶ The state school board rejected a similar proposal from the Obama Administration.¹⁴⁷ Ironically a report by the Wilderness Society found that Utah has sold off 54% of the original 7.5 million acres in school trust lands which it received upon becoming a state¹⁴⁸ and that, according to the Census Bureau, Utah spends less per student than any state in the Union.¹⁴⁹ The Bears Ears Monument’s final boundaries excluded areas rich with both paleontological and uranium resources as well as other areas where historically there was drilling for oil, and there are no pending leases within the monument boundaries.¹⁵⁰ The proclamation preserves existing grazing leases and new ones are allowed.¹⁵¹

As for killing jobs and destroying the local economy, a 2017 report by Headwater Economics, which examined “gateway communities” adjacent to seventeen monuments of 10,000 acres or more in eleven Western states designated between 1982 and 2001, found “no evidence” that these designations inhibited economic growth.¹⁵² In fact, the report found that “the local economies surrounding all 17 of the national monuments studied expanded following the creation of the new national monuments.”¹⁵³ “Across the board, trends in important economic indicators either continued or improved” in each of the areas studied, including a rise in personal wealth, which the report found significant because in rural areas this indicator is often declining.¹⁵⁴ The report also

¹⁴⁵ *Id.* at 3-4.

¹⁴⁶ *Id.* at 4.

¹⁴⁷ *Id.*

¹⁴⁸ Scott Streater, *Federal transfers to Utah would shut public out—report*, E & E NEWS (May 22, 2017), <http://www.eenews.net/eenewspm/stories/1060054918/print>.

¹⁴⁹ *Id.*

¹⁵⁰ Thompson, *supra* note 142, at 4.

¹⁵¹ *Id.* at 5.

¹⁵² HEADWATERS ECONOMICS, UPDATED SUMMARY: THE ECONOMIC IMPORTANCE OF NATIONAL MONUMENTS TO LOCAL COMMUNITIES 3 (2017).

¹⁵³ *Id.* at 1. While the report data showed “continued economic growth in nearby communities,” the data “do not demonstrate a cause-and-effect relationship” between monument designation and economic growth. *Id.*

¹⁵⁴ *Id.*

noted that “protected natural amenities,” like national monuments and their surrounding land, “help sustain property values and attract new investments.”¹⁵⁵ According to the report, these communities had an increase in non-labor income (investments, real estate, and government paychecks like social security) of \$189 million in 2015—an increase of 49% from 2001—and service jobs (teaching, engineering, health related) increased by 42% over the same period, with per-capita income increasing by 17% to nearly \$36,000 on average.¹⁵⁶ As for the counties hosting the Grand Staircase-Escalante National Monument, they “experienced strong growth after the designation of the monument, continuing previous growth trends.” Overall, from 2001-2015 in the Grand Staircase-Escalante Region, population grew by 13%, jobs by 24%, real personal income by 32%, and real per capita income by 17%.¹⁵⁷ There is no reason not to expect a similar growth in local economy from the designation of the Bears Ears National Monument, which explains why the Utah State Tourist Board is promoting the new monument.¹⁵⁸

There have been other examples of political backlash to monument designations in the not too distant past. For example, a Republican-controlled Congress refused to appropriate funds for ten years for the management of the Chesapeake & Ohio Canal Monument, designated by President Eisenhower in 1961, after a Democrat-controlled Congress refused to protect the area.¹⁵⁹ President Lyndon Johnson’s last minute signature on proclamations enlarging Arches and Capitol Reef national monuments provoked angry rhetoric from Utah’s Senators who criticized the President’s “unilateral and arbitrary” action.¹⁶⁰ Utah Senator Bob Bennett “proclaimed President Johnson’s national monuments a ‘last gasp attempt to embalm a little more land in the West.’”¹⁶¹ However, the vehemence and sustained nature of the outcry against President Clinton and President Obama’s designations and the use of the presidential bully pulpit to oppose their national monuments

¹⁵⁵ *Id.* at 2.

¹⁵⁶ Jennifer Yachnin, *Communities near large sites see economic growth—report*, E & E NEWS (June 1, 2017), <http://www.eenews.net/greenwire/stories/1060055414/print>.

¹⁵⁷ HEADWATERS ECONOMICS, *supra* note 152, at 1.

¹⁵⁸ Thompson, *supra* note 142, at 5.

¹⁵⁹ Lin, *supra* note 17, at 716.

¹⁶⁰ *Id.*

¹⁶¹ Sanders, *supra* note 9, at 5.

are unusual.¹⁶²

B. *General Criticisms of the Antiquities Act and the Response to Those Claims*

Typical criticisms of the Antiquities Act focus on two issues: the Act's alleged usurpation of Congress' authority under the Property Clause "to make all needful rules," respecting the property of the United States¹⁶³ and on the Act's undemocratic lack of public participation in the designation process.¹⁶⁴ Since withdrawals under the Antiquities Act are "more permanent," they argue that they "should be subject to greater procedural requirements and more thorough deliberation to ensure careful and well-informed decisions."¹⁶⁵ Additionally, critics perceive the Act's designation process as "unfair" because of the limited opportunity for affected communities and local interests to participate in the decision-making process and the adverse effects of designations on those same communities and on those who use public lands.¹⁶⁶ Supporters of the Act have responses for each of those arguments and argue that strong executive authority, like that found in the Antiquities Act, is necessary if public lands are to be preserved for future generations.¹⁶⁷

1. *Legal concerns.*

Opponents of the Antiquities Act frequently raise multiple legal concerns, for example that the statute divests Congress of its constitutional responsibility to make "all needful rules" regarding the sale and management of United States property in violation of the Property Clause of the Constitution. They also contend that the Act

¹⁶² See, e.g., Cary Coglianese & Christopher Yoo, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1593 (2016) ("The President's power to cajole has been well-established and acknowledged to be influential.").

¹⁶³ U.S. CONST. art. IV, § 3, cl. 2.

¹⁶⁴ Squillace, *supra* note 25, at 474-75.

¹⁶⁵ Lin, *supra* note 17, at 733.

¹⁶⁶ Sanders, *supra* note 9, at 5-6 ("The Antiquities Act's critics raise three objections most often: (1) the Act appropriates power that properly resides with Congress under the Property Clause (or with the states); (2) democracy and informed decision making demand that the public have the right to review and comment on proposed designations; and (3) national monument designations harm the economies of local communities.").

¹⁶⁷ *Id.* at 6-7.

violates the Administrative Procedure Act (APA) because the President's actions are not preceded by public notice and comment, and that it runs counter to NEPA, which requires that major federal actions significantly affecting the human environment must be accompanied by a statement describing and analyzing those impacts.¹⁶⁸ The silver lining to the concerns raised under the APA and NEPA is that they “underscore the degree to which procedures for public notice and comment, such as those required by the Administrative Procedure Act (in the context of rulemaking) and NEPA, have become engrained in the public's understanding of democratic norms.”¹⁶⁹

a. *Violates the Property Clause.*

Critics argue that the Property Clause¹⁷⁰ gave Congress, not the President, the power to manage public lands.¹⁷¹ Therefore, the President has no authority to affect public lands by designating objects on those lands as national monuments or withdrawing those land to protect objects on them. However, Congress has specifically delegated that authority to the President in the Antiquities Act.

*Mountain States Legal Foundation v. Bush*¹⁷² upheld that delegation when it rejected a challenge to President Clinton's designation of six New Mexico national monuments on *ultra vires* grounds.¹⁷³ Petitioner argued, in part, that only Congress had the power to make rules affecting public lands.¹⁷⁴ The Court of Appeals for the District of Columbia Circuit, however, disagreed, and affirmed the lower court decision, finding that President Clinton had properly exercised his delegated powers under the Antiquities Act, which contained intelligible principles to guide his action.¹⁷⁵ The contention by “legal formalists and

¹⁶⁸ See, e.g., Cannon, *supra* note 81, at 66-67 (raising many of these claims). Cannon also argues that the APA applies because, in the case of Grand Staircase-Escalante designation, the Secretary of Interior made the final decision. *Id.* While it is true that the Secretary of Interior makes recommendations to the President about which monuments should be designated, puts together a report, and drafts the declaration, only the President signs and issues the designating proclamation. *Id.* at 68.

¹⁶⁹ Lin, *supra* note 17, at 738.

¹⁷⁰ U.S. CONST. art. IV, § 3, cl. 2.

¹⁷¹ See Arnold & Porter, *supra* note 12, at 4.

¹⁷² 306 F.3d 1132 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003).

¹⁷³ *Id.* at 1137.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 174-76.

originalists . . . that the Antiquities Act, in giving the president wide-ranging power to designate national monuments, violates the non-delegation doctrine and intrudes on Congress's plenary authority over the federal public lands"¹⁷⁶ is easily met by *Mountain States*' finding that the Antiquities Act has "intelligible principles" to guide the President's actions. Additionally, "court decisions upholding the Act against all manner of challenges, and the fact that Congress has the last word on whether particular monuments, and indeed the Act itself, remain on the books," also counter the formalist/originalist arguments.¹⁷⁷

b. *Violates the Administrative Procedure Act.*

The Act's detractors also argue that Presidents who designate monuments under the Antiquities Act are violating the Administrative Procedure Act (APA). Although the APA does not specifically exclude the President from its scope, courts have held that it does.¹⁷⁸ Since only the President has affirmative duties under the Antiquities Act, for the APA to apply, therefore, an agency, like BLM or the FS, not the President, must make the decision to designate a national monument. But only Presidents have the delegated authority to designate national monuments.

Proponents of this argument contend that Executive Order No.

¹⁷⁶ Sanders, *supra* note 9, at 5.

¹⁷⁷ *Id.*

¹⁷⁸ See *Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992) ("The APA defines 'agency' as 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.' 5 U.S.C. §§ 701(b)(1), 551(1). The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."); see also Cannon, *supra* note 81, at 71. In their unsuccessful challenge to President Clinton's designation of the Grand Staircase-Escalante National Monument, "plaintiffs argued that the action by the Secretary of the Interior could be a final agency action, but the court dismissed that claim since the executive branch officers only provided recommendations and assistance, not final action, as defined under the APA." *Id.*

10,355,¹⁷⁹ which grants the Secretary of the Department of Interior authority to exercise the President's land withdrawal authority and place those lands in protected status, means the Secretary has the authority to exercise the President's delegated authority under the Antiquities Act to designate national monuments.¹⁸⁰ Putting aside the suspect nature of an argument that contravenes clear statutory text, the argument seems factually "dubious" because since the Order's promulgation in 1925, the President, not the Secretary of the Interior, has designated numerous national monuments.¹⁸¹

c. Violates the National Environmental Policy Act.

For reasons similar to arguments against the application of the APA to the President, namely that the President is not an agency and because the National Environmental Policy Act (NEPA) specifically exempts the President from its reach, NEPA does not apply to a presidential designation.¹⁸² Certainly, there may be sound policy reasons to apply NEPA to the monument designation process. For example, NEPA requires public participation, the input of local information, identification of alternatives to monument designation, and a demonstration of the costs and benefits of any proposed action. However, those reasons cannot justify contradicting statutory design. Arguments that it is really a federal agency official that designates a national monument because of the pre-designation work that agencies do, and that, therefore, NEPA applies, would fail for the same reasons they do not work when applied to the APA – namely, that the Antiquities Act only authorizes the President to designate national monuments. Allowing or even inferring, as is the case here, a sub-delegation of that authority would contradict the plain language of section 431.

One aim of "constitutional design is to prevent the abuse of

¹⁷⁹ Exec. Order No. 10,355, codified at 3 C.F.R. § 873 (1949-1953).

¹⁸⁰ Cannon, *supra* note 81, at 69-70 (discussing power, elements required to meet it, and why transfer is invalid because not approved by Congress).

¹⁸¹ *Id.* at 72.

