

THE HYBRID NATURE OF THE PROPERTY CLAUSE: IMPLICATIONS FOR JUDICIAL REVIEW OF NATIONAL MONUMENT REDUCTIONS

Lance F. Sorenson*

ABSTRACT

In the recurring and contentious debates regarding the President's authority to declare (and perhaps rescind) National Monuments, both those who argue for an expansive authority and those who favor restricted authority treat the Antiquities Act as a delegation of legislative power; they only disagree on whether the delegation is appropriate or, in the case of rescission, whether a delegation exists at all. However, this framework is wrong. The Property Clause is not strictly a legislative power. Rather, it is a hybrid; rulemaking power is interspersed with an administrative one—the power to manage property. The Supreme Court has recognized this distinction in the past, including in a case decided the same year Congress passed the Antiquities Act.

The distinction makes a difference because when Congress enlists the Executive in the management of public lands, as it did with the Antiquities Act, it is not delegating legislative power; rather, it is sharing its plenary powers of proprietorship. The principle that underlies the non-delegation doctrine—separation of powers—is not applicable when Congress delegates a non-legislative power. This has implications for the proper method of recourse for inappropriate presidential action made pursuant to delegated Property Clause power. Whereas recourse for an improper delegation of legislative authority lies with the courts, recourse for alleged inappropriate executive action under a delegated proprietor power lies with the entity that enlisted the Executive as its property manager in the first place—Congress. Indeed, Congress has often stepped in to correct presidential mismanagement of public lands, including the management of National Monuments. At other times, Congress has acquiesced in presidential action, a practice the Court has previously accepted as evidence of the constitutionality and legality of presidential action.

Courts have systematically refused to second-guess presidential actions pursued under the Property Clause, including the creation of National Monuments, even when those monuments arguably exceed the “smallest area compatible” with the protection and care of the objects to be protected as delineated in the statute. Courts should also refuse to second-guess the President's decision to reduce National Monuments, leaving to Congress the important work of correcting the President's missteps, as it has done in the past. Let Congress guard its own authority over land management.

TABLE OF CONTENTS

INTRODUCTION	763
I. WHAT'S THE FUSS?	769

* Olin-Darling Fellow in Constitutional Law and History, Stanford Law School; J.D., Pepperdine University; Ph.D., History, University of Nevada Las Vegas. The Author would like to thank Will Baude, Sam Bray, Jud Campbell, Maria Raquel Casas, Nathan Chapman, Rebecca Gill, Dan Hamilton, Jennifer Mascott, Michael McConnell, Zach Price, David Tanenhaus, Ilana Saltz, Mark Storslee, Geoff Sigalet, Charles Tyler, and Paul Werth for helpful comments and feedback on various aspects of this Article.

II. THE NATURE OF THE PROPERTY CLAUSE.....	778
A. <i>Why Article IV?</i>	778
B. <i>Past Delegations</i>	782
1. <i>Disposition Power</i>	782
2. <i>Territorial Governance</i>	783
3. <i>Power to Reserve Public Lands—Specific Delegations</i>	784
C. <i>Judicial Interpretations of the Nature of the Property Clause</i>	787
1. <i>Camfield v. United States</i>	787
2. <i>Butte City Water Co. v. Baker</i>	788
3. <i>United States v. Grimaud</i>	789
4. <i>Light v. United States</i>	791
5. <i>United States v. Midwest Oil Co.</i>	792
D. <i>The Property Clause Is Administrative, Not Legislative in Nature</i>	793
III. IMPLICATIONS FOR JUDICIAL REVIEW.....	793
A. <i>Past Judicial Deference Under the Antiquities Act</i>	793
1. <i>Grand Canyon National Monument</i>	794
2. <i>Jackson Hole National Monument</i>	794
3. <i>National Monuments in Alaska</i>	795
4. <i>Grand Staircase-Escalante National Monument</i>	796
B. <i>Past Congressional Acquiescence to Monument Reduction</i>	796
1. <i>Navajo National Monument</i>	796
2. <i>Mount Olympus, Santa Rosa Island, Glacier Bay, and Great Sand Dunes National Monuments</i>	797
C. <i>Past Congressional Remedial Action</i>	798
1. <i>Amendments to the Forest Service Act</i>	798
2. <i>Amendments to the Antiquities Act</i>	803
IV. JUDICIAL REVIEW OF PRESIDENT TRUMP'S MONUMENT REDUCTION.....	804
A. <i>No Review Under the Administrative Procedure Act</i>	804
B. <i>No Review for Abuse of Discretion</i>	805
C. <i>Limited Non-Statutory Ultra Vires Review</i>	805
D. <i>Limited Review for Constitutional Violation</i>	807
V. THE INSTITUTION BEST-SITUATED TO REMEDY TRUMP'S ACTION IS CONGRESS	808
A. <i>Option A—The 1897 Forest Reserve Compromise</i>	810
B. <i>Option B—The 1907 Repeal of Unilateral Authority</i>	810
C. <i>Option C—The 1950 Antiquities Act Amendment</i>	810
D. <i>Option D—ANILCA</i>	811
E. <i>Draft Legislation</i>	811
CONCLUSION	811

INTRODUCTION

A relatively obscure and seemingly benign piece of legislation enacted over 100 years ago is the source, every twenty years or so, of intense controversy in the American West. The Antiquities Act of 1906 grants the President power to withdraw federal land from the public domain, restricting commercial activities thereon, such as mining and grazing. The President does so by proclaiming a designated area of federal land to be a National Monument. Although the original purpose of the Act was to protect ancient artifacts from raiding, almost all presidents who have exercised power thereunder have adopted a very expansive view of their authority, often declaring millions of acres of the public domain to be National Monuments, rendering them “National Park Lites,” generally off limits to potentially profitable resource extraction activities.¹

The Antiquities Act has been divisive since its inception. Through this Act, Congress delegated its constitutional power to “make all needful rules and regulations respecting the territory or other property belonging to the United States” to the President.² Included within that delegation was discretion to determine the location and, more importantly, the size of National Monuments. In the exercise of this authority, the President is not required to consult with anyone—not Congress, not inferior executive branch departments, not the States, not the Tribes, and not the private sector. The President is not required to give advanced public notice or solicit public comments. The President is not required to conduct any environmental assessments (as the Department of Interior must do when considering whether to designate some public lands as wilderness.)³ Franklin Roosevelt created a National Monument in Wyoming in a semi-secretive process that caused one upset Senator to compare his action to the Japanese sneak attack on Pearl Harbor.⁴ Jimmy Carter and Bill Clinton established monuments in Alaska and Utah, respectively, for which they were both hung in effigy.⁵

¹ Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 54 U.S.C. § 320301 (2012)). Historically, already-existing mining and grazing claims have been grandfathered into National Monuments.

² U.S. CONST. art. IV, § 3, cl. 2.

³ See 42 U.S.C. § 4332 (2012) (requiring “detailed statements” from federal officials about the environmental consequences of proposed decisions).

⁴ Hal Rothman, *Showdown at Jackson Hole*, in THE ANTIQUITIES ACT 83 (David Harmon, Francis P. McManamon & Dwight T. Pitcaithley eds., 2006).

⁵ See Lee Davidson, *Grand Staircase*, DESERET NEWS (Sept. 17, 2006, 12:00 AM), <https://www.deseretnews.com/article/645201833/Grand-Staircase.html>; Timothy Egan, *Alaska Changes View on Carter After 20 Years*, N.Y. TIMES (Aug. 25, 2000), <https://www.nytimes.com/2000/08/25/us/alaska-changes-view-on-carter-after-20-years.html>.

The roots of National Monument controversies are procedural, not substantive. Both proponents and opponents of large-scale monuments find unilateral executive action distasteful. Indeed, the Framers of the Constitution felt the same way. They rejected the idea of “Crown Lands” and placed the power to manage property with Congress, not the Executive, where management decisions would be subject to deliberation and compromise.⁶ Congress has, however, enlisted the President as its property manager and given him immense discretion in public lands management. This delegated power is not legislative, but administrative. The concerns that animate the non-delegation doctrine are not in play. Thus, there is limited judicial review of presidential action pursuant to a delegated Property Clause power. If Congress wants to rein in a runaway president, it may do so, as it has done in the past. Indeed, past congressional action to modify the presidential public lands power serves as a useful model for possible amendments to the Antiquities Act.

Mark Twain is reputed to have said that although history does not repeat itself, it often rhymes.⁷ In the waning days of his administration, President Obama exercised delegated authority from Congress to designate several new National Monuments and expand the borders of others.⁸ While some of President Obama’s designations received bipartisan support, the large-scale designations in the West, particularly the 1.35 million-acre Bears Ears National Monument in southern Utah, ignited controversy, as anticipated. Many western states’ leaders announced their opposition, stating that the designation was federal overreach, and called upon incoming President Trump to rescind the Bears Ears National Monument.⁹ Supporters

⁶ See Katherine S.H. Wyndham, *Crown Land and Royal Patronage in Mid-Sixteenth Century England*, 19 J. BRIT. STUD. 18, 18–34 (1980) (explaining the crown lands and royal mischief resulting therefrom).

⁷ See Lawrence P. Wilkins, *Symposium Foreword: Then, Now and into the Future: A Century of Legal Conflict and Development*, 28 IND. L. REV. 135, 137 n.4 (1995).

⁸ On December 28, 2016, President Obama created the Bears Ears National Monument in southern Utah, consisting of 1.35 million acres, and the Gold Butte National Monument in Nevada, consisting of 300,000 acres. On January 12, 2017, President Obama declared three new National Monuments: the Birmingham Civil Rights National Historical Monument, the Freedom Riders National Monument, and the Reconstruction Area National Monument, all consisting of less than seventy acres. On that day, President Obama also enlarged the borders of the California Coastal National Monument and the Cascade-Siskiyou National Monument in Oregon. See Juliet Eilperin & Brady Dennis, *With New Monuments in Nevada, Utah, Obama Adds to His Environmental Legacy*, WASH. POST (Dec. 28, 2016), https://www.washingtonpost.com/national/health-science/with-new-monuments-in-nevada-utah-obama-adds-to-his-environmental-legacy/2016/12/28/e9833f62-c471-11e6-8422-eac61c0ef74d_story.html?utm_term=.ed17ce6372ef; see also Juliet Eilperin & Brady Dennis, *Obama Names Five New National Monuments, Including Southern Civil Rights Sites*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e_story.html?utm_term=.389d82a3fd46.

⁹ See, e.g., Brooks Hays, *Governor of Utah Calls on Trump to Revoke Bears Ears National Monument*, UNITED PRESS INT’L (Feb. 5, 2017, 1:58 PM), <https://www.upi.com/Governor-of-Utah-calls-on-Trump->

countered that the designation was necessary to protect sacred Native American sites, as well as the unique desert landscape.¹⁰

Upon taking office, President Trump issued an executive order instructing the Department of the Interior to review any monument designation since 1996 of at least 100,000 acres, and to make recommendations regarding rescission or reduction.¹¹ The parameters of the directive allowed the Secretary to review the even more controversial Grand Staircase-Escalante Monument, created in 1996.¹² President Trump vowed to “end these abuses and return control to the people.”¹³ Secretary of the Interior Ryan Zinke began his review in April 2017 and, in June, he recommended to President Trump that he significantly reduce the size of the Bears Ears and Grand Staircase-Escalante Monuments and grant greater control of the remainders to local Native American Tribes.¹⁴ On December 4, 2017, President Trump did exactly that, announcing significant reductions to both Monuments.¹⁵ Immediately, the Navajo Nation and four other American Indian tribes filed a lawsuit against Trump to undo his reductions.¹⁶ Others followed: to date, there are at least five lawsuits seeking

to-revoke-Bears-Ears-National-Monument/4251486315351/.

¹⁰ See, e.g., Peggy Fletcher Stack, *Supporters of Bears Ears, Grand Staircase Rally in Advance of Interior Secretary Ryan Zinke's Visit*, SALT LAKE TRIB., (Mar. 8, 2017, 12:25 PM), <https://www.sltrib.com/news/environment/2017/05/08/supporters-of-bears-ears-grand-staircase-rally-in-advance-of-interior-secretary-ryan-zinkes-visit/>.

¹¹ See Exec. Order No. 13,762, 82 Fed. Reg. 20,429 (Apr. 26, 2017) (“The Secretary . . . shall conduct a review of all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where the designation covers more than 100,000 acres . . .”). By taking the review back to 1996, the Department of Interior can review all the monument designations of Presidents Clinton and George W. Bush, including the even more controversial Grand Staircase-Escalante National Monument.

¹² See James Brooke, *New Reserve Stirs Animosities in Utah*, N.Y. TIMES (Oct. 13, 1996), <https://www.nytimes.com/1996/10/13/us/new-reserve-stirs-animosities-in-utah.html> (discussing the creation of the Grand Staircase-Escalante Monument).

¹³ See Juliet Eilperin, *Trump Orders Review of National Monuments, Vows to ‘End These Abuses and Return Control to the People*, WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/04/25/zinke-to-review-large-national-monuments-created-since-1996-to-make-sure-the-people-have-a-voice/?utm_term=.9e4fc74b49b1 (explaining the executive order); Brooke Seipel, *Interior Dept Recommends Reducing Bear Ears, Other Protected Land: Report*, HILL (Sept. 17, 2017, 10:33 PM), <https://thehill.com/policy/energy-environment/351117-interior-dept-recommends-reducing-bears-ears-other-protected-land> (reporting that the Interior Secretary recommended reducing the size of Grand Staircase-Escalante).

¹⁴ See Julie Turkewitz & Coral Davenport, *Interior Secretary Recommends Shrinking Borders of Bears Ears Monument*, N.Y. TIMES (June 12, 2017), <https://www.nytimes.com/2017/06/12/us/interior-secretary-public-lands-utah-bears-ears.html> (reporting on the Secretary’s recommendation).

¹⁵ See Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017); Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).

¹⁶ See Timothy Cama, *Navajo Nation Sues Trump over Utah Monument Reduction*, HILL (Dec. 5, 2017, 11:38 AM), <http://thehill.com/policy/energy-environment/363311-navajo-nation-sues-trump-over-utah-monument-reduction> (“The federal lawsuit . . . argues that Trump did not have the legal authority to remove . . . protections that former President Barack Obama had established in 2016.”).

to undo President Trump's actions.¹⁷ And, true to history, these land management arguments are taking place against background scenery that consists of unauthorized grazing, protest "occupations" of public lands, and federal arrests for the same.

Given the stakes involved, and especially given the intense controversy generated by land management decisions in the West, it is natural to turn to the courts to sort things out. That is what interested parties have done in the past (with little success), and that is what interested parties are doing now. But what is the appropriate role for a court in reviewing how the political branches choose to manage the nation's property? This Article makes two related assertions: (1) the Property Clause is qualitatively different than Congress's other, legislative powers; and (2) this difference demands a very limited judicial review of both congressional and presidential decisions regarding public lands management. Essentially, the Constitution vests Congress with the power to correct presidential missteps, such as those alleged against President Trump.

This Article will demonstrate these twin ideas—(1) that there is and ought to be judicial deference to the property-management decisions of the political branches; and (2) that Congress is the appropriate entity to remedy presidential abuses of power—find strong support in the history of public lands management generally and the Antiquities Act in particular. Judges have historically recognized their institutional comparative disadvantage to set land policy or second-guess the political branches. Further, Congress has both acquiesced to and remedied presidential actions in the past. Congress has shown itself to be perfectly capable of putting a halt to presidential acts that are an abuse of discretion, ultra vires, or unconstitutional.

