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Preserving Monumental Landscapes Under the Antiquities Act

Christine A. Klein
University of Florida Levin College of Law, kleinc@law.ufl.edu

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Christine A. Klein†

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† Professor of Law, Michigan State University—Detroit College of Law. LL.M., Columbia University; J.D., University of Colorado; B.A., Middlebury College. I would like to thank Professors Lisa Heinzerling, J. Peter Byrne, Hope Babcock, and Richard Lazarus, as well as the participants in the Georgetown Law Center Environmental Research Workshop, for reviewing a draft of this paper and for offering their thoughtful comments. I am thankful also for the research assistance of MSU-DCL students Kelly Dardzinski, Michael Manchester, and David Meninga.

This Article examines the Antiquities Act, a 1906 statute that delegates authority to the President to establish national monuments on federal lands for the protection of prehistoric structures and relics. This modest statute, originally a scant one page in length, has set off a century of intermittent controversy that its drafters could not have anticipated. Although Congress probably intended that the statute merely protect archaeological ruins from looting by treasure hunters, presidents quickly began to utilize the statute to preserve large natural landscapes—ranging from President Theodore Roosevelt's establishment of the 800,000-acre Grand Canyon National Monument in 1908 to President Clinton's reservation of about five million acres of national monuments from 1996–2001. Some outraged politicians and observers have called for the repeal of the Act and the reversal of executive monument designations. This Article contends that the controversy over the Act is illustrative of a larger phenomenon—the philosophical view that human culture is distinct from nature. Professor Klein argues that it is time to abandon the rigid legal wall between nature and culture, and to validate explicitly almost a century of past practice preserving large natural areas of historic and scientific significance—"monumental landscapes"—as antiquities.

INTRODUCTION

In 1906, Congress passed a one-page statute called the Antiquities Act, delegating authority to the President to declare small tracts of federal lands as "national monuments."[1] Congress intended simply to protect the nation's archaeological treasures from looting in order to preserve relics such as prehistoric pottery shards, burial mounds, and cliff dwellings.[2] The casual reader may think of modest educational sites and stifle a yawn while recalling tedious family vacation stops at historic battlefields and national landmarks.[3]

The executive branch, however, had a more grandiose view of the Antiquities Act. The congressional ink had barely dried before President Theodore Roosevelt declared seventeen national monuments, including the 808,120-acre Grand Canyon National Monument and

1 Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431–433 (2000)).

2 *See infra* notes 30–40 and accompanying text.

3 The Antiquities Act has been utilized to create small historic monuments, including the Lewis & Clark National Monument (160 acres), the Statue of Liberty National Monument (2.50 acres), Fort Matanzas National Monument (1 acre), and the Big Hole Battlefield National Monument (195 acres). *See* 146 CONG. REC. S7030–32 (daily ed. July 17, 2000) (listing name and acreage of national monuments created by each president).

the 639,000-acre Mount Olympus National Monument.[4] Numerous other presidents followed suit, creating monuments millions of acres in size.[5] As a result of such aggressive implementation, the statute has been the center of almost a century of intermittent, but bitter, controversy.

Opponents have been outraged by the reservation of large monuments. Following the 1943 designation of the 221,610-acre Jackson Hole National Monument in Wyoming, one congressman complained that Congress never intended that a national monument approach the size of a U.S. state.[6] More recently, the Antiquities Act received prominent media coverage as a result of President Clinton's declaration of nineteen monuments covering over five million acres.[7] In response, numerous critics decried the designations. An article printed in the *Salt Lake Tribune* captured the vehemence of the criticism: "We need to recognize these monuments [created by President Clinton under the Antiquities Act] for what they are: a special-interest boondoggle that sacrificed local populations and the American taxpayers to appease the demands of quasi-religious special-interest groups that the land be cleansed of humanity."[8] In more objective terms, the *Wall Street Journal* identified national monuments as political "flashpoints."[9]

What factors could account for such deep-rooted, emotional criticism of "national monuments," a legal classification that most Ameri-

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4 *Id.* The Grand Canyon monument was reserved in 1908 to protect "an object of unusual scientific interest . . . the greatest eroded canyon in the United States." Proclamation No. 794, 35 Stat. 175 (Jan. 11, 1908). President Roosevelt created the Mount Olympus National Monument in 1909. Proclamation No. 869, 35 Stat. 2247 (Mar. 2, 1909).

5 *See* 146 CONG. REC. S7030–32 (daily ed. July 17, 2000) (listing monuments with a combined area of over seventy million acres).

6 Les Blumenthal, *Presidents as Preservationists: Antiquities Act Gives Chief Executive Free Hand in Creating National Monuments*, NEWS TRIB. (Tacoma, Wa.), May 28, 2000, at A1; *see* discussion *infra* Part I.C.2.

7 President Clinton declared nineteen new monuments and expanded three existing monuments. Reed McManus, *Six Million Sweet Acres*, SIERRA, Sept.–Oct. 2001, at 41, 42.

8 Rainer Huck, *Clinton's Monument Designations Must Not Be Allowed to Stand*, SALT LAKE TRIB., Mar. 23, 2001, at AI5. Huck, the president of the Utah Shared Access Alliance, expressed the view that "[the President has] shamelessly and brazenly abuse[d] power in the pursuit of his own self-aggrandizement."

9 Shailagh Murray & Laurie McGinley, *Interior, HHS Nominees Lay Out Goals of Incoming Administration*, WALL ST. J., Jan. 19, 2001, at A4; *see also* Shawn Foster, *Monument Anger Still Simmering*, SALT LAKE TRIB., June 2, 2001, at B1 (citing Rep. Chris Cannon's statement that the Grand Staircase-Escalante National Monument "was a monster that was created by political appetite," and that "[t]he Clinton administration could not stop coal mining with the law so they stopped it with an illegal use of the Antiquities Act"); Daniel Sneider, *"Sagebrush Rebels" Learn the Fine Art of Compromise*, CHRISTIAN SCI. MONITOR, Oct. 31, 1996, at 4 (quoting a critic of the Grand Staircase-Escalante National Monument who argued that "[w]hat Bruce Babbitt and his friend are trying to do is take our freedom, our livelihoods, our traditional way of life away from us and run us off").

cans would be hard-pressed to define?[10] And why has the Antiquities Act endured for almost one hundred years, despite such criticism? This Article draws upon the disciplines of law and history in an attempt to answer these questions. The inquiry reveals that the controversy over the Antiquities Act is but an outgrowth of a broader paradigm that has dominated human thought for centuries—the dichotomy between nature and culture. This philosophical schism has profoundly influenced the law of natural resources. As a result, lawmakers instinctively have established one regulatory scheme for "wild" nature, and another separate and distinct regime for "tamed" landscapes.

Part I of this Article places the Antiquities Act into historical context. Despite the apparently limited intentions of the 1906 Congress, all three branches of government consistently have endorsed the protection of large landscapes as "antiquities."[11] This conclusion is surprising in light of current political rhetoric, which suggests that the executive branch alone has been responsible for aggressive implementation of the statute.[12] Despite this popular misconception, history demonstrates that Congress and the courts have acquiesced in an expansive interpretation of the Act. The easiest explanation for such acquiescence focuses upon the ambiguity of the statutory text: although the statute restricts monuments to the "smallest area compatible" with the protection of prehistoric structures and objects, it also contains a broad loophole allowing presidents to protect objects of "historic or scientific interest."[13] Relying upon that more expansive language, presidents beginning with Theodore Roosevelt have protected large natural features such as the Grand Canyon as "objects of scientific interest."[14] Congress, for its part, has bypassed numerous opportunities to repeal or modify the statute,[15] and has enacted signif-

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10 In an amusing travel article, one contributor to *Money* magazine wrote that while bragging to friends that he had just driven "about 14,000 miles, passed through 25 states, visited five national parks and three national monuments, [and eaten] at 14 different barbecue joints" he was cut short by an inquiry about the distinction between national parks and national monuments. *See* Paul Lukas, *American Beauties*, MONEY, June 2001, at 133. The author recalls that he "blinked, thought for a moment, and realized [he] hadn't the slightest idea." *Id.* Although prior to the trip he had "instinctively assumed that national monuments were man-made structures, like the Washington Monument," his travel experience proved that assumption to be false. *See id.*

11 *See infra* Part I.A.–C.

12 *See, e.g.*, Huck, *supra* note 8; William Perry Pendley, *Grand Staircase-Escalante National Monument: Protection of Antiquities or Preservationist Assault?*, UTAH B.J., Oct. 1997, at 8, 8.

13 *See infra* notes 41–45 and accompanying text.

14 *See* Blumenthal, *supra* note 6.

15 *See infra* Parts I.C, III.A.2.

icant amendments only twice during the past century.[16] Similarly, the courts have had five chances during the twentieth century to check the presidents' expansive interpretation of their statutory authority, but have declined to do so in every case.[17] The U.S. Supreme Court, for example, has supported presidential discretion to create monuments up to 800,000 acres in size, and has approved such diverse monument purposes as the protection of geologic features, prehistoric lakes, and rare species of fish.[18]

However, something much more fundamental than ambiguous statutory interpretation is fueling the ardent anger of the critics. Part II contends that the Antiquities Act transgresses the historically sanctioned separation of nature and culture. An exploration of Western cultural norms as expressed through literature, art, science, and religion reveals a long tradition of distinguishing human society from wild nature. From this perspective, perhaps the primary sin of the Antiquities Act is its unwitting synthesis of the human and natural realms, as it simultaneously protects large landscapes and the relics of ancient human civilizations under a single statutory scheme. The rage of monument opponents may reflect their implicit notion that the Antiquities Act violates an important norm of civilized societies.

This philosophical separation has not been confined to the Antiquities Act, but has affected much in the area of natural resources law. As legislators have struggled to define the appropriate role of nature in a civilized society, they have relied perhaps overmuch upon rigid, objective boundaries between nature and culture as a substitute for a messy, subjective dialogue about the proper use of wild lands. As discussed in Part II, statutes such as the Antiquities Act, the Wilderness Act, and the Endangered Species Act make important resource decisions dependent upon such narrow, technical questions as the physical size of an area, whether roads are present, and whether humans have relocated a species to a new geographic area. Part II concludes that such an unyielding legal line between nature and humans is both biologically infeasible and legally undesirable.

Finally, Part III delineates a modern role for the Antiquities Act as it enters its second century of existence. This Part describes recent threats by President George W. Bush and Congress to reverse the previous administration's monument designations and notes that the success of such efforts has been disproportionately slow when compared to the vehemence of the political criticism. Part III develops the hy-

16 *See infra* Part I.C.2 (discussing congressional amendments to the Act that precluded the designation of additional monuments in Wyoming and limited the designation of additional monuments in Alaska).

17 *See* discussion *infra* Part I.B.

18 *See* discussion *infra* Parts I.B.1, I.B.3.

pothesis that the Act's longevity may be attributable to its ability to serve at least four core values identified by the public and by the courts: (1) the protection of land from development; (2) the recognition of "living landscapes"; (3) the ability to take emergency action to preserve the status quo of threatened lands; and (4) the vesting of political accountability directly in the President, rather than burying monument responsibility deep within a bureaucratic structure. This Article suggests that Congress and the courts should explicitly validate a century of past practice under which presidents have protected large landscapes as antiquities, provided that the President deems such lands to hold historic or scientific interest, and provided that the President is willing to accept political responsibility for the monument designations.

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THE PROBLEM: UNINTENDED LANDSCAPE PRESERVATION

[National Monuments comprise] another federal lands category that was created, perhaps inadvertently, by passage of the 1906 Antiquities Act.[19]

Presidents have consistently relied upon the Antiquities Act to protect both unique natural resources and human landscapes. Ironically, the 1906 Congress may not have had natural resource protection in mind when it passed the legislation. Initially proposed and drafted by a non-partisan committee of anthropologists,[20] the statute might be characterized best as cultural properties legislation. In short order, however, presidents pressed the Act into service as a mechanism to protect large tracts of land,[21] filling a void that no other legislation at the time had addressed.[22] Arguably, to this day the Act

19 GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 140 (3d ed. 1993) (noting that "[a]lthough only the smallest area compatible with preservation is to be . . . reserved, huge areas such as Death Valley and Glacier Bay have been proclaimed monuments").

20 David J. Meltzer, *Prehistory, Power and Politics in the Bureau of American Ethnology, 1879–1906, in* THE SOCIO-POLITICS OF ARCHAEOLOGY 67, 74 (Joan M. Gero et al. eds., 1983).

21 *See* discussion *infra* Part I.A.

22 Commentators have long bemoaned the fragmented, media-by-media approach of federal environmental laws and their failure to address pollution on a comprehensive basis. *See generally* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 59–60 (2d ed. 1994) (discussing the need for integrated pollution control to avoid problems of fragmented responsibilities and cross-media pollution). Natural resource law, too, arguably has suffered from a failure to apply standards on an ecosystem-wide basis. *See, e.g.*, Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 975 (1997) (evaluating the Endangered Species Act and warning that although landscape-level planning is desirable, planners also must continue to protect species on an individual basis); J.B. Ruhl, *Ecosystem Management, the ESA, and the Seven Degrees of Relevance*, 14 NAT. RESOURCES & ENV'T 156, 156 (2000) (considering the ecosystem management movement and arguing that "while there is no substantial body of hard law to apply today, there will

continues to fill a unique niche unoccupied by any other modern legislation.[23]

The protection of the remnants of historic human cultures—together with the landscapes that supported them—has resulted in an arguably inadvertent group of federal lands that this Article will call "monumental landscapes." In its most precise sense, the word *landscape* does not refer to natural environmental features, but rather to "a *synthetic* space, a man-made system of spaces superimposed on the face of the land."[24] Under an early Gothic interpretation, the lone syllable *land* meant a "*plowed field*,"[25] certainly the quintessential example of human manipulation of the natural world. Accordingly, *landscape* evokes an area of human proportions, a bounded space that can be "comprehend[ed] at a glance."[26] The Antiquities Act reflects this intimate conception of landscapes because it contemplates the protection of only small tracts of land that have been marked by a human presence.[27]

The statute, however, simultaneously permits the protection of natural areas of "historic or scientific interest."[28] Under the etymology discussed above, this provision of the Antiquities Act creates an oxymoronic vision, that of the *natural landscape* that simultaneously implies the absence and presence of human manipulation. Despite the questionable pedigree of such a notion, it has firmly permeated the consciousness of the American public, which "tend[s] to think that *landscape* can mean natural scenery only."[29] This Article uses the term "monumental landscape" to capture the tension between large and small, as well as natural and human, and to suggest that even wilderness areas may have links to both science and history that make them legitimate candidates for protection under the Antiquities Act.

The Antiquities Act delegates discretionary authority to the President to proclaim federally owned tracts of land as national monuments:

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be someday soon, and lawyers wishing to shape the future appearance of that body of law ought to take an interest in its evolution, beginning *now*") (emphasis in original).

23 For a discussion of the "living landscape" protection the Antiquities Act provides, see *infra* notes 399–402 and accompanying text.

24 JOHN B. JACKSON, DISCOVERING THE VERNACULAR LANDSCAPE 8 (1984) (italics in original).

25 *Id.* at 6 (quoting Grimm's dictionary of the German language and its definition of land as "the plot of ground or the furrows in a field that were annually rotated").

26 *Id.* at 3 (discussing the three-hundred-year-old definition "drawn up for artists" under which a *landscape* is a "portion of land which the eye can comprehend at a glance" and noting that the word originally meant a picture of a view, rather than the view itself).

27 *See infra* notes 32–40 and accompanying text.

28 16 U.S.C. § 431 (2000); *see also* discussion *infra* notes 41–45 and accompanying text (discussing the practical effect of this language).

29 *See* JACKSON, *supra* note 24, at 5 (contrasting the American approach with the English notion that "a landscape almost always contains a human element").

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[30]

The Act also provides criminal penalties for the unauthorized appropriation or destruction of protected objects.[31]

The legislative history suggests that Congress intended to authorize the President to withdraw only small portions of land for the protection of archaeological sites. In 1906, much as today, some critics feared that the legislation would pose a threat to the development of resources in the West.[32] The House Report indicated that the legislation's purpose was to protect historic and prehistoric ruins in the Southwest, including cliff dwellings, communal houses, shrines, and burial mounds.[33] The Report stated that the bill was designed to "create small reservations reserving only so much land as may be abso-

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30 16 U.S.C. § 431.

31 Section 433 of the Act provides:

> Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the . . . United States, without [federal permission] . . . shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

Id. § 433. The Ninth and Tenth Circuits have considered whether § 433 is unconstitutionally vague. *See* United States v. Smyer, 596 F.2d 939, 941, 943 (10th Cir. 1979) (upholding conviction of defendants for removal of antiquities from prehistoric Mimbres ruin and holding that § 433 is not unconstitutionally vague); United States v. Diaz, 499 F.2d 113, 114–15 (9th Cir. 1974) (reversing conviction of defendant for appropriation of Native American face masks that were less than five years old and finding § 433 unconstitutionally vague for its failure to define key terms such as "object of antiquity"). Subsequent to its holding in *Diaz*, the Ninth Circuit may have modified its position. *See* United States v. Austin, 902 F.2d 743, 745 (9th Cir. 1990) (declining to find a successor statute to the Antiquities Act unconstitutionally vague for its use of undefined terms such as "weapons" and "tools").

32 The Chief Archaeologist of the National Park Service observed that "[f]rom the beginning, Westerners saw the Antiquities Act as another land withdrawal, a threat to development in the West," and commented that "[t]he debate was very similar to today's." Blumenthal, *supra* note 6.

33 H.R. REP. No. 59-2224, at 2 (1906) (citing memorandum from Professor Edgar L. Hewett). The Report referred to the "urgent need" for preservation because an extensive traffic in relics had developed:

> These relics are priceless when secured by proper scientific methods, and of comparatively little value when scattered about either in museums or private collections without accompanying records. No scientific man is true to the highest ideals of science who does not protest against this outrageous traffic, and it will be a lasting reproach upon our Government if it does not use its power to restrain it.