¹⁸² See Harrison, *supra* note 72, at 427 (challenging Carter's designation of national monuments based on NEPA violation and failing on the grounds that "because the President was 'not a federal agency,' he was not subject to NEPA's environmental impact statement requirements."). The doctrine of separation of powers also counseled against "inferring a Congressional intent to impose such a duty on the President." Iraola, *supra* note 3, at 182 (quoting *Alaska v. Carter*, 462 F. Supp. 1159, 1160 (D. Alaska 1978)).

power.”¹⁸³ Thus, while the legal concerns raised by opponents of the Antiquities Act lack merit, underscoring each of them are abuse of power concerns. However, largely consistent behavior by the three branches of government with respect to protection of national monuments for over a century belies these concerns and provides a supportive interpretive gloss that prevents a President from contravening the Act in a way that would, itself, constitute an abuse of power. Congress remains a check on Executive over-reaching, and it is difficult to dispute this long history, during which Presidents have designated monuments and courts have upheld these designations, which only rarely have been changed by Congress.¹⁸⁴

2. *Its implementation is undemocratic.*

There may be more traction to criticisms of the Act that it fosters undemocratic decision-making because neither the public nor its elected officials participate in the designation process. This lack of public process conflicts with “fundamental tenets of a participatory democracy.”¹⁸⁵ Supporters of the Act argue that public participation

¹⁸³ Vermeule, *supra* note 85, at 674. Vermeule attributes the increase in executive power generally to increasing congressional delegation to the Executive Branch and independent agencies, increasing deference by courts to agencies “in a world in which Congress has increasingly abdicated its policy responsibilities,” and the Executive Branch’s penchant for increasing its own power to act unilaterally, exploit “broad and vague delegations of power, vague constitutional powers, and traditional pockets of discretion,” as a way of changing policies without getting congressional authorization. *Id.* at 684-85.

¹⁸⁴ Sanders, *supra* note 9, at 3.

¹⁸⁵ Squillace, *supra* note 25, at 476; *see also* Lin, *supra* note 17, at 739 (“Standard rationales for broad-based public involvement in agency decision-making include: (1) promoting agency accountability and oversight; (2) reducing the potential for agency capture; (3) providing better quality information; and (4) enhancing proceduralist goals.”); Ann M. Eisenberg, *Do Sagebrush Rebels Have a Colorable Claim? The Space Between Parochialism and Exclusion in Federal Land Management*, 38 PUB. LAND & RESOURCES L. REV. 56, 86 (2017) (“Planners, philosophers, and environmental justice theorists agree that ethical norms and legal principles support the idea that people’s interest in participatory land use decisionmaking transcends formal law.”). Eisenberg also identifies a “reverse environmental justice” situation in that “the rhetoric used to justify vast public land holdings in the West—that those lands ‘belong to all Americans’—evokes an analogous subjugation of local will to “the greater good.” *Id.* at 85. She suggests a “meaningful” collaborative form of decision-making with respect to the management of public lands. *Id.* at 97-100.

would make the designation process even more contentious and could delay the protection of any qualified sites. They also note that Congress has not seen fit to amend the law to make it more transparent even in an era where many laws were enacted that included public participation, and that the public can participate in the decisions governing the management of protected sites at the agency level.

Public participation in governmental decision-making gives “a voice to affected constituencies.”¹⁸⁶ This helps assure that government officials are better informed about the consequences of their actions, thus fostering better decisions.¹⁸⁷ “[A] public process can also help achieve the virtues of civic republicanism,”¹⁸⁸ by focusing on deliberation that results in the virtuous political choice, leads to the common good and improves the art of citizenship.¹⁸⁹ Inviting interested members of the public and groups into any governmental process not only fosters democratic values, but can “defuse conflicts in a civil manner.”¹⁹⁰ James Rasband wonders if

aggressive use of the Antiquities Act [is] a repetition of this historical pattern of conquest by certitude? Should we be so certain about the altruism and correctness of our new preservation preference that we eschew any legal obligation to consult with those rural communities that have developed real and lasting attachments to the public lands, at

¹⁸⁶ Squillace, *supra* note 25, at 571; *see also* Lin, *supra* note 17, at 471 (a rationale that “posits that decisions are more likely to be viewed as legitimate if participants’ views have been fairly considered,” is likely to be the most relevant to the Antiquities Act.)

¹⁸⁷ Squillace, *supra* note 25, at 571. “While federal agencies may have a reasonable grasp of the resources within a monument and the manner in which they might best be protected, local officials and members of the public might well have additional information regarding the resources that would be valuable in deciding the extent to which lands should receive Antiquities Act protection.” *Id.* at 573.

¹⁸⁸ *Id.* at 574.

¹⁸⁹ *Id.* at 576. *See generally* MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICAN IN SEARCH OF A PUBLIC PHILOSOPHY* (1996) (discussing the virtues of civic republicanism).

¹⁹⁰ Lin, *supra* note 17, at 742; *see also* Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1960-61 (2016) (commenting that “the ‘civilizing force of hypocrisy,’ the inability to give openly partisan justifications in a transparent public setting may actually constrain behavior, at least at the edges, if there is no plausible public-spirited justification available as a pretext.”).

least in part because of their reliance on public policies that encouraged that attachment?¹⁹¹

Local accountability is often touted as the reason to favor legislative over executive action.¹⁹² “Local concerns are voiced by legislators from districts containing or dependent on public lands, and are thus less easily overlooked or dismissed.”¹⁹³ To be effective, the public must be informed of any pending action so its concerns can be expressed to local representatives. But, the Act contains no requirements that the communities that host proposed national monuments be informed about the pending designation, creating another potential flaw in the statute’s structure.

Another benefit of public participation in the decision-making process is that it can lessen the likelihood of agency capture by any single interest group. But the President is not a narrowly focused agency. The President responds to “a national constituency” unlike individual members of Congress, and the American public owns the nation’s public lands,¹⁹⁴ making capture unlikely.¹⁹⁵ In fact, by keeping the public out of the designation process, the President is immunized from pressure by local interests, enabling him “to make decisions from a national perspective.”¹⁹⁶

Those who fret about the lack of public involvement in the

¹⁹¹ James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 633 (2001). Rasband’s comment about “conquest with certitude” is a reference to Wilkinson’s statement that “the history of the American West has been one of ‘conquest by certitude.’” *Id.* at 633. *See also* Eisenberg, *supra* note 185, at 86-87 (pointing to “communities and individuals’ reliance on the longstanding history and continued persistence of the open-access model,” “their reliance on the durability of their private claims to public lands,” and their reliance “on particular resources and land uses for their livelihoods” as supporting their entitlement claims).

¹⁹² Lin, *supra* note 17, at 736 (“A primary explanation for the preference of legislative action is the assumption that congressional land management policy is likely to be more responsive to the public interest because members of Congress are more readily held accountable.”).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 737.

¹⁹⁵ *Id.* at 740 (“[W]ith respect to agency capture, the risk of Antiquities Act authority being ‘captured’ by industry and used inappropriately is minimal . . . [and] largely inapplicable to the Presidency.”). Further “an act that provides only the authority necessary to *protect* resources is less useful to industry.” *Id.*

¹⁹⁶ *Id.* at 737.

designation process and the resulting democracy deficit argue that lack of public participation is a primary reason that the Act “should be repealed or at least amended to require extensive public review.”¹⁹⁷ They point to other public land management laws that mandate public decision-making, like FLPMA, and suggest their use as a possible model for a revised Antiquities Act.¹⁹⁸ This concern also lies behind suggestions found in many of the bills that followed issuance of the Grand Staircase-Escalante proclamation that Congress, as the representative body in our system of government, should approve monument designations before they become law.¹⁹⁹

However, the Act’s supporters point out that there is sufficient informal public participation in the process already—“rarely is a national monument created without consultation between the Department of the Interior, the White House, Congress, and state and local representatives of the affected areas.”²⁰⁰ What’s more, the land-use plans that govern management of national monuments undergo “extensive public review” under NEPA and land management statutes, like FLPMA and the Forest Service Organic Act.²⁰¹

Indeed, information gathered through greater participation does not automatically lead to more representative decisions. Most participants in any planning process will probably represent special interests and will speak the loudest because they are likely to have “the most at stake” in any outcome, drowning out the less focused views of the general

¹⁹⁷ Sanders, *supra* note 9, at 6; *see also* Squillace, *supra* note 25, at 583 (“It is hardly surprising that some opponents of the law, recognizing that its repeal is unlikely, have pressed to amend the law to include a cumbersome public process. They understand that process can be used to delay, obfuscate, weaken, and perhaps even defeat new proposals.”).

¹⁹⁸ Sanders, *supra* note 9, at 5.

¹⁹⁹ *Id.* *See, e.g.*, S. 437, 114th Cong. (2015) (introduced by Sen. Lisa Murkowski (R-AK) requiring an Act of Congress to designate a national monument, approval of any states within the boundaries of a national monument—for marine national monuments, states and territories within 100 nautical miles of the new monument would have to consent to the designation). Maya Kapoor, *With more monuments, Republican backlash mounts: a proposed bill moves to weaken executive power of the Antiquities Act*, HIGH COUNTRY NEWS (Jan. 13, 2017), http://www.hcn.org/articles/with-more-monuments-Republican-backlash-mounts/print_view.

²⁰⁰ Sanders, *supra* note 9, at 5.

²⁰¹ *Id.*; *see also id.* at 6 (saying that supporters argue the Antiquities Act is more effective without extensive public review, which would hobble one of the few environmental laws that work).

public.²⁰² Moreover, public participation in monument designation could make that process unwieldy and cumbersome and actually chill the interest in beginning the designation process.²⁰³

In terms of protecting the resource, supporters maintain that the President's representation of "the broad interests" of the American public puts them in a better position "to make long term decisions about the management of public lands," than members of Congress and local groups with their "narrower constituencies."²⁰⁴ Saying that since Congress is the representational body it is the better decision-maker in these circumstances, is not by itself a compelling reason "because public land resources necessarily must be managed for the long term."²⁰⁵

In any event, Congress can abolish or "shrink" the boundaries of national monuments and prevent their designation, as occurred in Wyoming and Alaska.²⁰⁶ As an indication of congressional approval of the Act and its use to protect important natural resources and structures, Congress has converted many national monuments into national parks,²⁰⁷ "and has never significantly amended or repealed the

²⁰² Lin, *supra* note 17, at 741.

²⁰³ Squillace, *supra* note 25, at 572 ("Because a mandatory public process likely would hamper the ability of future Presidents to use the Antiquities Act, adding such a process would be a serious mistake."); *see also* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision Making*, 92 NW. U. L. REV. 173, 179-80 (1997) (showing that participation is used strategically to delay or to thwart agency programs, and not to engage in democratic dialogue); Gail L. Achterman & Sally K. Fairfax, *Public Participation Requirements of the Federal Land Policy Management Act*, 21 ARIZ. L. REV. 501, 508 (1979) ("Moreover, 'public involvement programs . . . may easily mobilize dissent' and heighten polarization, public frustration, and dissatisfaction").

²⁰⁴ Sanders, *supra* note 9, at 6; *see* Lin, *supra* note 17, at 740 ("[W]ith respect to accountability, the President is already directly accountable to majoritarian political processes."); *id.* at 746 ("[T]he President's distinction as the one leader elected by all the American people places him in a unique position to exercise long-term and broad-scale judgments regarding the national and historical significance of public lands."). This also makes the president accountable to the entire American public, not just those who inhabit a member's district or state.

²⁰⁵ Squillace, *supra* note 25, at 573-74.

²⁰⁶ Sanders, *supra* note 9, at 7.

²⁰⁷ *See* Lin, *supra* note 17, at 744 ("Congress has arguably recognized and endorsed prior executives' farsighted and decisive wielding of Antiquities Act authority when it converted numerous monuments to national parks."); *see also* Sanders, *supra* note 9, at 7 ("expressing anything but disapproval for how the Antiquities Act has been implemented, Congress has turned many national monuments into national

Antiquities Act, including in 1976 when it overhauled how the majority of federal public lands were managed in FLPMA.”²⁰⁸ In fact, it reaffirmed the importance of the Act in section 204(j).

Rasband characterizes the Antiquities Act “as a ‘gadget’ that ‘devalues the ennobling qualities of a fair and democratic preservation process’ by circumventing the more difficult process of crafting successful legislation.”²⁰⁹ Lin counters by saying “[t]he fact that both the executive and legislative branches can exercise a similar power, however, does not make the exercise by the former less democratic per se, as long as that power has been democratically delegated and is subject to democratic control.”²¹⁰ He adds the congressional acquiescence in the broad use of the Act’s authority creates an inference of such delegation and control.²¹¹ According to Lin, “[i]n light of Congress’ express and legitimate delegation of authority through the Antiquities Act, the effectiveness of Congress’ checks on that authority, and the political accountability of the wielder of that authority, the Act is prima facie consistent with democratic principles.”²¹²

Lin argues that the Antiquities Act “does not pose a serious threat to the foundations of our democratic system,” and neither the concerns of the “centralists,” who worry about power concentration, or the “decentralists” who worry about power diffusion, “are seriously at issue.”²¹³ “Land withdrawn pursuant to the Act is essentially put in trust. The means of protecting the land is both coercive and democratic-coercive because decisions are made in the absence of consensus and perhaps without exhaustive public input; democratic because of the multiple checks that ultimately provide accountability.”²¹⁴ The Act’s structure, thus, enables the popularly elected leader of the country “to

parks”). Today, lands that were initially withdrawn under the Antiquities Act “comprise more than 50 percent of the total acreage” in the national park system.