Legal posturing over President Trump's reduction of the monuments began when he won the election, with public lands and constitutional law scholars lining up on both sides. Mark Squillace, Eric Biber, Nicholas Bryner, and Sean Hecht argue that the President lacks authority to reduce or eliminate a national monument, based on the text of the Antiquities Act and the legislative history of the Federal Land Policy and Management Act ("FLPMA") of 1976.¹⁸ They have circulated a letter in opposition to

¹⁷ In addition to the five tribes' lawsuit against Trump, plaintiffs in other suits include the Natural Resource Defense Council, the Wilderness Society, the Grand Staircase-Escalante Partners, Patagonia Works, and Utah Dine Bikeyah. All lawsuits have been filed in the District of Columbia. The Administration has asked the Court to transfer them to Utah. See *Hopi Tribe v. Trump*, No. 1:17-CV-02590-TSC (D.D.C. filed Dec. 4, 2017); *Wilderness Society v. Trump*, No. 1:17-CV-02587-TSC (D.D.C. filed Dec. 4, 2017); *Grand Staircase Escalante Partners v. Trump*, No. 1:17-CV-02591-TSC (D.D.C. filed Dec. 4, 2017); *Utah Dine Bikeyah v. Trump*, No. 1:17-CV-02605-TSC (D.D.C. filed Dec. 6, 2017); *Natural Resources Defense Council, Inc. v. Trump*, No. 1:17-CV-02606-TSC (D.D.C. filed Dec. 7, 2017).

¹⁸ See Mark Squillace, Eric Biber, Nicholas Bryner & Sean Hecht, *Presidents Lack Authority to Abolish or*

presidential rescission power that has received the support of 121 law professors. On the other hand, a small but hardy number of legal academics argue that the President has rescission authority, basing their argument also on the text of the Antiquities Act, the history of its use, similar powers the President enjoys in other areas of law, and constitutional theory.¹⁹ Todd Gaziano and John Yoo make such an argument. Likewise, Richard Seamon contends that the President may rescind monuments based on the Take Care Clause, precedent, and constitutional theory.²⁰

Both sides of the debate treat the Antiquities Act as a delegation of *legislative* authority. For example, Squillace, Biber, Bryner, and Hecht state, “Congress can . . . delegate [Property Clause] power to the President or other members of the executive branch so long as it sets out an intelligible principle to guide the exercise of executive discretion.”²¹ The “intelligible principle” framework is a staple of non-delegation analysis for congressional legislative powers. To wit, they cite two cases addressing the non-delegation doctrine, both of which deal with congressional powers under Article I, not Article IV, where the Property Clause resides.²² They treat the Property Clause as yet another of Congress’s traditional legislative powers. Similarly, in arguing that the President does have the authority to rescind a national monument, Yoo and Gaziano point out that the Executive branch enjoys rescission power for other Article I powers delegated to him. To demonstrate what they call an “analogous” rescission power, Yoo and Gaziano discuss a case in which the executive branch terminated a program established under Congress’s Article I powers.²³

This framework is wrong. A threshold question that these scholars, and courts, need to ask is whether Congress, in the Antiquities Act, delegated a legislative power, or . . . something else. This Article contends that Congress delegated something else—its power to manage federal property. The property management power is not a legislative power. This argument is based on the history of the Property Clause, the purposes for which it exists,

Diminish National Monuments, 103 VA. L. REV. ONLINE 55, 63 (2017) (“The House Committee’s Report on [FLPMA] makes clear that this provision was designed to prevent *any* unilateral executive modification or revocation of national monuments.”). FLPMA eliminated all presidential authority to unilaterally withdraw the public lands, except for authority under the Antiquities Act.

¹⁹ See generally John Yoo & Todd Gaziano, Presidential Authority to Revoke or Reduce National Monument Designations (2017), <https://www.aei.org/wp-content/uploads/2017/03/Presidential-Authority-to-Revoke-or-Reduce-National-Monument-Designations.pdf>.

²⁰ Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 1, 31 (2018).

²¹ See Squillace, Biber, Bryner & Hecht, *supra* note 18, at 56.

²² See *id.* at 56 n.5 (citing *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

²³ See Yoo & Gaziano, *supra* note 19, at 6–8 (citing *Pennsylvania v. Lynn*, 501 F.2d 848, 855–56 (D.C. Cir. 1974)). Elsewhere, though, Yoo and Gaziano suggest that principles of trust law would be appropriate for analyzing presidential powers under the Antiquities Act. *Id.* at 6.

and its judicial interpretation both within and outside the Antiquities Act context. Courts have repeatedly asserted the Property Clause power is not strictly legislative.

A determination that public lands management is a different kind of government power than legislation changes the landscape of executive power exercised thereunder. Rather than viewing the executive branch as a quasi-legislature exercising delegated legislative authority, subject to judicial review, we should view the President as Congress's property manager. The President has all implied authority that is reasonably necessary to carry out his express instructions. This framework means that the President has broad discretionary power in the management of public lands, which discretion may be clarified or overruled by Congress (as Congress has done several times in the past).

More importantly, recourse for the alleged abuse of the President's management power lies primarily with Congress, not the courts. The difference exists because a delegation of property management power does not implicate the separation of powers the way that a delegation of legislative power does. The sovereign people have standing to challenge in court a delegation of legislative power to ensure that the three branches remain separate, so that "[a]mbition [can] be made to counteract ambition" which inures to the benefit of the people.²⁴ When it comes to managing the property of the United States, however, the concern regarding the separation of powers does not exist. Congress may manage the federal property through the enlistment of managers, including but not limited to the President, without implicating the separation of powers. This is not a novel framework. Past courts have repeatedly placed the burden on Congress to deal with runaway presidents.

The point of this article is not to argue about whether Trump's actions were lawful or unlawful. Although I am inclined to think they were lawful for reasons set forth in Part IV, even if he acted unlawfully, the proper remedial institution is Congress, not the judiciary.

This Article will proceed as follows. Part I sets the background of the present debate by tracing the history of (1) the Property Clause and (2) the evolution of land policy in the nineteenth century. It helps explain why these debates are so acrimonious. Part II explores the hybrid nature of the Property Clause by examining its pre-constitutional history, its development in the Convention, and its post-constitutional interpretation by both courts and Congress. Part III explains how the nature of the Property Clause limits judicial review. Part IV reviews the potential for judicial review of President Trump's actions, finding that judicial review for the Bears Ears reduction is

²⁴ THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999).

extremely limited. If the President violated the Antiquities Act, then it is the duty of Congress, not the Courts, to correct him. Finally, given that Congress is the best branch to remedy presidential action, Part V contains a proposed amendment to the Antiquities Act that will fulfill its important goals while defusing controversy.

I. WHAT'S THE FUSS?

The outgoing lame-duck President exercised authority delegated to him from Congress under the Property Clause to set aside millions of acres of western public lands as reserves. His “stroke of the pen” severely limited natural resource extraction and grazing in those areas—a staple of local economics. Western state politicians howled in opposition and accused executive officials (“Theorists!”) of not understanding what life is like in the American West. To them, the President was a tyrant, and the national government had violated a core notion of federalism—that land use decisions ought to be made locally. One livestock owner who continued to graze his animals on federal land without permission was arrested by federal authorities. The incoming President sought to allay the concerns of westerners by promising to rescind his predecessor’s executive proclamations, or at least reduce the size of the newly created reserves. The major legal issue, though, was whether the President had the authority to rescind a previous presidential proclamation creating land reserves. Some argued such authority was inherent in the office of the President or was implicitly contained within the initial delegation of power from Congress. Others contended that the President could not exercise such power absent an explicit delegation of rescission authority from Congress.

The scene depicted here comes, of course, from the year 1897.²⁵ The outgoing president was Grover Cleveland who designated thirteen new forest reserves in western states just before leaving office. The incoming president was William McKinley, who, though not opposed to the forest reserves per se, wanted to build as much support as possible for a potential war with Spain.²⁶ He needed to be on the good side of representatives from western states. The livestock owner was Pierre Grimaud, whose fight against the federal government found its way to the Supreme Court.²⁷ The pressing legal issue was whether McKinley could simply rescind Cleveland’s orders.

²⁵ See Robert Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RESOURCES L. 503, 509–11 (1974) (describing the response to President Cleveland’s establishment of nature reserves).

²⁶ During his administration, William McKinley proclaimed seven million acres of forest reserves. See HAROLD K. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* 34–36 (2004) (discussing the efforts to pass the Pettigrew amendment to the 1897 appropriations bill despite opposition).

²⁷ *United States v. Grimaud*, 220 U.S. 506, 514 (1911).

Although the revocation of a presidential proclamation was not unheard of in 1897, it was still rare, especially in light of the rarity of proclamations themselves.²⁸ McKinley hesitated to exercise such a power. Western state delegates, however, demanded action in the form of the rescission of various forest reserve designations. The impasse threatened McKinley's agenda in the first few days of his administration.

I will return to the history of the Forest Service Act of 1897 later to discuss its comparative usefulness, or lack thereof, in interpreting the Antiquities Act.²⁹ The point here, though, is that debate over public lands management in the United States is not new. Indeed, we may go much further back in time in U.S. history to find instances of westerners angry at the central government. The American Revolution began, in part, due to colonial anger at the Crown's attempts to prevent settlement west of the Appalachian Mountains and to expand the borders of Québec into what would become the Northwest Territory.³⁰ In the Treaty of Paris, the British ceded its large trans-Appalachian area to the United States—with the Mississippi River becoming the western border of the new nation, and ill-defined borders in the North and South.³¹ This large cession created immediate administrative issues—who would govern the new land, and how? These thorny political questions would present themselves time and time again in the nineteenth and twentieth centuries as the United States acquired more territory. The issues continue into the present—not so much with regard to federal territory outside the boundaries of the states, but to retained

²⁸ The American Presidency Project keeps track of Presidential Proclamations from the founding until the present. From 1789 until 1890, annual presidential proclamations numbered between zero and five, with a few notable exceptions such as during the Civil War. In the year 2017, President Trump issued 119 presidential proclamations, which is not inconsistent with his immediate predecessors in office. See *Proclamations (Washington 1789-Trump 2018)*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/proclamations.php> (last visited Dec. 19, 2018) (providing access to every Presidential Proclamation). Grover Cleveland, whose forest reserve declarations were under consideration for rescission by McKinley, had himself revoked a predecessor's executive order—that of Chester Arthur's restoring to the public domain lands that had been held in trust for various Indian Tribes. See Proclamation No. 268 (Apr. 17, 1885), available at <http://www.presidency.ucsb.edu/node/205898> (“[T]he lands so proposed to be restored to the public domain by said Executive order of February 27, 1885, are included as existing Indian reservations . . . and that consequently, being treaty reservations, the Executive was without lawful power to restore them to the public domain . . .”).

²⁹ Squillace, Biber, Bryner, and Hecht contend that the Forest Service Act, which grants an explicit power of rescission to the President, demonstrates that the Antiquities Act, which contains no such rescission power, is a one-way ratchet—a power to create monuments but not reduce or revoke them. Squillace, Biber, Bryner & Hecht, *supra* note 18, at 58. For a discussion of why this analysis of the Forest Service Act is wrong, see *infra* Part IV.

³⁰ See, e.g., COLIN G. CALLOWAY, *THE SCRATCH OF A PEN: 1763 AND THE TRANSFORMATION OF NORTH AMERICA* 97–99 (2006) (discussing colonists' sense of entitlement to western lands and the profitable opportunities there).

³¹ Treaty of Paris, U.K.-U.S., art. II, Sept. 3, 1783.

federal lands within the states. Who governs the land, and how? Contestations for the power to manage the public lands is the continuing source of controversy to the present day.

Federal land policy has a long and interesting history, not all of which is necessary to fleshing out the intricacies of the Antiquities Act.³² However, a

³² Scholarly interest in the history of the United States public lands grew in the early twentieth century as President Theodore Roosevelt exercised extensive executive power to reserve public lands for conservation efforts. Payson Jackson Treat, a historian at Stanford University, published *The National Land System, 1785–1820* in 1910, which was the first comprehensive examination of the origins of federal land policy. PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM, 1785–1820*, at v (1910) (introducing his study of the origins of the public domain in the United States and the disposition of that land before 1820). Benjamin Hibbard took up the cause in 1926 and extended the timeframe with the publication of his *A History of Public Land Policies*. There, Hibbard described three periods of land policy: (1) one based on using public lands for revenue (1780s–1841); (2) the public domain as a basis for national development (1841–1900); and (3) a period of conservation (1900–1920). BENJAMIN HORACE HIBBARD, *A HISTORY OF PUBLIC LAND POLICIES* 1, 136, 472 (1924) (separating the book’s discussion into three time periods). Vernon Parrington, although not a western historian per se, spent the bulk of his career at the University of Washington and memorably referred to the public lands disposition policy as “The Great Barbecue.” VERNON PARRINGTON, *3 MAIN CURRENTS IN AMERICAN THOUGHT* 23 (1930) (“Congress had rich gifts to bestow—in lands, tariffs, subsidies, favors of all sorts; and when influential citizens made their wishes known to the reigning statesmen, the sympathetic politicians were quick to turn the government into the fairy godmother the voters wanted it to be. A huge barbecue was spread to which all presumably were invited.”). In 1942, Roy Robbins published what he considered to be a “synthesis on the history of public lands in the United States” encompassing questions of politics, economics, law, and social history. ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776–1936*, at vii (1942). Felix Cohen made sure to note that federal title to public lands was obtained not only from European powers, but also from native tribes. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 35 (1947) (“Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners.”). In 1963, Vernon Carstensen edited a collection of historical essays on the public lands, commissioned by the Bureau of Land Management to mark the sesquicentennial of the creation of the General Land Office and the centennial of the Homestead Act (both anniversaries occurring the previous year. See PUBLIC LANDS: STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN (Vernon Carstensen ed., 1963). The “dean” of Public Lands history, Paul W. Gates, published his seminal work in 1968—*History of Public Land Law Development*—a government-financed project. This work, incorporating the work of assistants and other historians, provides a long-range legal history of public lands from the Founding to the 1960s. PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT*, at xi–xii (1968) (introducing the book with a discussion of Congress’s charge to study public land law and the scholars who contributed to the work). Karen Merrill makes a fascinating contribution to the history of public lands in *Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them*. There, Merrill demonstrates that ranchers in the West adopted a language of persuasion based in rights and the Constitution to assert an entitlement to graze on public lands. They won a temporary victory with the Taylor Grazing Act but ultimately lost the battle when Congress created the Bureau of Land Management. KAREN R. MERRILL, *PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM* 173, 175–76 (2002) (discussing how the Taylor Grazing Act galvanized ranchers to assert their rights and their frustration with the Bureau of Land Management’s regulation of their affairs). For a series of essays on conflict involving public lands, see generally Colloquium, *Constitutional Conflicts on Public Lands*, 75 U. COLO. L. REV. 1101 (2004).

basic knowledge of United States land policy, and especially how land management structures changed in the late nineteenth century to involve the executive branch to a much greater degree, is quite helpful to (1) understand why public land management is so important to westerners, and (2) contextualize the history of the Antiquities Act—both its passage and subsequent interpretation. This brief review is meant to further those goals. In doing so, we shall have a better grasp of the historical role of the judiciary in overseeing the land management decisions of the political branches.