Id. at 3.

lutely necessary for the preservation of these interesting relics of prehistoric times."[34] During the floor debate, Iowa Republican John Lacey introduced the Senate bill as one that would "merely make small reservations" in areas of cave and cliff dwellers.[35] Moreover, "[n]ot very much" land would be taken off the market, and it would be the "smallest area necesstry [sic] for the care and maintenance of the objects to be preserved."[36] One representative asked, "Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?"[37] Lacey replied, "Certainly not. The object is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest, whilst the other reserves the forests and the water courses."[38] The statutory text reflects this narrow legislative intent in two important ways. First, the Act authorizes the President to protect "objects," without specific reference to natural resources.[39] Second, although Congress authorized the President to reserve tracts of land, that authority is limited to the "smallest area compatible" with the objects' protection.[40]

In spite of such restrictive text and legislative history, presidents have reserved millions of acres of land under the statute. One explanation for such "unintended landscape preservation" is based upon the evolution of the statutory text during the legislative process. Two significant amendments were added to the original bill, using language that presidents and courts have interpreted broadly. First, the statutory protection of prehistoric and historic "landmarks and structures" was expanded to include also the protection of objects of "historic or scientific interest."[41] That phrase, perhaps more than any other, has opened the door for presidents to reserve vast tracts of land as monuments, beginning with the protection of the mile-deep Grand Canyon as an "object of unusual scientific interest."[42] Second, the limitation on monument acreage was relaxed throughout the legislative

34 *Id.* at 1.

35 40 CONG. REC. H7888 (1906) (comments of Rep. John Lacey).

36 *Id.*

37 *Id.* The Forest Reserve eventually encompassed even larger amounts of territory. *See* David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 286 (1982) (observing that between 1891 and 1909, presidents had used the Forest Reserve provision in the General Revision Act to set aside more than 194 million acres).

38 40 CONG. REC. H7888 (1906) (comments of Rep. John Lacey).

39 *See* 16 U.S.C. § 431 (2000).

40 *See id.*

41 *See* Anaconda Copper Co. v. Andrus, 14 Env't Rep. Cas. (BNA) 1853, 1854 (D. Alaska 1980) (noting that executive authority under the Act was "much enlarged" by the addition of language allowing for preservation of "other objects of historic or scientific interest").

42 *See infra* note 76 and accompanying text.

process. An earlier bill passed by the Senate would have limited monument size to 640 acres.[43] That restriction was deleted from the final bill in favor of language entrusting the final size determination to executive discretion, subject to the amorphous qualification that monuments must be "confined to the smallest area compatible with the proper care and management of the objects to be protected."[44] As a result of these two textual modifications, the Antiquities Act may not be as limited as its legislative history suggests.[45]

Throughout the past century, opponents of large monuments have emphasized the bill's original narrow text and legislative history, whereas monument supporters have relied upon the more expansive amendatory language that found its way into the final version of the statute. The courts and Congress generally have endorsed the latter view, albeit through silence as much as through explicit action.[46] Does this inaction constitute tacit support for the presidents' monument declarations, a legitimate *approval* expressed through judicial reticence and congressional acquiescence? Or, as one lower court recently pondered, does the protection of expansive landscapes constitute an illegitimate, "unintentional conspiracy" by all three branches of government?[47] To assist in answering these questions, the following subparts examine the first hundred years of practice by presidents, courts, and Congress under the Antiquities Act.

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43 *See* Getches, *supra* note 37, at 302 n.126 (citation omitted).

44 *See id.*

45 Several of the most conservative members of the current Supreme Court have indicated a distrust of excessive reliance upon legislative history, based in part upon the ability of legislators to insert self-serving—but not necessarily accurate—statements into the legislative record. *See generally* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 390 (2000) (Scalia, J., concurring) (declaring that statements of individual legislators are not a reliable indication of Congress's intent in voting for a particular statute); Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131, 212–13 & n.226 (2001) (discussing objection of Justices Thomas and Scalia to the Court's use of legislative history).

46 *See* discussion, *infra* Parts I.B, I.C.

47 In 1999, a federal district court in Utah suggested that congressional failure to amend or repeal the Antiquities Act in the face of aggressive executive implementation may constitute an "unintentional conspiracy" rather than congressional ratification. Utah Ass'n of Counties v. Clinton, Nos. 2:97CV479, 2:97CV492, 2:97CV863, 1999 U.S. Dist. LEXIS 15852, at *58–*67 (D. Utah Aug. 12, 1999) (rejecting the argument that Congress ratified President Clinton's creation of the Grand Staircase-Escalante National Monument through budget appropriations and legislative inaction). The court stated:

> If the court were to find congressional ratification based on the limited record in the present case it could quite possibly be the final act in a drama that accomplishes a set aside of 1.7 million acres of Utah land in which not one branch of government operated within its constitutional authority. It could be in effect an *unintentional conspiracy* of the three branches of government to do something none of them actually legally did, and thereby rob the people of their voice.

Id. at *64 (emphasis added).

A. Executive Zeal

During the twentieth century, presidents proclaimed more than one hundred national monuments, covering more than seventy million acres of land.[48] Fourteen of the seventeen presidents in office during the century have utilized the Act, including members of both political parties.[49] Individual monument size has varied from less than one acre to almost eleven million acres, and almost half of all executively created monuments were initially five thousand acres or more in size.[50] Congress has also established additional monuments through legislation, independent of the Antiquities Act's delegation of authority to the President.[51]

Immediately after the passage of the Antiquities Act in 1906, presidents began to exercise their newly delegated authority with vigor. Republican President Theodore Roosevelt continued to establish monuments until the last two days of his presidency.[52] By the end of 1909, he had designated seventeen areas, including the 800,000-acre Grand Canyon National Monument and the 639,000-acre Mount Olympus National Monument.[53] The U.S. Supreme Court did not address the scope of the Executive's authority under the Act until its 1920 decision in *Cameron v. United States*.[54] By that time, three presidents had established almost fifty monuments incorporating over 2.7 million acres,[55] creating an executive precedent the Court may have been unwilling to disturb.[56]

Later presidents continued to follow the aggressive pattern President Theodore Roosevelt first established. Republican President Calvin Coolidge proclaimed fifteen monuments covering 2.6 million acres, while Republican President Herbert Hoover established seven-

48 CAROL HARDY VINCENT & PAMELA BALDWIN, CONG. RESEARCH SERV., Pub. No. RL30528, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT: RECENT DESIGNATIONS AND ISSUES 3, 4 n.9 (2000) (noting that "[m]ost of this acreage is no longer in monument status because it has been included by Congress in other protective designations, primarily through enactment of [the Alaska National Interest Lands Conservation Act of 1980, 16 U.S.C. § 3213]").

49 *See id.* at 3. During the twentieth century, only Presidents Richard Nixon, Ronald Reagan, and George H.W. Bush did not designate monuments. *See* 146 CONG. REC. S7031-32 (daily ed. July 17, 2000).

50 *See* VINCENT & BALDWIN, *supra* note 48, at 4.

51 *Id.*

52 Blumenthal, *supra* note 6.

53 *See* 146 CONG. REC. S7030 (daily ed. July 17, 2000); *see also The National Monument NEPA Compliance Act: Hearing on H.R. 1487 Before the House Subcomm. on Nat'l Parks and Pub. Lands of the Comm. on Res.*, 106th Cong. 24–27 (1999) [hereinafter *Hearing on H.R. 1487*] (listing Jewel Cave as an additional monument declared by President Roosevelt in 1908).

54 252 U.S. 450 (1920) (upholding President Theodore Roosevelt's proclamation of the Grand Canyon National Monument). The *Cameron* case is discussed *infra* Part I.B.1.

55 *See* 146 CONG. REC. S7030 (daily ed. July 17, 2000); *see also Hearing on H.R. 1487*, *supra* note 53 at 24–44 (listing monuments established by presidential proclamation).

56 *See infra* Part I.B.1.

teen monuments protecting 2.1 million acres.[57] During his tenure, Democratic President Jimmy Carter declared seventeen monuments, encompassing more than fifty-five million acres of land.[58] Among his legacies are numerous monuments in Alaska, including Gates of the Arctic (8.2 million acres), Wrangell-St. Elias (10.9 million acres), and Yukon Flats (10.6 million acres).[59] About twenty years later, in 1996, Democratic President Bill Clinton created in Utah the 1.7 million acre Grand Staircase-Escalante National Monument.[60] During his second term of office, President Clinton designated eighteen additional monuments, covering approximately 3.3 million acres.[61]

B. Judicial Reticence

There has been strikingly little judicial commentary regarding the scope of executive authority under the Antiquities Act. The U.S. Supreme Court has addressed the issue only twice, its total discussion comprising a scant four sentences.[62] Despite the brevity of its opinions, the Supreme Court has explicitly endorsed the protection of large natural areas containing scientific curiosities such as unique geologic features, tourist attractions, and rare fish life.[63] In addition, three decisions of the lower federal courts have offered deferential support to executively created monuments.[64] By the end of the twen-

57 *See* 146 CONG. REC. S7030-31 (daily ed. July 17, 2000).

58 *See id.* at S7031. Subsequently, Congress modified the Carter monuments, but retained much of the land in protective classifications. *See* VINCENT & BALDWIN, *supra* note 48, at 3 n.8 (explaining that "Congress rescinded these withdrawals and reestablished most of the lands as national monuments or other protective designations (such as national parks) in § 1322 of [the Alaska National Interest Lands Conservation Act of 1980]").

59 *See* 146 CONG. REC. S7030–31 (daily ed. July 17, 2000).

60 *See id.* at S7030.

61 *See* Sanjay Ranchod, Note, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 536–37 (2001). In addition, President Clinton enlarged the boundaries of three monuments. *Id.* at 555. The executive tendency to utilize narrow statutory mandates for broad preservation purposes has not been confined to the Antiquities Act. *See, e.g.*, Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 299–301 (1995) (observing that the Endangered Species Act "is very much a surrogate law for ecosystems," and considering whether critics are correct in their assertions that "[e]nvironmentalists do not really care about the Indiana bat, the snail darter, or the northern spotted owl; they care about stopping a dam or a clearcut, or progress in general").

62 *See* Cappaert v. United States, 426 U.S. 128, 142 (1976) (rejecting, in one sentence, challenge to executive authority to create Devil's Hole Monument); Cameron v. United States, 252 U.S. 450, 455–56 (1920) (rejecting, in three sentences, challenge to executive authority to create Grand Canyon National Monument).

63 *See Cappaert*, 426 U.S. at 142; *Cameron*, 252 U.S. at 455–56.

64 *See* Anaconda Copper Co. v. Andrus, 14 Env't Rep. Cas. (BNA) 1853, 1854 (D. Alaska 1980); Alaska v. Carter, 462 F. Supp. 1155, 1159–60 (D. Alaska 1978); Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945). At least three additional parties have challenged President Clinton's establishment of the Grand Staircase-Escalante National Monument. *See* Utah Ass'n of Counties v. Clinton, 255 F.3d 1246, 1248–49 (10th Cir. 2001).

tieth century, no court had invalidated the Executive's establishment of national monuments. Rather, the courts have countenanced the presidents' use of the Act to provide sweeping protection to large landscapes, as well as to objects of archaeological interest.

Upon first consideration, this judicial support for zealous executive actions appears surprising. After all, presidents have designated immense multimillion-acre monuments, and have seemed to ignore the statutory admonition to preserve only the smallest land area necessary. Why did the courts fail to curb this arguable abuse of executive discretion? Alternatively, if presidents have acted within the bounds of their delegated authority, why have courts been so restrained in their consistent support of the presidential monument designations? Three observations may help to explain this supportive, yet succinct, judicial response.

First, separation of powers concerns permeate the courts' opinions, indicating judicial uncertainty as to the scope of jurisdiction over disputes involving executive interpretation and discretion.[65] The Antiquities Act itself contains no explicit cause of action to challenge the President's exercise of discretion. One lower court hinted that controversies arising under the Executive's implementation of the Antiquities Act may be nonjusticiable, but later retreated from that position.[66] Despite that retreat, a certain judicial discomfort seems to have prompted the courts to tread lightly when presidential prerogative is at issue. As a result, judges have deferred to the Executive with little clarifying commentary. This restraint in the judicial arena has had an unsettling effect upon public discourse, because it has failed to quiet allegations of illegality leveled against new monument designations, even when those new designations are similar to past executive actions that the courts have upheld.[67]

Second, the courts' support might be explained not only in terms of deference to executive action in general, but also by deference to a longstanding pattern of executive practice in particular. Through the vagaries of history, no challenge reached the courts until after numerous presidents had firmly established a practice of aggressive use of the Antiquities Act.[68] Three presidents had reserved millions of acres as monuments before the first U.S. Supreme Court opinion was handed down in 1920.[69] By the time the second legal challenge was decided in 1945, four other presidents had declared approximately

65 *See* discussion *infra* notes 103, 134–37 and accompanying text.

66 *Compare Franke*, 58 F. Supp. at 894 (concluding that the court had "limited jurisdiction") *with id.* at 895–98 (nonetheless holding a full evidentiary hearing).

67 *See* discussion *infra* Part I.D.

68 *See* 146 CONG. REC. S7031–32 (daily ed. July 17, 2000).

69 *See id.*

fifty additional monuments covering more than seven million acres.[70] Although courts will not hesitate to strike down actions of the President that are clearly unconstitutional, perhaps the judiciary is less willing to disturb a long-settled pattern of executive action based upon the courts' view of statutory language that is even arguably susceptible to more than one interpretation.[71]

Finally, the restrained judicial tone might also demonstrate a deference to Congress. Several courts have found comfort in the face of potential executive excesses by observing that Congress can correct any such situations without the need for judicial intrusion.[72] There is also some suggestion that presidential monument desiguations merely assist Congress, preserving the status quo of threatened lands until Congress can take protective action.[73] Therefore, judicial action might not be warranted.

The next sections examine the five judicial decisions on executive authority under the Antiquities Act, as rendered by the courts prior to the end of the year 2000. This analysis attempts to expand upon the existing literature[74] by highlighting the three themes discussed above: (1) deference to executive discretion, (2) affirmation of consistent past practice, and (3) reliance upon Congress to correct executive excess.

1. Cameron v. United States

Cameron was an action brought by the United States against a miner who sought to exclude tourists from the popular southern rim of the Grand Canyon.[75] President Theodore Roosevelt had reserved

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70 *See id.*

71 For a discussion of statutory language, see *supra* notes 39–47 and accompanying text; and for a discussion of methods of statutory interpretation and the public lands arena, see Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1003–13, 1037–49 (2000).

72 *See* Alaska v. Carter, 462 F. Supp. 1155, 1165 (D. Alaska 1978); Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945).

73 *See Carter*, 462 F. Supp. at 1157, 1165 (supporting Department of the Interior withdrawals designed to "preserve the status quo until the next Congressional session could consider the various Alaska land legislative proposals").

74 There is a small, but growing, body of literature concerning national monuments. *See* Getches, *supra* note 37, at 300–08; Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument—A Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409 (1998); Robert H. McLaughlin, *The Antiquities Act of 1906: Politics and the Framing of an American Anthropology & Archaeology*, 23 OKLA. CITY U. L. REV. 61 (1998); James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619 (2001); Ann E. Halden, Note, *The Grand Staircase-Escalante National Monument and the Antiquities Act*, 8 FORDHAM ENVTL. L.J. 713 (1997); Richard M. Johannsen, Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439 (1981); Jack M. Morgan, Jr., Recent Development, *Antiquities Protection Act*, 1993 UTAH L. REV. 327 (1993); Ranchod, *supra* note 61.

75 Cameron v. United States, 252 U.S. 450, 454–55 (1920).

the area in 1908 as an 800,000-acre national monument to protect the Grand Canyon as "an object of unusual scientific interest."[76] Although the monument proclamation withdrew the area from the operation of the public land laws, a savings clause preserved any "valid" mining claims that had been perfected prior to the reservation of the monument.[77] The United States, as plaintiff, asserted that Mr. Cameron's mining claim was invalid.[78] Therefore, the United States argued that the defendants were ineligible to benefit from the savings clause even though Cameron had entered the land prior to its designation as a national monument.[79] Before the Supreme Court, appellant Cameron asserted two claims: (1) that the President had exceeded the scope of his authority in creating the national monument,[80] and (2) that the courts below had improperly relied upon the Secretary of the Interior's determination that the mining claim was invalid.[81] The Court resolved both issues in favor of the United States by affirming the lower court's injunction that prevented the miner from occupying the disputed tract or excluding the public from that portion of the Grand Canyon Monument encompassed within the defective mining claim.[82]

Based upon a literal reading of the Antiquities Act, one might have expected the *Cameron* Court to strike down the monument as excessively large. Although the statute provides specifically that monuments "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected,"[83] the Grand Canyon National Monument approached 800,000 acres in size.[84] Moreover, the Act speaks solely to the protection of "landmarks, . . . structures, and . . . objects"[85]—categories that arguably do not include large geological features such as the Grand Canyon.[86] Despite the explicit language of the statute, in merely three sentences the Court disposed of Cameron's claim that the President had exceeded his statutory authority:

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76 *Id.* at 454–56. The area had been set aside previously as a forest reserve in 1893. *Id.* at 455.

77 *Id.*

78 *Id.* at 456–58.

79 *See id.* at 458–59.

80 *Id.* at 455.

81 *Id.* at 456. In order to sustain a valid mining claim on federal lands and to exclude others therefrom, Cameron was required to demonstrate that the land was "mineral in character" and that he had made an adequate mineral "discovery." *Id.*

82 *See id.* at 464–65.

83 16 U.S.C. § 431 (2000).

84 *See supra* text accompanying note 4.

85 16 U.S.C. § 431.

86 Cameron asserted that the monument designation was invalid because the Grand Canyon was not a "landmark, structure, or object." Getches, *supra* note 37, at 303 n.131 (describing Brief for Appellant at 44–48, *Cameron* (No. 205).

> The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.[87]

From the perspective of monument opponents, this must have been an unfortunate first test of the President's authority under the Antiquities Act, because it gave the Supreme Court's imprimatur to the protection of large landscapes, at least those with important scientific interest. Congress did not act to reverse the Court's opinion. Rather, it incorporated the monument into the protective national park system.[88]

Two aspects of the decision are particularly noteworthy. First, the Court was generous in its support of the President, and reached issues that were arguably extraneous to its decision.[89] The above-quoted language may not have been necessary to a resolution of the case, for the Court also rejected appellants' challenge to the invalidation of Cameron's mining claim.[90] That holding alone may have provided a sufficient basis upon which to enjoin Mr. Cameron from excluding tourists from the public lands. Nevertheless, the Court chose to reach Cameron's additional defense that the President had transgressed his statutory authority in protecting the Grand Canyon, particularly in light of factors such as its expansive size. As a result of its unwillingness to find that the President had exceeded his authority, the Supreme Court legitimized over a decade of executive practice protecting large landscapes under the Antiquities Act.[91]

A second noteworthy aspect of the case is the Court's deference to the President and its concurrence in his determination that the 800,000-acre Grand Canyon National Monument was "an object" of "scientific interest" within the meaning of the Antiquities Act.[92] Nota-

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87 *Cameron*, 252 U.S. at 455–56.

88 *See* 16 U.S.C. § 221 (2000) (establishing Grand Canyon National Park).