²⁰⁸ Sanders, *supra* note 9, at 7; *see also* Lin, *supra* note 17, at 731

(“Notwithstanding the expansive use of the Act’s authority, Congress has repeatedly considered and rejected proposals to repeal or modify it.”).

²⁰⁹ Lin, *supra* note 17, at 730 (quoting Rasband, *supra* note 191, at 533).

²¹⁰ Lin, *supra* note 17, at 731.

²¹¹ *Id.*

²¹² *Id.* at 730.

²¹³ *Id.* at 744.

²¹⁴ *Id.* (“[M]utual coercion, mutually agreed upon by the majority of the people affected,’ in its simplest form suggests an agreement among resource users to limit use of a resource to protect it for continued future uses.”) (quoting WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARY*, 150-51 (1977)).

make resource-protective decisions subject to further debate and disposition by the people's elected representatives in Congress,"²¹⁵ should they want to.

Still, on balance, the exclusion of the public from the Act's formal decision-making process is troubling and may resonate with a less conservation-oriented Congress in the future, as is the case with the current Congress. Whether informal public outreach, as was the case in the designation of Bears Ears, will be sufficient to counter complaints about the Act's democracy deficit remains to be seen, as the final chapter on that designation has yet to be written.

3. *The Act destabilizes local expectations and fosters anti-federal government feelings.*

a. *A landscape in transition and a history of anti-government movements.*

Many factors have made the Intermountain Western parts of the country unique, not the least of which is the dominant presence of the federal government. The federal government owns forty-seven percent of the land in eleven western states; up to sixty-five percent in Utah--the site of Bears Ears and Grand Staircase-Escalante National Monuments--and eighty-five percent in Nevada.²¹⁶ Out of 157 national monuments designated by Presidents, all but nineteen of them are located west of the 100th meridian, and sixty-four, nearly half of the total number of designated monuments can be found in the Intermountain Western states.²¹⁷ Opponents view designation of national monuments as a federal land grab,²¹⁸ even though the federal government already owns the designated lands, so the government is actually grabbing its own land.²¹⁹ And, national monuments cannot be made of private or state-

²¹⁵ *Id.* at 746.

²¹⁶ Sanders, *supra* note 9, at 3. Nationally, the federal government only owns 28% of the land. *Id.*

²¹⁷ Ranchod, *supra* note 10, at app. A at 585-88.

²¹⁸ Sellars, *supra* note 8, at 295 ("[C]ritics of the Antiquities Act believed that the monuments could take even more of the public domain out of the reach of private ownership or use."). The concern about locking up public lands was raised during debates on the original statute and is anything but a modern complaint.

²¹⁹ Lin, *supra* note 17, at 722 ("There was little substance to the 'land grab' charges, as the land in question already belonged to the federal government and was therefore subject to disposition under the Property Clause.").

owned lands; only pre-existing federal lands.²²⁰

Whether it's federal ownership of western lands or the intrusive shadow of federal rules and regulations backed by the omnipotent federal enforcement officer, westerners generally unite in their opposition to the federal government.²²¹ But the character of the western landscape is changing catching rural communities "between powerful forces of change."²²²

In the West, "traditional economies are in decline, creating hardship, dislocation, and no small amount of desperation among long-time residents."²²³ The "economic dislocation" this part of the country is experiencing is "'more widespread [and] more persistent' than it has been in the past."²²⁴ Changes in the national economy have put "small, marginally successful users of public resources," like ranchers, at a competitive disadvantage with larger, diversified corporations, shifting "the economies of many western states" away from these businesses toward recreation and tourism.²²⁵ "Recent world economic trends do not

²²⁰ Arnold & Porter, *supra* note 12, at 2. There can be exceptions to this where private or local land is donated to the federal government. *See id.* at 9 (in possession of author) (discussing the designation of the Mount Katahdin Woods and Waters National Monument on lands donated by the owner of Burt's Bees, and saying "[o]ther National Monuments established under the Antiquities Act stand on a different footing because they were established in concert with a city, State or private citizen or organization which owned the land and gave it to the federal government on the condition that it be included in a National Monument. If such a Monument designation were revoked, one can only imagine the chaos that would result, at least absent federal legislation, in terms of the disposition of the land and rights so contributed. But only Congress has the power to do so.").

²²¹ Rasband, *supra* note 191, at 857-58 (quoting Bruce Babbitt, *Federalism & the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 857-58 (1982) ("What angers most westerners is not the fact of federal ownership, but the federal government's insistence that it is entitled to exercise power 'without limitation.' When this sovereign power is wielded by a continually changing parade of federal administrators, each with a different agenda, the situation becomes intolerable.")).

²²² Bill Hedden, *The Monument in a Changing West*, 21 J. LAND RESOURCES & ENVTL. L. 535, 535 (2001).

²²³ *Id.*

²²⁴ Robert L. Glicksman, *Fear and Loathing on Federal Lands*, 45 U. KAN. L. REV. 647, 665 (1997).

²²⁵ *Id.*; *see also* HEADWATERS ECONOMICS, *supra* note 157, at 1 (reporting that 44% of total private wage and salary employment, the equivalent of 1,630 jobs, were associated with travel and tourism in Utah and that, according to the Outdoor

favor family ranching. Declining per capita beef consumption, overseas competition, and consolidation of packing houses have driven beef prices down at the same time that ranchers, who depend on federal grazing leases, face an increasingly complex regulatory environment that raises operating costs and increases uncertainty.”²²⁶ Indeed, long before designation of the Grand Staircase-Escalante National Monument. Traditional jobs like agriculture, mining, and timber “were becoming a smaller share of the overall economy, but they held steady after the monument’s designation.”²²⁷

Today, government services, mining, and construction are the principal income-producers in San Juan County, the location of the controversial Bears Ears and Grand Staircase-Escalante national monuments.²²⁸ The federal government is still the top employer in the country,²²⁹ which is not surprising as the federal government owns 60% of the land in the county.²³⁰ The public reaction to the recent designation of these two monuments in the county may reflect “a new reality in which the economic benefits of recreation on the public lands exceed economic benefits of alternative uses.”²³¹ Illustrating this change, a January 2017 poll of Utah residents showed that sixty percent of respondents wanted the designations to remain and that ninety-five percent recognized that opportunities for outdoor recreation at national parks in Utah were a “boon” to the state, in 2015 generating nearly \$850 million per year in visitor spending and creating 14,000 jobs that paid \$435 million.²³²

Industry Association, recreation contributes more than \$12 billion annually to the state’s economy).

²²⁶ Hedden, *supra* note 222, at 539; *see also* Glicksman, *supra* note 224, at 665 (“The West, surprisingly, is now the most urbanized scion of the country, and traditional industries such as farming, mining, ranching, and logging contribute less to state economies than they used to.”).

²²⁷ HEADWATERS ECONOMICS, *supra* note 157, at 12.

²²⁸ Julie Turkevitz, *A Vast Divide: Fight Intensifies as Trump Rethinks Monument Status for Utah Expanse*, N.Y. TIMES, May 15, 2017, at A11; *see also* Headwaters Economics, *supra* note 157, at 1 (service jobs in the Grand Staircase-Escalante region “account for the majority of employment growth”); *see also id.* (from 2001-2015 in that region, population grew by 13%, jobs by 24%, real personal income by 32%, and real per capita income by 17%).

²²⁹ Hedden, *supra* note 222, at 537.

²³⁰ Turkevitz, *supra* note 228, at A11.

²³¹ Lin, *supra* note 17, at 724.

²³² Darryl Fears, *Bears Ears is a national monument now. But it will take a fight to save it*, WASHINGTON POST, Mar 23, 2017,

But a shifting regional economy has not caught up with the anti-federal government feelings of the residents, and indeed may be provoking them. “Rebelling against government has been in the hearts of the ordinary American citizens ever since Colonial days,”²³³ and in no place is that more true than the Intermountain West perhaps because of these changes to the area’s economic and social equilibrium.²³⁴ The area has gone through a succession of anti-federal government movements, like the Sagebrush Rebellion,²³⁵ the Wise Use Movement,²³⁶ and now the County Supremacy Movement.

The Wise Use Movement focused on the threats posed to western communities by environmentalists and the need for stronger protection of private property rights. “Their goal, like that of the Sagebrush Rebels before them, was the transfer of undeveloped western federal lands to the private sector for commercial exploitation.”²³⁷ The County Supremacy Movement, the latest iteration of the Sagebrush Rebellion, “was born in Catron County, New Mexico, which in 1991 passed the

<http://www.washingtonpost.com/national/bears-ears-is-a-national-monument-now-but-it-will-take-a-fight-to-save-it> (noting the importance of the \$1.3 billion economic impact of parks and monuments, during the 2013 government shutdown, the state “paid the Park Service to keep them open.”).

²³³ Reed, *supra* note 127, at 530.

²³⁴ Glicksman, *supra* note 224, at 665 (historian Eric Hobsbawm describes a particular form of rural social unrest, which he calls social banditry, as “most likely to become a major phenomenon when the . . . social equilibrium is upset: during and after periods of abnormal hardship, such as famines and wars, or at the moments when the jaws of the dynamic modern world seize the static communities in order to destroy and transform them.”).

²³⁵ *Id.* at 652 (“The forerunner of the claims by the officials of Nye County, Nevada and Garfield County, Utah that they had the right to control activities on the federal lands was the Sagebrush Rebellion of the mid-1970s. Led by western ranching interests opposed to increased federal land use regulation, the rebels sought the transfer of title to millions of acres of federal lands to the states containing them . . . by the mid-1980s, the rebellion had fizzled out.”). See Eisenberg, *supra* note 185, at 63 n.34 (quoting former Interior Secretary Bruce Babbitt as saying “It is easy to dismiss the motives of the small group of stockmen and their political allies who have revived the rallying cry of states’ rights for their own benefit. But the considerable support that the Sagebrush Rebellion has gained in the West reflects a deep-seated frustration with what is perceived to be heavy-handed, arbitrary, and unreasonable federal regulation of public lands.”).

²³⁶ Glicksman, *supra* note 224, at 653 (“The successor to the Sagebrush Rebellion was the Wise Use Movement, born around 1988 in reaction to the increased emphasis placed on preservation of federal lands and resources.”).

²³⁷ *Id.* at 653.

first so-called ‘custom and culture’ ordinance.”²³⁸ Supporters of these ordinances maintain that their intent is to foster “the ‘American tradition of self-government’ by reducing bureaucracy and increasing economic stability.”²³⁹ Glicksman maintains that once the rhetoric of the County Supremacy movement and its focus on culture and custom is “stripped away,” the movement is all about rejecting change and maintaining “traditional access rights and prerogatives.”²⁴⁰ Regardless of how these groups self-describe, “it is difficult to distinguish the objective sought in Catron County from the nullification, not of all federal laws, but of those federal policies plans and practices related to land, water and wildlife which were not to the liking of the county government.”²⁴¹

The County Supremacy Movement, like its predecessor movements, is built on myth. There are no laws at the federal or even state level requiring deference to custom and culture, despite the passage of “custom and culture” ordinances, discussed above. As Reed says, the theory “teeters upon the slenderest of reeds”²⁴² Reed adds that “[t]he county supremacy ordinances have the durability of cow chips,” and the concept of county supremacy is little more than “a gaseous myth,” to which westerners seem to be especially susceptible.²⁴³ But that does not

²³⁸ *Id.* at 654; *see also id.* at 656 (“The *Kleppe* decision [*Kleppe v. New Mexico*, 426 U.S. 529 (1976)] should have put an end to the spurious notion that state or local governments have the right to dictate how the federal government may use and restrict its own lands. But the County Supremacists and their ideological kindred continue to press their claims which, despite refinements, still fly in the face of precedent.”).

²³⁹ *Id.* at 660. *But see* Reed, *supra* note 127 (quoting Bill Welsch of Lewiston, in Trinity County in northern California, as saying that “an honest search to discover the local custom and culture would produce something different: ‘The custom of our past is to seize land by force from the natives, plunder the resources using slave and child labor, wash away land with hydraulic mining and clear-cut virgin forests.’”).