Congress established three important land policies during the 1780s, prior to the adoption of the Constitution. First, the federal government would manage unorganized territory. Many colonial charters had granted tracts of land from “sea to sea” at a time when Anglo settlers and their benefactors in England had no knowledge of the geography of North America.³³ The competing and overlapping claims to trans-Appalachian land caused sharp divisions among the states. Those with competing claims to the same land asserted primacy. Others with no western land claims, like Maryland, insisted that Congress assert control. Maryland refused to ratify the Articles of Confederation until such land disputes were resolved to its liking.³⁴ The Confederation Congress, derided then and since as structurally insufficient for administering a large republic, was remarkably successful in negotiating the cession of western land claims from the original states to the national government.³⁵

Second, Congress created a land acquisition system by which large tracts of newly acquired territory would be placed on a path to statehood. Although Congress would ultimately abandon this policy more than 100 years later in the wake of the Spanish-American War, it adopted the initial policy as it faced the pressing question of what to do with federal territory. From the land ceded by both the British in the Treaty of Paris and the states in the mid-1780s, two federal administrative districts emerged under the Confederation Congress: the Northwest Territory and the Southwest Territory. Thomas Jefferson, Virginia’s delegate to the Confederation Congress in 1783 and 1784, drafted a bill for the governance of federal territory. This proposal called for the creation of fourteen new states to be

³³ See Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315, 316 (2001) (“Essentially, the exercise of writing charters furnished projectors with means to plan enterprises whose dimensions in practice could not be known with any certainty.”).

³⁴ Merrill Jensen, *The Creation of the National Domain, 1781–1784*, 26 MISS. VALLEY HIST. REV. 323, 323 (1939).

³⁵ *Id.*; see also JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 156 (1979) (describing the original states’ willingness to sell off their western land). *But see* Jack P. Greene, *The Background of the Articles of Confederation*, 12 PUBLIUS: J. FEDERALISM 15, 15–44 (1982).

formed in the Northwest Territory, and required that such states enter the Union as members equal to the original thirteen. Jefferson's national vision in 1784 did not include a role for vast and permanent federal property. Although Congress later amended Jefferson's statehood process, and mercifully ignored his proposed state names, the founding-era policy that new large tracts of land ought to be divided and admitted into the Union as states was written into law when Congress passed the Ordinance of 1784.³⁶

Jefferson's model permeated future Acts of Congress concerned with the administration of new territorial acquisitions. Congress debated and passed the Northwest Ordinance in the summer of 1787, as the Constitutional Convention met in Philadelphia. Several members of the Convention took leave to attend Congress, likely for the express purpose of passing the Northwest Ordinance.³⁷ The Northwest Ordinance modified Jefferson's requirements for statehood and set forth a more detailed plan for the administration of unorganized federal territory. In short, Congress exercised plenary authority in the territories, but placed organized territories on a path to statehood, with limited self-governance in the interim.

The third important land policy of the 1780s was that the vital work of transferring federal territory into private hands was a job for Congress, not the states. In the Land Ordinance of 1785, Congress set forth a process for the systematic surveying, dividing, and selling of public land to private landholders, with reservations made in each township for the establishment of public schools.³⁸ Through this Act, Congress created a geographer-general, with several subordinates, whose job it was to survey the public lands and return the plats to the Treasury Office.³⁹ The Treasury Office would then direct commissioners of regional land offices to sell the land at public auction.⁴⁰ The army was authorized to remove squatters on public lands.⁴¹ As Milton Conover notes, the regional land offices "did much to bring the people of the West into close relationship with the national government."⁴²

³⁶ Jefferson proposed names for ten new states: Sylvania, Michigania, Cherronesus, Assenisipia, Metropotamia, Illinoia, Saratoga, Washington, Polypotamia, and Pelipsia. See COMM. FOR THE W. TERRITORY, 5TH CONFEDERATION CONG., RES. ON WESTERN TERRITORY GOVERNMENT, (1784), available at <https://www.loc.gov/item/mtjbib000873/>; Reginald Horsman, *Thomas Jefferson and the Ordinance of 1784*, 79 ILL. HIST. J. 99, 108 (1986) (describing how Jefferson drew upon Native American, Anglo-Saxon and British, and colonial American cultures to craft names for the states).

³⁷ See RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 216 (2009) ("It appears quite likely . . . that the Georgia and North Carolina members traveled to New York for the express purpose of providing a quorum in Congress so that the ordinance could be adopted.").

³⁸ 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 375 (John C. Fitzpatrick ed., 1933).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² MILTON CONOVER, THE GENERAL LAND OFFICE: ITS HISTORY, ACTIVITIES AND

Conover suggests this close relationship helped settlers “develop their faith in the justice of lawful methods of disposing of the public domain.”⁴³ As we shall see, many western representatives in the twentieth and twenty-first century hold a different view of the “justice” of national land management.

Notably, the process for transferring land to private ownership bypassed local governmental involvement even after statehood. The sale of public lands was an important revenue source for the fledgling national government.⁴⁴ From the Founding, including the period prior to the ratification of the Constitution, disposal of the public domain was a federal endeavor.

This establishment of congressional plenary authority, then, predated the Constitution but was did not go uncontested for several decades. The question of congressional primacy was not fully settled until well after ratification.⁴⁵ Indeed, some legal thinkers and elected officials today suggest that Congress is under constitutional obligation to transfer federal territory to state control following statehood.⁴⁶ Although these latter groups have yet to persuade Congress to engage in a wholesale transfer of public land, they nevertheless articulate the discontent of some westerners.

Having established its tentative primacy, Congress quickly adopted land policies in the 1780s. Some early influential American thinkers suggested the United States adopt a land-*retention* policy for federal territory.⁴⁷ However,

ORGANIZATION 8 (1923).

⁴³ *Id.*

⁴⁴ *See, e.g.*, ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 283–86 (William Young Birch & Abraham Small eds., 1803) (“The western territory ought to be regarded as a national stock of wealth.”).

⁴⁵ *See* Greg Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 695 (“The rise of federal title questions this commonplace assumption about the historical primacy of local control.”).

⁴⁶ *See, e.g.*, John W. Howard et al., LEGAL ANALYSIS OF THE LEGAL CONSULTING SERVICES TEAM PREPARED FOR THE UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS 51 (2015), <https://le.utah.gov/interim/2015/pdf/00005590.pdf> (explaining legal theories for state control). In 2016, prior to Donald Trump’s election, the State of Utah was preparing to file a lawsuit against the federal government asking the Court to order the United States to patent federal land in Utah to the State. *See* Robert Gehrke, *Utah’s Lawsuit over Federal Lands Nearly Ready, Expenses Questioned*, SALT LAKE TRIB. (June 10, 2016), <http://archive.slttrib.com/article.php?id=3984279&itype=cmsid>.

⁴⁷ St. George Tucker argued that the United States should dispose of just enough land to pay off the national debt, but no more. Tucker’s concern was that the proceeds from disposition of valuable land in the west would cause federal coffers to overflow. This was a bad thing because it might [L]ay the foundation of so large a revenue, independent of the people, as to be formidable in the hands of any government. To amass immense riches to defray the expenses of ambition when occasion may prompt, without seeming to oppress the people, has uniformly been the policy of tyrants. Should such a policy creep into our government, and the sales of land, instead of being appropriated to the discharge of former debts, be converted to a treasure in a bank, those who can at any time command it, may be tempted to apply it to the most nefarious purposes.

TUCKER, *supra* note 44, at 283–86.

Congressional policy beginning in 1785 was to *dispose* of most federal lands, primarily through sale to the public, but also by small land transfers to states.⁴⁸ And while disposition remained the official policy of the United States until 1976 when Congress passed the Federal Land Policy and Management Act (“FLPMA”), federal policy began to shift to retention, conservation, and preservation in the late 1800s,⁴⁹ with the most important policy changes taking place between 1864 (the creation of Yosemite State Park) and 1946 (the creation of the Bureau of Land Management by the merger of the General Land Office with the United States Grazing Service). Congress passed the Antiquities Act in 1906 as it adopted more explicit preservation policies in addition to already existing conservation policies.⁵⁰

As the nation’s public lands policies shifted from disposal to conservation and preservation, Congress initially struggled with how to enforce its policies. For example, when Congress first showed interest in reserving public lands, its initial instinct was to transfer such land to state control, with conditions placed upon use. For this reason, Congress initially organized Yosemite as a California state park, under state control. Decades later, after becoming convinced of alleged incompetence and corruption of California’s management of public lands, and also after witnessing the apparent success of federal management of national parks in the federal territories of Wyoming and Washington, Congress reversed course and insisted that reserved public lands be managed federally.⁵¹ Following a long campaign

⁴⁸ After the Founding, the disposition of federal lands proceeded apace. Congress created the General Land Office in 1812 to handle the large amount of disposition work going through the Department of the Treasury. CONOVER, *supra* note 42, at 3. By placing responsibility for land policy within the Department of the Treasury, Congress underscored the revenue-raising nature of federal lands. Congress moved the General Land Office to the newly-created Department of the Interior in 1849. *Id.* While the policy of the United States continued to be to put the public domain into private hands, Congress began to focus less on revenue-generating sales, and more on using the public lands as a nationalizing project.

⁴⁹ The idea that some public lands should be preserved, and that some natural resources should be conserved, gained steam in the latter end of the nineteenth century. Congress commissioned four grand-scale surveys of the American West in the 1870s, led by John Wesley Powell, Ferdinand Hayden, Clarence King, and George Wheeler. RICHARD A. BARTLETT, *GREAT SURVEYS OF THE AMERICAN WEST* 373 (1962). Congress sought to create a uniform federal lands policy with the creation of a Public Lands Commission in 1879. *Id.* From these ad hoc surveys and Public Lands Commission findings was born the U.S. Geological Survey in 1879, a permanent bureau housed within the Department of the Interior charged with researching and understanding the geography and geology of the public lands, most of which were located in the American West. *Id.*

⁵⁰ For a scholarly treatment of the distinction between conservation and preservation, see Jean-Frédéric Morin & Amandine Orsini, *Conservation and Preservation*, in *ESSENTIAL CONCEPTS OF GLOBAL ENVIRONMENTAL GOVERNANCE* 40 (Jean-Frédéric Morin & Amandine Orsini eds., 2015).

⁵¹ See George G. MacKenzie, *Despoiling the Yosemite: An Official Report that is Full of Falsehoods*, N.Y. TIMES (July 20, 1980), <https://www.nytimes.com/1890/07/20/archives/despoiling-the-yosemite-an-official-report-that-is-full-of.html>; George G. MacKenzie, *Needs of the Yosemite: Natural Beauty Destroyed by Bad Management*, N.Y. TIMES (Feb. 23, 1890), <https://www.nytimes.com/1890/02/23/archives/>

by John Muir and Robert Underwood, Congress first created Yosemite National Park to surround the State Park, and then ultimately repurchased Yosemite State Park from California in 1906, the same year it passed the Antiquities Act.⁵²

During the 1870s, Congress passed a series of public lands management bills, designed to bring some uniformity and stability to the law of the public domain, and also to conserve diminishing resources and preserve natural beauty. Congress created Yellowstone National Park in 1872, to be followed by others.⁵³ The General Mining Act of 1872 codified the law governing mining claims on public lands.⁵⁴ The Timber Culture Act of 1873 sought to encourage homesteaders to plant and conserve trees on their land.⁵⁵ The Desert Land Act of 1877 sought to encourage the cultivation of arid lands in the Southwest.⁵⁶ In addition, the Timber and Stone Act of 1878 allowed individuals to purchase land that was deemed unfit for agriculture, so that they might exploit the timber and mineral resources.⁵⁷ This Act, like the original Homestead Act, was designed to get such property into the hands of the hardy yeomen of Jefferson's dreams. But, like the Homestead Act, much of the land granted under the Timber and Stone Act ended up in the hands of large companies. They continued to clear-cut timbered land in the 1880s, giving rise to concerns about deforestation, which led to forest reserve legislation and the delegation of Property Clause power to the President, discussed in Part II. Congress passed all of these acts pursuant to its Property Clause power—its power to pass “needful rules and regulations” for property belonging to the United States.⁵⁸

Congressional efforts to conserve and preserve the American West in the 1870s and 1880s were unsuccessful, partly because such policies were sometimes contradicted by other goals, but also because Congress, by itself, lacked real executive management power. Congress thus began to involve the executive branch in the management of public lands to a much greater extent in the 1890s. These delegations of discretionary management power to the President are discussed more fully in Part II. Briefly, though, these

needs-of-the-yosemite-natural-beauty-destroyed-by-bad-management-a.html; George G. MacKenzie, *The Neglected Yosemite: Some Inexcusable Faults of Management*, N.Y. TIMES (Feb. 16, 1980), <https://www.nytimes.com/1890/02/16/archives/the-neglected-yosemite-some-inexcusable-faults-of-management-not.html>.

⁵² See STEPHEN R. FOX, JOHN MUIR AND HIS LEGACY: THE AMERICAN CONSERVATION MOVEMENT 99 (1981).

⁵³ GATES, *supra* note 32, at 566.

⁵⁴ *Id.* at 723.

⁵⁵ *Id.* at 399–400.

⁵⁶ *Id.* at 401.

⁵⁷ *Id.* at 550–51.

⁵⁸ U.S. CONST. art IV, § 3, cl. 2.

delegations to the President served and continue to serve as the catalyst for controversy.

Understanding the changes to federal land policy in the nineteenth century is critical to analyzing the legal questions raised as Congress and the Executive asserted greater power over the land in the late nineteenth and early twentieth centuries. In the early nineteenth century, Congress sought to dispose of the public domain as a revenue-raising venture. During the Civil War, Congress continued to dispose of the land, not to raise revenue but to encourage western settlement, relieve overcrowded cities in the East, and “harvest . . . good citizens.”⁵⁹ Also during the Civil War, Congress for the first time withdrew some public lands from settlement due to their scenic beauty. In the late nineteenth century, as we will see, Congress sought to enlist greater help from the Executive branch in the conservation and preservation of natural resources on public lands in the West.

Because the shift from a land policy of disposal to one of retention occurred as western territories were joining the Union as states, federal land ownership in the United States is largely concentrated in the West:

This history and distribution of public lands creates disparity between East and West. Western states that are comprised of mostly federal land lack the same property tax base as eastern states, at least proportionately.⁶⁰ Further, western states generally do not enjoy the same ability to foster the development of profit-oriented (and taxable) resource extraction and related businesses.⁶¹ And, most relevant for this discussion, people living in western states or on western tribal lands feel the effects of unilateral executive decisions regarding public lands management to a greater degree than those living elsewhere. Some states and scholars even argue that Congress is required to sell off its land, or transfer it to the states under the Equal Footing Doctrine and/or the Equal Sovereignty Doctrine.⁶² Whether or not they are

⁵⁹ Public Lands Commission, Report of the Public Lands Commission, Created by The Act of March 3, 1879, Relating to Public Lands in the Western Portion of the United States and to the Operation of Existing Land Laws, at VIII (1880).

⁶⁰ Because the national government does not pay property taxes, Congress allocates to states Payments in Lieu of Taxes (“PILT”) for federally-held property in their states. Western state representatives often argue that the payments are far too low to compensate for lost revenue where the federal government owns such large tracts of land. *See, e.g.*, Press Release, U.S. Senator Mike Lee, Lee Gets Vote on Amendment to Increase PILT Payments (Mar. 23, 2013), <https://www.lee.senate.gov/public/index.cfm/press-releases?ID=6e7f7c10-fb8f-44d2-8dcf-f2f14380a8a7> (“PILT payments tend to be a small fraction of what the local governments could generate through property taxes . . .”).

⁶¹ *See, e.g.*, *National Monuments Have a Monumental Impact on the U.S. Economy*, WILDERNESS SOC’Y (July 10, 2015), [<https://web.archive.org/web/20171211212603/http://wilderness.org/blog/national-monuments-have-monumental-impact-us-economy>] (last visited Jan. 16, 2019) (countering that large National Parks encourage alternative industries, such as tourism).