89 The defendants had objected to the monument's size in their initial brief, but did not fully brief the issue before the Supreme Court. *See* Getches, *supra* note 37, at 303 & n.131.

90 *Cameron*, 252 U.S. at 464.

91 *See supra* notes 52–56 and accompanying text.

92 The Court was also quite deferential to determinations of the Secretary of the Interior, and found that the Secretary had implied authority to determine the validity of mining claims, even though no statute specifically conferred such authority. *See Cameron*, 252 U.S. at 459–62. With respect to the Secretary's invalidation of Cameron's mining claim, the Court found that the relevant issues were factual in nature, and that the Secretary's decision was "conclusive in the absence of fraud or imposition." *Id.* at 464.

bly absent is an independent analysis of the concomitant requirement that the monument be limited to the "smallest area" compatible with the object's preservation.[93] Instead, the Court simply rejected the challenge to the President's authority and accepted the President's own recitation of his compliance with the Antiquities Act.[94] Through such unquestioning deference, the Court paved the way for several lower courts to suggest that challenges to the establishment of national monuments might be nonjusticiable.[95]

2. Wyoming v. Franke

A quarter of a century passed before the courts again considered the scope of the Executive's authority under the Antiquities Act. In *Wyoming v. Franke*, the State of Wyoming challenged President Franklin Roosevelt's establishment of the 221,610-acre Jackson Hole National Monument.[96] The plaintiff State of Wyoming squarely presented the court with an opportunity to clarify the meaning of two salient limitations of the Act that had been liberally construed by President Theodore Roosevelt and prior presidents: (1) that monuments must be limited to the preservation of objects of historic or scientific interest, and (2) that monuments must be limited to the smallest area compatible with the care of the protected objects.[97] Although the court was sympathetic to Wyoming's claim that it would suffer "great hardship and a substantial amount of injustice" if the monument designation were upheld, it dismissed the plaintiff's cause of action.[98] The court's decision is noteworthy for its deference to the Executive and for its reliance upon Congress to remedy any potential presidential abuses.

In deference to the President, the court employed a lenient standard of review. Rejecting the preponderance of the evidence standard applicable in an "ordinary suit," the court simply determined whether the President's action had been arbitrary and capricious and whether it had been supported by substantial evidence.[99] The court accepted the President's contention that qualifying objects of historic

93 Although the issue had not been briefed fully, the defendants had objected to the monument's size in both their answer and in their brief. *See* Getches, *supra* note 37, at 303 & n.131.

94 *Cameron*, 252 U.S. at 455.

95 *See* Wyoming v. Franke, 58 F. Supp. 890, 894 (D. Wyo. 1945).

96 *Id.* at 894–95.

97 *See id.* at 892.

98 *See id.* at 896–97. Wyoming argued, and the court agreed, that the "alleged interference with the use, maintenance and control of the State highways, together with the loss in taxation which would occur to the State, and the loss of revenue from game and fish licenses" resulting from federal establishment and control of the monument would far exceed the $3,000 jurisdictional threshold applicable at the time. *Id.* at 893.

99 *See id.* at 895.

or scientific interest included early fur trapping and hunting trails, structures of glacial formation, peculiar mineral deposits and indigenous plant life, and wildlife habitat.[100] Under the court's liberal standard of review, it appears that virtually any natural feature would qualify for protection, as long as the President were willing to accept the criticism of Congress and the press.[101] In fact, the court suggested that anything short of a barren prairie might be a suitable candidate for monument status if the President were willing to declare it as such.[102]

The court also deferred to the corrective authority of Congress, and openly pondered whether the matter was even susceptible to judicial resolution. The court appeared to be in qualified agreement with the federal defendant's assertion that the court was without authority to hear the case, concluding that it had only a "limited jurisdiction" over the matter.[103] The Wyoming court cited a 1919 U.S. Supreme Court opinion for the proposition that "a mere excess or abuse of discretion [by the President] in exerting a power given . . . involves considerations which are beyond the reach of judicial power."[104] The court concluded:

> In short, this seems to be a controversy between the Legislative and Executive Branches of the Government in which, under the evidence presented here, the Court cannot interfere. . . . [I]f the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch.[105]

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100 *See id.*

101 *See id.* at 895–96 (suggesting that the President's discretion can be controlled through the "propaganda" of the press and through congressional action).

102 *Id.* at 895 (describing as "clearly outside the scope and purpose of the Monument Act" a "monument . . . created on a bare stretch of sage-brush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest").

103 *Id.* at 894 (rejecting defendant's claim of immunity, but concluding that the court has less than full jurisdiction over the case). Despite its suggestion that the matter might be nonjusticiable, the court held a full evidentiary hearing and allowed the government to introduce evidence in support of its position. *Id.* at 895–98.

104 *Id.* at 896 (citing Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 184 (1919)). The court also relied upon *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (holding judgment of public officer not subject to review where Congress authorized such officer to take legislative action that officer deems necessary or appropriate to carry out the policy of Congress, and asserting that judicial probing of the reasoning which underlies an executive proclamation "would amount to a clear invasion of the legislative and executive domains").

105 *Franke*, 58 F. Supp. at 896.

The court also deferred to Congress in the matter of executive motive. Wyoming claimed that the President had improperly employed the Antiquities Act, when his true intention had been to create a national park—an action reserved solely to Congress.[106] In response, the court concluded that an examination of presidential motives was a subject of public interest suitable for congressional, rather than judicial, action.[107]

Congress accepted the court's invitation to act, and passed legislation that restrained the Executive from creating any new national monuments in the State of Wyoming.[108] Despite its anger at the President, Congress did not return the Jackson Hole monument to the public domain.[109] Instead, the monument was incorporated into the congressionally created Grand Teton National Park.[110]

3. Cappaert v. United States

In the second Antiquities Act case decided by the U.S. Supreme Court, the federal government brought an action to enjoin ranch owners from pumping their wells in a manner that would adversely impact the water levels of nearby Devil's Hole Monument.[111] President Harry Truman had established the forty-acre monument in 1952 for the preservation of a unique underground pool of water—the remnant of a prehistoric chain of lakes that supported an unusual desert fish believed to exist nowhere else in the world.[112] The Court upheld the lower court's injunction against excessive well pumping, finding that President Truman's establishment of the monument impliedly reserved that quantity of unappropriated water necessary to accomplish the purposes of the reservation, including the preservation of the Devil's Hole "pupfish."[113]

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106 *See id.* at 892; *see also* 16 U.S.C. § 1a–5 (2000) (describing current procedure for congressional addition of lands to the National Park System).

107 *Franke*, 58 F. Supp. at 896.

108 Act of Sept. 14, 1950, Pub. L. No. 787, § 1, 64 Stat. 849 (codified as amended at 16 U.S.C. § 431a (2000)).

109 *See* Getches, *supra* note 37, at 305.

110 *See id.*

111 Cappaert v. United States, 426 U.S. 128, 135–36 (1976). The monument was a detached addition to the Death Valley National Monument. *Id.* at 131.

112 *Id.* at 131–32.

113 *See id.* at 133, 147. The Court relied upon the reserved water rights doctrine, first set forth in *Winters v. United States*, 207 U.S. 564 (1908). 426 U.S. at 138. According to that doctrine,

> when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Id.

In their defense, petitioners maintained that the Antiquities Act did not give the President the statutory authority to reserve a pool, but rather the authority only to protect archaeological sites.[114] The Court summarily rejected that argument in one terse sentence, citing *Cameron* for its conclusion that "[t]he pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest'" and therefore appropriate for protection under the Act.[115] The Court's deference to the Executive is perhaps less expected than in *Cameron*, for the Cappaerts had strong equities on their side: the survival of the pupfish threatened the survival of the Cappaert's 12,000-acre ranch, an operation that was worth more than seven million dollars and that employed more than eighty people.[116] Despite those factors, the Court deferred to the Executive's determination that the pool was appropriate for protection, quoting with approval from the executive proclamation establishing the Devil's Hole Monument.[117]

4. Alaska v. Carter

Two years after *Cappaert*, a federal district court in Alaska considered the scope of executive authority under the Antiquities Act. In *Alaska v. Carter*, the State challenged actions by the President and the Secretary of the Interior to withdraw from appropriation and development approximately ninety-nine million acres of federal land pending implementation of legislative proposals to protect the land.[118] The withdrawals were part of a massive congressional effort to protect Alaskan lands as national parks, wildlife refuges, and wilderness areas—an attempt that had been stalled by vigorous opposition from Alaska and its congressional representatives.[119] The State claimed that the executive and administrative actions violated the National Environmental Policy Act's (NEPA) public comment requirements.[120] The court

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114 *Cappaert*, 426 U.S. at 141–42. The text of a congressional report that accompanied the bill creating the Antiquities Act lends some support to the petitioners' contention:

> There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.

H.R. REP. NO. 59-2224, at 1 (1906).

115 *Cappaert*, 426 U.S. at 142 (citing Cameron v. United States, 252 U.S. 450, 455 (1920)).

116 *See id.* at 133.

117 *See id.* at 131–32, 141.

118 Alaska v. Carter, 462 F. Supp. 1155, 1157 (D. Alaska 1978). Of that land, President Jimmy Carter designated more than fifty-five million acres as national monuments. *See* 146 CONG. REC. S7030–31 (daily ed. July 17, 2000).

119 COGGINS ET AL., *supra* note 19, at 308.

120 *See Carter*, 462 F. Supp. at 1157.

held, inter alia, that NEPA regulates only federal "agencies" and therefore does not apply to actions of the President himself under the Antiquities Act.[121]

Two aspects of the decision are particularly relevant to the current discussion. First, consistent with prior decisions, the court emphasized the discretionary nature of executive actions under the Antiquities Act.[122] In the court's view, separation of powers concerns prevented it from inferring that Congress intended to impose NEPA's requirements upon the President.[123] The court dismissed as absurd the State's argument that consultation with the Secretary of the Interior somehow transformed the President into an "agency" subject to NEPA's requirements.[124]

Second, as in *Wyoming v. Franke*,[125] the court's deference to the Executive was based upon the broader premise that the matter was not well suited to judicial resolution. In particular, the court was impressed by the idea that the challenged executive actions merely preserved the status quo of the relevant lands until Congress could enact permanent protective legislation.[126] Any errors of the President, in the court's view, were appropriate targets for congressional correction rather than resolution in the courts:

> This court will not be drawn into the merits of the land issue in Alaska under the rubric of "public interest." The ultimate decision on public lands has been delegated to the Congress by Article I of the Constitution and the public interest lies in allowing the Congress to make the ultimate decision. That interest will be hindered if the status quo of the concerned lands is not maintained until the Congress can render that decision.[127]

Congress accepted the court's challenge in 1980 and passed legislation that revoked President Jimmy Carter's withdrawals, but protected

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121 *See id.* at 1159. The issue of NEPA's relevance to the establishment of national monuments has been raised in a more recent lawsuit filed by counties in Utah. *See* Plaintiff's Complaint at 2, Utah Ass'n of Counties v. Clinton, No. 2:97CV-0479B (D. Utah filed July 31, 1997). In an attempt to circumvent the persuasive authority of *Carter*, perhaps, the Utah plaintiffs allege that the challenged national monument was created by President Bill Clinton "at the instigation" of Interior Secretary Bruce Babbitt, who launched an "unprecedented campaign" to persuade the President to establish the monument. *Id.* at 1.

122 *See Carter*, 462 F. Supp. at 1159.

123 *Id.* at 1160.

124 The court stated that "[t]he argument that the President cannot ask for advice, and must personally draw lines on maps, file the necessary papers, and the other details that are necessary to the issuance of a Presidential Proclamation in order to escape the procedural requirements of NEPA approaches the absurd." *Id.*

125 58 F. Supp. 890 (D. Wyo. 1945).

126 *See Carter*, 462 F. Supp. at 1165.

127 *Id.*

most of the affected lands under various other federal preservation schemes.[128]

5. Anaconda Copper Co. v. Andrus

In a second case arising out of President Carter's withdrawals in Alaska, a copper company challenged the establishment of three immense monuments:[129] the Admiralty Island National Monument (1.1 million acres), the Gates of the Arctic National Monument (8.2 million acres), and the Yukon Flats National Monument (10.6 million acres).[130] The court declined to consider whether the monuments were excessively large, confining itself to the narrow issue of whether the monuments were in conformity with the Antiquities Act's objectives.[131] In denying the plaintiff's motion for partial summary judgment, the court stated that "[o]bviously, matters of scientific interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act."[132] Although the court balked at the President's concern for solar basins and certain climatological phenomena, it found that the Act protected a broad range of natural features, including the ecosystem of plant and animal communities associated with the Western Arctic Caribou herd.[133]

Contrary to the opinion in *Alaska v. Carter*,[134] the *Anaconda Copper* court indicated that the matter was indeed justiciable: "I do not agree and reject the view that the only limitation upon the exercise of presidential authority under [the Antiquities Act] is the paramount power of Congress in its undoubted authority to provide for the disposition and use of public lands."[135] Nevertheless, the court was unwilling to limit the executive withdrawals at bar, despite its recognition that the Antiquities Act does contain meaningful limits on the nature of the objects and the amount of land suitable for monument status.[136] Consistent with all prior decisions, the court reviewed the President's withdrawals with deference, accepting at face value President Carter's

128 *See* Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (codified as amended in scattered sections of 16 U.S.C. and 43 U.S.C.). For a discussion of events leading up to this measure's enactment, see COGGINS ET AL., *supra* note 19, at 308; and Johannsen, *supra* note 74, at 453 n.112.

129 Anaconda Copper Co. v. Andrus, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980). The passage of the Alaska National Interest Lands Conservation Act ultimately rendered this case moot.

130 *See* 146 CONG. REC. S7031 (daily ed. July 17, 2000).

131 *See Anaconda Copper*, 14 Env't Rep. Cas. (BNA) at 1854–55.

132 *Id.* at 1855.

133 *See id.*

134 Alaska v. Carter, 462 F. Supp. 1155, 1165 (D. Alaska 1978).

135 *Anaconda Copper*, 14 Env't Rep. Cas. (BNA) at 1853.

136 *Id.* at 1853–54 (noting that "[t]he outer parameters [of executive authority] have not yet been drawn by judicial decision").

recitations that the monuments would protect objects of historic and scientific interest.[137]

C. Congressional Ambivalence

If the presidents' generous interpretation of the Antiquities Act resulted in landscape preservation on a scale that Congress never intended, the legislators did little to protest it. Rather, over the past century Congress has been inconsistent in its approach to the Executive's aggressive use of the Antiquities Act. Despite its occasional harsh criticism, partisan posturing, and even occasional introduction of bills to amend or repeal the Act, Congress has also affirmed the presidents' withdrawals by placing monuments into protected national parks and by providing funding for the management of national monuments.[138] Moreover, with only two exceptions, the President's monument authority has remained substantially unaltered since its enactment in 1906.[139] Examination of the century as a whole reveals that the congressional response has been one of ambivalence toward, or even acquiescence in, executive actions under the Antiquities Act.

1. *Supporting Executive Authority*

By 1906, the practice of protecting land through executive withdrawals had been well established. Under an 1891 statute, for example, Congress had authorized the President to withdraw lands for the creation of forest reserves.[140] Within twenty years, presidents had protected more than 194 million acres of forest land under the authority of the Forest Reserve Act.[141] The 1906 Congress that passed the Antiquities Act was well aware of the Executive's aggressive use of its withdrawal powers.[142] Nevertheless, through the Antiquities Act Congress expanded the President's statutory withdrawal authority in terms that are broad, discretionary, and arguably insufficient to curb the demon-

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137 *See id.* at 1854–55.

138 *See* VINCENT & BALDWIN, *supra* note 48, at 2–3.

139 *See* discussion *infra* Part I.C.2.

140 Forest Reserve Act, ch. 561, § 24, 26 Stat. 1095, 1103 (1891), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792. The Act authorized the President to "set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations." *Id.*

141 *See* Getches, *supra* note 37, at 286; *see also* PAUL W. GATES, PUBLIC LAND LAW REVIEW COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 581 (1968) (offering a table of forest reserves by states and territories as of 1909).

142 *See supra* note 37 and accompanying text.

strated presidential tendency to make generous withdrawals of land.[143]

In numerous cases, Congress has supported the President's declaration of monuments by folding them into the protective national park or national refuge systems.[144] Although this process involves the abolition of monuments in a technical sense, it provides a substitute status of protection within other federal land management regimes.[145] More than one-half of all national parks were originally protected by presidents as monuments.[146] Congress also has established national monuments itself, including vast landscapes containing unusual natural features.[147]

In other cases, Congress has provided support to presidential monuments through subsequent legislation or funding appropriations. Although President Bill Clinton's designation of the Grand Staircase-Escalante National Monument created a firestorm of criticism by some individual legislators,[148] Congress as a whole provided generous funding for the monument, expanded its boundaries in certain areas, and passed land-exchange legislation to facilitate its management.[149]

2. *Limiting Executive Authority*

In several important instances, Congress has chastised the President for his aggressive implementation of the Antiquities Act. To indicate its displeasure with the Executive, Congress has twice abolished monuments.[150] Beyond the abolition of individual monuments, Con-

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143 Just nine years prior to the passage of the Antiquities Act, Congress had vacated several forest reserves set aside by the President. *See* 1 CHARLES F. WHEATLEY, JR., PUBLIC LAND LAW REVIEW COMM'N, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 51 (rev. 1969). Although the extensive forest reserves were mentioned during debate over the Antiquities Act, *see supra* note 37 and accompanying text, Congress nevertheless enacted the statute.

144 *See* VINCENT & BALDWIN, *supra* note 48, at 2–3.

145 Commentators have noted that "[m]any of the crown jewels of the national park system were first protected by executive action under the Act, when Congress dragged its feet." COGGINS ET AL., *supra* note 19, at 307.

146 *See* VINCENT & BALDWIN, *supra* note 48, at 4.

147 *See, e.g.*, 16 U.S.C. § 431 (2000) (listing monuments Congress has created, including the 110,000-acre Mount St. Helens National Volcanic Monument).

148 *See infra* Part III.A.2.

149 *See* Utah Ass'n of Counties v. Clinton, Nos. 2:97CV479, 2:97CV492, 2:97CV863, 1999 U.S. Dist. LEXIS 15852, at *46–*47 (D. Utah Aug. 12, 1999) (discussing congressional activity after proclamation of the Grand Staircase-Escalante National Monument, but denying federal defendants' motion to dismiss based upon the theory of congressional ratification).