²⁴⁰ Glicksman, *supra* note 224, at 666. Reporting on the comments by a senior fellow at the Cato Institute, a conservative think tank located in Washington, D.C., Glicksman says he described the supporters of the County Supremacy Movement as wanting to do is “build walls against the future.” *Id.* Glicksman identifies another “prominent theme in the recent movement to reform environmental policy,” namely that federal regulatory authority infringes of private property rights. *Id.* at 660. *But see* Eisenberg, *supra* note 185, at 65 (identifying three “colorable claims” made by these groups “justifying local outrage”).

²⁴¹ Reed, *supra* note 127, at 543.

²⁴² *Id.* at 526.

²⁴³ *Id.*

matter to its participants; according to Reed, “it is folly to underestimate the political power of myths.”²⁴⁴

One striking aspect of the County Supremacy movement that separates it from the groups that preceded it is the strength of the hostility to the federal presence and a “willingness” to resort to extreme, sometimes violent behavior, an attitude that has not yet infected the debates about reforming pollution control laws.²⁴⁵ This violence, Glicksman says, is attributable to another unique feature of western culture, “the tradition of lawlessness in the West,” a tradition based in part on reality and in part on “myth.”²⁴⁶ “Diatribes” like those emanating from a Congresswoman from Wyoming, that the West was not settled by “wimps and faint-hearted people,”²⁴⁷ “have been enthusiastically received in some corners of the West because of a combination of resentment over the disappearance of longstanding traditions and practices and fear of what the future will bring.”²⁴⁸ In this mix of anger and anxiety, the federal government becomes “a convenient scapegoat” for the repressed frustrations of a regional population undergoing unwanted and destabilizing change.²⁴⁹

Another important strand of western thinking that plays into these movements is the “tradition of subjugating nature,”²⁵⁰ which has encouraged the building of dams, making money and “packing in more people,” regardless of the environmental and societal costs. At “a very deep level,” conflicts over monument designations, like Grand Staircase-Escalante and Bears Ears, “are rooted in the divergent moral and cultural values that generate differing views of the relationship between humans and nature.”²⁵¹ Hence, the withdrawal of lands that have traditionally

²⁴⁴ *Id.*

²⁴⁵ Glicksman, *supra* note 224, at 661. Glicksman cites as an example of this President Clinton and Interior Secretary Babbitt being burned in effigy. *Id.* at 666.

²⁴⁶ *Id.* at 661.

²⁴⁷ 141 CONG. REC. H8789, H8790 (daily ed. Sept. 12, 1995 (remarks of Rep. Chenoweth)), quoted in Glicksman, *supra* note 224, at 664.

²⁴⁸ Glicksman, *supra* note 224, at 664.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 663 (attributing these thoughts to DONALD WORSTER, UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST 90 (1992)).

²⁵¹ Sarah Trainor, *Finding Common Ground: Moral Values and Cultural Identify in Early Conflict Over the Grand Staircase-Escalante National Monument*, 28 J. LAND RESOURCES & ENVTL. L. 331, 355 (2008); *see also id.* at 354 (“We have seen how for each group: the Southern Paiute, descendants of Mormon pioneers, and wilderness advocates, moral and cultural values of the landscape constitute an integral part of the identity of group members, both individually and collectively.”)

been exploited for mining, oil and gas development, and grazing is unfathomable to traditionalists in the west and deeply threatening to established ways of living.

Traditions and engrained attitudes die hard and in the designation of national monuments have found an opportune target.

There is a stream, that sometimes widens into a river, flowing through our history from the Whiskey Rebellion through the Know Nothing movement to the Populists to Ross Perot. The best government is the least government. The next best government is local government. Those people back there don't understand our territory or our ways.²⁵²

In 2012, for example, Utah passed a law demanding that the federal government hand over thirty-one million acres of federal lands, and the state is ready to go to court if the government does not accede to the demand.²⁵³ “Thirty-six similar bills have been introduced in 10 other western states during the current legislative cycle.”²⁵⁴ As Sanders notes, one “can dismiss the Oregon standoff as fringe activism, and the land transfer movement as wishful thinking, but they are emblematic of a long-running and very real debate over the proper role of the federal

Yet, each group has a different cultural and moral narrative for the relationship between humans and nature.”); *id.* at 355 (The conflict over monument designations “is incomplete and oversimplified when characterized as conflict over jobs versus nature or over private versus public rights to access.”).

²⁵² Reed, *supra* note 127, at 530; *see also id.* at 530 (“Even in times of very popular presidents . . . there have always been strident dissenters complaining about the federal government.”).

²⁵³ Sanders, *supra* note 9, at 3. Ironically, Utah has the strongest support for federal-state collaborative efforts of any state in the Intermountain West, “with respondents favoring collaboration outnumbering those who favor a ‘no compromise’ approach by an eleven to one margin.” John C. Ruokey & Robert B. Keiter, *Alternatives to the Transfer of Public Lands Act*, S.J. Quinney College of Law, RES. PAPER No. 157 (March 1, 2016), at 9.

²⁵⁴ Sanders, *supra* note 9, at 3. Eight members of Congress who introduced legislation this session to weaken public lands protections also received “hefty campaign contributions from powerful players in extractive industries, such as Koch Industries and Chevron.” Rebecca Worby et al., *Eight Lawmakers Whose Bills Attack Public Lands*, HIGH COUNTRY NEWS, June 10, 2017, at 1, http://www.hcn.org/issues/49.10/the-western-lawmakers-whose-bills-attack-public-lands/print_view. However, retiring senator Jason Chaffetz (R. Utah) withdrew his bill to sell 3.3 million acres of public lands in Utah in response to “backlash” from his constituents. *Id.*

government in owning and managing American lands.”²⁵⁵ Many of the earlier advocates of transferring federal land to the states have shifted their efforts to nullifying national monuments and restricting presidential authority under the Antiquities Act; Bears Ears has become the flashpoint of that debate.²⁵⁶

b. *The destabilizing impact of monument designation on host communities.*

Monument designations disrupt the expectations of people who are used to using public lands as though they, and not the American people, owned them.²⁵⁷ They worry that the withdrawal of lands into a more protected status will curtail largely unregulated uses of these lands for recreation as well as grazing and extractive activities, thus changing how people are accustomed to conducting their lives. They fear economic harm to individuals, local communities, and the state.²⁵⁸ Designation

²⁵⁵ Sanders, *supra* note 9, at 3; *see also id.* (“The Malheur standoff and the state land transfer movement will join the Sagebrush Rebellion of the 1970s and 1980s, and the ‘wise use’ movement of the 1980s and 1990s, as manifestations of the fractious dispute among ranchers, loggers, miners, private property activists, conservationists, federal land managers, and others about how best to manage our nation’s federal public lands.”); Eisenberg, *supra* note 185, at 56 (“supporters of . . . the Movement to Transfer Public Lands, encompassing such sub-movements as the Sagebrush Rebellion, the Wise Use Movement, and the County Supremacy Move—all maintain some version of the narrative that federal ownership is illegal or mismanaged, and thus the land should be transferred to the states or counties, or privatized outright.”).

²⁵⁶ Tay Wiles, *Land transfer advocates steer their focus to monuments: A transfer movement moves to rescind monuments and weaken the Antiquities Act*, HIGH COUNTRY NEWS (Apr. 12, 2017), at 1, http://www.hcn.org/articles/Public-land-transfer-advocates-target-national-monuments-bears-ears/print_view. Six Western states, including Utah, have pending resolutions or bills to revoke or shrink the size of national monuments. *Id.* at 2. Sen. Dean Heller of Nevada sponsored the Nevada Land Sovereignty Act, which would prevent future presidents from using the Antiquities Act to designate monuments in that state. *Id.* at 3. Utah Governor Herbert’s resolution would rescind Bears Ears and urge Congress to shrink Grand Staircase-Escalante. There is also a counter-movement among environmentalists and sportsmen, which may have been responsible for Nevada legislators discussing a bill to support the Antiquities Act and the Gold Butte and Great Basin National Monuments. *Id.* at 4

²⁵⁷ Lin, *supra* note 17, at 722.

²⁵⁸ *See* Lin, *supra* note 17, at 724 (“Nevertheless, even if effects on such interests ultimately do not give rise to takings, the monument designations admittedly have adverse economic impacts on certain users of the federal lands.”); Sanders, *supra*

could result in an emigration of residents who can no longer make a living in the area or who cannot afford the higher taxes which may accompany increased property values, and greater need for public service like law enforcement or search and rescue units. Existing residents worry that the influx of tourists and new businesses drawn to the area by the new monuments will demand non-traditional skills, like those associated with service and hospitality industries, and will destroy the rural character that has defined the area and its population for generations.²⁵⁹

But fears about discontinuation of traditional uses of lands within the boundaries of a national monument are not well founded. These lands are subject to management standards, which can allow most of these existing uses to go forward.²⁶⁰ National Parks, monuments, and other protected areas attract visitors, who spend money in the surrounding communities;²⁶¹ money that will support new schools and additional public service obligations.²⁶² Right before President Clinton designated Grand Staircase-Escalante National Monument in 1996, 47% of Utahans opposed its creation.²⁶³ Half a year later, that number had sunk to 32%.²⁶⁴ A year after the designation, “the number of tourists stopping by the visitor center had jumped by 58%, and ten years later, they and the monument’s 430 full-time jobs were contributing at least \$26 million to the local economy.”²⁶⁵

note 9, at 6 (“Regarding economic impacts, critics contend that monuments, by restricting allowable uses, destroy long-established enterprises on public lands. The effects can be especially severe in the remote places in the West where most monuments are created and job opportunities are few. President Clinton’s 1996 Grand Staircase-Escalante Monument sequestered what was then the largest undeveloped coal deposit in the United States, while the national monument reportedly being considered for the Owyhee Canyonlands (which helped precipitate the recent standoff at the Malheur National Wildlife Refuge in Oregon) could close nearly 2.5 million acres to cattle grazing.”).

²⁵⁹ Lin, *supra* note 17, at 724-25.

²⁶⁰ Squillace, *supra* note 25, at 573-74 (noting that valid existing rights and proclamations that allow new land uses, even extractive ones to continue means that “the temporary protection of these lands and resources in a national monument preserves, rather than limits, the options available to the Congress in deciding on the long-term management of those lands.”).

²⁶¹ Sanders, *supra* note 9, at 6.

²⁶² See e.g., HEADWATERS ECONOMICS, *supra* note 152 at 26 n.160.

²⁶³ Sanders, *supra* note 9, at 6.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

Thus, national monuments “don’t kill local economies and jobs so much as transform them”²⁶⁶ from traditional uses to new ones and help preserve the existing landscape. As Alan Simpson, a longtime Republican Senator from Wyoming, said about the Jackson Hole National Monument:

All of us [those who now live in Jackson Hole] agree that Teton County would not look like it does today if they hadn’t (established the monument and expanded the park). Instead of open space there would be gas stations, motels and other businesses on Antelope Flats north of Jackson where the view of the Tetons remains largely unobstructed by development. It was great in hindsight.²⁶⁷

But that transformation is part of the problem for traditionalists, which has found new voice in response to recent designations of national monuments.

This Part has shown how little merit there is to the arguments raised by opponents of the Antiquities Act and of specific monument designations like Bears Ears and Grand Staircase Escalante. Legal complaints against the statute under the Property Clause, the APA, and NEPA have little merit, and while the law is short on public participation, Congress has seen fit not to amend it to correct this democracy deficit. In fact, more process and public participation might hinder future designations, thus undermining the Act’s purpose.

Finally, fears that designation of national monuments would negatively affect the economies of host communities turns out not to be true—quite the contrary, those economies improve post-designation. What is true, however, is that these designations are occurring during a time and in a part of the country where change is already occurring, and that itself is destabilizing and a source of animosity to the federal government as well as to federal lands, including national monuments. The next Part discusses a sitting President’s authority to revoke, directly or indirectly, a prior President’s designation of a national monument.

²⁶⁶ *Id.*

²⁶⁷ Squillace, *supra* note 25, at 498 n.159 (quoting former Senator Alan K. Simpson, previously a strident opponent to the Jackson Hole National Monument). As another indication of the monument’s contribution to local life and the area’s economy, Congress made it into a National Park in 1950. Leshy & Squillace, *supra* note 8, at A23.