⁶² Howard et al., *supra* note 46, at 51–52.

correct, many westerners feel slighted by the public lands arrangement. Their discontent has manifested itself in the Sagebrush Rebellion of the 1970s and 1980s, the actions of Cliven Bundy and his associates more recently, and in proposed state and federal land management restructuring legislation in western jurisdictions and in Congress.⁶³

II. THE NATURE OF THE PROPERTY CLAUSE

What is the nature of the Property Clause? Is it a legislative power or an executive one? Could it be something else? We are accustomed to classifying all governmental power one of three ways—legislative, executive, and judicial. Further, we assume that if a particular power is constitutionally vested in, say, the legislative branch, then it must be a legislative power. Such an assumption supposes one of two things: either (1) governmental powers have no inherent nature, but are classified only by who exercises the power; or (2) governmental powers are inherently legislative, judicial or executive *and* the Founders managed to place each and every one precisely in the branch of government that corresponds to its nature. Neither supposition is true. At its heart, the Property Clause is an administrative power which, under the British system, belonged to the King. The power contains rulemaking elements that the owner of any property owner has to regulate conduct on private property, as well as executive elements to sell, lease, fence, etc. In this Part, I will demonstrate the hybrid nature of the Property Clause by appealing to its placement in Article IV, the nature of congressional delegations thereof, and judicial interpretations of the same. Then in Part III, I will explain why this hybrid nature suggests limited judicial review for public land management decisions, including those for National Monuments.

A. *Why Article IV?*

The origins of the Property Clause are inextricably intertwined with that of the Admission Clause, which may help explain its placement in Article IV, instead of Article I. Resolution Fourteen of the Virginia Plan, finalized by James Madison as he impatiently waited for the other delegates to show up to the Constitutional Convention, was a proposal “that provision ought to be made for the admission of States, lawfully arising within the limits of the United States.”⁶⁴ This resolution passed the Committee of the Whole unanimously on July 18, 1787 with little discussion. Madison was not a part

⁶³ See, e.g., Action Plan for Public Lands and Education Act of 2011, H.R. 2852, 112th Cong. (2011) (“The Federal Government is the source and potential solver of [western states’ financial problems] because of the enormous amount of untaxed land the Federal government owns in Wester States.”).

⁶⁴ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 226 (Max Farrand ed., 1911).

of the Committee of Detail, however, which the Convention commissioned to re-draft the accepted resolutions into articles of a new constitution. That committee, led by John Rutledge, Edmund Randolph, and James Wilson, re-wrote Resolution Fourteen as Article XVII. It read:

New States lawfully constituted or established within the limits of the United States may be admitted, by the Legislature, into this Government. . . . If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States, concerning the public debt which shall be then subsisting.⁶⁵

The Admission Clause at that point still lacked an explicit property disposition and regulation component—an oversight the delegates soon corrected. The Committee of Detail presented their work to the Convention on August 6 and the delegates began methodically debating each Article. The first time the convention saw anything resembling the current Property Clause was on August 18, when it heard a proposal that Congress would have power “[t]o dispose of the unappropriated lands of the United States.”⁶⁶ The proposition was not voted upon until the end of August, when Congress began considering the Admission Clause. Congress debated whether new states should enter the Union “on the same terms” as existing states. Gouverneur Morris argued they should not.⁶⁷ He stated he “did not wish to bind down the Legislature to admit Western States on terms here stated”—equal footing—and he did not wish to “throw the power” into the hands of western states.⁶⁸ James Madison, propounder of the large republic theory and close confidant of Thomas Jefferson, rose in opposition to Morris “insisting that the Western States neither would nor ought to submit to a Union which degraded them from an equal rank with the other States.”⁶⁹ Morris’s motion passed with the help of other delegates who expressed the sentiment that at some future point it might become inconvenient to admit new States on terms of equality.⁷⁰

⁶⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 188 (Max Farrand ed., 1911).

⁶⁶ *Id.* at 321.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* In reviewing the records of the Convention in Philadelphia, especially the debates, a word of caution is warranted regarding the accuracy of the records. Most of the reconstruction of the debates draws from Madison’s notes. Madison, however, revised his notes throughout his life. See MARY SARAH BILDER, MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION 179 (2015) (“These changes and many small editorial revisions began to transform the Notes from a diary into a report of debates.”). The debate described by Madison on August 29, 1787 is consistent with the changes made to the work of the Committee of Detail. Madison, however, may have not fully registered his objection during the Convention. The statements Madison attributes to Gouverneur Morris are consistent with Morris’s later recollections of the Convention.

⁷⁰ 4 THE FOUNDERS’ CONSTITUTION 544–45 (Philip B. Kurland & Ralph Lerner eds., 1987). Although Morris won the battle at the Convention, he would ultimately lose the war. Equal Footing did obtain status as a constitutional principle. That status derives from (1) the Northwest

Against this backdrop of debate about the relative powers of the national and state governments, Gouverneur Morris introduced a revamped Property Clause. Mindful of the need for *someone* to exercise sovereign power in the federal territories prior to statehood, Morris proposed, “the Legislature [Congress] shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging the United States.”⁷¹ It also sought to ensure that under the new Constitution the federal government would continue to handle the disposition of land, even after the organization of new states out of federal territory.⁷² This proposal passed the Committee of the Whole.⁷³

Following the extensive debate in August and the first week of September, the Convention sent the document to a Committee of Style to rearrange and add “polish” to the Articles. Although Gouverneur Morris had not been on the Committee of Detail, he took the lead in redrafting the Constitution in the Committee of Style, and Madison later praised his work— “[a] better choice could not have been made.”⁷⁴ The Admission and Property Clauses that went into the Committee of Style as Article XVII came out as Article IV, Section 3. The Convention agreed to that section without amendment and it was thus placed in the final document.⁷⁵

Much of constitutional law is teased out of the structure of the document, not the words. The great principles underlying the text—separation of powers, judicial review, federalism—all derive from an analysis of the structure of the document. Thus, the Committee of Style’s important work in rearranging the articles is of immense constitutional import. And yet,

Ordinance, (2) the practice of Congress to invoke “Equal Footing” in each statehood enabling act, and (3) Supreme Court precedent. All of these practices served to constitutionalize or, in the words of Madison—“liquidate”—Equal Footing. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 1 (2019). Sixteen years later, after the United States had completed its purchase of the Louisiana Territory in 1803 and the question of administration of new territory presented itself, not for the first or last time, Morris exchanged letters with Henry Livingston discussing the Constitutional Convention and particularly the Admission and Property Clauses. Morris stated that it was his belief that Congress could not admit a new state from any territory that did not already belong to the United States in 1787. “I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils.” However, he was quick to add that the reason he did not insert more explicit language to that effect was that because a “strong opposition would have been made,” suggesting he was in the minority at the Convention on this point. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 404 (Max Farrand ed., 1911).

⁷¹ 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 578; see also U.S. CONST. art. IV, § 3, cl. 2.

⁷² *Id.*

⁷³ 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 70, at 582.

⁷⁴ See RICHARD BROOKHISER, GENTLEMAN REVOLUTIONARY: GOUVERNEUR MORRIS—THE RAKE WHO WROTE THE CONSTITUTION 89–90 (2003).

⁷⁵ 4 THE FOUNDERS’ CONSTITUTION, *supra* note 70, at 545 (1987).

unfortunately, we have very little direct evidence of Morris' and the Committee's decision-making process. Essentially, we have only the document they produced, and some scattered statements made after the fact over the course of decades. The big drafting question for present purposes is: Why is the Property Clause in Article IV instead of Article I where virtually all other congressional powers are housed?

I have already suggested one possible reason—the Admission Clause and the Property Clause were too closely related to separate. Article IV speaks mainly to (1) the relationship among states, and (2) the relationship between the national government and the states. The constitutional provision by which new states would be admitted by Congress thus fit naturally with other similar provisions—such as the one by which Congress guarantees to each state a republican form of government.⁷⁶ Since states were to be erected out of federal territory, it would make sense to place the provision granting Congress the power to regulate federal territory next to the one granting Congress the power to admit new states.

Let me suggest one other possible reason the Property Clause found its way to Article IV. The Constitution's approach to federal territory stood in marked contrast to Great Britain's manner for regulating its national domain. The appropriately named "Crown Lands" (or Royal Demesne) were subject to the plenary power of the monarch. That is, that land belonged to the Crown, and the King could govern it as he saw fit. Only after the King disposed of vast amounts of land to fund questionable activities did Parliament seek to regulate their disposition. Even then, Parliament did not seek to legislate private conduct on those lands—that remained the prerogative of the King.⁷⁷ Under the British system, managing the national domain was an executive affair, not a legislative one. For this reason, the Proclamation of 1763 was promulgated through the King as a proclamation—instead of through Parliament as a law, even though the King's ministers were largely responsible for its drafting and adoption.⁷⁸ Under the Constitution, the Convention did *not* want the public domain managed by the President out of concern that it was too much power in one person's hands. Therefore, the power went to Congress instead. Nevertheless, the Convention did not conceive of the management of property as a legislative power. Rather, it remained administrative. As such,

⁷⁶ See U.S. CONST. art IV, § 4.

⁷⁷ See Michael McConnell, Professor and Director of the Constitutional Law Ctr., Stanford Law School, Tanner Lectures on Human Values at Princeton University: The President Who Would Not Be King: Executive Power and the Constitution (Nov. 29, 2018) (on file with author); see also Daniel W. Hollis, III, *The Crown Lands and the Financial Dilemma in Stuart England*, 26 ALBION 419, 419–22 (1994) (detailing the King's authority over Crown Lands).

⁷⁸ See R.A. Humphreys, *Lord Shelburne and the Proclamation of 1763*, 49 ENG. HIST. REV. 241, 241–64 (1934).

it was separated from more traditional legislative functions. Public lands management was, and remains to this day, an administrative power housed in Congress.

Although the Admission and Property Clauses of Article IV garnered some attention during the ratification debates, the discussion centered mainly around its implication for existing states, as it had during the Convention—that is, Ratifiers were concerned with whether territory from existing states might be carved out for new states. The proposition that Congress could institute rules and regulations for federal territory lying outside the jurisdiction of states was not a major point of disagreement, though it would become one in the years leading up to the Civil War.

Finally, Greg Ablavsky persuasively shows that federal dominance of the public domain was not fully settled in 1787 or 1789, despite the apparent lack of concern about the Property Clause during the ratifying debates. The “rise of federal title” only became relatively settled through a series of post-founding moments in the 1790s and the first decade of the nineteenth century involving the admission of western states and the securing of private titles.⁷⁹ And while theories of state control of the public domain occasionally find their way into state and federal proposals, congressional plenary power over public lands remains secure.

B. Past Delegations

To be certain, Congress has delegated various aspects of its Property Clause power to the Executive since the Founding. These early delegations involved the power to dispose land and the power to govern territorial inhabitants through the promulgation of territorial law, enforcement mechanisms, and a fledgling judiciary. However, in the late 1800s Congress enlisted the aid of the President in managing the federal public domain and granted him immense discretion.

1. Disposition Power

In 1789 the Treasury Department, which became part of the newly-created Executive Branch, continued the role it had played under the Articles of Confederation in surveying and selling the public domain. Because the sale of land was intended to pay down the nation’s debt, the Treasury Department seemed to be the most logical governmental entity for conducting land sales. And given the nation’s policy of disposition, an immense amount of work needed to be performed (eventually giving rise to

⁷⁹ See Ablavsky, *supra* note 45, at 695.

the phrase “land office business”).⁸⁰ Although initial attempts to create a general land office died in Congress in 1789 and 1791, Congress finally created one in 1812.⁸¹ The Land Office remained housed in the Treasury Department but grew to be larger than other cabinet-level departments. To underscore the executive nature of the business, each land patent had to be signed by the President or Secretary of State until 1836. The Land Office was transferred to the Department of the Interior upon the creation of that Department in 1849.⁸² The General Land Office was discontinued in 1946.

2. Territorial Governance

Congressional power to create territorial governance also derives from its Property Clause power to pass “all needful rules and regulations” for federal territory.⁸³ One of the first acts of the First Congress was to reauthorize the Northwest Ordinance. Both the Northwest Ordinance and the Southwest Ordinance created territorial governments with officials appointed directly by Congress, including a governor, secretary, and three judges.⁸⁴ However, direct congressional appointment of territory officials was not to last. Beginning with the Organic Act for the Indiana Territory in 1800 and for every territorial Organic Act since then, Congress has delegated the appointment power to the President, who has appointed governors, secretaries and judges for each territory since 1800. Incidentally, the Organic Acts of the territories do not grant the President an explicit removal power for territorial officials. Nevertheless, presidents have not hesitated to remove territorial officials, including those appointed by their predecessors. Indeed, presidents have often removed territorial officials precisely because they had been appointed by their predecessors.⁸⁵ When Congress delegated Property Clause power to the President to appoint territorial officials, it did not give him a one-way ratchet, despite the lack of explicit removal powers. The Supreme Court upheld as constitutional congressional power to organize territories, including presidential appointment of territorial officials, in *American Insurance Co. v. Canter*.⁸⁶ Congress thus began delegating to the President specific management powers in 1891. Three important pieces of legislation passed near the turn of the century granted the President specific

⁸⁰ See generally MALCOLM ROHRBOUGH, *THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS* (1968).

⁸¹ See Act of Apr. 25, 1812, ch. 68, 2 Stat. 716.

⁸² See Conover, *supra* note 42, at 8.

⁸³ U.S. CONST. art IV, § 3, cl. 2.

⁸⁴ 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 281 (Roscoe R. Hill ed., 1936) (detailing Article III of the Northwest Ordinance).

⁸⁵ See John S. Goff, *The Appointment, Tenure, and Removal of Territorial Judges: Arizona—A Case Study*, 12 AM. J. LEGAL HIST. 211, 224–31 (1986). Similarly, the Antiquities Act does not grant the President an express rescission power. Presidents have nevertheless exercised rescission in the past.

⁸⁶ 26 U.S. 511, 546 (1828).

land management power—all made in response to concerns about extraction activities occurring on public lands.

3. *Power to Reserve Public Lands—Specific Delegations*

When Congress sought to reserve public lands from resource extraction, it quickly realized that administrative power was essential to (1) identify land deserving of protection; and (2) police activity on reserved lands. Each time that Congress identified a new threatening activity on public lands, it enlisted the President not only as its enforcement agent, but also granted the President immense discretion regarding what rules and regulations to promulgate to best preserve the resources. Interestingly, in each of the following three delegations of the Property Clause power, Congress gave power to the President to reserve land by a royal-sounding “Proclamation,” suggesting something of a return to the British method in which the King enjoyed immense discretion to manage the Crown Lands.

a. *Forest Reserve Act*

To better manage forests on federal land in a uniform and energetic way, Congress took action in 1891. In March of that year, on the last day of the legislative session, Congress proposed a Forest Reserve Act that would delegate power to the President under the Property Clause to identify and withdraw from the public domain forested lands, and set them aside as reserves. Such lands would not be sold or otherwise disposed of, and logging thereon would be regulated. Representatives from the Northeast were largely in favor of this delegation of power. However, during the debate over the Forest Reserve Act, representatives from other regions expressed concern at the “extraordinary and dangerous power” granted to the President.⁸⁷ Representative Mark Dunnell of Minnesota called the bill a “monstrous measure . . . a vast power to give to the President.”⁸⁸

Notwithstanding these objections, Congress passed the Forest Reserve Act and gave the President wide discretion to choose land that is worthy of protection, similar to the broad discretion that would later be given to the President in the Antiquities Act: “[T]he President of the United States may, from time to time, set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations”⁸⁹

⁸⁷ 32 CONG. REC. 3614 (1891) (statement of Rep. Thomas C. McRae).