150 Congress has abolished the Holy Cross and Wheeler National Monuments in Colorado, *see* Act of Aug. 3, 1950, Pub. L. No. 648, 64 Stat. 404; Act of Aug. 3, 1950, Pub. L. No. 652, 64 Stat. 405, and the Shoshone Cavern National Monument in Wyoming, *see* Act of May 17, 1954, Pub. L. No. 360, 68 Stat. 98.

gress also has limited the President's statutory withdrawal authority. In its strongest rebuke under the Antiquities Act, Congress reacted adversely to President Franklin Roosevelt's establishment of the 221,610-acre Jackson Hole National Monument in Wyoming.[151] John D. Rockefeller, Jr. had offered to donate approximately 33,000 acres to the federal government for park purposes.[152] In response to nearly two decades of congressional refusal to incorporate the area into a national park and the potential retraction of the proffered donation, President Franklin Roosevelt unilaterally protected the land by proclamation in 1943.[153] Congress retaliated immediately by withholding funds for the administration of the monument.[154] One congressman exclaimed angrily in hearings before the House Interior Committee, "It does not seem reasonable to me that Congress ever intended that a national monument should extend over a body of land . . . nearly one-third the size of Rhode Island."[155] Later, Congress amended the Antiquities Act to prohibit the establishment of additional monuments in the State of Wyoming and tried unsuccessfully to repeal the Antiquities Act itself.[156] Despite this sharply critical response, Congress ultimately protected much of the Jackson Hole monument as the Grand Teton National Park.[157] Thus, even in its strongest rebuke of the Pres-

151 *See supra* text accompanying notes 108–10.

152 H.R. REP. No. 2910, at 3747 (1950).

153 *See* Proclamation No. 2578, 3 C.F.R. 327 (1943); *see also* Getches, *supra* note 37, at 304 (describing eighteen-year congressional impasse over expansion of Grand Teton National Park based upon local resistance to erosion of tax base and loss of state fish and game revenues).

154 *See Getches, supra* note 37, at 304.

155 Blumenthal, *supra* note 6 (quoting Congressman Frank Barrett, a Wyoming Republican).

156 Act of Sept. 14, 1950, Pub. L. No. 787, 64 Stat. 849 (codified as amended at 16 U.S.C. § 431a) (banning establishment of additional monuments in Wyoming absent express congressional authorization); *see Resolutions Authorizing the Comm. on Pub. Lands and Surveys to Make a Full and Complete Investigation with Respect to the Admin. and Use of Pub. Lands, Hearing Before the Subcomm. of the S. Comm. on Pub. Lands and Surveys*, 78th Cong. 3542–43 (1943) (statement of Gus P. Backman, President, Mountain States Association) (advocating repeal); H.R. REP. No. 2910, at 3749 (1950). At the same time, Congress passed legislation to abolish the monument, which was defeated by presidential veto. *See* 2 WHEATLEY, *supra* note 143, at 465.

It is interesting to compare this reaction to the congressional response nearly half a century earlier when President Theodore Roosevelt withdrew 150 million acres under the Forest Reserve Act between 1902 and 1909. *See* Getches, *supra* note 37, at 288 & n.50. Congress nullified the executive withdrawals and amended the Act to prohibit the creation of new reserves in six states, unless by act of Congress. *See* Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1271. In defiance of the congressional action, President Theodore Roosevelt established new reserves and enlarged existing reserves (including lands within the six forbidden states) while the legislation was pending. *See* Getches, *supra* note 37, at 286.

157 Act of Sept. 14, 1950, Pub. L. No. 787, 64 Stat. 849 (codified as amended at 16 U.S.C. §§ 406d-1 to -5, 482m, 673b (2000)) (providing for abolition of monument and reorganization into Grand Teton National Park, Teton National Forest, and National Elk Refuge).

ident, Congress bowed to the political reality that by mid-century, the general public supported the preservation of lands, whether by Congress or by the President.[158]

Several other presidents faced strident criticism for their use of the Antiquities Act. In 1961, Republican President Dwight Eisenhower established the Chesapeake and Ohio Canal National Monument[159] in defiance of a Democratic Congress that refused to protect the 184-mile historic haul route.[160] In retaliation, Congress blocked funding for the monument for a decade.[161] Today, however, the monument remains a vital part of the Maryland landscape.[162] Nearly twenty years later, President Jimmy Carter's reservation of millions of acres in Alaska triggered the anger of Congress.[163] After a two-year impasse, Congress chastised the President by limiting executive authority to establish additional monuments in Alaska.[164] At the same time, however, Congress confirmed the Executive's preservation efforts by incorporating most of the monuments into the national park system.[165] Most recently, President Clinton's establishment of the 1.7 million acre Grand Staircase-Escalante Monument in Utah provoked the wrath of western politicians.[166] Although several bills were introduced in Congress to diminish the President's authority under the Antiquities Act, the dispute was largely partisan, and none of the bills was enacted into law.[167]

3. *Declining to Limit Executive Authority*

In several other important instances, Congress has forgone clear opportunities to restrict presidents' authority under the Antiquities

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158 *See* 2 WHEATLEY, *supra* note 143, at 465.

159 Proclamation No. 3391, *reprinted in* 75 Stat. 1023, 1023–25 (1961).

160 *See* Blumenthal, *supra* note 6.

161 *Id.*

162 *See* 146 CONG. REC. S7031 (daily ed. July 17, 2000).

163 *See supra* note 128 and accompanying text.

164 *See* Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3213 (2000) (establishing that executive withdrawals exceeding five thousand acres are not effective until notice is provided in the Federal Register and to both Houses of Congress; and that such withdrawals terminate after one year unless approved by a joint resolution of Congress). Reminiscing about his career, former President Carter noted, "Of all of the things that I've done, nothing exceeds my pride in having been permitted to play a small part in the passage of . . . legislation [protecting Alaska lands]." *Alaska Land Bills Still Debated After 20 Years*, CNN.COM, Nov. 29, 2000, *at* http://www.cnn.com/2000/NATURE/11/29/seward.alaska.reut/index.html. However, President Carter had been detested by many Alaskans during the controversy he triggered. *Id.* Recalling a long past Alaska State Fair at which one concessionaire gave the public a chance to throw balls either at a picture of President Carter or one of the Ayatollah Khomeni of Iran, President Carter recalls, "The fair people made a lot more money on my picture than the [A]yatollah's." *Id.*

165 *See supra* note 157 and accompanying text.

166 *See* Blumenthal, *supra* note 6.

167 *See* discussion *infra* Part III.A.2.

Act, but has specifically limited their withdrawal authority under other statutes. Two such missed opportunities are particularly relevant. First, in 1910 Congress passed the Pickett Act in response to President William Taft's 1909 withdrawal of over three million acres of land to protect underlying oil and gas reserves.[168] The Act provided general authority for executive withdrawals, but limited that authority to *temporary* withdrawals of land that would remain *open* for oil and gas development.[169] Although the Antiquities Act also had been used broadly by that time to withdraw expansive tracts of land, Congress declined to impose similar restrictions upon the President's establishment of national monuments in terms of acreage, duration, or purpose.[170]

In 1976, Congress declined to seize a second critical opportunity to amend or repeal the Antiquities Act. In that year, Congress passed the Federal Land Policy and Management Act (FLPMA) and expressly repealed the executive withdrawal authority contained in twenty-nine statutes.[171] The Antiquities Act is conspicuously absent from that list, despite the recommendation of the Public Land Law Review Commission (PLLRC) that

> Large scale, limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress. All other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for executive action.[172]

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168 *See* Pickett Act, Pub. L. No. 303, 36 Stat. 847 (1910) (repealed 1976); *see also* Getches, *supra* note 37, at 290–91 (describing the politics behind the enactment).

169 *See* Getches, *supra* note 37, at 288 & n.51. The Pickett Act provided general withdrawal authority to the President to supplement the more specialized withdrawal authority for specific purposes already provided under existing statutes such as the Antiquities Act. *See* Pickett Act, 36 Stat. 847 (repealed 1976).

170 By the end of 1909, President Theodore Roosevelt had set aside seventeen national monuments encompassing over 1.5 million acres. 146 CONG. REC. S7030 (daily ed. July 17, 2000).

171 *See* Federal Land Policy and Management Act of 1976, Pub. L. No. 94–579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701–1782 and scattered sections of the U.S. Code (1994 & Supp. V 1999)). The repeal of executive withdrawal authority is contained in 90 Stat. 2792. Congress also enacted an express repeal of any implied delegations of authority recognized by the courts: "Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) and the following statutes and parts of statutes are repealed . . . ." *Id.* § 704(a).

172 *See* PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 9 (1970). For a detailed argument in support of this position, see *id.* at 54–56; and see also 2 WHEATLEY, *supra* note 143, at 463–65 (criticizing executive misuse of the Antiquities Act by "circumvent[ing] the requirement that only Congress can create a national park" and describing the "overwithdrawal" that occurs when the President creates monuments "far in excess of the amount needed to properly administer the reserved site"). The Wheatley study was prepared under contract with the Public Land Law Review Commission (PL-

Through its enactment of FLPMA, Congress declined to implement the PLLRC's recommendation. Moreover, Congress expressly affirmed the value of executively designated national monuments by forbidding the Secretary of the Interior from modifying or revoking any monuments created by executive withdrawal under the Antiquities Act.[173]

In sum, although various members of Congress have vehemently criticized executive withdrawals, Congress has imposed executive limits only with respect to new monuments in Wyoming and Alaska. In the other forty-eight states, the President's authority under the Antiquities Act remains intact and vigorous.

4. *Enacting Overlapping Legislation*

After the passage of the 1906 Act, Congress passed a number of statutes with preservationist goals that overlap with those of the Antiquities Act. Typically, however, the later legislation contains more precise standards and procedures than does the Antiquities Act, and includes provisions for public participation in natural resource decisions.[174] This overlapping legislation raises questions concerning the legitimate sphere of executive authority under the Antiquities Act. If Congress alone has the authority to create national parks and wilderness areas, does this indicate that the President's authority to designate national monuments with *wilderness-type characteristics* has been supplanted or restricted?[175] If the Secretary of the Interior has explicit authority to make emergency or other withdrawals of land that are threatened with development, but only in limited circumstances and pursuant to specific procedures,[176] does this preclude application of the President's broader authority under the Antiquities Act?

Four statutes with purposes compatible with those of the Antiquities Act may render the President particularly vulnerable to allegations

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LRC). 1 WHEATLEY, *supra*, at ii. For a thorough discussion of FLPMA, see Getches, *supra* note 37, at 313–29.

173 *See* 43 U.S.C. § 1714(j) (1994). Section 1714(j) also forbids the Secretary from making, modifying, or revoking any congressional withdrawals. *Id.*

174 *See, e.g., infra* text accompanying note 189.

175 Critics have alleged that presidents have improperly utilized the Antiquities Act to make an "end run" around Congress by usurping the exclusive congressional prerogative to create national parks and wilderness areas. *See, e.g., Balance of Power*, FLA. TIMES-UNION, May 23, 2000, at B4 (asserting that "President Clinton has mastered the art of using executive orders, in some cases to circumvent the U.S. Constitution and Congress"); Michael Janofsky, *Amid Protests, Land-Protection Plan Goes to President*, N.Y. TIMES, Dec. 13, 1999, at A30 (noting Republican criticism that President Clinton's monument declarations constitute an end run around Congress); Sean Paige, *Seizing Land for Posterity?*, WASH. TIMES, Feb. 7, 2000, at 16 (reporting that opponents perceived the Clinton proclamations as "an act of election-year pandering to the green lobby, an end-run around the legislative process and yet another example of the federal government's high-handed ways out West").

176 *See* Federal Land Policy Management Act of 1976, 43 U.S.C. § 1714 (1994).

of wrongdoing. First, the National Park Service Organic Act of 1916 created the National Park Service within the Department of the Interior.[177] The Service, which manages national monuments, as well as parks and reservations, has been charged with the task of managing such federal properties "to conserve the scenery and the natural and *historic objects* and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[178] Although national parks and monuments may resemble one another, they are distinct in one important respect: only Congress can establish a national park.[179] Critics have claimed that the President has established various national monuments in a deliberate attempt to circumvent the congressional approval required for the creation of a new national park.[180]

A modern statute that overlaps with the Antiquities Act is the Wilderness Act of 1964,[181] which establishes the National Wilderness Preservation system "[i]n order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States . . . , leaving no lands designated for preservation and protection in their natural condition."[182] In general, wilderness areas must be at least five thousand acres in size.[183] Their purpose overlaps significantly with that of national monuments: although wilderness areas should be tracts where "the imprint of man's work [is] substantially unnoticeable," they "may also contain ecological, geological, or other features of *scientific*, educational, scenic, or *historical* value."[184] Wilderness areas, like national parks, can be established only by acts of Congress.[185] Thus, critics have claimed that some large national monuments are mere surrogates for wilderness preservation, illegally created by the President without the participation of Congress.[186]

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177 National Park Service Organic Act of 1916, Pub. L. No. 235, ch. 408, 39 Stat. 535 (codified as amended at 16 U.S.C. §§ 1–18f (2000)).

178 16 U.S.C. § 1 (emphasis added).

179 *See id.* § 1a–5(a) (directing Secretary of Interior to recommend to Congress areas for potential inclusion in the National Park System).

180 *See* 2 WHEATLEY, *supra* note 143, at 464; sources cited *supra* note 175.

181 *See* Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131–1136 (2000)).

182 16 U.S.C. § 1131(a).

183 *Id.* § 1131(c).

184 *Id.* (emphasis added).

185 *See id.* § 1131(a) (providing that "no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter [including provisions for congressional involvement]").

186 *See supra* note 175. Indeed, such criticisms have served as the basis for allegations of legal wrongdoings. *See, e.g.*, Utah Ass'n of Counties v. Clinton, Nos. 2:97CV479, 2:97CV492, 2:97CV863, 1999 U.S. Dist. LEXIS 15852, at *58–*67 (D. Utah Aug. 12, 1999)

The Federal Land Policy and Management Act of 1976[187] is yet another statute that promotes goals that overlap with the preservation of antiquities. Among the stated goals of FLPMA are the management of the public lands "in a manner that will protect the quality of *scientific,* scenic, *historical,* ecological, environmental . . . and *archeological* values."[188] The procedural requirements of FLPMA are more detailed than those of the Antiquities Act. Contrary to the broad scope of executive discretion recognized by the Antiquities Act, FLPMA orders the Secretary of the Interior to provide for public notice and comment regarding the management of the public lands,[189] and explicitly states that Congress holds the primary authority to withdraw and reserve federal lands for specific purposes.[190] The statute also reserves to Congress the final authority for the designation of wilderness areas on public lands managed by the Bureau of Land Management.[191]

Finally, the Endangered Species Act of 1973 (ESA)[192] overlaps with the Antiquities Act. The ESA protects endangered and threatened species, in part to preserve their "esthetic, ecological, educational, *historical,* recreational, and *scientific* value to the Nation and its people."[193] Similarly, the Supreme Court has allowed the President to use the Antiquities Act to protect certain rare species of plant or animal life.[194] Just as both statutes may protect species for their scientific and historic value, they also have been utilized to protect the ecosystems upon which those species rely.[195]

Thus, at least four statutes other than the Antiquities Act explicitly recognize the value of protecting large landscapes for their his-

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(challenging President Clinton's designation of the Grand Staircase-Escalante monument in Utah on the grounds that it unlawfully withdrew monument lands from the operation of the mining and mineral leasing laws and exceeded executive authority by reserving lands for wilderness purposes—powers allegedly reserved to Congress under FLPMA).

187 *See* 43 U.S.C. §§ 1701–1784 (1994 & Supp. V 1999); *supra* note 171 and accompanying text.

188 *Id.* § 1701(a)(8) (emphasis added).

189 *Id.* § 1712(f).

190 *See id.* § 1701(a)(4) (declaring that Congress shall "exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress [shall] delineate the extent to which the Executive may withdraw lands without legislative action").

191 *See id.* § 1782(b).

192 *See* Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2000)).

193 16 U.S.C. § 1531(a)(3) (emphasis added).

194 *See* Cappaert v. United States, 426 U.S. 128, 132–33, 147 (1976) (approving implicitly protection of rare Devil's Hole pupfish as objects of historic or scientific interest); *see also* Anaconda Copper Co. v. Andrus, 14 Env't Rep. Cas. (BNA) 1853, 1855 (D. Alaska 1980) (approving protection of Western Arctic Caribou herd and its habitat under the Antiquities Act).

195 *See* 16 U.S.C. § 1536(a)(2) (protecting critical habitat of endangered and threatened species); *Cappaert,* 426 U.S. at 132–33 (protecting pupfish); *Anaconda Copper,* 14 Env't Rep. Cas. (BNA) at 1855 (protecting caribou habitat).

toric and scientific value. For the past century, presidents have utilized the Antiquities Act as the most expeditious method of achieving such preservation. Although the later statutes reflect the modern value placed upon citizen participation and the modern device of delegating land management duties to administrative agencies or to the Secretary of the Interior, the Antiquities Act contains no such provisions. As a result, critics have suggested that the President should abide by the more recent—and more restrictive—legislation.[196] This criticism raises the question of whether the Antiquities Act continues to perform a unique and valuable function, or whether it has been implicitly superseded, or even repealed, by modern and overlapping legislation.[197]

D. Political Rhetoric

For almost a century, the courts consistently have supported sweeping exercises of presidential authority under the Antiquities Act. Despite this judicial support, the designation of new monuments often has triggered angry rhetoric by critics of the President. As one might expect, much of the criticism focuses upon the wisdom of the Executive's policy choices—certainly an appropriate topic of political debate. More surprisingly, the rhetoric also suggests that presidents have acted improperly, illegally, or even unconstitutionally by withdrawing lands under the Antiquities Act—allegations oddly divorced from the consistent judicial precedent to the contrary.[198] Overall, political criticism advances the notion that the presidents have created national monuments on a scale unintended by the 1906 Congress that passed the Antiquities Act.

It is easy to overstate this point. Certainly, there are several obvious reasons why critics might choose to ignore pronouncements of the courts. The case law is sparse and the determination of whether a particular monument exceeds the bounds of the President's authority involves substantial questions of fact that vary from case to case. Furthermore, at times anger may trump reason, prompting those who oppose national monuments to be concerned not with the legal niceties of existing law, but rather with garnering the political support necessary to change the law.

Nevertheless, the rhetoric is striking for its repetitiveness and its failure to accept relevant judicial precedent. In 1920, for example, the U.S. Supreme Court upheld President Theodore Roosevelt's establishment of the Grand Canyon National Monument, deferring to

196 *See, e.g., infra* notes 200–01 and accompanying text.

197 *See* discussion *infra* Part III.B (suggesting an ongoing role for the Antiquities Act, despite the subsequent passage of overlapping legislation).