IV. NEITHER THE TEXT OF THE ANTIQUITIES ACT NOR INTERPRETIVE CANONS AUTHORIZE A PRESIDENT DIRECTLY OR INDIRECTLY TO REVOKE OR AMEND A PRIOR PRESIDENT'S DESIGNATION OF A NATIONAL MONUMENT

What counts as an abuse of executive discretion, and how best to try to prevent those abuses through law, extralegal norms, or politics, will remain among the most pressing questions at the center of constitutional governance in the United States.²⁶⁸

The previous Part of the article looked at arguments opposing and supporting the Antiquities Act and concerns the designation of a national monument creates in a host community. This Part examines the authority of a President to override a decision of a prior President to designate a national monument when he does not like that decision. Some say this authority inheres within the general powers of the President; others disagree. Like any question involving a statute and authority delegated under it,²⁶⁹ the answers, if they can be found, lie in statutory text, as elucidated by canons of statutory interpretation, the Act's legislative history, and the text's application by others, including subsequent congressional action. It is to these analytical tools the Article now turns to answer the Part's question.

Since prior sections of the article have discussed the Act's legislative history, its application by prior Presidents, and how courts have interpreted it, this section will focus on the statutory text and its reaffirmation in FLPMA, on whether the President might have an implied power to affect a national monument, and on canons of statutory interpretation. The Part concludes that only Congress has the power to affect a previously designated national monument, and that all contrary conclusions based on statutory text, interpretive canons, and implied powers fail to support the President having this power. To cede to Presidents this power in defiance of statutory text would defy norms of separation of powers and delegated authority, as discussed in the last Part of the Article.

A. *Section 204(j) of FLPMA Reaffirmed the Textual Clarity of Section*

²⁶⁸ Coglianese & Yoo, *supra* note 162, at 1606.

²⁶⁹ Arnold & Porter, *supra* note 12, at 1 (“Whether or not the President has the power unilaterally to revoke a National Monument designation therefore depends on whether that power is expressly or by implication delegated to the President by an Act of Congress.”).

431 of the Antiquities Act that Only Congress Can Rescind a National Monument or Modify its Boundaries

The statutory text of section 431 of the Antiquities Act gives the President only the power to identify and then protect historical and pre-historical structures and objects of scientific interest. The Act gives no authority to the President to rescind or “de-designate” a designated national monument, shrink its boundaries, or change any conditions in the designation proclamation. Those powers to revoke or amend a presidential designation reside only in Congress and implicitly in the courts, if the Presidential designation violates the Act in some way. No judicial decision could be found authorizing a President to do either,²⁷⁰ and no canon of statutory interpretation or other interpretive trope can force a contrary meaning to the text.

Congress affirmed its authority to revoke or modify national monuments in the Federal Land Policy and Management Act (FLPMA) (1976).²⁷¹ FLPMA was preceded by a 1964 congressional commission which recommended that “large scale withdrawals and reservations for the purpose [among other things] of establishing or enlarging” national monuments “should be reserved to congressional action.”²⁷² The House Report on FLPMA “made clear that . . . [i]t would also specially reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.”²⁷³ The House Committee Report, thus, specifically reiterated that only

²⁷⁰ BALDWIN, *supra* note 22, at 3 (“We have found no cases deciding the issue of the authority of a President to revoke a national monument. While in FLPMA Congress expressly limited the authority of the Secretary of the Interior to revoke monument withdrawals and reservations, that language arguably does not affect the President's authority under the 1906 Act, which FLPMA neither amended nor repealed. No President has ever revoked a previously established monument. That a President can modify a previous Presidentially-created monument seems clear. However, there is no language in the 1906 Act that expressly authorizes revocation; there is no instance of past practice in that regard, and there is an attorney general's opinion concluding that the President lacks that authority.”).

²⁷¹“Establishing Public Land Policy; Establishing Guidelines for its Administration; Providing for the Management, Protection, Development, and Enhancement of the Public Lands; and For Other Purposes,” H. R. REP. 94-1163 (1976) (hereafter the “House Report”) at 9.

²⁷² Arnold & Porter, *supra* note 12, at 4 (quoting Commission report).

²⁷³ *Id.* at 6 (quoting House Report, at 9).

Congress had “the authority to modify and revoke withdrawals for national monuments under the Antiquities Act.”²⁷⁴

FLPMA repealed most of the President and Secretary of Interior’s land withdrawal authority²⁷⁵ and subjected future withdrawals to additional congressional scrutiny and approval.²⁷⁶ “FLPMA additionally repealed the implied general withdrawal authority that had been recognized by the Supreme Court in *United States v. Midwest Oil*.”²⁷⁷ Amidst all this repealing and cabining of Secretarial withdrawal authority, FLPMA specified in section 204(j) that the Secretary of Interior “could not make, modify, or revoke any withdrawal created by Act of Congress or ‘modify or revoke any withdrawal creating national monuments under the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431-433).”²⁷⁸

While section 204(j) refers to the Secretary’s authority to withdraw land and not the President, “the breadth of the committee report language” supporting the legislation indicates that Congress could have thought that preventing the Secretary from affecting any previously designated national monument would, in effect, control a President from doing the same thing.²⁷⁹ “Whether this is a fair reading of FLPMA and

²⁷⁴ *Id.* at 1-2.

²⁷⁵ Lin, *supra* note 17, at 710 (“The 1976 passage of the Federal Land Policy and Management Act (FLPMA) drastically curbed and modified the executive branch’s withdrawal authority. FLPMA repealed all or part of twenty-nine statutes that had given the President authority to create, modify, or terminate withdrawals for such purposes as reclamation, native purposes, power site reserves, town sites, stock driveways, and public water reserves.”).

²⁷⁶ BALDWIN, *supra* note 22, at 2; *see also* 43 U.S.C. § 1714(c) (2014).

²⁷⁷ Lin, *supra* note 17, at 710 (commenting in addition Congress noted that this implied authority was the main authority that the executive branch had used to make withdrawals).

²⁷⁸ 43 U.S.C. § 1714(j) (2014). Section 204(j) also prohibited the Secretary to “make, modify or revoke any withdrawal created by Act of Congress” or “modify or revoke any withdrawal which added lands to the National Wildlife Refuge System” prior to the enactment date of FLPMA; *see also* BALDWIN, *supra* note 21, at 2. According to Baldwin, this “provision came from the House bill, H.R. 13777, as introduced and as reported. The relevant committee report states: ‘[the bill] would also specifically reserve to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act . . . These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.’” *Id.* at 4.

²⁷⁹ BALDWIN, *supra* note 22, at 5 (one might “argue that the general controls in FLPMA over large withdrawals made by the Secretary were also intended to

whether controlling withdrawals or revocations made by the Secretary effectively controls the President under the Antiquities Act are issues that are not clear.”²⁸⁰ What is clear is that although FLPMA gave the Secretary of the Interior some authority to withdraw public lands, it specifically stated that he could not revoke or modify in any way a previously designated national monument under the Antiquities Act.²⁸¹

In section 204(c) of FLPMA, Congress reasserted its control over withdrawals and reservations of public lands and limited actions that could be taken by the President or by his surrogate the Secretary of the Interior with respect to those lands.²⁸² It did this by requiring congressional approval of large land withdrawals and repealing earlier laws, which gave that authority to the President. In section 204(f), Congress repealed the President’s authority “to make withdrawals implied by the acquiescence of Congress in the actions of previous Presidents.”²⁸³ However, amidst all of this taking back of Presidential power over the nation’s lands, Congress in FLPMA “conspicuously” retained the President’s authority under the Antiquities Act to designate national monuments and withdraw land necessary for their maintenance, without any explanation of why it made that decision, implying some

control withdrawals made by the President under the 1906 Act.”); *see also* Squillace et al., *supra* note 5, at 60-64 (discussing the legislative history of § 204(j) making it clear that only Congress possesses the authority to revoke or “downsize” a national monument).

²⁸⁰ BALDWIN, *supra* note 22, at 3. Brown argues against construing this report language as repealing the authority of the President to make large scale withdrawals “because courts are reluctant to find statutes repealed by implication and this would seem especially true of a statute that so carefully and extensively repealed or modified so many other acts, but did not amend or repeal the Antiquities Act.” *Id.* Indeed, uncodified section 701 (a) of FLPMA expressly states that the Act should not be construed to repeal any existing law by implication, and Presidents have created large-acreage monuments since enactment of FLPMA.” *Id.*

²⁸¹ Arnold & Porter, *supra* note 12, at 6 citing 43 U.S.C. § 1714; *see also* BALDWIN, *supra* note 21, at 3 (quoting the report as saying “[the bill] would also specifically reserve to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act . . . These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.”).

²⁸² BALDWIN, *supra* note 22, at 3; *see also* Lin, *supra* note 17, at 711 (“FLPMA provided to the Secretary of the Interior a new, more limited withdrawal authority and subjected it to congressional veto and other procedural restrictions. This authority cannot be used to modify or revoke a withdrawal previously made by Congress, or to make withdrawals ‘which can be made only by Act of Congress.’”).

²⁸³ *See* Sec. 304(f), 43 U.S.C. § 1714(f); *see also* BALDWIN, *supra* note 22, at 3.

obviousness to the choice.²⁸⁴

B. Interpretive Canons and Other Forms of Guidance on Statutory Meaning Are Either Irrelevant or Confirm a Limited View of Presidential Authority under the Act

“[T]he body of the law should make sense, and . . . it is the responsibility of courts, within the permissible meanings of the text, to make it so.”²⁸⁵ Toward this end, when there is textual ambiguity, courts often use interpretive canons or other rules to help clarify statutory meaning. Canons are basically “interpretive principles” judges use when faced with ambiguous statutory text.²⁸⁶ Despite some unease with their use,²⁸⁷ canons and interpretive principles are easy for judges to apply and help assure some coherence and consistency in judicial decision making.²⁸⁸ In addition to canons, courts use presumptions and legislative history to help “resolve statutory ambiguity.”²⁸⁹

Gluck and Bressman divide interpretive canons into three groups: (1) “textual canons,’ which are default rules about how text is drafted,” like *noscitur a sociis*; (2) “substantive canons,’ which are policy-based presumptions,” like Chevron deference; and (3) “extrinsic canons,’ which are outside sources, such as legislative history.”²⁹⁰ There are also clear statement rules, which imply that drafters use what Gluck and Bressman call ‘magic words’ to achieve an interpretation that may contradict a constitutional default rule, citing as an example the rule

²⁸⁴ BALDWIN, *supra* note 22, at 1; *see also* Lin, *supra* note 17, at 711 (“FLPMA’s sweeping changes, however, did not affect the President’s withdrawal authority under the Antiquities Act.”).

²⁸⁵ Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside-an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 961 (2013) (quoting former Justice Antonin Scalia).

²⁸⁶ *Id.* at 924.

²⁸⁷ *Id.* at 1019 (“The canons provide at least a veneer of legitimacy by allowing judges to point to something other than their own personal preferences or intuitions to justify their decisions. At the same time, the legitimacy of the canons themselves is a cause for discomfort. Judges, and even scholars, seem reluctant to discuss more frankly where the canons come from and whether at least some are necessarily judicial creations rather than reflections of legislative intent or practice.”).

²⁸⁸ *Id.* at 925; *see also id.* at 961 (such canons derive their most powerful justification from ‘rule of law’ norms—the idea that interpretive rules should coordinate systemic behavior or impose coherence on the corpus juris.”).

²⁸⁹ *Id.* at 924.

²⁹⁰ *Id.* at 924-25.

requiring “‘unmistakably clear’ language that Congress intends to abrogate the states’ immunity from suits before a statute will be so construed.”²⁹¹ Then there is the major questions doctrine, which “supports a presumption of nondelegation in the face of statutory ambiguity over major policy questions or questions of major political or economic significance on the theory, as Justice Scalia has memorably described it, that Congress ‘does not . . . hide elephants in mouse holes’”²⁹² And finally the “constitutional avoidance” rule, favoring an interpretation of a statute that comports with the Constitution.²⁹³

The only textual canon of any possible relevance with respect to the meaning of section 431 of the Antiquities Act is *expressio unius* (presence of one term in the statutory text implies a deliberate exclusion of any other terms).²⁹⁴ This canon “instructs that when a legal instrument grants a power and specifies the mode of its implementation, interpreters should treat the specified mode as exclusive.”²⁹⁵ The rule is commonsensical—“a lawmaker would not take pains to prescribe particular means of carrying out a power if other methods would do.”²⁹⁶ Thus, when Congress specifically gave affirmative authority to the President under the Antiquities Act to protect structures and objects of historical and scientific interest and withdraw associated land for their

²⁹¹ *Id.* at 942. “In addition there are ‘nearly a dozen’ administrative law canons. The spectrum extends from *Chevron*, which presumes that Congress intends to delegate interpretive authority to an agency whenever it leaves an ambiguity in a statute that the agency implements; to *Mead*, which presumes that Congress does not intend to delegate interpretive authority without the authorization of relatively formal procedures (such as notice-and-comment rulemaking); to the ‘major questions’ doctrine, which presumes that Congress does not intend to delegate interpretive authority over major policy questions to an agency, even if it leaves a statutory ambiguity.” *Id.* at 990.