⁸⁸ *Id.* (statement of Rep. Mark Dunnell).

⁸⁹ Forest Reserve Act, Pub. L. No. 51-561, § 24, 26 Stat. 1095, 1103 (1891).

Three weeks later, President Benjamin Harrison first exercised power under the Act to set aside a tract of land in Wyoming as a forest reserve.⁹⁰ Harrison, Grover Cleveland and William McKinley each utilized the act to collectively proclaim forty-five million acres of the public domain as forest reserves.⁹¹ Theodore Roosevelt would use the Act even more aggressively.⁹² These executive actions received strong support in the East and Midwest but, in what would become a pattern, were opposed by western states where the reserves were located.⁹³

b. Antiquities Act

The opening scene of *Indiana Jones and the Last Crusade* depicts young Indiana's attempt to prevent a private antiquities collector from taking possession of an ancient artifact.⁹⁴ Setting aside the exciting chase involving horses, trains, snakes, and a lion, the scene underscores a reality of the late nineteenth and early twentieth centuries. During this period, non-Indian settlers and explorers explored well-preserved ancient settlements on public lands in the American Southwest, particularly in Chaco Canyon and Mesa Verde. Both professional and amateur collectors raided the sites. According to Mark Squillace, "[a] consensus had emerged among policy officials that this practice had to be stopped and that even . . . qualified researchers had to be carefully regulated."⁹⁵ Squillace adds, "There seems little doubt that the impetus for the law . . . was the desire of archeologists to protect aboriginal objects and artifacts."⁹⁶

The operable language of the Antiquities Act states that:

[T]he President . . . is hereby authorized . . . 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 . . . shall be confined to the smallest area compatible with the proper care and management of the objects to be protected . . .⁹⁷

⁹⁰ Cécile Brooks-Nicolopoulos, *Forest Policy (1890–1910): The Impact of Two Pioneering Decades*, 70 *REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES* 28, 31 (1996).

⁹¹ *Id.*

⁹² *Id.* ("Theodore Roosevelt . . . did more for the conservation movement in his seven years in office than any administration before him.")

⁹³ See Bassman, *supra* note 25, at 509–10.

⁹⁴ *INDIANA JONES AND THE LAST CRUSADE* (Paramount Pictures 1989).

⁹⁵ Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 *GA. L. REV.* 473, 477–78 (2003).

⁹⁶ *Id.* at 477.

⁹⁷ Antiquities Act of 1906, Pub. L. No. 59-209, § 2, 34 Stat. 225, 225 (1906) (codified as amended at 54 U.S.C. § 320301(a) (2012)). Through the Act, Congress also made it a crime to "appropriate, excavate, injure, or destroy" historic or prehistoric ruins or antiquities located on U.S. land. *Id.*

Squillace notes that the legislative history of the Antiquities Act suggests that various factions argued over the expansiveness of the power in the drafting of the bill. Some Congressmen sought a wide-ranging power that would give the President the authority to declare monuments over areas of scenic beauty. Others, primarily from the West, sought to restrict the power.⁹⁸ Both received some concessions in the final bill, ensuring that the law would continue to be debated for more than a century. Those seeking a restrictive power inserted language that the President could declare an amount of land that was “confined to the smallest area compatible with the proper care and management of the objects to be protected.”⁹⁹ And although the language from earlier bills that would have protected lands based on their “scenic beauty, natural wonders or curiosities” was stricken, the law nevertheless protects “objects of historic and scientific interest.”¹⁰⁰ This latter language is broad enough to encompass areas of scenic beauty since such areas may be said to always be scientifically interesting.

Congress perceived that it could not act quickly enough to identify and protect archeological sites needing protection. It delegated its power to the President, who was better suited to act swiftly. Congress effectively recognized that this aspect of property management was not legislative in nature, but administrative and executive.

c. Pickett Act

In 1909, Congress became alarmed at an oil rush occurring on public lands in western states. Under then-extant mining laws, prospectors staked claims to mining sites and drilled for oil on the public domain. Growing demand for oil, coupled with new technologies for identifying and extracting it, led to a massive oil boom.¹⁰¹ The head of the U.S. Geological Survey warned the Secretary of Interior that all western oil might be claimed within a few months, meaning that the United States would need to buy back for its own use oil extracted from U.S. lands.¹⁰² Congress passed the Pickett Act in 1910, which gave power to the President to remove tracts of land temporarily from the public domain to prevent the assertion of mining claims thereon.¹⁰³ As it turns out, the Act was unnecessary: the Supreme Court later upheld presidential power to remove these lands even in the absence of congressional delegation.¹⁰⁴ This important case will be addressed in the next Section.

⁹⁸ Squillace, *supra*, note 95, at 477–78.

⁹⁹ Antiquities Act of 1906 § 2.

¹⁰⁰ Squillace, *supra*, note 95, at 477–78.

¹⁰¹ GATES, *supra*, note 32, at 730.

¹⁰² *Id.* at 732–33.

¹⁰³ Pickett Act, ch. 421, Pub. L. No. 61-303, 36 Stat. 847 (1910).

¹⁰⁴ *United States v. Midwest Oil Co.*, 236 U.S. 459, 483 (1915).

In addition to these three specific delegations of Property Clause power to reserve land, Congress also created important structural changes within the Executive Branch in the late nineteenth and early twentieth centuries, which facilitated the management of public lands. These structural changes include the creation of the U.S. Geological Survey in 1879,¹⁰⁵ the creation of grazing districts in 1934,¹⁰⁶ and the creation of the Bureau of Land Management in 1946.¹⁰⁷

C. Judicial Interpretations of the Nature of the Property Clause

In a series of cases from the late 1800 and early 1900s, the Court expounded the nature of the Property Clause, as it was asked to decide the appropriateness of congressional delegations of the same. The Court continually described the Property Clause as something other than a purely legislative power. This characterization led the Court to a position of deference toward Congress and the President.

1. Camfield v. United States

In *Camfield*, private property owners in Colorado had, through a clever fencing system, managed to effectively enclose public lands with fences that were placed entirely on their own private property.¹⁰⁸ The fencing made it impossible for anyone other than the private property owners to access the public lands for grazing. In the course of ruling that the private property owners must remove the fences, the Court stated that the government has, with respect to its own lands, the rights of an “ordinary proprietor” to maintain its possession and to prosecute trespassers.¹⁰⁹ The government was allowed to protect its property from nuisance as any property owner might. “It may deal with such lands precisely as a private individual may deal with his farming property.”¹¹⁰ Congressional power over its property was, at least in the *Camfield* case, more analogous to the rights of a private property holder than that of a national legislature charged with regulating private conduct pursuant to enumerated powers.

¹⁰⁵ GATES, *supra* note 32, at 422.

¹⁰⁶ *Id.* at 610.

¹⁰⁷ *Id.* at 128.

¹⁰⁸ *Camfield v. United States*, 167 U.S. 518 (1897).

¹⁰⁹ *Id.* at 524.

¹¹⁰ *Id.*

2. Butte City Water Co. v. Baker

Could Congress delegate its land management responsibilities to another department of government? The Court faced this question in a case involving mining legislation.¹¹¹ When Congress first attempted to regulate mining on public land in 1866, it authorized the mining of public lands “subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts so far as the same may not be in conflict with the laws of the United States.”¹¹² Congress initially instructed courts to adopt the “law” of mining camps rather than promulgating its own code. When Congress finally prescribed a general mining law in 1872, it still adopted the Miners Code to fill in the gaps, as it did in subsequent amendments to the general law.

The validity of the adoption of the Miners Code as the law of the United States, as well as the constitutionality of Congress’s delegation of its power under the Property Clause to local legislatures, came before the Court in the 1905 case of *Butte City Water Co. v. Baker*. There, two parties had a dispute over a mining claim that was located in the federal public domain within the State of Montana. The lower courts in Montana resolved the dispute by referencing Montana law and the Miners Code.¹¹³ The aggrieved party appealed to the United States Supreme Court, arguing that local legislatures lacked constitutional authority to regulate mining because Article IV,

¹¹¹ *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905).

¹¹² Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866) (granting right of way to ditch and canal owners over public land). The history of mining legislation in the United States is an interesting study in self-governance and federalism. The discovery of valuable minerals in the West, particularly gold in California in 1849 and silver in Nevada in 1858, led to many mining communities living and working on public lands. While falling within the legal jurisdiction of the United States, they were essentially autonomous, falling outside the practical reach of the law. In real and significant ways, they operated in a legal vacuum.

Just as land claim clubs developed in the Midwest as an ad hoc legal system to address competing claims to land before the arrival of the General Land Office, mining camps further west created their own internal rules to recognize mining claims and adjudicate disputes. These “Miners Codes” regulated the right to and size of claims, how many claims an individual could work, what work must be done to maintain a claim, and even, in some cases, the amount of water that could be used on the claim. To enforce the Miners Codes, the miners created regulatory districts, encompassing several camps. Mining camps took on some of the features of autonomous city-states. The Town of Rough and Ready, California, even voted to secede from the Union in 1850. Because miners tended to travel from camp to camp and took the Miners Code with them, these “laws” became remarkably uniform in the American West. The story of the Miners Codes began to be told as early as 1885 with the publication of a book by Charles Howard Shinn. CHARLES HOWARD SHINN, *THE MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT* 234 (Rodman Wilson Paul ed., 1965) (1884); see also Charles W. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850–1866: A Case Study of Judicial Resource Allocation in Nineteenth Century America*, 10 *LAW & SOC’Y REV.* 235 (1976) (describing the California Supreme Court’s general willingness to allow local regulations to operate).

¹¹³ *Baker v. Butte City Water Co.*, 72 P. 617, 618 (1903).

Section 3 specifically vested the power to make “needful rules and regulations” of federal property in Congress.¹¹⁴ The Court rejected the argument, stating that Congress had in 1866 (and again in 1893) specifically adopted local law, whether it be the Miners Code or state law, as the law of the public domain.¹¹⁵ Miners’ law was valid insofar as it did not conflict with state or federal law, and state law was valid insofar as it did not conflict with federal law.¹¹⁶

The Court’s opinion hinged upon its characterization of the Property Clause. The Court stated that congressional action under the Property Clause was “not of a legislative character in its highest sense of the term.”¹¹⁷ The Court continued, “While the disposition of [public] lands is provided for by Congressional legislation, such legislation savors somewhat of mere rules prescribed by an owner of property for its disposal.”¹¹⁸ That is, had Congress been delegating its *legislative* authority to the states or the miners’ camps, it may have run afoul of the non-delegation doctrine and the constitutional principle of separation of powers. However, because the Court found Congress’s Act to be one delegating *property management* powers, it was not unconstitutional. Congress merely enlisted the aid of agents to manage federal property. The distinction between legislative power and property management power exists whether Congress is delegating to states and miners or to the federal executive. A subsequent Court decision, *United States v. Grimaud*,¹¹⁹ underscored the constitutional validity of delegating proprietorship power to the Executive.

3. *United States v. Grimaud*

As previously mentioned, in response to the forest depletions of the mid-nineteenth century, Congress gave the President power in 1891 to create Forest Reserves. Then in 1897, Congress created the Forest Service to manage the nation’s forests.¹²⁰ In a bit of an anomaly, Congress housed the Forest Service in the Department of Agriculture, while the Forest Reserves themselves remained under the jurisdiction of the Department of Interior (which was not particularly energetic in its approach to forest management.) Gifford Pinchot, the nation’s self-appointed forestry expert and first head of the Forest Service, campaigned for almost a decade to have the Forest

¹¹⁴ U.S. CONST. art. IV, § 3.

¹¹⁵ *Butte City Water Co. v. Baker*, 196 U.S. 119, 126–27 (1905).

¹¹⁶ *Id.* at 127.

¹¹⁷ *Id.* at 126.

¹¹⁸ *Id.*

¹¹⁹ 220 U.S. 506 (1911).

¹²⁰ Organic Act of 1897, ch. 2., 30 Stat. 11, 34.

Reserves transferred to the Department of Agriculture.¹²¹

When he finally succeeded, he renamed the Forest Reserves as “National Forests,” and immediately began a more aggressive implementation of his forest management policies, which included placing stricter limitations on grazing and mineral extraction.¹²² To engage in those activities, one needed a permit issued by the Secretary of Agriculture. The permit rule was not promulgated by Congress, but by Pinchot in the Department of Agriculture.¹²³ Pinchot also enlarged the number of employees of the Forest Service, and established forest rangers to police the reserves by arresting those engaged in unauthorized grazing, mining, and timber removal.¹²⁴ Such clandestine resource extraction had continued in the 1890s and early 1900s.¹²⁵

One such person, who had once enjoyed free access to the public domain for sheep grazing but then resorted to unauthorized grazing, was Pierre Grimaud. He grazed his sheep without a permit in the Sierra Forest Reserve. One of Pinchot’s forest rangers arrested him in 1907. Grimaud challenged his arrest by arguing that the delegation of rulemaking to the Department of Agriculture was unconstitutional because it was legislation, and legislation belongs to the domain of Congress, not the Executive.¹²⁶

Although the lower court agreed with him, the Supreme Court disagreed. As in *Butte City Water Co. v. Baker*, the Court stated that the power given to the Executive in this instance was not legislative in nature. Rather, it was power like an “owner may delegate to his principal agent.”¹²⁷ According to the Court, the Executive, as agent for Congress, had promulgated rules governing the use of government property. Grimaud, the Court said, made “an unlawful use of the Government’s property.”¹²⁸

[I]n authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. The authority actually given was much less than what has been granted to municipalities by virtue of which they make by-laws,

¹²¹ Stephen Ponder, *Gifford Pinchot: Press Agent for Forestry*, 31 J. FOREST HIST. 26, 26–35 (1987).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *United States v. Grimaud*, 220 U.S. 506, 507 (1911). Pierre Grimaud is the nineteenth-century version of Cliven Bundy. Bundy’s beef, so to speak, with the United States is nearly identical to that of Pierre Grimaud. Upset that his family’s ability to graze cattle on the public domain had been diminished, Bundy and his sons first fought their battle with the Department of the Interior in federal court, and then on federal lands. See David Montero, *Judge Dismisses Case Against Nevada Rancher Cliven Bundy and his Sons*, L.A. TIMES (Jan. 8, 2018, 8:15 PM), <https://www.latimes.com/nation/la-na-bundy-mistrial-2018-story.html>.

¹²⁷ *Id.* at 516 (quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905)).

¹²⁸ *Id.* at 521.

ordinances and regulations for the government of towns and cities.¹²⁹

Not only did the Court distinguish the Property Clause's legislative features from its property management ones, it also discussed the nature of the discretion committed to the Executive in the Forest Reserve Act and its amendments:

What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another.

In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features . . .¹³⁰

Working out the details of which forest deserves reservation status, the size of those reserves, and the nature of the regulations on the reserves were details that Congress gave to the Executive branch to work out in its discretion. The Antiquities Act, as we shall see, similarly gave the Executive broad discretion in the establishment and regulation of National Monuments.

4. *Light v. United States*

In *Light v. United States*,¹³¹ the Court faced a similar issue as it had in *Grimaud*—unauthorized grazing. In the course of enjoining a sheepherder from grazing his sheep on the public domain, the Court articulated a theory of judicial deference to Congress in the management of public lands.