198 *See supra* Part I.B.

the President's proclamation that the area embraced objects of historic or scientific interest.[199] Over three-quarters of a century later, litigants continued to challenge the President's discretion in protecting large land areas, refusing to accept the findings expressed by presidential proclamation. One critic of President Clinton's creation of the 1.7 million acre Grand Staircase-Escalante National Monument asked the court to invalidate a similar presidential proclamation based on the allegation that the area may contain no prehistoric relics:[200]

> Apparently believing that saying it makes it so, President Clinton's proclamation contained all the requisite words of the Antiquities Act, including "scientific," "historic," and "the smallest area compatible." Whether saying it makes it so, even for presidents, and whether words on paper make up for what is not on the ground, remains to be seen . . . .[201]

Similarly, a 1997 lawsuit alleges that the process establishing the Grand Staircase-Escalante Monument exceeded the scope of the President's delegated authority, that it violated NEPA,[202] that the President's motives were improper, and that the monument was excessive in size.[203] In similar circumstances, lower federal courts have previously disposed of similar claims in favor of the President, holding that NEPA does not apply to the President,[204] that the President's motives are irrelevant,[205] and that even monuments over ten million acres in size may be acceptable provided that they serve historic and scientific purposes.[206] It seems as though the general public has not heard the message of the courts.

This perplexing situation may be a consequence of the courts' uncertainty as to the scope of their jurisdiction to review presidents' discretionary withdrawals under the Antiquities Act. Based upon their respect for the office of the President (and perhaps upon the Antiqui-

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199 Cameron v. United States, 252 U.S. 450, 455–56 (1920). For a discussion of *Cameron*, see *supra* Part I.B.1.

200 Pendley, *supra* note 12, at 15 (discussing an action filed by the Mountain States Legal Foundation, of which Pendley is President and Chief Legal Officer).

201 *Id.* at 8.

202 42 U.S.C. §§ 4321–4370e (1994 & Supp. V 1999).

203 Plaintiff's Complaint at 23–26, 32–34, Utah Ass'n of Counties v. Clinton, No. 2:97CV-0479B (D. Utah filed July 31, 1997); *see also* Pendley, *supra* note 12, at 14 (contending that President Clinton's establishment of the monument was a "ruse" to preserve wilderness, and that the President may have violated NEPA); Neil A. Lewis, *House Tweaks Clinton over Creation of National Monuments*, N.Y. TIMES, Oct. 8, 1997, at A16 (citing Representative James V. Hansen of Utah for the claim that "Mr. Clinton had abused his authority when he created the Grand Staircase-Escalante National Monument in Utah without informing the local members of Congress or the Governor").

204 Alaska v. Carter, 462 F. Supp. 1155, 1159 (D. Alaska. 1978).

205 Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945).

206 *See* Anaconda Copper Co. v. Andrus, 14 Env't Rep. Cas. (BNA) 1853, 1854 (D. Alaska 1980).

ties Act's failure to incorporate an explicit private right of action), courts have deferred to the executives and disposed of claims against them. Ironically, this judicial respect for presidents may have promoted a concomitant disrespect among the general population. As one commentator has observed:

> There are . . . reasons why it would be unwise to treat the President's statutory duties as political questions. . . . [T]he President would lose an important means of defending the legitimacy of his actions. A judicial determination that executive action is consistent with statutory authority enables a President to blunt charges that he has overstepped his role in defiance of the institutional interests of Congress.[207]

Thus, the courts' reluctance to second-guess executive authority—whether expressed as deference or as a limited jurisdiction—opens the door for critics to assert that the President has transgressed the law. If the President is unable to vindicate himself in the courts of law, then the court of public opinion will remain actively critical.

II
THE HISTORICAL CONTEXT: NATURE AS ISOLATED CONSTRUCT

One great irony of history is that civilized societies have transformed nature into an *unnatural* philosophical construct.[208] This "nature" has been both despised and revered, viewed simultaneously as an obstacle to be conquered and as a reflection of a divine presence. In both cases, nature is the antithesis of civilization, a living force distinct and apart from human society. This Part observes that resistance to the designation of large national monuments may be rooted in the historical and philosophical dichotomy between natural and human systems. Through the Antiquities Act—as well as the Wilderness Act, the Endangered Species Act, and other legislation—Congress has promoted the often-unworkable legal fiction that humans and nature can remain separate from one another. This illusion may have harmful, unintended consequences, diverting dialogue from difficult, subjective decisions about the proper use of our wild lands. In many instances, the degree of legal protection afforded a landscape is inversely proportional to the amount of human disturbance that can be detected on it.[209] Under the Antiquities Act, however, the opposite

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207 Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 9–10 (1982).

208 *See* Jonathan Baert Wiener, *Law and the New Ecology: Evolution, Categories, and Consequences*, 22 ECOLOGY L.Q. 325, 348 (1995) (book review) (asserting that "the very concept of 'nature' is not 'natural' but is a human construct").

209 *See infra* Part II.B.2.

is true: a landscape may not be entitled to protection unless it has been prominently marked by a human presence.[210] In either case, current statutory schemes rely, perhaps excessively, upon rigid objective markers—such as whether an area contains archaeological ruins, roads, or wild animals that have been touched by humans—to answer difficult questions about the protection of large landscapes and ecological systems.[211]

A. The Philosophical Dichotomy Between Nature and Culture

Scientists have long struggled against the drive to separate humans from natural systems. As early as 150 A.D., astronomer Ptolemy of Alexandria developed an elaborate geocentric model of the universe in which the moon, sun, and planets revolved around the earth.[212] The Catholic Church embraced the Ptolemaic system, which served as a useful scientific counterpart to the Church's belief in the supremacy of humans over all creation.[213] Both philosophies supported the vision of man as center and *raison d'être* of the universe, rather than merely one member of the complex ecosystems of the earth. When Galileo Galilei postulated in 1632 that the sun rather than the earth may be the center of the universe, the Church put him on trial for heresy.[214] Thus, Galileo's theory represented an early challenge to the assumption of civilized societies that humans are in a hierarchical position above and apart from nature.

Over two hundred years later, another major scientific theory met with resistance for linking humans to other forms of life.[215] Charles Darwin proposed his theory of natural selection, contending that existing species of plants and animals have their origin in preexisting types that have modified from one generation to the next.[216] The

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210 *See infra* Part II.B.4.

211 *See, e.g.*, 16 U.S.C. § 1131(c) (2000) (defining wilderness as "an area of underdeveloped . . . land retaining its primeval character and influence, without permanent improvements or human habitation").

212 HAL HELLMAN, GREAT FEUDS IN SCIENCE 7 (1998).

213 *See id.* at 8. Hellman notes that the Bible contains numerous astronomical references with which the Ptolemaic view is consistent. For example, *Psalm* 93 proclaims, "Yea, the world is established; it *shall never be moved.*" *Id.* (quoting *Psalm* 93:1 (Revised Standard Version)) (emphasis in original).

214 *Id.* at 2–3. Galileo was not the first to propose a heliocentric model. *See id.* at 6–9 (discussing the contributions of Aristarchus, Nicolaus Copernicus, and Johannes Kepler).

215 *See id.* at 81 (describing public reaction to Darwin's theory of natural selection). *See generally* J. BRONOWSKI, THE ASCENT OF MAN 291–309 (1973) (discussing Darwin's work in a chapter entitled "The Ladder of Creation").

216 CHARLES DARWIN, THE ORIGIN OF SPECIES 69 (J.W. Burrow ed., Penguin Books 1985) (1859). Darwin described natural selection as follows:

> Let it be borne in mind how infinitely complex and close-fitting are the mutual relations of all organic beings to each other and to their physical conditions of life. Can it, then, be thought improbable, seeing that variations useful to man have undoubtedly occurred, that other variations useful

potential application of Darwin's theory to humans raised vehement opposition for its suggestion that humans evolved from lower forms of life.[217] As the bishop of Oxford, Samuel Wilberforce, reportedly argued in 1860:

> Man's derived supremacy over the earth; man's power of articulate speech; man's gift of reason; man's freewill [sic] and responsibility; man's fall and man's redemption; the incarnation of the Eternal Son; the indwelling of the Eternal Spirit,—all are equally and utterly irreconcilable with the degrading notion of the brute origin of him who was created in the image of God.[218]

In the early twentieth century, anti-evolutionary forces intensified.[219] By the early 1920s, the teaching of evolution had been banned in Tennessee, Mississippi, and Arkansas.[220] Later that decade, John Thomas Scopes was convicted of teaching evolutionary theory to public school students in violation of Tennessee law.[221] Although the Supreme Court of Tennessee ultimately reversed the conviction, it upheld the state statute that criminalized the teaching of evolution in Tennessee public schools.[222] Thus, the intellectual isolation of humans from nature received the imprimatur of the law during roughly the same period in which the Antiquities Act was drafted, enacted by Congress, and first utilized by President Theodore Roosevelt.[223]

1. *Culture: Tamed Landscapes*

The philosophical dichotomy between nature and culture is also evident in the historical narratives that portray nature as a force that humans must conquer. The drive to conquer nature has been infused with religious overtones. An often-quoted passage of the Bible declares that man shall have "dominion over the fish of the sea, and over

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> in some way to each being in the great and complex battle of life, should sometimes occur in the course of thousands of generations? If such do occur, can we doubt (remembering that many more individuals are born than can possibly survive) that individuals having any advantage, however slight, over others, would have the best chance of surviving and of procreating their kind? . . . This preservation of favourable variations and the rejection of injurious variations, I call Natural Selection.

Id. at 130–31.

217 ERNST MAYR, ONE LONG ARGUMENT: CHARLES DARWIN AND THE GENESIS OF MODERN EVOLUTIONARY THOUGHT 25 (1991) ("[N]o Darwinian idea was less acceptable to the Victorians than the derivation of man from a primitive ancestor. . . . The primate origin of man . . . immediately raised questions about the origin of mind and consciousness that are controversial to this day.").

218 RONALD W. CLARK, THE SURVIVAL OF CHARLES DARWIN 145 (1984).

219 HELLMAN, *supra* note 212, at 92–96.

220 RONALD L. NUMBERS, THE CREATIONISTS 41 (1992).

221 Scopes v. State, 289 S.W. 363, 363 (Tenn. 1927); *see also* HELLMAN, *supra* note 212, at 94–96 (describing John Thomas Scopes's trial).

222 *Scopes*, 289 S.W. at 364–67.

223 *See supra* Part I.A.

the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth."[224]

That biblical authority took on new life during the drive to settle the western United States in the mid-nineteenth century. A spirit of "manifest destiny" seized the nation in its effort to conquer and acquire title to the vast territory stretching from coast to coast. As journalist John O'Sullivan wrote in 1845,

> Away, away with all these cobweb tissues of rights of discovery, exploration, settlement, contiguity, etc. . . . . The American claim is by the right of our *manifest destiny* to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federative self-government entrusted to us. It is a right such as that of the tree to the space of air and earth suitable for the full expansion of its principle and destiny of growth.[225]

In 1887, W.M. Thayer used a similar metaphor of conquest to describe the cultivation of the seemingly endless cornfields of Kansas and wheat fields of Dakota. This time, the force to be conquered was nature itself:

> [A] farm of twenty or thirty thousand acres . . . is divided into sections, with superintendent and army of employees for each section, who go to work with military precision and order. The . . . workers . . . [move] forward like a column of cavalry, turning over a hundred acres of soil in an incredibly brief period of time. . . . Under this arrangement the earth is easily *conquered* by this mighty army of ploughers, who move forward to the music of rattling machines and the tramp of horses. It is an inspiring spectacle,—the almost boundless prairie farm and the cohorts of hopeful tillers marching over it in triumph.
>
> . . . .
>
> . . . It seems as if God had concentrated His wisdom and power upon this part of our country, to make it His crowning work of modern civilization on this Western Continent. For its history is Providence illustrated,—God in the affairs of men to exhibit the grandeur of human enterprise and the glory of human achievement.[226]

Thus, the rhetoric of divinely-sanctioned conquest accompanied both the acquisition and domestication of the national territory.

American literature and art of the era likewise portray the conquest of nature as a handmaiden of civilization. In an 1881 poem in praise of pioneers, Walt Whitman declared:

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224 *Genesis* 1:26 (King James).

225 RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A HISTORY OF THE AMERICAN WEST 73 (1991) (emphasis added).

226 WILLIAM M. THAYER, MARVELS OF THE NEW WEST 637, 710 (1887) (emphasis added).

> All the past we leave behind,
> We debouch upon a newer mightier world, varied world,
> Fresh and strong the world we seize, world of labor and the march,
> Pioneers! O pioneers!
>
> . . . .
>
> We primeval forests felling,
> We the rivers stemming, vexing we and piercing deep the mines within,
> We the surface broad surveying, we the virgin soil upheaving,
> Pioneers! O pioneers![227]

Early American visual art favored the depiction of domesticated nature rather than uncultivated scenery.[228] It was not until the early nineteenth century that "a few connoisseurs began to regard the American landscape as either a 'noble' subject or one of sufficient 'grandeur' to make it worth the painting."[229] Prior to that time, "nobody . . . felt the need for pictures showing the uncouth state of the [American] countryside."[230] Rather, comparatively tame views of formal parks and gardens were preferred.[231]

2. *Nature: Untamed Wilderness*

In contrast to those who have viewed nature as simply a force to be conquered, others have perceived wilderness as an object to be revered and protected from human interference. From both perspectives, however, civilization remains distinct and apart from the natural environment. The bold explorer may venture into the wilderness, returning in victory and laden with the bounty of nature. The awestruck poet or artist may spend the day outdoors seeking an inspiration that can be transformed through human artifice into an object of human culture. At the end of the day, however, both conqueror and artist retreat to the familiar comforts of hearth and home and civilization.

The so-called Hudson River School of the nineteenth century presents a clear example of the growing reverence for wilderness scenery. Artists such as Thomas Cole painted dramatic scenes of the American wilderness, departing from "landscape painting tradition by either omitting any sign of man and his works or reducing the [proportions of] human figures."[232] These artists struggled against the attitude that untamed landscapes were unworthy of artistic treatment.[233]

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227 WALT WHITMAN, *Pioneers! O Pioneers!*, *in* LEAVES OF GRASS 194, 194–95 (Emory Holloway ed., Doubleday & Co. 1954) (1881).

228 *See* HANS HUTH, NATURE AND THE AMERICAN 40–41 (1957).

229 *Id.* at 41.

230 *Id.* at 40 (describing attitudes of the seventeenth century).

231 *Id.*

232 RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 79 (1967).

233 *See* HUTH, *supra* note 228, at 50.

American landscape artists in the nineteenth century faced the same brand of criticism that later was leveled at presidents who protected large landscapes under the Antiquities Act. Cole and his followers devoted themselves to refuting the notion that "American scenery possessed little that is interesting or truly beautiful, and that being destitute of the vestige of *antiquity* it may not be compared with European scenery."[234] On the contrary, Cole maintained, the "sublimity of untamed wilderness and the majesty of the eternal mountains" made the American landscape a worthy artistic subject.[235] Indeed, by the early 1800s the public had begun to appreciate scenery that was "wild, romantic and awful,"[236] allowing depictions of such scenery to take their place beside those of cultivated landscapes. Less than one hundred years later, presidents would demonstrate much the same spirit by attempting to protect under the Antiquities Act both immense natural features and modest prehistoric ruins.

Some nineteenth century American writers and philosophers shared the view that nature should be insulated and protected from human exploitation. In his 1864 book *Man and Nature*, George Perkins Marsh argued that natural resources should be conserved and that nature should be respected for its aesthetic, scientific, and spiritual values.[237] Echoing this theme, Frederick Law Olmsted worked for the protection of special landscapes.[238] His efforts set the stage for the establishment of Yosemite National Park.[239] Contemplating a strong human presence, Congress set aside the land "for public use, resort and recreation."[240] Nonetheless, the dominant goal was the preservation of the Yosemite Valley, which was to be held in protective public management "inalienable for all time."[241]

B. Importing the Dichotomy into Law

Like other disciplines, the field of law has been influenced by the distinction between nature and culture. Lawmakers have struggled to define the appropriate role of nature in a civilized society, maintaining the view that nature and culture are separate. The practice of labeling all things natural as somehow uncivilized appeared as early as

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234 *Id.* (emphasis added) (quoting a lecture Cole delivered in 1831 at the American Lyceum in New York City).

235 *See id.*

236 *See id.* at 44 (quoting an 1816 speech by New York Governor De Witt Clinton, an active promoter of the American Academy of the Fine Arts).

237 GEORGE PERKINS MARSH, MAN AND NATURE (David Lowenthal ed., Harvard Univ. Press 1965) (1864). *See generally* HUTH, *supra* note 228, at 192–93 (discussing Marsh's book and subsequent changes in society's attitude toward nature).

238 *See* NASH, *supra* note 232, at 106.

239 *See id.*

240 Act of June 30, 1864, ch. 184, § 1, 13 Stat. 325, 325.

241 *Id.*

1823 in the decision of *Johnson v. M'Intosh*.[242] Chief Justice Marshall regarded with suspicion the Piankeshaw Indians' harmonious relationship with nature: "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . ."[243] The Court declined to treat the tribes as truly civilized societies with title to their territory, in part because there was no clear demarcation between their culture and wild nature.[244] Instead, the Court adopted the fiction that tribal lands were unoccupied and that "discovery" of these lands conferred title upon the European explorers.[245]

1. *Conservation and Preservation*

Over time, the philosophical norms regulating the interface between nature and culture led to a disparate collection of natural resource laws. By the dawn of the twentieth century—the era that spawned the Antiquities Act—two dominant natural resource philosophies had emerged: conservation and preservation. Both were reactions against the unrestrained exploitation of natural resources spurred by the industrial revolution and the coast-to-coast settlement of the continent. Although both resource philosophies share the laudable goal of protecting the natural environment, each advances the simplism that nature and culture are two distinct entities.

The first resource philosophy—conservation—found its roots in the ideology of conquest.[246] Inspired by the work of scientist-lawyer George Perkins Marsh, conservationists embraced scientific management principles that would lead to efficient and sustainable *use* of natural resources.[247] Their belief that the public lands should remain under federal management and ownership was promoted by the passage of the Forest Reserve Act of 1891, which authorized the President to "set apart and reserve . . . any part of the public lands wholly or in

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242 21 U.S. (8 Wheat.) 543 (1823).

243 *Id.* at 590.

244 *See id.* (describing the Piankeshaw as "a people with whom it was impossible to mix, and who could not be governed as a distinct society").

245 *See id.* at 573 (describing the discovery principle under which "discovery gave title to the government by whose subjects . . . it was made, against all other European governments, which title might be consummated by possession").

246 *See supra* Part II.A.1.