²⁹² *Id.* at 1003.

²⁹³ Dawn E. Johnsen, *What’s a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 406 (2008) (commenting on President Bush’s use of that canon and saying “President Bush’s objections typically took the form of a declaration that he would use the canon of statutory construction known as constitutional avoidance to interpret the statute in a constitutional manner—but that ‘[a]s a practical matter, this form of interpretation amounts to the same thing as an assertion that the President will not enforce or be bound by a particular provision of law.’”).

²⁹⁴ Gluck & Bressman, *supra* note 285, at 924.

²⁹⁵ Jack Goldsmith & John Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1859 (2016).

²⁹⁶ *Id.*

management, but withheld any power to do more, like revoke a previously designated monument or change its boundaries, courts and Presidents should treat that authority as exclusive.

None of the other textual, substantive, or extrinsic canons supports a contrary interpretation of the President's limited authority under the Antiquities Act are of any help. There is no list of terms in section 431 to which *noscitur a sociis* could apply, what legislative history there is supports a sharply curtailed grant of authority to the President to designate and protect monuments, not to rescind or amend prior designation, and neither the clear statement rule nor major questions doctrines is relevant, as no abrogation of power or diminution in state authority is involved in withdrawing and protecting land that already belongs to the federal government. Nor are there major policy questions or questions of major political or economic import involved in a designation of a national monument as the effects, to the extent they are negative, are highly localized.

Indeed, no canon of statutory interpretation or interpretive rule or doctrine can read into the text of the Antiquities Act a presidential authority to rescind or modify a previously declared national monument because there is no textual ambiguity on that issue.²⁹⁷ Even if there was ambiguity, there are no external signals, such as longstanding interpretations of the statutory language, legislative history directives, and "linguistic signaling," which would reveal a congressional intent to delegate this authority to the President.²⁹⁸ Quite the contrary, the designation of 157 monuments by sixteen Presidents of both political parties, as well as affirming judicial opinions and congressional action, make it clear that the President possesses only delegated authority to designate and protect monuments, not to rescind or amend their designation. And any question raised in the legislative history of section 431 about a presidential power to revoke or modify a previously designated national monument was firmly laid to rest in section 204(j) of FLPMA, which, as discussed previously, strongly implies Congress reserved that authority to itself and not the President.²⁹⁹ Any

²⁹⁷ *But see* Gluck & Bressman, *supra* note 285, at 1013 (referring to court review under the *Chevron* doctrine and saying, "[c]ourts currently consider the relative clarity of the text at Step One, but our findings indicate that textual clarity is not always a reliable signal of delegation. As an initial matter, courts often look to textual and substantive canons as indications of congressional intent in deciding whether statutory text is clear.").

²⁹⁸ *Id.*

²⁹⁹ *See* above, Part IV.A.

interpretation of section 431 to the contrary would countenance “a usurpation of congressional powers by the Executive Branch,”³⁰⁰ as discussed in Part V.A.

An additional limit on executive discretion are so-called unwritten, but nonetheless “obligatory rules of the political game.”³⁰¹ Vermeule divides politics into “two critically different subcategories: ordinary contingent politics and moralized politics, in which there are widely shared unwritten rules of the political game.”³⁰² With regard to the second category, moralized politics, rules regarding them “are founded on a sense of obligation, and a public act violating the rules provokes retaliatory sanctions or moralized outrage.”³⁰³

Thus, it is conceivable that if President Trump changed the rules of the game and exercised a power he does not have, like revoking the prior designation of a national monument or shrinking its boundaries, he might enrage supporters of that monument who, feeling morally wronged, might seek retaliatory sanctions against the President in court or in Congress. The resultant political backlash or public anger of the people most affected when a convention is transgressed may occur even if the underlying law is not violated,³⁰⁴ which it clearly would be in this

³⁰⁰ Arnold & Porter, *supra* note 12, at 2; *see also* Rasband, *supra* note 191, at 629-30 (“there is no question of Congress’ power to revoke or modify a national monument designation. Congress has plenary power over the public lands under the Property Clause and Congress has abolished a number of monuments in the past, although typically only to include the monument lands within a national park instead.”).

³⁰¹ Vermeule, *supra* note 190, at 1949.

³⁰² *Id.* at 1955-56.

³⁰³ *Id.*; *see also id.* at 1956 (“[C]onventions may, but need not, be based upon the force of ‘public opinion.’”). “Wayne Aspinall of Colorado, the powerful chair of the House Committee on Interior and Insular Affairs, that Aspinall blocked funding for the C&O Canal National Monument for many years. Aspinall’s action, like the action of an earlier Congress with respect to the Jackson Hole National Monument, served as a continuing warning to future presidents that national monument proclamations under the Antiquities Act carried risks. A President might be able to preserve the status quo on public lands through a monument proclamation, but he might be denied the money that was needed to protect the monument’s resources.” Squillace, *supra* note 25, at 500.

³⁰⁴ Vermeule, *supra* note 190, at 1959 (“There exists a category of executive discretion such that the Executive may do things without violating any law or convention, but will violate a convention, triggering political backlash or public outrage, if the Executive makes explicit that he or she is doing those things. Some

case, making the reaction still more justified. “Politicians believe—with good reason—that the American public cares about the law and will punish a President who flouts it.”³⁰⁵ This is especially true when the result of a President’s actions is not perceived as good³⁰⁶ or the President’s actions are driven by political motives,³⁰⁷ as arguably might be the case here as the President seeks to shore up his political base in the Intermountain West.³⁰⁸

Even if a limited right of Presidents to act on their own without congressional support was viewed as legitimate, for example when Congress does not act to protect some resource or object that is threatened with irreversible harm, a President may hesitate to act out of concern about public anger, “just as he hesitates before exercising his acknowledged right to veto a piece of legislation.”³⁰⁹ Thus, the possibility of public anger and/or “political repercussions” operates as “a plausible mechanism for assuring that self-help stays within tolerable bounds.”³¹⁰ But under the Antiquities Act, Congress has specifically authorized the President to take unitary action to protect threatened resources. So no hesitation is warranted as no boundary between the two

things may be done, but may not be talked about. Making things explicit may be a separate violation.”).

³⁰⁵ *Id.* at 1960 n.61 (quoting Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1748-49 (2016); see also Cary Coglianese & Kirstin Firth, *Separation of Powers Legitimacy: An empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869, 1909 (2016) (“With the addition of our research findings, judges and scholars now have empirical evidence indicating that, in addition to traditional legal and interpretive issues, something else appears to be at stake in the debate over norms of executive power: public perceptions of the legitimacy of law.”).

³⁰⁶ Coglianese & Firth, *supra* note 305, at 1900 (“Furthermore, individuals are discriminating when it comes to allocating credit and blame. They are generally more willing to assign blame to the President when there are poor outcomes than they are to give him credit when things go well.”).

³⁰⁷ *Id.* (“Our decision to focus on less contentious issues is reinforced by other empirical research demonstrating that politicization of legal actors and institutions significantly weakens public legitimacy in these institutions.”).

³⁰⁸ Political motivations might be attributed to President Clinton’s last minute decision to designate Grand Staircase-Escalante National Monument timed to help with Vice President Gore’s presidential election campaign. See Lin, *supra* note 17, at 736-37 (commenting on the timing of President Clinton’s national monument proclamations).

³⁰⁹ Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1748-49 (2016).

³¹⁰ *Id.*

branches has been transgressed; nor would public anger, like that currently directed at President Obama's designation of Bears Ears National Monument, be justified. On the other hand, should a sitting President act to revoke or change a prior President's designation without the legal authority to do that, the public might perceive this as flouting the law and be angry.³¹¹

Congress is the best prevention against a President's abuse of the their power under the Antiquities Act to designate a national monument. Congress, at any time, can overturn a presidential designation of a national monument, change its boundaries, or amend the management provisions set out in the designation proclamation.³¹² Indeed, Congress can repeal the Antiquities Act or restrict the exercise of presidential discretion under it.³¹³ "In the end, '[c]ongressional correction remains the most potent check on excesses under the Antiquities Act.'"³¹⁴ Yet, Congress has rarely seen fit to do this, implying some acquiescence in how its law is being implemented.³¹⁵

³¹¹ See e.g. Scott Streater, *Voters want Trump to protect land, keep monuments*, E & E NEWS 1 (June 28, 2017),

<http://www.eenews.net/greenwire/stories/1060056738/print> (reporting on a Theodore Roosevelt Conservation Partnership commissioned poll that found 83% of the respondents supported keeping both the number and size of existing national monuments created by Presidents over the past 30 years); see also Letter from Hector H. Balderas, Attorney General, State of New Mexico, to Secretary Ryan Zinke (May 18, 2017) (copy in possession of the author) (writing in opposition to "any attempt to undo or diminish National Monuments in New Mexico," reminding the Secretary that limitations in the Antiquities Act of undoing prior designations "remain the law of the land," and stating that he fully expected the Secretary's review and recommendations to "stay within the bounds of the law."); Letter from Bob Ferguson, Attorney General of Washington to Secretary Ryan Zinke (May 11, 2017) (copy in possession of author) (threatening litigation if President Trump "seeks to do harm to Washington's National Monuments by eliminating or reducing them").

³¹² Iraola, *supra* note 3, at 188-89.

³¹³ *Id.* Iraola speculates that Congress may need a supermajority to do this. *Id.* at 189 n.139.

³¹⁴ David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 306 (1982).

³¹⁵ Lin, *supra* note 17, at 729 (saying that the times Congress has done this shows that "these checks and balances are actual and not merely theoretical."); see also Arnold & Porter, *supra* note 12, at 5 n.16 ("Congress has abolished a number of National Monuments by legislation. See, e.g., Wheeler National Monument in 1950 (64 Stat. 405); Shoshone Cavern in 1954 (68 Stat. 98); Papago Saguaro in 1930 (46 Stat. 142); Old Kasaan in 1955 (69 Stat. 380); Fossil Cyad in 1956 (70 Stat. 898);

C. The President Lacks Implied Power to Revoke or Modify a Previously Designated National Monument

Since statutory text does not directly support presidential revocation or modification of a prior monument designation and canons offer no interpretive gloss that can change unambiguous text, a question remains whether that power can be implied from the language of the Act or from an inherent power the President has over the nation's public lands.³¹⁶ The answer to that question is also no.

Although Presidents reduced or eliminated Indian reservations unilaterally by executive order until Congress acted to prohibit those actions,³¹⁷ “the executive power to *create* the reservation had also been implied . . . from long congressional silence and acquiescence to prior executive order Indian reservations.”³¹⁸ The President's power to create a national monument is textually supported in the Antiquities Act and not a matter of implication. It would seem logical, “therefore, that a court would be much more reluctant to find implied authority to revoke a proclamation issued pursuant to a specific congressional directive,” as opposed to an implied authorization to do so when the initial grant of power was implied as well.³¹⁹

Further, several laws enacted in the same era as the Antiquities Act authorizing the President to withdraw public lands also specifically delegated to the President or the Secretary of the Interior Department the

Castle Pinkney in 1956 (70 Stat. 61); Father Millet Cross in 1949 (63 Stat. 691); Holy Cross in 1950 (64 Stat. 404); Verendrye in 1956 (70 Stat. 730), and Santa Rosa Island in 1946 (60 Stat. 712).”

³¹⁶ Rasband, *supra* note 191, at 625 (“Because there is no express delegation, a president would need to prove that a power to revoke can be implied from the language of the act or can be derived from some inherent executive authority over the public lands.”); Arnold & Porter, *supra* note 12, at 6 (“For the President to have the power to revoke a Monument designation under the Antiquities Act, therefore, the issue is whether that Act, not the Constitution's grant of the executive power to the President, may be interpreted to imply the unstated power to revoke a Monument designation thereunder.”). Rasband adds “[i]ndeed, if a court were to read into the Antiquities Act presidential power to revoke a proclamation, it might prove a pyrrhic victory for those who support revocation because it would suggest that the president has some inherent power to withdraw public lands in the future.” Rasband, *supra* note 191, at 627.