[I]t is not for courts to say how [public lands] shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. . . . These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.¹³²

While the Supreme Court was perfectly willing to review congressional *legislative* action, it took a much more deferential approach to congressional *proprietorship* action.

¹²⁹ *Id.* at 516 (emphasis added).

¹³⁰ *Id.*

¹³¹ 220 U.S. 523 (1911).

¹³² *Id.* at 537.

5. United States v. Midwest Oil Co.

As previously mentioned, Congress passed the Pickett Act in response to the oil boom of the early 1900s.¹³³ Even before the Pickett Act was passed, President Taft removed public lands in Wyoming and other western states from oil claims and extraction.¹³⁴ Midwest Oil asserted a claim to oil in Wyoming and began extraction activities after Taft's Proclamation. The United States filed a claim against Midwest Oil. Midwest Oil argued that the President's actions were unconstitutional because he had no specifically delegated authority from Congress at that time to remove lands.¹³⁵ The Supreme Court ruled against Midwest Oil. In doing so, it articulated a theory of constitutionality based upon congressional acquiescence. After reviewing a litany of presidential withdrawals conducted without congressional authorization, the Court stated, "Congress did not repudiate the power claimed or the withdrawal orders made. On the contrary it uniformly and repeatedly acquiesced in the practice and, as shown by these records, there had been, prior to 1910, at least 252 Executive Orders making reservations for useful, though non-statutory purposes."¹³⁶ Then, in reviewing a line of cases that refused to strike down non-statutory presidential action, the Court stated:

Nor do these decisions mean that the Executive can by his course of action create a power. *But they do clearly indicate that the long-continued practice, known to and acquiesced in by Congress,* would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands. This is particularly true in view of the fact that the land is property of the United States and that the land laws are not of a legislative character in the highest sense of the term . . .¹³⁷

According to the Court, congressional acquiescence in a presidential practice is evidence of its constitutionality. This was not only the view of the *Midwest Oil* Court, but of many prior courts faced with the same question—what to make of congressional acquiescence? That acquiescence was accorded deference due to the proprietor nature of the Property Clause. Similar deference was usually not given with respect to legislative power. As we shall see, Congress has long acquiesced in the reduction of National Monuments.

¹³³ *Supra* Section II.B.3.c.

¹³⁴ United States v. Midwest Oil Co., 236 U.S. 459, 467 (1915).

¹³⁵ *Id.* at 468–69.

¹³⁶ *Id.* at 471.

¹³⁷ *Id.* at 474 (emphasis added) (citation omitted).

D. *The Property Clause Is Administrative, Not Legislative in Nature*

The Property Clause power does not lend itself well to classification as a purely legislative power. Congress, for example, has power “to dispose of” the federal territory.¹³⁸ Selling land to private parties can hardly be characterized as legislative in nature if we conceive of legislation as generally regulating private conduct. To be sure, Congress also has power under the Clause to make “all needful rules and regulations” for the territories.¹³⁹ But this power, which previously belonged to the King, seeks to create specific rules for specific places that are generally off-limits to human habitation. It is administrative in nature, not legislative.

This distinction found expression in jurisprudence when courts were called upon to rule in cases and controversies involving the public lands. As congressional policies slowly changed from disposition to conservation and preservation in the late nineteenth century, and as Congress began to regulate the use of the public lands to a greater extent by enlisting the executive, litigation regarding the nature and appropriate use of the Property Clause became inevitable. The Court repeatedly characterized the Property Clause as non-legislative in nature and refused to upset congressional or presidential action exercised thereunder.

III. IMPLICATIONS FOR JUDICIAL REVIEW

A. *Past Judicial Deference Under the Antiquities Act*

The cases reviewed in the last Part demonstrate a practice on the part of the Court to (1) treat the congressional exercise of Property Clause power as plenary and non-reviewable; and (2) treat the presidential exercise of Property Clause power as essentially non-reviewable on the theory that non-delegation principles are not at play and it is therefore Congress’s job to overturn presidential action.

With respect to the Antiquities Act in particular, the judiciary has always adopted a deferential approach to presidential action for reasons that suggest the courts believe Congress is the entity best-situated to remedy unlawful acts. One is hard pressed to find a case where the Supreme Court struck down congressional or presidential action performed pursuant to the Property Clause, other than *Dred Scott*.¹⁴⁰

¹³⁸ U.S. CONST. art. IV, § 3, cl. 2.

¹³⁹ *Id.*

¹⁴⁰ *Scott v. Sanford*, 60 U.S. 393 (1856).

1. *Grand Canyon National Monument*¹⁴¹

Ralph Henry Cameron and his brother, Niles, asserted mining claims along the South Rim of the Grand Canyon in the early 1900s.¹⁴² Their claims were located along the main trail from the South Rim to the Canyon Floor—the Bright Angel trail.¹⁴³ This allowed them, they thought, to charge access fees to anyone wishing to use the trail.¹⁴⁴ After Theodore Roosevelt proclaimed the entirety of the Grand Canyon a National Monument, the Secretary of the Interior sought to dislodge the Cameron brothers from the area, alleging that their claims lacked sufficient minerals to justify perfection of the claim.¹⁴⁵ The Camerons' case wound up in the Supreme Court where they argued, among other things, that President Roosevelt lacked authority to declare the entire Grand Canyon a National Monument.¹⁴⁶ The Court gave short shrift to this argument. The Court was not willing to second guess the President's determination of the size of the area necessary for protection of the object of scientific interest.¹⁴⁷

2. *Jackson Hole National Monument*

Congress created Grand Teton National Park in 1929. At the time of the creation of the Park, John D. Rockefeller owned 33,000 acres of the Jackson Hole Valley adjacent to the Park through his Snake River Land Company. His goal was to hold that acreage in effective trust for the federal government until such time as it could be added to the Park. However, local residents learned of the semi-secret plan and opposed it. The National Park Service could not convince Congress to add Rockefeller's land to the Park over the objections of the Wyoming delegation. By the 1940s, Rockefeller was ready to divest himself of his property in Wyoming if it could not be protected land, and he announced his intentions to the Secretary of the Interior. Franklin Roosevelt decided to circumvent Congress, and declared a new national monument—the Grand Teton National Monument in 1943. He did so with Rockefeller's donated land as well as some land already managed by the U.S. Forest Service.¹⁴⁸

¹⁴¹ See *Cameron v. United States*, 252 U.S. 450 (1920) (holding that the monument reserve of the Grand Canyon was proper); see also Squillace, *supra* note 95, at 490–507 (describing the role of the Antiquities Act of 1906 in the creation of the Grand Canyon as a national monument).

¹⁴² *Cameron*, 252 U.S. at 454.

¹⁴³ *Id.* at 455 & n.1.

¹⁴⁴ *Id.* at 458.

¹⁴⁵ *Id.* at 455.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 464.

¹⁴⁸ This history is recounted in Hal Rothman, *A Showdown at Jackson Hole: A Monumental Backlash against the Antiquities Act*, in *THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY*,

In the middle of World War II, Wyoming Senator Edward Robertson called the designation a “foul, sneaking Pearl Harbor blow.”¹⁴⁹ Other congressional delegates and local newspapers also denounced the decision. Hollywood actor Wallace Beery led 550 sheep and their shepherds into the monument for the summer to protest. Wyoming filed a lawsuit against the National Park Service in a federal district court, claiming that the Monument designation violated the Antiquities Act.¹⁵⁰ The district court judge characterized the dispute as a political controversy, and declined to rule. According to the court, “the burden [was] on Congress to pass such remedial legislation as may obviate any injustice.”¹⁵¹ The court’s dismissal of the case meant the Monument remained.

3. *National Monuments in Alaska*

Alaska is roughly 600,000 square miles—or about 370 million acres—more than twice the size of Texas. When Congress created the State of Alaska, it transferred 105 million acres to state control, leaving three-quarters of the new state in federal control. However, the question of control and management of these public lands was not clear at statehood due to the claims of Alaskan Natives, the discovery of oil on the North Shore, and the growing preservation movement. Throughout the 1960s and 1970s, state leaders, federal officials, and tribal leaders all negotiated for control and management of the land.¹⁵² In the midst of ongoing negotiations and the debating of proposed legislation, President Carter announced on December 1, 1978 new National Monuments in Alaska totaling fifty-six million acres, to be managed partly by the U.S. Forest Service and partly by the U.S. Fish and Wildlife Service.¹⁵³ This remains the largest creation of National Monuments through a single proclamation. Carter felt compelled to act based on the very slow-moving legislative process and pressure from conservation activists.¹⁵⁴

In the only case to challenge President Carter’s Monument designations in Alaska, the federal district court held that there was a long-established history of congressional acquiescence to the broad exercise of presidential

HISTORIC PRESERVATION, AND NATURE CONSERVATION, 81–83 (David Harmon, Francis P. McManamon & Dwight T. Pitcaithley, eds. 2006).

¹⁴⁹ *Id.*

¹⁵⁰ *Wyoming v. Frank*, 58 F. Supp. 890 (D. Wyo. 1945).

¹⁵¹ *Id.* at 896.

¹⁵² See Cecil D. Andrus & John C. Freemuth, *President Carter’s Coup: An Insider’s View of the 1978 Alaska Monument Designations*, in *THE ANTIQUITIES ACT*, *supra* note 148, at 93 (highlighting the prevalence of land claims left unresolved by Alaska’s statehood act).

¹⁵³ See Proclamation Nos. 4611–27, 43 Fed. Reg. 57,009–131 (Dec. 1, 1978).

¹⁵⁴ See Andrus & Freemuth, *supra* note 152, at 93.

authority.¹⁵⁵ The court refused to disturb the Monument.¹⁵⁶ In the two aforementioned cases in Wyoming and Alaska, the courts effectively invited Congress to respond to the alleged presidential abuses of discretion, which is exactly what Congress did, as discussed in Part V.

4. *Grand Staircase-Escalante National Monument*

The primary case challenging President Clinton's designation of the Grand Staircase-Escalante National Monument is discussed more fully in Part IV. As will be seen, the court there showed extreme deference to both the President and Congress in the exercise of property management power, granting only the most minimal judicial review.

B. *Past Congressional Acquiescence to Monument Reduction*

Many times in the past, Presidents have adjusted the size of monuments both to enlarge them and to reduce them. Congress has yet to overrule a reduction.

1. *Navajo National Monument*

President William Howard Taft, upon taking office in 1909, set about to continue the conservation legacy of his then-close friend Theodore Roosevelt. Two weeks into his presidency, he created the Navajo National Monument within the boundaries of the Navajo Indian Reservation to protect "a number of prehistoric cliff dwellings and pueblo ruins."¹⁵⁷ Three years later, Taft issued a second proclamation stating that "after careful examination and survey . . . [the Navajo National Monument] has been found to reserve a much larger tract of land than is necessary for the protection of such of the ruins . . . and therefore the same should be reduced in area."¹⁵⁸ The original Monument was 360 acres. The elimination of 320 acres reduced its size by eighty-nine percent. If we view the purpose of the Antiquities Act as allowing the President to act swiftly to prevent the raiding of archeological sites, we should not be surprised to find an initial overprotection of the sites based on limited knowledge of the area, followed by a reduction in the monument based upon a more thorough examination. Congress did not stop Taft from reducing the size of the Monument.

¹⁵⁵ *Anaconda Copper Co. v. Andrus*, No. A79-161, 1980 U.S. Dist. LEXIS 17861, at *5-6 (D. Alaska July 1, 1980)

¹⁵⁶ *Id.*

¹⁵⁷ Proclamation No. 873 (Mar. 20, 1909), available at <https://www.presidency.ucsb.edu/node/277580>.

¹⁵⁸ Proclamation No. 1186 (Mar. 14, 1912), available at <https://www.presidency.ucsb.edu/node/277569>.

2. *Mount Olympus, Santa Rosa Island, Glacier Bay, and Great Sand Dunes National Monuments*

Taft may have reduced his own proclaimed Monument, but subsequent presidents did not hesitate to reduce monuments proclaimed by predecessors. In 1915, Woodrow Wilson cut the Mount Olympus National Monument, proclaimed by Theodore Roosevelt, in half.¹⁵⁹ In doing so he specifically cited the discretion given to him in the Antiquities Act.¹⁶⁰ Harry Truman reduced by almost half the size of the Santa Rosa Island National Monument that had been created by his predecessor in office.¹⁶¹ President Eisenhower diminished at least two National Monuments—the Glacier Bay National Monument created by Calvin Coolidge¹⁶² and the Great Sand Dunes National Monument created by Herbert Hoover.¹⁶³

In all of these instances, Congress chose not to intervene. If Congress had intended to hand the President a one-way ratchet as Squillace and others contend, it has failed to intervene to correct the President's improper use of the Antiquities Act. Congressional silence on these issues stands in marked contrast to congressional action taken in response to perceived abuses of the Antiquities Act, discussed in the next Section.

The courts have taken note of congressional acquiescence in the exercise of presidential discretion regarding public lands management. As previously mentioned, in *United States v. Midwest Oil Co.*, the Court faced the question of whether Taft's removal of federal land for purposes of preserving its oil was constitutional in the absence of a specific statute.¹⁶⁴ The Court noted that although land management was generally a congressional affair, Congress could delegate by implication some of its proprietor powers to the President. And how did this implied delegation work? By failure to object to the "long continued practice" of presidential withdrawals.¹⁶⁵ In short, Congress acquiesced to the President's exercise of power.¹⁶⁶ This is not to say Congress is incapable of taking action. To the contrary, Congress has many times demonstrated its ability to reign in the President. These actions are discussed in the next Section.

¹⁵⁹ See Clifford Edwin Roloff, *The Mount Olympus National Monument*, 25 WASH. HIST. Q. 214, 227 (1934).

¹⁶⁰ Antiquities Act of 1906, 54 U.S.C. §§ 320301–03 (2012).

¹⁶¹ Proclamation No. 2659, 10 Fed. Reg. 10,275 (Aug. 13, 1945).

¹⁶² Proclamation No. 3089, 20 Fed. Reg. 2103 (Mar. 31, 1955).

¹⁶³ Proclamation No. 3138, 21 Fed. Reg. 4035 (June 7, 1956).

¹⁶⁴ 236 U.S. 459, 460 (1915). The facts of the case occurred prior to passage of the Pickett Act in 1910.

¹⁶⁵ *Id.* at 483.

¹⁶⁶ *Id.* at 471.

C. Past Congressional Remedial Action

1. Amendments to the Forest Service Act

Although the President had the authority to declare Forest Reserves in the early part of the 1890s, he lacked real enforcement and management mechanisms. Ranchers continued to graze their livestock on reserved land and miners continued to mine. Congress created a Forest Commission in 1896, modeled on prior Land Commissions, to study the issue and make recommendations for improving forest management.¹⁶⁷ Entering the scene that decade as a member of the commission was a strong advocate for a progressive-based theory of forest management—Gifford Pinchot.¹⁶⁸

Following his graduation from Yale in 1889, which education included his induction into the Skull and Bones Society from which he would later hire many managers in the U.S. Forest Service, Pinchot studied forestry in Europe.¹⁶⁹ To do so, he turned down an offer to work in the Department of the Interior. Upon his return to the United States a few months later, Pinchot was considered a national authority on forest management. Once again, though, Pinchot turned down employment with government in order to manage a private forest in North Carolina owned by the Vanderbilt family. Pinchot's hope was to parlay successful management of a private forest based on European techniques into political capital that could be used to assert forest management on a grand, national scale. Although the Vanderbilt forest was a success on paper only, Pinchot nevertheless enhanced his status as an expert in forest management.¹⁷⁰ Pinchot was named as one of the Forest Service Commissioners in 1896 and his big personality would

¹⁶⁷ See Gerald W. Williams & Char Miller, *At the Creation: The National Forest Commission of 1896–97*, *FOREST HIST. TODAY*, Spring/Fall 2005, at 32.