247 *See* FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 31–33 (3d ed. 1999); *see also* MARSH, *supra* note 237, at 36 (asserting that "[m]an has too long forgotten that the earth was given to him for usufruct alone, not for consumption, still less for profligate waste").

part covered with timber or undergrowth, whether of commercial value or not, as public reservations."[248]

In an action that would presage his protection of immense tracts of land under the Antiquities Act,[249] President Theodore Roosevelt withdrew approximately 150 million acres under the General Revision Act for the establishment of forest reservations.[250] President Theodore Roosevelt was assisted in this endeavor by Gifford Pinchot, who was appointed in 1905 as Chief Forester of the newly created U.S. Forest Service.[251] Pinchot proceeded from the premise that "[a]ll of the resources of forest reserves are for *use* . . . where conflicting interests must be reconciled, the question will always be decided from the standpoint of the greatest good for the greatest number in the long run."[252] Similarly, the Forest Service's organic act provides that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the *use* and necessities of citizens of the United States."[253] Thus, although the Forest Service is the quintessential example of a modern, protective federal agency, its conservation mission reflects the historical philosophy that nature should be isolated and tamed for the benefit of humans.

The second major resource philosophy—preservation—is a natural outgrowth of the view that wild nature should be revered and protected from the impact of humans.[254] Drawing upon the work of writers such as Sierra Club founder John Muir, preservationists worked to set aside federal lands for the protection of "wild beauty."[255] The National Park System, described as the "first modern category of public lands,"[256] represents the archetypal expression of the preservationist philosophy. Despite Congress's earlier creation of individual parks during the nineteenth century, the National Park Service was not formally chartered until the passage of its organic act in

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248 Forest Reserve Act, ch. 561, § 24, 26 Stat. 1095, 1103, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792. Under that statute, the Executive reserved millions of acres of federal land for protective management. COGGINS ET AL., *supra* note 19, at 107 (describing reservations for national park and national forest purposes). The Organic Act of 1897 authorized federal management of these forest reserves. Act of June 4, 1897, ch. 2, § 1, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482 (2000)).

249 *See supra* Part I.A.

250 COGGINS ET AL., *supra* note 19, at 107.

251 *See id.*; NASH, *supra* note 232, at 163.

252 Harold W. Wood, Jr., *Pinchot and Mather: How the Forest Service and Park Service Got That Way*, NOT MAN APART, Dec. 1976, at 1, 1.

253 16 U.S.C. § 475 (2000) (emphasis added).

254 *See supra* Part II.A.2.

255 EDWIN WAY TEALE, THE WILDERNESS WORLD OF JOHN MUIR, at xix (1954).

256 COGGINS ET AL., *supra* note 19, at 116.

1916.[257] That legislation articulates a coherent rationale for the parks, describing their purpose as the preservation of scenery, wildlife, and historic objects for future generations.[258] The Park Service is the agency that manages most national monuments.[259]

More recently, the Wilderness Act of 1964[260] provides for the designation of wilderness areas, lands in which the impacts of humans are minimized even more than in national parks. The statute authorizes the reservation as wilderness of large tracts of land that are "untrammeled by man, where man himself is a visitor who does not remain."[261] After reservation, wilderness areas must be preserved and protected "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness."[262]

In sum, both conservationist and preservationist laws promote the perception that nature and culture are two distinct entities, and that the philosophical demarcation between the two can be translated into actual, physical boundary lines. At times, this premise has created confusion and disagreement. For example, preservationist statutes such as the Wilderness Act and the Endangered Species Act disqualify human-tainted landscapes from protection, an exclusion that often seems arbitrary.[263] In contrast, conservationist laws may achieve the opposite result. The Antiquities Act illustrates this second phenomenon, interpreted by some to preclude legal protection for large, natural areas. When presidents have designated large tracts of land as monuments, critics have reacted with outrage.[264] The philosophical fuel for this anger may be the implicit assumption that the Antiquities Act is a conservationist law designed to protect only the remnants of human society and to preserve them for human use and scientific study. Under this view, aggressive executive use of the Act violates the longstanding social understanding that nature and society should be kept distinct in our thoughts and in our laws.

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257 National Park Service Organic Act, ch. 408, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. §§ 1–4 (2000).

258 *See* 16 U.S.C. § 1.

259 *See id.* § 2. President Clinton deviated from past practice by placing monuments under the management of the Bureau of Land Management instead of the National Park Service. *See* David Williams, *Planning the BLM's First National Monument*, 21 J. LAND RESOURCES & ENVTL. L. 543, 543 (2001).

260 16 U.S.C. §§ 1131–1136 (2000).

261 *Id.* § 1131(c).

262 *Id.* § 1131(a).

263 *See infra* Parts II.B.2, II.B.3.

264 *See supra* Part I.D.

2. *The Wilderness Act*

> *But does the fact of human contact make nature any less worth protecting? If we learned that all the world's forests, even dense jungle, were merely regrowth after ancient human habitation, would that lead us to abandon them to deforestation? Faced with such facts, the categorical [separation of human action from nature] would offer no reason for conserving forests or wilderness; and yet abdication cannot be the answer.*[265]

The Wilderness Act of 1964[266] is perhaps the best legislative manifestation of the impulse to divide the world into the mutually exclusive spheres of nature and culture. The legislation embodies the philosophy that wild nature is to be revered and protected from human influence. As a corollary, however, the statute suggests that lands touched by humans have been tainted and rendered ineligible for special protection. In practice, the theoretical line between wild and civilized territory might be difficult, if not impossible, to draw. To facilitate such line-drawing, Congress chose roads as the emblem of civilization and instructed federal agencies to study only "roadless" areas as potential candidates for wilderness status.[267] At times this formalistic distinction has yielded absurd results. In a few extreme cases, counties have raced to grade roads into wilderness study areas in order to preclude the federal government from designating them as wilderness.[268] As a result, sensitive lands have been unnecessarily degraded, a consequence probably not desired by either the federal or county parties.

In the Act, Congress specifically defined "wilderness" in terms that exclude all traces of human society.[269] Congress emphasized that wilderness areas are those which "generally appear[ ] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."[270] A book published by the U.S. Forest Service in 1978 distinguished between this narrow, statutory view of "legal wilderness" and the broader territory of "sociological wilderness" that might include "any relatively undeveloped wildland, uncut forest, or woodlot."[271] The Forest Service observed that the legal definition "places wilderness on the 'untrammeled' or 'primeval' portion of the environmental modification spectrum."[272]

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265 Wiener, *supra* note 208, at 347.

266 16 U.S.C. §§ 1131–1136.

267 *See infra* notes 277–82 and accompanying text.

268 *See infra* notes 298–300 and accompanying text.

269 16 U.S.C. § 1131(c); *see supra* text accompanying note 261.

270 16 U.S.C. § 1131(c).

271 JOHN C. HENDEE ET AL., WILDERNESS MANAGEMENT 4 (2d ed. 1990). The Forest Service noted that "[a]t the other extreme [from legal wilderness, sociological wilderness] is whatever people think it is, potentially the entire universe, the *terra incognita* of people's minds." *Id.*

272 *Id.*

Prior to the passage of the Wilderness Act, wild areas were protected administratively by federal agencies. As early as 1924, the Forest Service had set aside 700,000 acres in the Gila National Forest of New Mexico as wilderness.[273] The agency placed additional lands into protective categories such as "wild," "canoe," or "primitive."[274] Congress itself designated several more protected areas under legislation requiring the land to be managed as "primitive."[275] In general, the distinguishing feature of these early wilderness areas was the absence of roads and motorized vehicles.[276]

Through the Wilderness Act, Congress sanctioned the practice of using roads as a proxy for civilization, thereby giving roads a symbolic as well as practical function in delineating the separate spheres of nature and culture. The Act originally designated some nine million acres as official wilderness, thereby permanently protecting areas previously classified by the Forest Service as "wilderness," "wild," or "canoe."[277] In addition, the statute established wilderness study programs for the potential expansion of the system.[278] The study areas focused primarily upon large roadless tracts, including national forest areas previously classified as "primitive,"[279] as well as roadless areas of at least five thousand contignous acres in the national park system, national wildlife refuges, and game ranges.[280] In 1967, the Forest Service began a comprehensive study of additional roadless areas, well beyond those study areas mandated by the Wilderness Act.[281] In 1976, yet more roadless lands came under study as potential wilderness under FLPMA, which required the Bureau of Land Management (BLM) to "review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified . . . as having wilderness characteristics described in the Wilderness Act."[282]

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273 COGGINS ET AL., *supra* note 19, at 1012–13 (noting the influential role of Aldo Leopold in convincing the agency to set aside the land).

274 *See id.* at 1014.

275 *Id.* at 1013 (citing as an example Congress's 1930 designation of a portion of the Superior National Forest in Minnesota for maintenance "in an unmodified state of nature").

276 *See id.*

277 *See* 16 U.S.C. § 1132(a) (2000); COGGINS ET AL., *supra* note 19, at 1014.

278 *See* 16 U.S.C. § 1132(b)–(c).

279 *Id.* § 1132(b).

280 *Id.* § 1132(c).

281 *See* COGGINS ET AL., *supra* note 19, at 1040–41 (describing two phases of Roadless Area Review and Evaluation, which came to be known as RARE I and RARE II).

282 Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 603(a), 90 Stat. 2743, 2785 (codified as amended at 43 U.S.C. § 1782(a) (1994)). Noting the substantial delay in establishing a wilderness study program for lands managed by the BLM, Coggins and his coauthors ironically observed: "To prove that neither conservationists nor Congress had yet learned all of the lessons of history, the [Wilderness] Act did not expressly deal with the single largest block of federal lands, those managed by the BLM." COGGINS ET AL., *supra* note 19, at 1015.

As wilderness legislation established roads as a metaphor for culture, roadless areas became the symbol of wilderness. Significant consequences flow from this rigid distinction. In general, wilderness designation effectively enjoins the construction of permanent or temporary roads, commercial enterprises, or structures, and it forbids the use of motorized vehicles or equipment.[283] It also limits mining and prospecting activities.[284] Similarly, BLM wilderness study areas are generally managed under a "nonimpairment" standard that prevents "unnecessary or undue degradation of the lands and their resources."[285]

This arbitrary, albeit expedient, categorization of lands as either "roadless" or "roaded" is perhaps an inadequate means of distinguishing lands that are worthy of special protection from those that are not.[286] In some cases, even the slightest human imprint may disqualify lands otherwise deserving of wilderness status. For example, the Forest Service initially followed the policy that "any trace of man's activity" precluded management as wilderness.[287] Accordingly, the Service argued in an early case that a wild, "thickly wooded, secluded and unspoiled" area should be disqualified from wilderness status due to the presence of an overgrown and barely noticeable "bug" road that had been constructed some twenty years earlier to control infestation by the bark beetle.[288] The Forest Service ultimately abandoned this narrow interpretation and adopted a more generous view of wilderness.[289]

The decades-long dispute over wilderness designation in Utah serves as an illustration of how the formalistic distinction between nature and culture is prone to abuse and manipulation. Pursuant to FLPMA,[290] in 1979 the BLM began an inventory of all its lands in Utah for potential inclusion in the wilderness system.[291] Ultimately, the

283 16 U.S.C. § 1133(c). The section contains a grandfather clause protecting "existing private rights." *Id.* In addition, it creates certain exemptions for health, safety, and administrative purposes. *Id.*

284 *Id.* § 1133(d)(2)–(3).

285 43 U.S.C. § 1782(c). *See generally* Justin James Quigley, *Grand Staircase-Esalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 62–66 (1999) (discussing interim management of wilderness study areas).

286 Some writers have called for an expansion of the legal definition of wilderness to include lands that bear a human imprint. *See, e.g.*, Robert L. Glicksman & George Cameron Coggins, *Wilderness in Context*, 76 DENV. U. L. REV. 383, 395–400 (1999). Professors Glicksman and Coggins argue that "[t]he notion of reclaiming nature or recreating wilderness is not a pipe dream." *Id.* at 397. "If development turns out to be mistaken," they explain, "corrective measures sometimes can and should be taken." *Id.* (discussing the possibility of selectively removing dams and roads).

287 H.R. REP. No. 95-540, at 5 (1977); *see* COGGINS ET AL., supra note 19, at 1039.

288 Parker v. United States, 309 F. Supp. 593, 594–96 (D. Colo. 1970).

289 *See* H.R. REP. No. 95-540, at 4–6; COGGINS ET AL., *supra* note 19, at 1039.

290 43 U.S.C. § 1782.

291 Quigley, *supra* note 285, at 67–68.

agency designated 3.2 million acres as wilderness study areas for possible designation as wilderness.[292] In its final environmental impact statement, the BLM recommended the designation of 1.9 million acres of wilderness, an amount which then-Interior Secretary Manuel Lujan adopted in his 1991 recommendation to Congress.[293] Due to political controversy, however, Congress failed to act upon the recommendation.[294]

Frustrated by the slow progress of final wilderness designations, the succeeding President and Secretary of the Interior intervened, prompting an angry response from state and local wilderness opponents. Interior Secretary Bruce Babbitt argned for the designation of at least five million acres as wilderness.[295] In response to a heated challenge by Utah Representative James Hansen, Babbitt initiated a "reinventory" of Utah's BLM lands in July 1996 to support his proposal.[296] Soon afterward, on September 18, 1996, President Clinton established the Grand Staircase-Escalante National Monument on 1.7 million acres of land in southern Utah.[297]

The vulnerability of a protection system that focuses in large part upon the presence or absence of roads has not been overlooked by opponents of the wilderness system. In protest of President Clinton's aggressive preservation efforts, Utah counties took actions designed to make lands ineligible for wilderness status. In Kane County, for example, officials graded over five hundred miles of backcountry roads in an acknowledged attempt to thwart their designation as wilderness.[298] Noting that wilderness cannot be established in areas containing mechanically maintained roads, one county commissioner stated:

> What we said was, if [Babbitt's reinventory team is] having trouble judging if it's a road, we are going to brighten those roads up . . . . We went out and reestablished our roads. We smoothed them out. Then they can't say it wasn't graded or it wasn't maintained. It was to help them with their judgment.[299]

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292 *See id.* The BLM increased its initial designation of 2.5 million acres as wilderness study areas to just over 3.2 million acres after an administrative appeal. *See id.*

293 *Id.* at 68–69.

294 *Id.* at 69.

295 *Id.* at 72.

296 *See id.* at 72–73. In 1998, the Tenth Circuit dismissed for lack of standing a challenge to the Secretary's authority to conduct the reinventory, and vacated the trial court's preliminary injunction of the reinventory. Utah v. Babbitt, 137 F.3d 1193, 1197 (10th Cir. 1998). Secretary Babbitt completed his reinventory in 1999 with a report calling for a total of 5.8 million acres of designated wilderness. Quigley, *supra* note 285, at 76.

297 Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996).

298 Tom Kenworthy, *Blazing Utah Trails to Block a Washington Monument*, WASH. POST, Nov. 30, 1996, at AI.

299 *Id.* (quoting Kane County Commissioner Joe C. Judd); *see also* Jim Woolf, *Fewer Bumps on the Back Roads*, SALT LAKE TRIB., Aug. 24, 1996, at B1 (quoting Southern Utah

Local officials elsewhere in southern Utah followed suit, bringing heavy road grading equipment to hundreds of additional miles of remote jeep trails.[300]

In a highly publicized expression of support for the Utah counties, wilderness protesters in Nevada organized the so-called Jarbidge Shovel Brigade on the Fourth of July 2000.[301] The brigade rebuilt a Forest Service road near Jarbidge, Nevada that had been closed to protect the endangered bull trout.[302] The Nevada protesters awarded neighboring Governor Mike Leavitt of Utah the "Golden Shovel Award" in recognition of his fight to exert local control over roads on federal lands.[303] Recognizing the larger message implicit in the protest, the *Salt Lake Tribune* observed, "the Jarbidge road-opening event . . . has come to symbolize the resurgent rebellion by rural Westerners against an allegedly tyrannical federal land-management bureaucracy."[304]

In sum, the deliberate destruction of wild areas in Utah and Nevada illustrates the perverse, unintended consequences of legislation such as the Wilderness Act that relies upon a rigid, unrealistic dichotomy between nature and civilization. Admittedly, any scheme of land protection entails difficult and highly charged political choices. However, the inflexible nature-culture distinction employed by the Wilderness Act threatens to transform thoughtful discussions about the best use of a tract of land into a trivial search for roads and other indicia of a human presence that can disqualify federal lands from wilderness protection.

3. *The Endangered Species Act*

The ESA,[305] like the Wilderness Act, illustrates the reluctance to acknowledge that nature and culture are interrelated. Provisions of its reintroduction scheme rest on the assumption that purely wild animals remain wholly apart from animals that humans have transported to new geographic sites.[306] Furthermore, the ESA presumes that the two populations can be distinguished readily, even though they are of

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Wilderness Alliance Director Ken Rait, who refers to the road grading work as "bulldozer vigilantism").

300 Kenworthy, *supra* note 298.

301 Brent Israelsen, *Governor Given Shovel by Nevada Road Protesters*, SALT LAKE TRIB., Aug. 26, 2000, at B3.

302 *Id.*

303 *Id.*

304 *Id.*

305 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000); *see supra* notes 192–93 and accompanying text.

306 *See* 16 U.S.C. § 1539(j)(1) (defining reintroduced populations as those "wholly separate geographically" from natural populations).

the very same species.[307] Once tainted by human intrusion, so-called "experimental populations" lose many of the protections afforded to their wilder counterparts, creating a dichotomy reminiscent of the one between roadless and roaded areas maintained under the Wilderness Act.[308] As illustrated by the gray wolf reintroduction program, absurd results might occur when reality confronts the legal fiction that reintroduced populations are distinct from naturally occurring populations.[309]

Under section 10(j) of the ESA, designated federal agencies may transport endangered or threatened species for release outside their current range to further the conservation of the species.[310] As distinguished from naturally occurring populations, these transplanted animals are deemed "experimental populations" as long as they remain "wholly separate geographically from nonexperimental populations of the same species."[311] Consistent with the long tradition of sacrificing "tamed nature" for the service of human needs,[312] experimental populations may lose a significant measure of legal protection upon reintroduction. In particular, they are treated as "threatened" rather than "endangered."[313] As a result, § 9's prohibition against the "taking" of species may be relaxed.[314] Thus, in certain circumstances, members of a reintroduced population may be harmed or even killed.[315] For example, the regulations that govern the gray wolf rein-

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307 *Id.*

308 *See id.* § 1539(j)(2)(c) (generally reducing protection of reintroduced endangered species to the level accorded "threatened" species).

309 *See infra* note 324 and accompanying text.

310 *See* 16 U.S.C. § 1539(j)(2)(A).