³¹⁷ *Id.* at 625.

³¹⁸ *Id.* at 625-26.

³¹⁹ *Id.* at 626.

power to revoke a prior withdrawal.³²⁰ These provisions would have been “surplusage” in those laws had Congress understood that the power to revoke a withdrawal could be implied from the authority to make a withdrawal or was an inherent power of the President.³²¹

The Attorney General of the United States, in an oft-cited 1938 opinion, characterized as “improper” implying a presidential power to revoke or amend a prior designation of a national monument from the text of the Antiquities Act.³²² In response to a request by President Franklin Delano Roosevelt to rescind a national monument designation by President Coolidge, Attorney General Cummings wrote:

A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.³²³

The Cummings Opinion commented that since there was no separate statutory authority for the President to terminate a monument that a prior President had designated, any authority to do this must be implied by the other powers given the President in the Antiquities Act. Attorney General Cummings reasoned that since the President had no inherent authority over public lands, when he did anything affecting those lands, he was acting only with delegated authority from Congress. This made the designation of a monument equivalent to an act of Congress, leaving

³²⁰ *Id.* (citing the Pickett Act, 36 Stat. 847 (1901) (codified at 43 U.S.C. § 141) (repealed by Pub. L. No. 94-569, § 704(a) (1976)), (“giving Presidents authority to “temporarily withdraw public lands”).

³²¹ Rasband, *supra* note 191, at 627. Similarly, if Congress has delegated the authority to excise or suspend some provision of a law, it “would be conceptually redundant if that authority already existed under the aegis of ‘inherent’ executive power.” Andrew Dudley, *Open Borders: Congressional Delegation of Discretionary Authority to Suspend or Repeal the Laws of the United States*. 41 ARIZ. ST. L. J. 273, 281, 284 (2009).

³²² Arnold & Porter, *supra* note 12, at 1.

³²³ 39 Op. Atty Gen. 185, 185 (1938) (the Cummings Opinion); *see also* Arnold & Porter, *supra* note 12, at 5 (quoting Proposed Abolishment of Castle Pinckney Nat’l Monument, 39 Op. Atty. Gen. 185, 185 (1938), citing Opinion by Attorney General Edward Bates to the Secretary of the Interior, 10 Op. Atty. Gen. 359 (1862)) (in possession of author).

the President without independent power to rescind a previously designated monument.³²⁴ The opinion cited prior Attorney General Opinions in support.³²⁵

The fact that Presidents have occasionally changed or revoked executive orders implementing some public land action could militate in favor of granting the President the power to *modify* a previously designated national monument.³²⁶ However, the same reasoning that argues against allowing a President to *revoke* a previously designated national monument applies when the President tries to modify that earlier designation—namely, that when “a President issues a proclamation on matters either within the President’s inherent powers or delegated authority, the proclamation has the force of law,”³²⁷ as the Cummings Opinion states.

Rasband disagrees and finds that presidential modifications that reduce a previously designated monument’s size to conform to the management needs of the protected objects should be allowable. He cites in support Attorney General Cumming’s 1938 Opinion that identifies this as an open question.³²⁸ He also relies on a 1947 Department of Interior Decision stating that language in the Antiquities Act that a monument’s size be limited to “the smallest area compatible with the proper care and management of the objects to be protected” may authorize such action.³²⁹ Rasband points to the separation in the Act of the President’s power to designate structures from the power to reserve lands necessary to protect them, opining that courts might use that separation to justify allowing the President to shrink the size of a

³²⁴ BALDWIN, *supra* note 22, at 1 n.10; *see also* Squillace, *supra* note 25, at 522 (commenting on President Hoover’s Attorney General’s Opinion saying that transferring jurisdiction over national monuments to the NPS from the Departments of War and Agriculture was beyond the President’s authority because “Congress intended that jurisdiction to administer the national monuments which the President was . . . authorized to create should reside in the Departments which had jurisdiction respectively of the land within which the monuments were located,” and explaining that opinion as indicative of the President’s limited delegation under the Antiquities Act, which did not allow him to transfer jurisdiction over federal lands).

³²⁵ BALDWIN, *supra* note 22, at 1 (noting that the Cummings Opinion cited with approval 10 Op. Atty. Gen. 359, 364 (1862) (an opinion cited with approval in 17 Op. Atty. Gen. 168 (1881) and 36 Op. Atty. Gen. 75, 79 (1929)).

³²⁶ BALDWIN, *supra* note 22, at 1.

³²⁷ *Id.*

³²⁸ Rasband, *supra* note 191, at 627.

³²⁹ *Id.*

monument that is considered inconsistent with that language.³³⁰

Asserting that since the only support for large withdrawals from President Teddy Roosevelt to the present is “congressional acquiescence,” Rasband reasons that shrinking the size of a previously designated monument “would thus be akin to modifying a withdrawal based on implied executive authority rather than on a specific act of Congress.”³³¹ But, Rasband cites no support for implied executive authority. While Squillace concedes that a proclamation might need to be modified “to correct a mistake or clarify a legal description in the original proclamation,”³³² FLPMA, enacted thirty-eight years after the Cummings Opinion, “cements” the prohibition against a President “revisit[ing] a predecessor’s decision about how much public land should be protected,”³³³ eliminating any textual ambiguity on the question.

Congress, in essence, adopted the conclusion of Attorney General Cummings’ Opinion that only Congress had the authority to revoke the designation of a National Monument in section 204(j) when it enacted FLPMA in 1976,³³⁴ giving it the force of law.³³⁵ When it enacted section 207(j) of FLPMA forbidding a President from modifying a prior designation, Congress eliminated any ambiguity in the Cummings Opinion over whether the President could shrink or otherwise change the boundaries of a designated monument to conform to the statutory mandate that only the “smallest acreage” be reserved to properly manage and protect designated objects.³³⁶

Thus, there is no basis in the text of the Antiquities Act for granting President Trump the direct or implied power to rescind or modify the boundaries of the Bears Ears National Monument. No statutory canons or other interpretive guidance can contradict that text or the later action by Congress and prior administrations reifying it.

V. GRANTING THE PRESIDENT THE AUTHORITY TO AFFECT A PREVIOUSLY

³³⁰ *Id.* at 627-28.

³³¹ *Id.* at 628.

³³² Squillace et al., *supra* note 5, at 69 (citing the issuance of two proclamations by President Taft to clarify an ambiguous initial description of the Navajo Mountain National Monument in the initial proclamation).

³³³ *Id.*

³³⁴ Arnold & Porter, *supra* note 12, at 1.

³³⁵ *Id.* at 6.

³³⁶ BALDWIN, *supra* note 22, at 1 (noting that Presidents have done this).

DESIGNATED NATIONAL MONUMENT VIOLATES THE SEPARATION OF
POWERS DOCTRINE AND WELL-ESTABLISHED NORMS OF DELEGATED
POWER

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.³³⁷

By assuming a power that only Congress has, a President who revokes or amends a prior designation of a national monument violates the separation of powers doctrine. Unless a power is specifically delegated to a President or can be implied from the Act's text or the President's general powers, a President cannot usurp a congressional prerogative. The prior Part showed the President has no such power either by direct or implied congressional delegation.

Nor can the President waive statutory text that would otherwise apply to him because he finds it limiting or inconvenient. The President's constitutional duty to take care that the laws are faithfully executed prevent him from ignoring unambiguous language in the Antiquities Act limiting his authority to the identification and protection of national monuments.

A. *Violation of the Separation of Powers Doctrine*

The doctrine of separation of powers is not explicitly mentioned in the Constitution.³³⁸ The concept does not "have the status of an enforceable legal norm," nor is it "a freestanding principle" that can be implied from the Constitution's overall structure.³³⁹ However, "separation of powers, like democracy and the rule of law, may be an indispensable part of our theory of politics (in America) or our American constitutionalism, even if it is not, in the legalistic sense, a

³³⁷ THE FEDERALIST No. 47, at 313 (James Madison) (Clinton Rossiter ed., 1961).

³³⁸ Vermeule, *supra* note 85, at 688.

³³⁹ *Id.*

freestanding principle of our Constitution.”³⁴⁰

Presidents must “respect the constitutional functions of the other branches of government. . . .[and] must not impermissibly infringe upon the Supreme Court’s judicial power or Congress’s legislative power.”³⁴¹ They display “constitutional arrogance” when they use their “unilateral powers to break boundaries and displace other constitutional authorities.”³⁴² Gerhardt points to what he calls the “inherent tendency” of Presidents to “aggrandize” their power making the Executive Branch the one “most prone to ‘constitutional arrogance.’”³⁴³ Any new claim of executive power “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”³⁴⁴ Claims that President Obama’s designation of the Bears Ears National Monument will cause economic hardship, trampled on the constitutional rights of Utah, and represents an abuse of executive authority have the ring of an urgent need for action—here revocation of that designation. However, as prior parts of this article have shown, none of these claims is valid and so no urgency exists.

Underlying the concept of separation of powers is respect for “the character and distinctiveness of each of the three main functions of government”³⁴⁵—legislative, executive, and judicial. “[F]unctionally separated decisionmaking” has “intrinsic or inherent value from the standpoint of political morality.”³⁴⁶ The result is that the separation of powers doctrine has risen to a “canonical” level in our “tradition of

³⁴⁰ Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 436 (2013); *see also id.* at 435 (“[W]hatever it says in the constitution, does the best interpretation of the constitution’s provisions require us to embrace this as a background legal principle”); Vermeule, *supra* note 85, at 688 (“But Waldron rightly observes that even if the separation of powers lacks legal force, it may still have force as a principle of our constitutional culture—a political ideal in the high constitutional sense.”).

³⁴¹ Johnsen, *supra* note 293, at 413.

³⁴² Coglianese & Yoo, *supra* note 162, at 1601 n.57 (quoting Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1651 (2016)).

³⁴³ *Id.* at 1651.

³⁴⁴ Johnsen, *supra* note 293, at 397-98 n.11 (quoting *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting)).

³⁴⁵ Vermeule, *supra* note 85, at 688; *see also id.* at 688-89 (“Rather than collapse all official decisionmaking into an undifferentiated mass, as in the dictates of a khadi or monarch, it is desirable that there should be ‘articulated government through successive phases of governance each of which maintains its own integrity.’”).

³⁴⁶ *Id.* at 689.

political thought.”³⁴⁷ Although the Court has not constructed “rigid barriers” separating the three branches of government, it has “sought to guard against direct acts of ‘encroachment or aggrandizement’ that would shift the balance of power between the branches and thereby weaken structural checks among them.”³⁴⁸ By proposing to exercise a power that Congress reserved to itself the power to rescind or modify a monument designation, the President will impermissibly “encroach” on the powers of the Legislative Branch and thus violate the separation of powers doctrine.

B. Abuse of the Norms Governing Delegated Power

The basis for Congress’ authority to enact the Antiquities Act resides in the Property Clause of the Constitution authorizing Congress “to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States.”³⁴⁹ A President who designates a national monument under the Antiquities Act is acting pursuant to congressionally delegated powers; “he is not exercising authority vested in the executive branch.”³⁵⁰ Accordingly, whether a President may revoke or change a prior designation depends on whether Congress intended the President to have that power. However, as discussed previously, the Act does not delegate to the President the direct or implied power to do this.

On its face, the Antiquities Act does not appear to be a two-way delegation. It expressly delegates to the president authority to ‘declare’ a national monument and to ‘reserve’ the land necessary to care for and manage that monument, but says nothing about a president’s authority to revoke an existing monument.³⁵¹

The Take Care Clause of the Constitution³⁵² and Article II, Section

³⁴⁷ Waldron, *supra* note 340, at 437.

³⁴⁸ Dudley, *supra* note 321, at 281, 290.

³⁴⁹ U.S. CONST. art IV, § 3, cl. 2.

³⁵⁰ Rasband, *supra* note 191, at 625.

³⁵¹ *Id.*; see also Arnold & Porter, *supra* note 12 (referring to national monuments which have been brought into the National Park system and saying, “[r]evoking the designation of such a National Monument and pulling it out of the National Park system would certainly be in derogation of the reasons such special places were added to that system.”).

³⁵² U.S. CONST. art. II, § 3.