¹⁶⁸ Gifford Pinchot was born in 1865 with a silver spoon in his mouth. Both of his grandfathers were wealthy landowners—one in Pennsylvania and one in Manhattan. His maternal grandfather, Amos Eno, was at one point the richest man in New York City. Pinchot grew up in New York and traveled extensively through Europe during his adolescence. Traditional professions for someone like Pinchot, in medicine, law, or the ministry, did not interest him. Pinchot preferred the outdoors. “I loved the woods and everything about them,” he later recalled. Instead of adapting to an indoor profession, Pinchot decided to professionalize the outdoors. Pinchot's father, James, had been introduced to forest management during travels in Europe and encouraged his son to consider forestry as a profession, an idea Pinchot found very appealing. Such a profession did not exist in the United States and, Brian Balogh writes, Pinchot “literally had to create” it. Brian Balogh, *Scientific Forestry and the Roots of the Modern American State: Gifford Pinchot's Path to Progressive Reform*, 7 *ENVTL. HIST.* 198, 203 (2002).

¹⁶⁹ In Europe, Pinchot met Dietrich Brandis, a German academic who managed the British forest system in Burma. Brandis advised Pinchot to remain in Europe longer to become a master of his profession. Pinchot ignored his advice and returned home accurately anticipating that he would be considered the highest authority of forestry in the United States. *Id.* at 208.

¹⁷⁰ *Id.* at 199–200.

dominate forest management for decades.

Most members of the Forest Service Commission toured the West in 1896 and were joined by John Muir, who advocated a vast expansion of Forest Reserves. The members of the Commission also recommended the creation of an enforcement arm—to prevent unauthorized grazing and timber extraction in reserves. They only disagreed upon the appropriate composition of forest enforcement. The chair of the committee wanted the military in charge, whereas Pinchot argued for a scientifically-trained civilian corps. Upon its return to Washington, the Commission made their recommendations to the President and Congress.¹⁷¹

On February 22, 1897 (George Washington's birthday), just before leaving office, President Grover Cleveland proclaimed twenty-one million acres of new forest reserves, increasing the acreage by more than 150%.¹⁷² The "Washington Birthday Reserves" created a furor in the West, particularly among livestock interests, who called upon the newly-elected McKinley to cancel the reserves.¹⁷³ Gerald Williams and Char Miller write that Cleveland's Proclamation brought a central question to the fore in American politics—"Who controlled the West?"¹⁷⁴ The American Forestry Association summarized the complaints of western interests as:

- (a) Unnatural irritation at the idea that Eastern influences are presuming to assert themselves in regard to the Western states.
- (b) Natural irritation at the manner in which the reservations were made, without consultation with Western Representatives.
- (c) Reasonable objection to the inclusion of agricultural lands within the bounds of the reservation.
- (d) Unreasonable objection to the whole forest reservation idea as impeding licentious use of the public domain by everybody.¹⁷⁵

Without waiting for McKinley's inauguration, western state congressional delegates attached a rider to the Sundry Appropriations Act for 1898 that would eliminate all of the Forest Reserves.¹⁷⁶ Cleveland pocket vetoed the legislation on his last day of office.¹⁷⁷ The government would run out of money on July 1 of that year without further action by Congress and incoming President McKinley. In his first week in office, McKinley called Congress into an extra session and urged its members to provide "sufficient revenue to faithfully administer the Government" before other business was

¹⁷¹ See Williams & Miller, *supra* note 167, at 32–41.

¹⁷² *Id.* at 37.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 39.

¹⁷⁵ *Id.* at 38–39.

¹⁷⁶ Bassman, *supra* note 25, at 509–11.

¹⁷⁷ *Id.*

transacted.¹⁷⁸ McKinley did not heed the call to simply cancel Cleveland's designations. Rather, he worked to ensure passage of compromise legislation in the spring of 1897.

Although Cleveland's designations were unpopular in the West, they were popular in the East. Eastern progressives desired a robust Forest Reserve system, complete with enforcement power. Both sides of the debate used appropriations legislation in 1897 to wrangle some concessions. Therefore, much of the Forest Service Organic Act of 1897 (which was part of the general appropriations bill) was a response to the concerns of the western states that the President had too much power to remove from the public domain commercially important lands. Western state leaders were angry over (1) the creation of thirteen western reserves by President Cleveland and (2) the recommendations of the Forest Commission, which suggested the creation of many more reserves in western states. "A storm of protest arose in the West, expressed in public meetings, memorials from legislatures, by letters from western public officials, angry editorials and vituperative denunciation of the President in both houses of Congress"¹⁷⁹

In order, then, to establish the Forest Service, the Organic Act needed to be a bill of compromise. In exchange for the creation of the Forest Service, the Organic Act made three concessions to western states. First, the Organic Act limited the President's discretion to create forest reserves by stating that: "No public forest reservation shall be established except to improve and protect the forest within the reservation . . . it is not the purpose or intent of these provisions . . . to authorize the inclusion . . . of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes."¹⁸⁰

Congress thus curtailed the President's wide-ranging discretion under the Forest Reserve Act. Second, Congress suspended Cleveland's designations for a period of nine months. This would give President McKinley time to review and decide upon the fate of those reserves pursuant to the third and perhaps most important concession of the bill—Congress specifically authorized the President to revoke previous designations:

[T]o remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests¹⁸¹

¹⁷⁸ President William McKinley, Message to Congress (March 15, 1897), <http://www.presidency.ucsb.edu/ws/index.php?pid=69239>.

¹⁷⁹ See Bassman, *supra* note 25, at 509.

¹⁸⁰ Organic Act of 1897, ch. 2., 30 Stat. 11, 34.

¹⁸¹ *Id.* at 34.

The man who introduced the amendment that granted the President a rescission power was Representative Oscar Underwood, from Alabama. Underwood thought the Office of the President was better suited than Congress to make determinations about which Forest Reserve areas should be reduced or rescinded. “I think that the Executive of this nation is in a much better position to exercise his judgment as to what portions of this reserve should be established and what portions should not be than we are, who do not have the full facts before us.”¹⁸² Representative William Ellis of Oregon stated that the amendment was necessary not because any member of Congress doubted the President’s ability to revoke a prior order, but because McKinley himself felt some “timidity” about undoing the work of his predecessor.¹⁸³ Indeed, the impatient Representative Freeman Knowles of South Dakota argued that he and like-minded colleagues had been trying for months already to get McKinley to agree to revoke Cleveland’s orders, to no avail. “The President has power to revoke it. There is no question about that at all.”¹⁸⁴ This exchange during the floor debate suggests that the prefatory language of the amendment “to remove any doubt” was inserted to remove any doubt in McKinley’s own mind about his power to revoke, rather than any doubt in the minds of the members of Congress. McKinley signed the bill.¹⁸⁵

The question that occupies the legal field of Public Lands Management in 2018 is the same question that occupied Congress 120 years ago as it debated the Forest Service Act: Does the President have the authority to revoke a previous presidential proclamation withdrawing lands from the public domain? In both cases the proclamation power was not a constitutional prerogative power, but rather a delegated power from Congress. And in both cases the initial delegation of power was silent on the question of rescission. Arguments both for and against this rescission power

¹⁸² 30 CONG. REC. 1006 (1897) (statement of Rep. Oscar Underwood).

¹⁸³ *Id.* at 1007 (statement of Rep. William Ellis).

¹⁸⁴ *Id.* (statement of Rep. Freeman Knowles).

¹⁸⁵ Despite the nine-month suspension, McKinley did not rescind Cleveland’s designations. Brooks-Nicolopoulos, *supra* note 90, at 36–37. Indeed, McKinley continued to designate new forest reserves throughout his administration, only invoking the rescission power one time to return a portion of the Olympic Forest Reserve in Washington to the public domain in 1900. *Id.* Western states saw a growth of forest reserves in the region during the administration of McKinley, and an even larger expansion during the administration of Theodore Roosevelt. Roosevelt’s aggressive use of the power, at the urging of Gifford Pinchot, proved so unpopular that Congress repealed the power in 1907. *Id.* Roosevelt, recognizing the political realities, reluctantly signed the repeal bill, but not before creating sixteen million new acres of reserves the day before. *Id.* Pinchot, for his part, engaged in an eight-year long campaign between 1897 and 1905 to transfer management of the nation’s forests from the Department of the Interior to the Department of Agriculture, where the Forest Service was housed, so that he might have free hand in their management. *Id.* Pinchot also decided that “National Forest” was a better name than “Forest Reserve.” *Id.*

with respect to National Monuments were reviewed briefly in the Introduction. How did Congress answer that question in 1897?

Congress decided to grant the President an explicit rescission power. This has led some scholars to claim the President cannot reduce the size of monuments because the Antiquities Act contains no such provision.¹⁸⁶ However, the legislative history and the prefatory language tells a different story. “To remove any doubt” suggests the possibility that an explicit authorization from Congress was not actually necessary, but was inserted to avoid further debate and expedite the process of rescinding previous orders, for which westerners were extremely anxious. Further, those most strongly advocating in favor of an express delegation, as the history reveals, thought the President already had an inherent power. To use the language in this context suggests that the President had an inherent rescission power already, and that the statute merely underscores his pre-existing power. Similarly, the Supreme Court has referred to the Tenth Amendment as a “truism,” merely stating explicitly what is already implied in the structure of the Constitution.¹⁸⁷ One could imagine prefatory language to the Tenth Amendment reading, “To remove any doubt, the powers not delegated” Interestingly, the prefatory language “to remove any doubt” did not find its way into the United States Code, despite its relevance to the current question. Such editing of the Statutes at Large is a good reminder that the United States Code is not the law, but merely a reflection of the law.¹⁸⁸

Is this history of the Forest Service Act dispositive of the issue today involving National Monuments? Of course not. And that is the point. Scholars and attorneys today who argue that the Forest Service Act demonstrates the absence of an inherent rescission power have not paid close enough attention to the historical context of the Act. Congress limited this revocation power to proclamations made under the Forest Reserve Act of 1891. The statute, therefore, is not legally applicable to the designation of National Monuments under the subsequently passed Antiquities Act of 1906 or to any other presidential proclamations or orders. And there is no reason why a court today is bound by a congressional interpretation from 120 years ago. However, if the statute of 1897 is, as Congress thought, a “truism” in that it merely confirms the President already holds a power of revocation with respect to previous presidential orders, then he would also hold that same revocation power with respect to presidential proclamations made under the Antiquities Act.

¹⁸⁶ See Squillace, Biber, Bryner & Hecht, *supra* note 18, at 56 (“Congress did not, in the Antiquities Act or otherwise, delegate to the President the authority to modify or revoke the designation of monuments.”).

¹⁸⁷ *United States v. Darby*, 312 U.S. 100, 124 (1941).

¹⁸⁸ See Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283, 284 (2007) (describing the Code as a guide to reading the law as opposed to the law itself).

2. Amendments to the Antiquities Act

a. Wyoming

Returning to the story of Jackson Hole, the federal government still wanted to make Grand Teton National Monument part of the Grand Teton National Park and continued to work toward that end, even after the court refused to upset the Monument.¹⁸⁹ The creation of a National Park goes through Congress. In order to win approval for the expanded National Park from western delegates, members of Congress agreed to a compromise. In the legislation creating the Park, it agreed to abolish the Antiquities Act with respect to Wyoming only.¹⁹⁰ For this reason, the Antiquities Act to this day has no application in Wyoming. The President is not allowed to name any more Monuments in Wyoming. In the face of controversial presidential action, Congress demonstrated its ability to rein in the President.

b. Alaska

Following Jimmy Carter's proclamation creating monuments in Alaska, there was a large outcry and protest of his actions in the West, as anticipated. He was burned in effigy in Alaska and, as with the creation of Grand Teton National Monument, protestors stormed onto the land and conducted prohibited activities in defiance of federal regulations.¹⁹¹ Carter's designations spurred Congress into action. It finally passed the Alaska National Interest Lands Conservation Act ("ANILCA") to resolve multiple outstanding public lands issues. Among other things, it modified some of Carter's monument designations and allowed for various resource extraction activities in others. It also modified the Antiquities Act such that any new monument designations in Alaska in excess of 5,000 acres must be listed in the *Federal Register* and must be approved by Congress within one year of the date of designation.¹⁹² President Carter signed the bill into law just before leaving office. Alaska thus joined Wyoming as the second of only two states with special exemptions from the Antiquities Act. Whereas Presidents have *no* power to act in Wyoming pursuant to the Antiquities Act, they may declare new monuments in Alaska subject to congressional approval. Congress once again proved its ability to reign in runaway presidential action.¹⁹³

¹⁸⁹ Wyoming v. Frank, 58 F. Supp. 890 (D. Wyo. 1945).

¹⁹⁰ 64 Stat. 849, 853 (1950).

¹⁹¹ See Egan, *supra* note 5.

¹⁹² Alaska National Interest Lands Conservation Act, Pub. L. No. 96-478, § 1326, 94 Stat. 2371, 2488 (codified at 16 U.S.C. § 3213 (1980)).

¹⁹³ In this discussion of Congressional remedial action, I have not undertaken to discuss the

IV. JUDICIAL REVIEW OF PRESIDENT TRUMP'S MONUMENT REDUCTION

Having reviewed this history of judicial deference to both Congress and the Executive, as well as congressional action and acquiescence, we now may turn to the question of what type of judicial review is available for the challenges that have been made to President Trump's reduction to Bears Ears and Grand Staircase Escalante. The following are four possible avenues for judicial review of President Trump's actions. The first two avenues are barred to plaintiffs in the present case. The second two avenues, though allowing for judicial review, still demand judicial deference be made—not strictly to the President, but to Congress.

A. *No Review Under the Administrative Procedure Act*

The lawsuits filed against Trump assert claims under the Administrative Procedure Act (“APA”).¹⁹⁴ The APA creates statutory judicial review of agency action. The law allows a person suffering legal wrong due to the actions of an agency to seek relief against the United States.¹⁹⁵ However, the Supreme Court has held that this statutory avenue for relief is not available for presidential actions. In *Franklin v. Massachusetts*, the Court stated, “the President is not an agency within the meaning of the [APA].”¹⁹⁶

Perhaps, one might argue, because Trump based his decision on the recommendation of an agency that would fall under the APA's provisions—the Department of the Interior—then his actions are reviewable thereunder. This argument was foreclosed in *Franklin* and rejected in a district court case even more directly on point *Utah Ass'n of Counties v. Bush*.¹⁹⁷ There, a group of counties and other interested parties filed a lawsuit seeking to undo President Clinton's creation of the Grand Staircase-Escalante National Monument. The court, applying *Franklin*, held that “the fact that presidential action is required before there will be any effect eliminates the prospect of

comprehensive land management reform Congress enacted in 1976—the Federal Land Policy and Management Act (“FLPMA”). In this Act, Congress formally terminated old disposal policies, ended presidential discretion for most withdrawals (except the Antiquities Act), and placed formal rules on the Department of Interior and other land-management governing bodies. Pub. L. No. 94-579, 90 Stat. 2743, 2789–92 (1976). For a discussion of FLPMA interaction with the Antiquities Act, see Elena Daly & Geoffrey B. Middaugh, *The Antiquities Act Meets the Federal Land Policy and Management Act*, in *THE ANTIQUITIES ACT*, *supra* note 148, at 219.