311 *See id.* § 1539(j)(1). For a thorough discussion of the reintroduction provisions and their legislative history, see Federico Cheever, *From Population Segregation to Species Zoning: The Evolution of Reintroduction Law Under Section 10(j) of the Endangered Species Act*, 1 WYO. L. REV. 287 (2001). Arguing that the "wholly separate geographically" requirement arose from Congress's flawed perception that nature remains static, Professor Cheever notes that although "species populations do surprising things, . . . they rarely do nothing at all." *Id.* at 294. This section of the Article develops a related point—that the problems created by § 10(j) may derive from the overly rigid view that "nature" (naturally occurring populations) and "culture" (reintroduced populations) operate in two distinct physical and philosophical realms.

312 *See supra* Part II.A.1.

313 *See* 16 U.S.C. § 1539(j)(2)(C).

314 *Compare id.* § 1532(6) (describing an endangered species as one "which is in danger of extinction"), *with id.* § 1532(20) (describing a threatened species as one "which is likely to become an endangered species within the foreseeable future"). On its face, § 9 forbids the "taking" of endangered, but not threatened, species. *Id.* § 1538(a)(1)(B). The "taking" prohibition has been extended to threatened species by regulation. *See* 50 C.F.R. § 17.31 (2001). The ESA provides that "[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19). *See generally* Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687 (1995) (upholding expansive definition of "take").

315 This is particularly true if the reintroduced population has been desiguated nonessential to the continued existence of the species. *See* 16 U.S.C. § 1539(j)(2)(B). In that

troduction program allow ranchers to shoot wolves that are caught killing livestock on private property.[316]

On their face, the ESA reintroduction provisions distinguish between "natural" and "experimental" populations—an abstract, legal distinction that is not readily discernible in any biological or physical sense. The practical difficulties attendant in such a scheme are illustrated by the case of gray wolf reintroduction in the northern Rocky Mountain region. In 1995, pursuant to the Northern Rocky Mountain Wolf Recovery Plan, the Fish and Wildlife Service (FWS) transported thirty-three gray wolves from Canada for release into central Idaho and into Yellowstone National Park in Wyoming.[317] The FWS acknowledged that lone wolves from Montana had been sighted in the release area, but concluded that such lone dispersers failed to constitute a naturally occurring wolf "population."[318] Soon after the release, the Wyoming Farm Bureau Federation and others brought suit, alleging, inter alia, that the FWS exceeded its authority under the ESA, which confines reintroduction efforts to areas *outside* the current range of the species.[319] Furthermore, plaintiffs asserted that the overlap of experimental and naturally occurring gray wolf populations violated the ESA's mandate that the two groups be kept "wholly separate geographically."[320]

In a now infamous decision, federal district court Judge William F. Downes struggled mightily in the face of the Act's seemingly absolute distinction between the work of humans and the work of nature. Judge Downes agreed with the plaintiffs' contention that Congress intended to grant full endangered species protection to naturally occurring wolves, even when they wandered into experimental areas.[321] Therefore, he struck down the final reintroduction rules that reduced the protection to all wolves within the experimental area, finding that the "blanket treatment of all wolves found within the designated experimental population areas as experimental animals is contrary to law."[322] Noting the desire of Congress to avoid "potentially complicated problems of law enforcement," Judge Downes rigidly enforced

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case, in all areas outside of national wildlife refuges or national parks, the population's protected status is reduced to that of a species proposed to be listed. *Id.* § 1539(j)(2)(C)(i). In addition, critical habitat may not be designated for nonessential experimental populations. *Id.* § 1539(j)(2)(C)(ii).

316 *See* 50 C.F.R. § 17.84(i)(3)(ii) (2001).

317 *See* Wyo. Farm Bureau Fed'n v. Babbitt, 987 F. Supp. 1349 (D. Wyo. 1997); Mimi S. Wolok, *Experimenting with Experimental Populations*, 26 Envtl. L. Rep. (Envtl. L. Inst.) 10,018, 10,027–28 (1996).

318 *See Wyo. Farm Bureau Fed'n*, 987 F. Supp. at 1370.

319 *See id.* at 1355–56.

320 *Id.* at 1355.

321 *Id.* at 1373–74 (interpreting legislative history).

322 *Id.* at 1375–76.

the requirement that natural and introduced populations be kept "wholly separate geographically."[323] With the "utmost reluctance," he ordered the removal of all reintroduced non-native wolves and their offspring from the experimental area.[324] Although rigid, Judge Downes's decision was not unreasonable in light of Congress's historical propensity to distinguish "wild nature" from that which bears a human imprint.[325]

On appeal, the Tenth Circuit took steps to avoid the mischief created by strictly applying the congressional dichotomy between native and non-native animals.[326] Purporting to introduce an element of "biological reality" into Congress's scheme, the court of appeals noted that it would be physically impossible to keep wild and experimental populations forever separate.[327] Accordingly, the court declined to engage in a literal interpretation of the provision at issue.[328] Instead, the court held that "the Department [of the Interior] reasonably exercised its management authority under section 10(j) in defining the experimental wolf population by location."[329] As a result, the court upheld the FWS's determination that the legal protection accorded to individual animals should be determined by "geographic location," rather than by "animal origin."[330]

From an analytical perspective, the Tenth Circuit's decision is an important step toward acknowledging that the distinction between nature and culture might be untenable. In the short term, the decision might reduce the protections accorded to individual wild wolves if

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323 *Id.* at 1372–73.

324 *Id.* at 1376. Some feared that Judge Downes's order may have amounted to a death sentence for the reintroduced wolves. *See* Elizabeth Cowan Brown, *The "Wholly Separate" Truth: Did the Yellowstone Wolf Reintroduction Violate Section 10(j) of the Endangered Species Act?*, 27 B.C. ENVTL. AFF. L. REV. 425, 462 (2000). Brown observes that:

> [E]ven if all of the reintroduced wolves could be tracked, captured, and removed, there is nowhere for them to go." Interior Secretary Bruce Babbitt explained prior to reintroduction that, "[t]he Canadians have said no returus, no refunds. [The wolves] can't go back to Canada." American zoos are already at capacity and do not have enough room for these wolves. The only option left would be euthanasia—death.

Id. (citations omitted).

325 *See supra* Part II.B.1.

326 *See* Wyo. Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224 (10th Cir. 2000).

327 *See id.* at 1237 (observing that "wolves can and do roam for hundreds of miles and cannot be precluded from intermingling with the released experimental population").

328 *See id.* ("While the language of section 10(j)(1), read in isolation, might suggest an experimental population can only be comprised of those particular animals physically relocated (and any offspring arising solely therefrom), such a narrow interpretation is not supported by the provision, or the Endangered Species Act, read as a whole.").

329 *Id.* The court also found that the presence of lone wolves from Montana did not violate § 10(j)'s apparent requirement that reintroduced wolves be kept separate from nonexperimental *populations*, holding that "an individual animal does not a species, population or population segment make." *See id.* at 1236.

330 *Id.* at 1237.

they wander into the experimental area.[331] In the long term, however, the decision advances the larger goal of bringing endangered species back from the brink of extinction.[332] The court's impulse to synthesize the treatment of naturally occurring and introduced wolves is faithful to biological reality. Under the court's approach, the relevant issue becomes how best to protect wolves, rather than how to keep natural and reintroduced wolves separate.

4. *The Antiquities Act*

As discussed in the preceding two sections, the Wilderness Act and the Endangered Species Act potentially withhold protection from landscapes and species that bear the mark of a human presence. In contrast, the Antiquities Act seemingly *requires* evidence of human civilization as a prerequisite to protection. Ironically, critics have argued that particular areas do not qualify for monument status because they are too scenic, too large, or bear too little trace of human activity—the very attributes that would virtually guarantee protection under wilderness or endangered species legislation.[333] Although these two statutory approaches appear to be direct opposites, they both derive from the same impulse—the tendency to distinguish conceptually between humans and nature. Despite the probable intention of Congress in 1906 to protect only tamed landscapes with archaeological siguificance, the legislature employed language susceptible to broader interpretation. As a result—in defiance of the historical nature-culture dichotomy—the statute has been utilized to protect nature and culture alike.

Distilled to its essence, the fundamental problem of the Antiquities Act may be that it incorporates both conservationist and preservationist impulses. That is, the Act contains both narrow language *conserving* objects of antiquity for human use, and broad language *preserving* areas in their natural condition.[334] Keeping in mind the historical context, it seems likely that Congress intended the statute to be primarily conservationist in tone. The sparse legislative history emphasizes the limited size of national monuments and the protection of small archaeological artifacts.[335] Edgar Lee Hewett, a well-known archaeologist who drafted the bill that became the Antiquities Act, indicated that areas "sufficiently rich in historic and scientific interest and scenic beauty" would be protected as congressionally created national

331 *See id.*

332 *See id.*

333 *See supra* notes 6, 114, 201 and accompanying text.

334 For the distinction between conservation and preservation, see *supra* Part II.B.1.

335 *See supra* notes 30–40 and accompanying text.

parks, rather than executively created National Monuments.[336] Moreover, in 1906, when the statute was enacted, the utilitarian conservation movement was in its ascendancy.[337] As late as 1913, the conservationists who favored utilitarian resource use soundly defeated the preservationists in the famous battle over Hetch Hetchy.[338]

Despite this evidence of narrow congressional intent, the text of the Antiquities Act undeniably contains the seeds of preservationism.[339] Just ten years after the passage of the Antiquities Act, those seeds would germinate into the quintessential preservationist statute, the organic act for the newly chartered National Park Service.[340] If Congress intended to protect only cultural artifacts, it used language ill-suited to that task, for the statute clearly authorizes presidents to reserve *lands* containing objects of "historic or scientific interest."[341] This expansive language was added at the request of the Department of the Interior to protect scenic and scientific resources.[342] In 1920, the U.S. Supreme Court found that the phrase was broad enough to support President Theodore Roosevelt's creation of the 800,000-acre

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336 *See* H.R. REP. No. 59-2224, at 3 (1906) (quoting memorandum from Professor Hewett). Professor Hewett wrote:

> Unquestionably some of these regions are sufficiently rich in historic and scientific interest and scenic beauty to warrant their organization into permanent national parks. Many others should be temporarily withdrawn and allowed to revert to the public domain after the ruins thereon have been examined by competent authority, the collections therefrom properly cared for, and all data that can be secured made a matter of permanent record.

Id. As the text of the Antiquities Act indicates, Congress declined to adopt Professor Hewett's suggestion that monument reservations exist only temporarily.

337 For example, the National Forests System's Organic Act was passed in 1897. Act of June 4, 1897, ch. 2, § 1, 30 Stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482 (2000)).

338 Wood, *supra* note 252, at 1 (describing the preservationists' unsuccessful attempt to prevent the damming of the Hetch Hetchy Valley in Yosemite National Park to provide a water supply for the city of San Francisco); *see also* NASH, *supra* note 232, at 161–81 (providing a detailed account of the Hetch Hetchy controversy).

339 *See supra* notes 41–45 and accompanying text.

340 National Park Service Organic Act of 1916, Pub. L. No. 235, ch. 408, 39 Stat. 535 (codified as amended at 16 U.S.C. §§ 1–18f (2000)). Although Congress had created a handful of national parks at "irregular intervals" beginning with the reservation of Yellowstone, no comprehensive management authority was created until the 1916 legislation. COGGINS ET AL., *supra* note 19, at 116.

341 16 U.S.C. § 431 (2000).

342 *See* Utah Ass'n of Counties v. Clinton, Nos. 2:97CV479, 2:97CV492, 2:97CV863, 1999 U.S. Dist. LEXIS 15852, at *9–*10 (D. Utah Aug. 11, 1999) (noting that although Congress repeatedly "rejected attempts to include the Department's proposal," it was apparently "unable to pass the limited archaeologists' bill because of bureaucratic delays and various disagreements between museums and universities seeking authority to excavate ruins on public lands") (citing Johannsen, *supra* note 74, at 450). In addition, the bill that was ultimately enacted expanded the size limitation from a maximum of 640 acres to "the smallest area compatible with the proper care and management of the objects to be protected." 1999 U.S. Dist. LEXIS 15852, at *10.

Grand Canyon National Monument.[343] Thus, the problem—and perhaps also the genius—of the Antiquities Act can be traced to Congress's unwitting synthesis of nature and culture into the same protective statutory scheme.

This statutory schizophrenia—arguably extending protection to both nature and culture—has provoked several battles over the past century. Although one easily might have predicted that the ambiguous statutory language would spawn some minor disagreements, Congress could not have foreseen the bitterness of the debate when it passed the Antiquities Act in 1906. What could explain such a heated response to the creation of large monuments by the presidents? One potential explanation is the age-old conceptual divide between the realm of nature and that of human society. Often, the anger of those who oppose national monuments on pragmatic grounds seems to have an underpinning of moral outrage.[344] Some criticism conveys a tone of betrayal, as if the creation of excessively large or scenic national monuments has violated some implicit cultural understanding as to the natural order of things.[345] With only slight exaggeration, one might find the current outrage over the Clinton monuments—purporting to protect both cultural remnants and large landscapes under the same statutory umbrella—evocative of past condemnation of the evolutionists' linking of man and ape, or the astronomers' reduction of the earth to just one of many planets orbiting around the sun.[346]

III
THE FUTURE: PRESERVING MONUMENTAL LANDSCAPES?

> *The Antiquities Act . . . is one of the most successful environmental laws in American history.*
>
> John Leshy
> Interior Department Solicitor (2000)[347]

For almost one hundred years, presidents have consistently used the Antiquities Act to protect large tracts of land from development.[348] Just as consistently, critics have decried such actions as abusive and excessive.[349] In the face of such consistent criticism, the Antiquities Act has proved remarkably resilient. This Part considers why the Act has endured, despite the flaws alleged by its detractors.

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343 Cameron v. United States, 252 U.S. 450, 455–56 (1920). The *Cameron* case is discussed *supra* Part I.B.1.

344 *See supra* note 8 and accompanying text.

345 *See id.*

346 *See supra* Part II.A.

347 Blumenthal, *supra* note 6.

348 *See supra* Part I.A.

349 *See supra* Part I.C.

Part III.A discusses the relative failure of political will to amend or repeal the statute and examines whether a president has legal authority to reverse the executive proclamations of his predecessor. Part III.B suggests that the Act's longevity is attributable to its ability to serve core values the public and the courts have identified. Finally, Part III.C is prescriptive, suggesting that for all its asserted flaws, the Act continues to serve a valuable function that no other legislation serves, and that appropriate checks on the Executive's authority are already in place. Although history has demonstrated that we love to hate the Antiquities Act,[350] this Article concludes that the statute should be retained in its present form. Over the past century, all three branches of government have implicitly supported an interpretation of the Act that allows protection of large landscapes as antiquities.[351] Congress and the courts should explicitly recognize and validate this long tradition of executive preservation.

A. The Temptation to Repeal

Despite the relative failure of reform efforts over the past century,[352] the temptation to revoke individual monument designations or to weaken the Antiquities Act itself persists to this day. The most recent impetus for reform occurred when former President Clinton designated more than five million acres of land as national monuments.[353] Although he created the 1.7 million acre Grand Staircase-Escalante National Monument during his first term, President Clinton designated the bulk of his national monuments during his last year in office.[354] The furor over the Clinton monuments—followed by little or no concrete reform—illustrates a pattern that has become familiar.[355]

When viewed from a historical perspective, the pattern suggests that western politicians have consistently resisted the designation of new monuments in their home states, condemning them as federal

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350 *See supra* Part I.D.

351 *See supra* Parts I.A–C.

352 *See supra* Part I.C.

353 *See supra* notes 7–9 and accompanying text.

354 Blumenthal, *supra* note 6. President Clinton set aside more than one million acres as national monuments during his last week in office. *See Clinton Will Create Six More National Monuments in West*, ST. LOUIS POST-DISPATCH, Jan. 17, 2001, at A7 [hereinafter *Clinton Will Create*]. This type of eleventh-hour preservation was not without precedent: President Eisenhower established the Chesapeake and Ohio Canal National Monument during his last week in office, and President Theodore Roosevelt created new monuments two days before his term expired. Blumenthal, *supra* note 6.

355 At the time of this writing, the first Clinton monument, the Grand Staircase-Escalante of Utah, has been in existence for nearly six years without triggering concrete reform.

"land grabs."[356] Although such political rhetoric may curry favor with local constituents, it has consistently fallen short of commanding the congressional majority necessary to weaken or abolish the Antiquities Act.[357] As one journalist observed, politicians of both political parties have been "conspicuously un-outraged" by the reservation of the Grand Staircase-Escalante monument.[358]

1. *Executive Inaction*

Overall, efforts to undo the Clinton monuments have proved both legally and politically infeasible. Two reactions merit a brief discussion to illustrate the tenor of modern critics. First, opponents of the Clinton monuments explored the possibility of overturning them through executive orders issued by succeeding President George W. Bush. Before taking office, President-elect Bush vowed to review all "eleventh-hour executive orders, rules and regulations" in order to promote a "balanced approach to [the] environment that is based on working closely with states and local communities."[359] Congress, for its part, requested a report from the Congressional Research Service on the authority of a President to modify or eliminate national monuments.[360] However, a month after the new administration took office,

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356 *See* Blumenthal, *supra* note 6.

357 *See* Jon Margolis, *In Washington, the Emperor is on Babbitt's Side*, HIGH COUNTRY NEWS (Paonia, Colo.), Nov. 22, 1999, at 15 (concluding that western monument opponents are "on their own" and that "Western Republicans have been unable to export their ire over Grand Staircase-Escalante" to the rest of the nation).

358 *Id.* As the author observed:

> Nor is it just Democrats and Republican moderates who have been conspicuously un-outraged [over the creation of the Grand Staircase-Escalante National Monument]. So have GOP conservatives from the South and Midwest. They are pro-business, but not anti-nature. They are fierce protectors of private property, but not hostile to public land, and the Antiquities Act only covers land that belongs to the federal government. These Republicans may not like the way Bill Clinton went about Grand Staircase-Escalante, but they're not particularly unhappy about the outcome.

Id.

359 *Clinton Will Create*, *supra* note 354 (quoting Scott McClellan, spokesman for the Bush transition team).

360 *See* PAMELA BALDWIN, CONG. RESEARCH SERV., Pub. No. RS20647, AUTHORITY OF A PRESIDENT TO MODIFY OR ELIMINATE A NATIONAL MONUMENT (2000). The report cautiously suggested that the President may lack such authority, concluding:

> No President has ever revoked a previously established monument. That a President can *modify* a previous Presidentially-created monument seems clear. However, there is no language in the 1906 Act that expressly authorizes *revocation*; there is no instance of past practice in that regard, and there is an attorney general's opinion concluding that the President lacks that authority.