1, together with Section 2, Clause 8³⁵³ requires the President to assure the faithful execution of the laws of the United States.³⁵⁴ The Antiquities Act is a law of the United States. The “Court has treated the Take Care Clause as the direct constitutional source of the President’s obligation to respect legislative supremacy”³⁵⁵ and as “the textual source of the President’s duty to abide by and enforce the laws enacted by Congress—that is, as the instantiation of the President’s duty to respect legislative supremacy and not to act *contra legem*.”³⁵⁶ Despite “the inherently imprecise nature of the Take Care Clause obligation,”³⁵⁷ the Court has interpreted the Clause as though it had “firm and definite content,” including the maxim of legislative supremacy.³⁵⁸

Suspending or repealing a provision of a statute is “legislative in character.”³⁵⁹ A President simply does not possess inherent discretionary

³⁵³ U.S. CONST. art. II, §1, cl. 8

³⁵⁴ Johnsen, *supra* note 293, at 408 (“The President’s constitutionally prescribed oath of office, the Take Care Clause, and the Supremacy Clause confirm the President’s obligation to uphold the Constitution through all executive action.”); *see also* Coglianesse & Yoo, *supra* note 162, at 1599 (“Bellia notes that the Take Care Clause cuts both ways in terms of discretion, recognizing that Presidents possess discretion in how the law is enforced, while simultaneously obligating them to execute the law in a faithful manner.”).

³⁵⁵ Goldsmith & Manning, *supra* note 295, at 1837. While Coglianesse and Yoo found it “not very surprising” that the Court agreed to review a lower court’s injunction blocking implementation of the Obama Administration’s immigration policy, they found it “telling that the Court, on its own accord, added to the questions raised by the parties a constitutional question involving the duty of a President to take care that federal laws are faithfully executed.” Coglianesse & Yoo, *supra* note 162, at 1591 (referring to the Supreme Court’s decision in *United States v. Texas*, 136 S. Ct. 906, 906 (2016), and saying that “the Take Care Clause has been like the Court’s own Key Number for freestanding separation-of-powers principles.”).

³⁵⁶ Goldsmith & Manning, *supra* note 295, at 1849; *see also id.* at 1851 (“[T]he Court has read the Take Care Clause to limit the President’s authority to act *contra legem*”); *id.* at 1850 (“Justice Jackson wrote that the clause confers on the President ‘a governmental authority that reaches so far as there is law,’ thereby ‘signify[ing] . . . that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.”).

³⁵⁷ *Id.* at 1866.

³⁵⁸ *Id.* at 1867 (“The Take Care Clause underwrites the President’s removal power, draws a line between judicial and executive power, offers a source for the President’s exercise of prosecutorial discretion, establishes legislative supremacy, and gives the President a measure of completion power.”).

³⁵⁹ Dudley, *supra* note 321, at 278.

authority to excise the laws of the United States, even though Presidents possess prosecutorial discretion, have inherent foreign policy powers, and can proceed without congressional approval in certain situations.³⁶⁰ It is a “simple intuition that once Congress has legislated with specificity, it has made its policy preference clear and demonstrated its capacity to make policy in that area.”³⁶¹ If the President was allowed to waive the language in FLPMA preventing him from affecting in any way a designation of a national monument by a prior President, he would be “dispensing with” a duly enacted law of Congress.³⁶² This means that the President cannot view a decision to rescind or modify a prior designation of a national monument like an “administrative waiver” of language in FLPMA that specifically prevents him from doing this or language in the Antiquities Act that only gives him limited authority to identify and protect historic structures and objects of scientific interest.

According to Goldsmith and Manning, “any authority conferred by the Take Care Clause ‘starts and ends with the laws Congress has enacted.’”³⁶³ The Court considers that the Clause deprives the President of any power to create exceptions or exemptions from a legislative directive—what Goldsmith and Manning call “dispensation powers.”³⁶⁴ It is rare that a presidential refusal to enforce a statute is justifiable;³⁶⁵ indeed Johnsen suggests that such an action by a President would be “highly suspect.”³⁶⁶

Allowing a President to waive a statutory obligation is comparable to the President refusing to enforce the law. For this reason, Presidents

³⁶⁰ *Id.* at 281, 284.

³⁶¹ David J. Barron & Todd Rukoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 317 (2013); *see also id.* at 333 (“[I]t makes sense presumptively to view the congressionally stipulated rule as primary, which is to say, as governing unless the waiver can be shown to be superior. Moreover, according this presumption creates a positive dynamic of accountability when fed back into the legislative process . . .”).

³⁶² *Id.* at 340.

³⁶³ Goldsmith & Manning, *supra* note 295, at 1850 (quoting Justice Douglas, concurring in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952)).

³⁶⁴ Goldsmith & Manning, *supra* note 295, at 1850.

³⁶⁵ Johnsen, *supra* note 293, at 411 (“To identify those rare cases in which nonenforcement is justified requires ‘the President to make sometimes difficult evaluations that depend on the specific statutory provision and the circumstances surrounding its enactment.’”).

³⁶⁶ *Id.* at 413.

cannot waive a statutory requirement unless they have explicit authority to do that.³⁶⁷ There is no authority in FLPMA section 204(j) to waive section 213 of the Antiquities Act—in fact, quite the opposite, the provision enjoins doing this. Thus, allowing a President to rescind the designation of a monument by a prior President would only be possible if the President ignored language in section 204(j) of FLPMA prohibiting him from doing this. Such an action would amount to a “veto” of section 204 and would “obliterate”³⁶⁸ the designation process in the Antiquities Act by making something that is intended to be permanent, a national monument, impermanent.

Nor can a change in Administration or in “political complexion” serve as a justification for waiving a statutory requirement.³⁶⁹ Justification of a waiver of a statute’s substantive provisions, what Barron and Rukoff refer to as “big waivers, may be justifiable if the waiver carries forward what might “reasonably be thought to be one or more purposes of the statute”³⁷⁰ or at least the purpose of the provision being waived.³⁷¹ Except for reconfiguring the boundaries of a monument

³⁶⁷ Barron & Rukoff, *supra* note 361, at 312; *see also id.* at 335 (“To begin, to waive any, or at least major, substantive statutory provisions, there has to be explicit statutory authority. And the scope of the waiver authority should be specific-specific, at least, relative to the statute itself.”).

³⁶⁸ *Id.* at 312-13. Barron and Rukoff use the terms “administrative veto” and “obliterate” in their discussion of “big waivers,” statutorily authorized waivers of a law’s provisions that amount to an “administrative veto” of the heart of that statutory framework, “provisions that seem most central to its effective operation as a regulatory mechanism.” They distinguish big waivers from the power to “modify” or “tinker” with a law by excising certain requirements in the law in response to a situation the law did not contemplate. *Id.* at 277. If President Trump proceeded to de-designate Bears Ears that would amount to a big waiver of sections 213 of the Antiquities Act and 204(j) of FLPMA and would be way beyond “tinkering” with those provisions.

³⁶⁹ *Id.* at 331 (“It is not a sufficient justification for the exercise of big waiver that the administration has a different political complexion from Congress or that a new administration with different political views has been elected. Even in the rule-for-rule substitution case, the proposition that a new administration, for that reason alone, is justified in changing the rules has never had more than fitful support in the Supreme Court.”); *see also id.* at 232 (“The assumption that the initial conditions Congress established were intended to be stickier than a mere agency rule seems appropriate.”).

³⁷⁰ *Id.* at 332.

³⁷¹ *Id.* at 335 (“[S]tatute should provide, or, if silent, should be understood to provide, for big waiver only insofar as it is in furtherance of the same basic purposes as the substantive statutory provisions to be waived. If the waiver

to conform to preservation needs or to correct some error in the designation, it is difficult to point to any other modification let alone rescission of a prior monument designation that would be considered as carrying forward the Antiquities Act's purposes. It would also be difficult for President Trump to show that a change in circumstances, other than a change in Administration, since Bears Ears was originally designated six months ago, justifies its rescission or modification given that the factor's justifying the monument's designation should still be in existence if the area has been properly preserved.³⁷²

Further, a President has no discretion whether to implement a law which "assigns specific duties" to him.³⁷³ Conformance with a non-discretionary legal requirement, here the *process* for designating a national monument, "is a ministerial duty of the Executive Branch."³⁷⁴ Allowing a President to suspend or repeal enacted laws, be it section 431 of the Antiquities Act or section 207(j) of FLPMA, enables that President "to eliminate popularly-passed laws outside the delegating statute without the operation of an authorized legislative process."³⁷⁵ The fact that a President can act in derogation of a law more quickly than Congress can correct or amend it "poses an additional threat to the social contract," by curtailing the time the public or its elected representatives have "to identify and to correct the wrongful actions of a rogue agent"—here the President—"as well as reducing the time available for fact-finding, deliberation, and debate."³⁷⁶

Among problems with allowing Presidents to amend or suspend existing laws is that Congress might have considered the suspended provision to be consistent with the statute's objectives or might be a provision that Congress would preserve, if given a choice.³⁷⁷ Giving Presidents the power "to suspend or repeal laws passed by previous

authority is meant to serve some additional or different purpose, it should explicitly so state.").

³⁷² Barron & Rukoff, *supra* note 361, at 332 ("It may be helpful in understanding what the agency is doing for it to show how the world differs from the world that existed, or was imagined, at the enactment of the statute.").

³⁷³ Dudley, *supra* note 321, at 284-85.

³⁷⁴ *Id.*; see also *id.* at 285 (citing *Marbury v. Madison*, 5 U.S. 137, 141, 166 (1803) ("Conformance with the law itself, however, is not within the inherent discretion of the Executive Branch.")).

³⁷⁵ *Id.* at 289

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 291-92.

Congresses”³⁷⁸ also creates an indirect separation of powers problem. This problem arises “because it would enable a hypothetical political majority in control of both Congress and the Presidency to disassemble the enactments of previous governments with exceptional haste, thereby removing an intrinsic ‘temporal’ check imposed by the plodding Article I process.”³⁷⁹ At the time of writing this article, this situation is not “hypothetical.”

According to Peter Straus, “the question here is how we should prefer the President to imagine his role in a rule-of-law culture—not what he can get away with, not what the sanctions are, but what it is that his role under the Constitution, well-imagined, calls on him to do.”³⁸⁰ The President’s obligation under the Take Care Clause is “an expression of the President’s unique authority in the allocated functions of government.”³⁸¹ The “root proposition,” again according to Straus, “is that the President does, of necessity, have room for his own provisional judgments about what the Constitution means, and the power to act on those judgments.”³⁸² However, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”³⁸³ Such a “[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”³⁸⁴

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 281, 291-92.

³⁸⁰ Peter Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 110 (2000).

³⁸¹ *Id.* at 112.

³⁸² *Id.* at 117.

³⁸³ *Id.*

³⁸⁴ *Id.* at 118 (quoting Justice Jackson, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 535-38 (1952); see also Strauss, *supra* note 380, at 112 (“Congress has, on occasion, made such decisions reviewable.” A painful footnote to *Heckler v. Chaney* hints that there might be limits to judicial reluctance to review, leaving open for future decision the “situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”).

VI. CONCLUSION

“Even drops of water falling upon a rock in long lapse of time hollow out that rock.”³⁸⁵

This article has shown that there is no support in the text of the Antiquities Act or its legislative or implementation history or in judicial opinions for presidential rescission or modification of previously designated national monuments. Enactment of section 204(j) in 1976 affirmed that this power belongs only to Congress. Well-understood principles of separation of powers counsel against allowing Presidents to assume this authority; while, norms of delegated authority warn against allowing Presidents to waive provisions of laws they do not like or disagree with, as this would contradict their constitutional duty to assure that the laws are faithfully executed.

Preferences in states like Utah are changing as employment shifts from traditional occupations, like ranching, to recreation and tourism. Operating under the shadow of a possible de-designation of a national monument may destabilize these transitioning local economies, which have adjusted positively to their presence. Granting the President this power will also create uncertainty with respect to the permanence of these monuments, affecting their long term management, and undercut the Act’s purposes by lessening the likelihood that any new monuments will be designated.

All these reasons militate against assuming the President has this power, making any use of it vulnerable to judicial challenge and potential political backlash, if the President is perceived to be behaving illegitimately. Questions about the legitimacy of the President’s actions can destabilize the Republic to the extent it disrupts the “equilibrium” of our constitutional system. Thus, what at first glance appears to be an inconsequential act-- the revocation of President Obama’s designation of Bears Ears National Monument—upon further reflection gains grave importance.

³⁸⁵ LUCRETIUS, *DE RERUM NATURA*, 134 (Martin Ferguson Smith, trans., Hackett Publishing Company 1969) (1st century, B.C.).