¹⁹⁴ See, e.g., Complaint for Injunctive & Declaratory Relief at ¶12, *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017).

¹⁹⁵ 5 U.S.C. § 702 (2012).

¹⁹⁶ 505 U.S. 788, 796 (1992).

¹⁹⁷ 316 F. Supp. 2d 1172, 1189 (D. Utah 2004).

judicial review under the APA.¹⁹⁸ To be certain, plaintiffs in the current litigation argue that there are other avenues for judicial review against the President—these will be addressed shortly. But *Franklin* and *Utah Ass'n of Counties*, if they are to be followed, demand dismissal of plaintiffs' claims made pursuant to the APA.¹⁹⁹

B. No Review for Abuse of Discretion

The plaintiffs in the current litigation against President Trump do not allege an abuse of discretion. Rather, they assert he had no discretion whatsoever to reduce the monuments. These claims are considered in the next two sections. Nevertheless, if the Court were to treat the Antiquities Act as having given the President not only the discretion to create monuments initially, but also the discretion to reduce their size *ex-post facto*, then the Court must also defer to that discretion. The Supreme Court has said that “[w]henver a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.”²⁰⁰ Further, where 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.”²⁰¹

C. Limited Non-Statutory Ultra Vires Review

Those suing Trump allege that he acted *ultra vires*—outside the scope of the Antiquities Act. Squillace, Biber, Bryner, and Hecht agree with this, arguing that the Act grants the President only the power to create new monuments, but not power to reduce the size of existing ones.²⁰²

This alleged *ultra vires* act of the President, they say, allows for judicial review even in the absence of a statutory grant. Presidents may lawfully act in only two circumstances: (1) with constitutional authority or (2) with delegated authority from Congress. However, non-statutory review of presidential *ultra vires* acts is not guaranteed under current case law. As

¹⁹⁸ *Id.* (footnote omitted).

¹⁹⁹ The Tribes are on stronger statutory jurisdictional ground than other parties. This is because they may turn to a separate statute that provides U.S. district courts with original jurisdiction to hear “all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1362 (2012).

²⁰⁰ *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 380 (1940) (citation and internal quotation marks omitted).

²⁰¹ *Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919).

²⁰² See Squillace, Biber, Bryner & Hecht, *supra* note 18.

Kevin Stack writes, there is a long line of decisions in which the Supreme Court has declined to review whether the President properly used his statutory powers.²⁰³ Even in cases where the Court engages in a nominal non-statutory review, it has limited its inquiry to determining whether the President has merely invoked its statutory authority. For example, in *Utah Ass'n of Counties*, the court acknowledged the existence of non-statutory review. “Although judicial review is not available to assess a particular exercise of presidential discretion, a Court may ensure that a president was in fact exercising the authority conferred by the act at issue.”²⁰⁴ However, the court then severely curtailed its own non-statutory review by stating that “[c]learly established Supreme Court precedent instructs that the Court’s judicial review in these circumstances is at best limited to ascertaining that the President in fact invoked his powers under the Antiquities Act. Beyond such a facial review the Court is not permitted to go.”²⁰⁵

Turning briefly to the substance of the argument: Squillace, Biber, Bryner, and Hecht argue for a one-way ratchet interpretation of the Antiquities Act.²⁰⁶ That is, the President may create National Monuments with unlimited discretion and even enlarge the borders of existing ones, but the President may never reduce their size because such a rescission power is not included in the language of the statute. This argument is one that might make strict textualists proud—it requires a reading of the words “The President . . . may reserve . . . parcels of land, the limits of which . . . shall be confined to the smallest area compatible with proper care and management of the objects to be protected” to absolutely preclude a reduction to monuments, despite the historic use of the Antiquities Act to do just that, with congressional acquiescence, if not express approval.²⁰⁷

Presumably, then, Squillace, Biber, Bryner, and Hecht believe that the absence of this language in the Antiquities Act would preclude a President from reducing the size of a monument that he himself created. That is, if President Obama, one week after creating Bears Ears, announced a reduction to Bears Ears based on a confessed abuse of discretion, the courts

²⁰³ Kevin Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171, 1172, 1175 (2009). Professor Stack argues that courts ought to review presidential acts, even absent statutory judicial review, to determine whether the President acted ultra vires.

²⁰⁴ *Utah Ass’n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1186 (D. Utah 2004).

²⁰⁵ *Id.* at 1183.

²⁰⁶ The argument that the Antiquities Act gives the President a “one-way lever” is also made by Jayni Foley Hein. See Jayni Foley Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 ENVTL. L. 125, 161 (2018) (“Both the Antiquities Act and OCSLA section 12(a) provide one-way levers for the President to protect special places for the benefit of present and future generations. Congress did not give the President the power to undo or diminish these reservations of public land.”).

²⁰⁷ Antiquities Act of 1906, Pub. L. No. 59-209, § 2, 34 Stat. 225, 225 (1906).

must disallow the reduction as violative of the statute. If Squillace, Biber, Bryner, and Hecht, however, believe that the prohibition on reduction applies only to successor presidents, they have not explained how they tease that caveat out of the plain language of the statute. If a President is allowed to correct his own abuse of discretion, why may a President not correct the abuse of discretion of a predecessor in office?

Further, if Congress intended for the Antiquities Act to be a one-way ratchet, it could have inserted clear language to that effect, as it has done with other delegations of power to the Executive Branch. For example, in multiple delegations of environmental regulation to the President, Congress has included anti-backsliding provisions, which at least one court has referred to as “one-way ratchet[s].”²⁰⁸ The Clean Water Act says, “a permit may not be renewed . . . to contain . . . limitations which are less stringent than the comparable . . . limitations in the previous permit”²⁰⁹ Likewise, the Clean Air Act contains an anti-backsliding provision that prevents the relaxation of air quality standards.²¹⁰ If Congress wants to create a specific anti-backsliding provision for the Antiquities Act, it knows how to do so. Thus far, Congress has chosen not to include one. The courts should not read one into the statute where there is an absence of express language.

There is good reason for the Court to take a deferential approach in this situation. Everyone agrees that Congress has the authority to step in and remedy what Trump has done. Everyone also agrees that Congress has the authority to amend the Antiquities Act to clarify whether it is a one-way ratchet or not. If the Court would attempt to resolve the statutory ambiguity, it would be trying to do the job of Congress. As discussed more fully in Part V, Congress is the branch of government with the most institutional competency to remedy presidential action taken pursuant to delegated Property Clause powers.

D. Limited Review for Constitutional Violation

A claim that the President acted *ultra vires*, in order to succeed, must be coupled with a claim that he lacks independent constitutional authority to so act. Squillace, Biber, Bryner, and Hecht, and the claimants in the litigation against Trump, claim that the President has misappropriated a Property Clause power from Congress—the power to adjust the boundaries of National Monuments. Even if it is true that the President has misappropriated the Property Clause, the Court should adopt a modest and deferential attitude in its judicial review for two reasons.

²⁰⁸ Nat. Res. Def. Council v. Envtl. Prot. Agency, 643 F.3d 311, 322 (D.C. Cir. 2011).

²⁰⁹ 33 U.S.C. § 1342(o)(1) (2012); *see also* 33 U.S.C. § 1313(d)(4) (providing a similar anti-backsliding provision).

²¹⁰ 42 U.S.C. § 7502(e) (2012).

First, as with the ultra vires claim, congressional intent regarding the degree to which it wishes the President involved in these decisions is not clear. The language of the Antiquities Act does not clearly indicate congressional intent to prevent the President from reducing monuments. This ambiguity, coupled with a history of congressional acquiescence to reduction decisions, suggest that perhaps Congress *wants* the President to be able to reduce monuments at his discretion. Congress certainly has the power to stop him. The Court should let Congress correct the President if Congress feels the President is out of bounds. After all, it is a congressional administrative authority at issue, not a judicial one. Let Congress guard its own authority—it does not need help from the Court.

Second, the hybrid nature of the Property Clause means that ordinary separation of powers concerns are not at play. Underlying the non-delegation doctrine and the separation of powers doctrine is the idea that only the legislative branch should exercise legislative powers and only the executive branch should exercise executive powers. When the executive branch exercises legislative powers, we are justifiably concerned that too much power is housed in one branch. The Property Clause, as many court decisions have articulated, is not strictly a legislative power. It is an administrative one—one that was naturally exercised by the executive of Great Britain. It is qualitatively different than the powers housed in Article I—enumerated powers Congress has to regulate private conduct. When the President manages property pursuant to the invitation of Congress, an ordinary separation of powers analysis is not warranted. While it is certainly possible for the President to exceed both his constitutional and statutory authority, the entity best positioned to remedy his acts is Congress.

V. THE INSTITUTION BEST-SITUATED TO REMEDY TRUMP'S ACTION IS CONGRESS

President Trump's Proclamation shrinking the size of the Bears Ears and the Grand Staircase-Escalante Monuments has raised new concerns about unilateral executive action. The Patagonia Company, which has filed a lawsuit against the President, asserts "The President Stole Your Land."²¹¹ Other groups opposed to President Trump's actions similarly claim that he acted illegally.

Antiquities Act controversies are, at their heart, procedural. Trump's actions have stirred a re-awakening and attraction to the stability and permanence of *legislative* solutions to difficult land management decisions,

²¹¹ Joseph Hincks, 'The President Stole Your Land.' *Patagonia to Sue Trump Over Rollback of National Monuments*, FORTUNE (Dec. 5, 2017), <http://fortune.com/2017/12/05/patagonia-lawsuit-utah-monuments-trump/>.

rather than *executive fiat*. John Echohawk is the Executive Director of the Native American Rights Fund, which is opposed to President Trump's Proclamation. The Fund plans to finance litigation that seeks to nullify Trump's actions. Echohawk writes that a "true government-to-government" process for setting the boundaries of National Monuments in which Native Americans have an interest entails "member[s] of Congress approach[ing] the tribes, and in open and transparent dialogue . . . discuss[ing] shared priorities and interests."²¹² Echohawk lauds the legislative process for setting the boundaries of Bears Ears, including efforts by Representative Reuben Gallego of Arizona, who would establish the boundaries through a congressional process.²¹³

Echohawk's sentiments about the legislative process are not unlike those who opposed the creation of Bears Ears in the first place. They, too, would prefer that monuments, if they are to be created, be created legislatively.²¹⁴ Although these opposing parties disagree on the size and even existence of the monuments, they both find unilateral executive action distasteful. The controversies are generated not from substance, but from the process. For in the creation of monuments, Congress has forgone bicameralism and presentment, which necessitate dialogue and compromise, and replaced them with a delegation of a seemingly monarchical authority to the President. This was the system of Great Britain that the Framers found distasteful.

Trump's actions therefore present a unique opportunity for compromise legislation. Modest proposals have been offered in the past twenty years, although no action has been taken. James Rasband, for example, suggested after President Clinton's surprise announcement of the Grand Staircase-Escalante Monument, that Presidents be required to post notice and receive comments for a designated period, similar to what is already required of the Secretary of the Interior when changes to land use are under consideration for Bureau of Land Management land.²¹⁵ However, this was essentially the process followed by President Obama in the creation of the Bears Ears Monument. Although he was not legally required to do so, President Obama's intentions to create Bears Ears were not secret, and his Interior Secretary Sally Jewel visited the area and received feedback.²¹⁶ President Obama's openness about the process did little to dampen the controversy or

²¹² John E. Echohawk, *President Trump's Bears Ears Order is an Illegal Attack on Tribal Sovereignty*, HUFFINGTON POST (Dec. 4, 2017), https://www.huffingtonpost.com/entry/trump-bears-ears-tribal-sovereignty_us_5a25b663e4b03c44072fcc02.

²¹³ *Id.*

²¹⁴ See Brian Maffly & Thomas Burr, *Obama Declares Bear Ears National Monument in Southern Utah*, SALT LAKE TRIB. (Dec. 29, 2016, 1:31 PM), <https://archive.sltrib.com/article.php?id=4675012&itype=CMSID>.

²¹⁵ James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 537 (1999).

²¹⁶ See Maffly & Burr, *supra* note 214.

to prevent Trump's rescissions.

What are other options? Here, again, congressional history may be useful to identify several courses of action. While many of them may not be politically viable or otherwise good solutions, one precedent offers hope for reasonable and wise congressional action.

A. Option A—The 1897 Forest Reserve Compromise

Congress could follow the example of the 1897 Congress and grant the President an explicit rescission power to “remove any doubt” about his power to rescind. Such an option is probably not viable in the current political climate because such a large constituency is not inclined to grant the President more power at this time, especially a rescission power.

B. Option B—The 1907 Repeal of Unilateral Authority

Congress could follow the example of the Congress of 1907 and repeal the presidential power to designate monuments altogether. Again, such an option is probably not politically viable in the current moment. Although many western state representatives would likely support this move, they are still a small minority. Should the Court uphold an inherent executive rescission power, Congress may wish to revisit this option to avoid continuing see-saw battles of designations followed by revocations followed by redesignations and so forth. Congress would, of course, need to convince the President to sign away his own power, or override his veto.

C. Option C—The 1950 Antiquities Act Amendment

Given that the most controversial designations in the past twenty years have been in Utah, Congress could follow the example of the 1950 Congress and exempt only Utah from future designations (as it did with Wyoming), in exchange for restoration of the original Bears Ears and Grand Staircase-Escalante Monuments. The moment for this legislative move has likely passed. The time to have accomplished it would have been as President Obama was contemplating his initial designation of the Bears Ears Monument. However, given the uncertainty surrounding the presidential rescission power and the difficulty of predicting how the courts will rule on the issue, both sides may feel more inclined to this compromise if they each feel they have a reasonable chance of losing in court.

D. Option D—ANILCA

The best option in terms of both its political viability and its consistency with the American form of limited executive power is to adopt a compromise modeled upon the most recent amendment to the Antiquities Act—ANILCA. ANILCA allows the President to designate monuments in Alaska but, for those greater than 5,000 acres, the designation must be ratified by Congress within one year. Congress should extend this idea to the entirety of the nation, not just Alaska, and should make the rescission power subject to the same congressional approval.

E. Draft Legislation

Those who defend the power delegated to the President in the Antiquities Act argue that it is important to have a mechanism for swift executive action to protect land and monuments that might be subject to harm while Congress deliberates. The ANILCA compromise allows the President to act quickly to protect fragile ecosystems and antiquities, but, by placing an expiration fuse on presidential action, puts Congress in charge of the final decision. The compromise legislation could be drafted using the language of ANILCA Section 1326 to rein in *both* the presidential *designation* power and *rescission* power. Such language might look like this:

No future executive branch action which withdraws land from the public domain pursuant to the Antiquities Act or rescinds or modifies existing National Monuments shall be effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawals, rescissions, and modifications shall terminate unless Congress passes a joint resolution of approval within two years after the notice has been submitted to Congress.

The reason for the change from the one-year fuse in ANILCA to a two-year fuse would be to allow for an intervening congressional election to ensure that voters have the chance to express their approval or disapproval of executive action at the ballot box.

CONCLUSION

The heart of Antiquities Act controversies is not substantive, but procedural. Virtually no one disagrees that some public lands are worth preserving based upon their scenic beauty and for other reasons. The process is the problem. Congress should fix the problem. It has the power to do so. And because that plenary power resides in Congress, the judiciary should continue to tread lightly in reviewing public lands decisions.

The main procedural defect of the Antiquities Act is the vast power granted to the President to act unilaterally. Public Lands Management history demonstrates that Congress is perfectly able and willing to offer

protection to public lands. Restoring that power to Congress will ensure that the public lands and the people who love them will not be subject to arbitrary or unpredictable executive behavior.