Id. at 5 (emphasis added).

Interior Secretary Gale A. Norton announced that President Bush would not seek to overturn any of the Clinton national monuments.[361]

The new administration may have made this announcement because of a reluctance to pay the political price associated with dismantling national monuments. As the *Washington Post* speculated, "[c]oming just a month after President Bush took office vowing to review Clinton's actions, [Norton's statement] suggested that the administration recognized that a battle with environmentalists over land designations would be unwise as the White House seeks to push through its tax cut plan and other legislative initiatives."[362] Despite its unwillingness to revoke the Clinton monuments, the Bush administration was careful to distinguish its natural resource policy from that of its Democratic predecessor. In her statement, Secretary Norton criticized President Clinton for hastily designating monuments and for failing to consult with state and local governments.[363] In addition, Secretary Norton indicated that the Bush administration may seek to adjust the monuments' boundaries and to manage them in a way that allows certain existing uses to continue.[364] Although monument supporters fear that such seemingly innocuous modifications may constitute a de facto abolition,[365] Secretary Norton's announcement does address critics' claims that the Antiquities Act allows presidents to designate monuments without accountability or meaningful checks on their power.

President Bush's acceptance of the Clinton monuments may also reflect the legal conclusion that a president lacks the authority to re-

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361 *See* Eric Pianin, *White House Won't Fight Monument Designations: Norton Says Boundaries, Land Use Rules May Be Amended*, WASH. POST, Feb. 21, 2001, at A7.

362 *Id.*; *see also Monumental Reversal*, SALT LAKE TRIB., Sept. 4, 2000, at A14 (noting that "Republican vice presidential candidate Dick Cheney was being more idealistic than politically astute when he recently raised the possibility that a George W. Bush victory in November could lead to reversal of some of President Clinton's controversial monument designations"). The article accurately predicted that "Cheney's proposal likely will play well in the West, but it will have little resonance elsewhere. And if Bush wins in November, he may have second thoughts about reversing Clinton's monumental activity." *Id.*

363 Pianin, *supra* note 361. Secretary Norton's stated that "[w]e're now cleaning up after the fact and doing things that should have been done before the monuments were designated. . . . The monument designations were more show than substance. We now have to provide the substance." *Id.*

364 *Id.*

365 *See, e.g.*, *Monumental Decisions*, DENVER POST, Mar. 12, 2001, at 7B (noting Secretary Norton's willingness to change monument boundaries or alter monument rules, and fearing that this "philosophy could be only one step away from rolling back the monument designations altogether. While they still would exist on paper, in the field their preservation could be shredded, one small cut at a time."); *see also* M.E. Sprengelmeyer, *Norton Stays in Critics' Cross Hairs: Former Coloradan Approaches 100th Day as Interior Secretary*, ROCKY MOUNTAIN NEWS (Denver, Colo.), May 7, 2001, at 7A (noting that Secretary Norton "sent letters to state and local leaders saying each monument . . . should have its boundaries and land use restrictions revisited").

voke a national monument previously established through executive action.[366] Although this issue has never been tested,[367] a strong argument can be made that the President lacks such power. The Antiquities Act specifically delegates authority to the President to "declare by public proclamation"[368] national monuments, but is silent regarding the authority to terminate monuments.[369] A 1938 Attorney General opinion reasoned that presidential proclamations under the Antiquities Act have the force of law, and can be repealed only through subsequent acts of congressional lawmaking:

> The grant of power to execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed. A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.[370]

Finding that the Antiquities Act contains neither express nor implied authority to terminate monuments, the opinion concluded that a president lacks authority to abolish national monuments.[371]

Arguments to the contrary may emphasize that presidents have routinely revised or revoked the executive orders of their predecessors, often to promote a different ideological agenda.[372] However, in determining the force of an executive order or proclamation, it is important to discern the underlying legal justification for such action.[373] Although later presidents may reverse orders involving minor policy

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366 For an excellent analysis of this issue, see BALDWIN, *supra* note 360.

367 No president has ever revoked a national monument. *Id.* at 2.

368 16 U.S.C. § 431 (2000).

369 *See id.*; *see also* BALDWIN, *supra* note 360, at 3 n.7 (concluding that it is legally insignificant whether a president creates monuments through proclamation or through executive order).

370 39 Op. Att'y Gen. 185, 187 (1938) (quoting 10 Op. Att'y Gen. 359, 364 (1862) (finding President lacked power to revoke or rescind military reservation President established pursuant to discretion delegated by statute)).

371 *See id.* at 189. The Attorney General found implied executive authority to *modify* the boundaries of established monuments in the statutory requirement "that the limits of the monuments 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.'" *See id.* at 188 (quoting 16 U.S.C. § 431). However, the Attorney General concluded that "it does not follow from his power so to confine that area that he has the power to abolish a monument entirely." *Id.*

372 *See* ROBERT A. SHANLEY, PRESIDENTIAL INFLUENCE AND ENVIRONMENTAL POLICY 83 (1992).

373 *See id.* at 49 (observing that executive orders "have the force of law . . . when issued under a valid claim of authority . . . [but that] increasingly, orders have been promulgated under unclear claims of authority").

initiatives without challenge,[374] it seems unlikely that a reviewing court would countenance the casual reversal of an executive order promulgated pursuant to a specific delegation of authority by Congress.[375] In a context distinct from natural resources law, the Supreme Court in *INS v. Chadha* endorsed the general proposition that when the executive branch acts pursuant to a lawful delegation of authority, such action can be revoked only by an act of Congress.[376] In holding that the legislative veto provision was unconstitutional, the Court stated, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."[377] Similarly, a court might find that the executive designation of national monuments has the force of law, and that only an act of Congress can overturn it.[378]

2. *Legislative Inaction*

As a second reaction to President Clinton's aggressive use of the Antiquities Act, legislators introduced a spate of reform proposals in Congress following the 1996 designation of the Grand Staircase-Escalante National Monument, and introduced additional proposals following the 2000–2001 designations.[379] Notably, none of the legislative sponsors sought to repeal the Grand Staircase-Escalante designation, perhaps fearing the adverse public reaction that such a proposal would engender. Rather, many of the proposed amendments were partisan expressions of anger and disapproval, lacking any realistic possibility of becoming law. For example, congressional representatives from California, Idaho, and Oregon expressed their disapproval

374 *See id.* at 83 (noting that since "executive orders are seldom used in major policy initiatives, they are rarely struck down by the courts or revoked by Congress. More commonly, they are revised by the presidents who issued them or amended or sometimes revoked by succeeding presidents of different partisan or ideological outlook.").

375 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring). In concluding that an executive order seizing the nation's steel mills was invalid, Justice Jackson was careful to distinguish three spheres of presidential powers. *See id.* at 635–38. He argued that the President's authority was at its maximum when he acts pursuant to an express or implied authorization of Congress, "includ[ing] all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635.

376 462 U.S. 919, 954–55 (1983). In the context of a deportation decision by the Attorney General, the Court stated:

> Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President.

Id. at 954–55.

377 *Id.* at 955.

378 In a few cases, Congress itself has abolished monuments. *See* BALDWIN, *supra* note 360, at 2.

379 *See* Blumenthal, *supra* note 6; *supra* text accompanying note 354.

of the Clinton monuments by introducing legislation that would have precluded the designation of additional monuments in their home states without an act of Congress.[380] Still other proposals would have revoked or limited the Antiquities Act's delegation of authority to the President, reserving the right to establish national monuments primarily to Congress itself.[381]

Other proposals sought to incorporate public participation into the process of designating monuments. For example, under a proposal passed by the House in September 1999,[382] the President would have been required to solicit public participation before designating monuments and to consult with the governor and congressional delegation of the affected state at least sixty days prior to designation.[383]

By the end of the Clinton presidency, Congress had not enacted any of the reform proposals. One of the harshest critics of the Clinton monuments, Republican Representative James V. Hansen of Utah, urged members of the House to introduce legislation to challenge monuments in their home districts.[384] However, Representative Hansen indicated that he did "not intend to introduce legislation of his own," and acknowledged that "a 'slashing and burning' approach" would not be politically feasible.[385]

Although executive implementation of the Antiquities Act has been criticized harshly for almost a century, the Act has exhibited a

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380 *See* H.R. 4294, 104th Cong. (1996) (forbidding additional executive monument designations in Oregon without congressional approval); H.R. 4242, 104th Cong. (1996) (forbidding additional executive monument designations in California without congressional approval); H.R. 4120, 104th Cong. (1996) (forbidding additional executive monument designations in Idaho without congressional approval).

381 *See* H.R. 4121, 106th Cong. (2000) (limiting to each president the designation of only one national monument, such monument designation to expire within two years unless approved by joint resolution of Congress); H.R. 4214, 104th Cong. (1996) (requiring congressional approval of the establishment of national monuments); H.R. 4147, 104th Cong. (1996) (prohibiting extension or establishment of national monuments without express act of Congress); H.R. 4118, 104th Cong. (1996) (limiting authority of the President to designate more than 5000 acres as national monuments).

382 145 CONG. REC. H8657 (daily ed. Sept. 24, 1999) (indicating 408 votes for passage of the bill).

383 H.R. 1487, 106th Cong. (1999). The Act also would have required that national monument management plans comply with the procedural requirements of NEPA. *Id.*; *see also* National Monument Public Participation Act of 1999, S. 729, 106th Cong. (1999) (requiring congressional and public participation in monument designation).

384 Pianin, *supra* note 361.

385 *Id.* (stating that Rep. Hansen "does not foresee a major effort in Congress to roll back Clinton's designations"). One "noncontroversial change," passed by the House on May 1, 2001, would allow hunting in Idaho's Craters of the Moon National Monument, a provision that was "inadvertently" excluded from President Clinton's proclamation. *See Monumental Second Thoughts*, CONG. DAILY, May 17, 2001; *see also Norton Seeks Proposals for Protected Areas*, WASH. POST, Mar. 29, 2001, at A14 (describing unanimous vote of the House Resources Committee to redesignate the area as a national preserve so that hunting could be allowed).

remarkable tenacity and ability to endure. In an ironic display of deference, both courts and Congress have attempted to place the burden of reform—with its potential to trigger the public ire—upon one another. In 1945, a federal district court stated that "the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about [by excessive acquisitive proclivities of the Executive]."[386] In a parallel statement nearly fifty years later, one legislative proposal attempted to shift the burden squarely back upon the judicial branch. The proposed Grand Staircase-Escalante National Monument Minor Boundary Adjustments Act contained an express disclaimer against approval of the monument, but stopped short of taking action to repeal the designation, specifying that "[i]t is the intent of Congress that the Grand Staircase-Escalante National Monument be abolished if any court finds that the President exceeded the authority of the President under the [Antiquities Act] in establishing the national monument."[387]

In light of Congress's political inability or reluctance to undertake meaningful reform, the implicit message of history may be that the Antiquities Act—although maligned—continues to serve some vital national purpose. The next subpart attempts to identify the core values that have made the Act so resistant to change over the course of a century. By explicitly recognizing the Act's strengths, it may be possible to carve out a productive and modern role for the Antiquities Act in the twenty-first century.

B. Identifying Core Values

The Antiquities Act has demonstrated a remarkable tenacity over the past century, an endurance that is puzzling in light of the harsh criticism periodically leveled against it.[388] This subpart attempts to identify core values the Act promotes that may explain its longevity. Although the Act's virtues rarely have been expressed explicitly and comprehensively, at least four fundamental strengths can be gleaned by drawing upon statements of the courts, the politicians, and the public.

First, the public may value the Act for its ability to protect large landscapes.[389] Despite the outrage some politicians have expressed against the Clinton monument designations, contemporaneous public opinion polls demonstrated widespread, bipartisan support for land-

386 Wyoming v. Franke, 58 F. Supp. 890, 896 (D. Wyo. 1945); *see also supra* Part I.B.2 (discussing the district court's decision in *Franke*).

387 H.R. 3909, 105th Cong. § 5 (1998).

388 *See supra* Parts I, III.A. *But see supra* note 347 and accompanying text.

389 Although critics have argued that the Act was intended only to protect archaeological ruins and small tracts of land, the Supreme Court has acquiesced in the use of the Act to protect large landscapes such as the Grand Canyon. *See supra* Part I.B.1.

scape preservation.[390] One survey indicated that "a strongly bipartisan 76 percent of Arizona voters" supported President Clinton's designation of national monuments in Arizona.[391] Recognizing such public opinion and the need for the support of urban voters, even the staunchest political opponents have declined to speak out unequivocally against such protection.[392] Some conservative politicians have even advanced their own land protection proposals, albeit primarily as a defensive tactic to ward off suggestions for more aggressive measures.[393]

The courts have also supported the Act's ability to preserve landscapes up to several million acres in size,[394] protecting a wide range of natural features including geologic features, structures of glacial formation, natural wonders, and tourist attractions.[395] In addition, the courts have specifically approved the use of the Act to protect plant, animal, and fish life,[396] and even the "ecosystem" associated with wild Arctic caribou herds in Alaska.[397]

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390 As one newspaper columnist stated, "These days, opinion polls show that Americans—Republicans as well as Democrats—want government to protect the nation's most striking landscapes be they backyard wood lots or nooks of remote wilderness most people will never see." Todd Wilkinson, *To Protect Land, Uncle Sam Buys More: Recent Purchases of Western Acreage Are Backed by Growing Public Support for Preservation*, CHRISTIAN SCI. MONITOR, Sept. 14, 1999, at 1. The article also cites a Zogby International poll of Republican voters in five states indicating that "the desire for landscape protection transcends party lines." *Id.*; *see also* Gary Bryner, *John Leshy on Shaping the Modern West: The Role of the Executive Branch*, RESOURCE LAW NOTES (Natural Res. Law Ctr., Sch. of Law, Univ. of Colo. at Boulder), Mar. 2000, at 2, 2 (citing the 1998 passage of some 170 bipartisan ballot initiatives to limit growth and protect open space); Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 158–59 (discussing overwhelming success of open space initiatives in 2000).

391 Jerry Kammer, *Gulf Grows over Western Land Use: New National Monuments Stir Passions over Preservation, State Rights, and Future of the West*, CHRISTIAN SCI. MONITOR, Jan. 11, 2000, at 1 (citing survey by the Behavior Research Center of Phoenix).

392 *See* Rocky Barker, *"War" More Like a Skirmish*, DENVER POST, July 23, 2000, at 6H (noting western Republican politicians' bitter opposition to President Clinton's use of the Antiquities Act, but concluding that "few of them suggest the lands in question don't deserve protection. No one has proposed a massive new program to build roads into remaining roadless areas."); *see also* Kammer, *supra* note 391 (quoting press secretary to Republican Governor Jane Hull of Arizona as stating that "[s]he doesn't like people in Washington telling Arizona what is going to happen inside Arizona's borders," but adding that the Governor "is a big supporter of open space").

393 *See* Matt Kelley, *GOP Group Supports Land-Protection*, AP ONLINE, Mar. 28, 2000, *available at* 2000 WL 17833783 (stating that western Republicans "hope to set terms for protection rather than have the Clinton administration impose them").

394 *See, e.g.*, *supra* Part I.B.5 (discussing court opinion approving three monuments in Alaska comprising almost twenty million acres); *supra* Part I.B.1 (discussing court opinion approving 800,000-acre monument).

395 *See supra* Part I.B.

396 *See supra* Part I.B.5 (discussing court opinion approving protection of ecosystem supporting plant, animal, and fish life, particularly Arctic caribou); *supra* Part I.B.3 (discussing court opinion approving protection of water pool supporting rare fish population).

397 *See supra* Part I.B.5.

This preservation of federal lands and open space can be supported on an economic, as well as philosophical, basis. One prominent article on the transformation of public lands from commodity uses to nonconsumptive uses concludes that "[t]he imputed market benefits of public lands devoted to recreation and preservation far exceed the economic benefits of commodity extraction uses. Furthermore . . . the value of preservation . . . overwhelms the economic benefits of recreation and commodity uses."[398]

Second, society may value the Act for its ability to serve a unique role among natural resource laws—that of protecting "living landscapes."[399] Rather than simply duplicate the results that could be achieved under the Wilderness Act[400] or the National Park legislation,[401] the Antiquities Act allows for the designation and management of unique areas where human ties to the land are particularly apparent.[402] Former Interior Secretary Bruce Babbitt noted the interrelationship between humans and nature. In criticizing the tempta-

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398 Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 145–46 (1999). The authors estimate that recreation and ecosystem benefits exceed commodity benefits by a factor of sixty-two in the national forests, and by a factor of over twenty on lands managed by the Bureau of Land Management. *Id.* at 238 & n.502 (cautioning that dollar estimates rely on innovative methods and "should only be viewed as preliminary, illustrative calculations"). The authors also note that,

> One group of scientists has estimated the global value of seventeen essential ecosystem services (for example, climate and water regulation, natural waste treatment, and nutrient cycling) at $33 trillion, most of which is normally not reflected in market prices. This estimate compares with $18 trillion as the value of all the goods and services provided by the world's people each year.

Id. at 200. *But see* Robert R.M. Verchick, *Feathers or Gold? A Civic Economics for Environmental Law*, 25 HARV. ENVTL. L. REV. 95, 96 (2001) (offering a critique of both moral and market advocates in the realm of environmental policy).

399 *See, e.g.*, Donna M. Kemp, *Third Monument's a Charm*, DESERET NEWS (Salt Lake City, Utah), July 27, 2000, at A1 (discussing "living landscape monuments" of the BLM, managed to "protect rugged and isolated areas of the West" and to protect the heritage of the western way of life).

400 *See, e.g., supra* notes 181–86 and accompanying text.

401 *See, e.g., supra* notes 177–80 and accompanying text.

402 Secretary Babbitt proposed a new designation of "national landscape monuments" for the protection of entire ecosystems. Unlike national parks, hunting and grazing might be permitted. Also unlike parks, the system would not explicitly promote tourism and recreation through the development of visitor centers, gas stations, or other amenities. *See* Mark Eddy, *Babbitt: Time is Now to Protect West's Lands*, DENVER POST, Feb. 18, 2000, at 1A. As described by Secretary Babbitt, "This is not about creating a second national park service." Penelope Purdy, *New Mission for Public Lands: BLM Tackles Role as Environmental Champion*, DENVER POST, July 30, 2000, at J1 (describing "history written across a landscape as big as the American West" and a proposed "landscape conservation system" lacking such traditional national park features as developed campgrounds, cafes, souvenir shops, and paved roads).

tion to preserve only "little postage stamps on the landscape,"[403] Babbitt argued passionately,

> [Past politicians] went west onto this landscape of riches, would see a ruin, and would make a national park or a monument out of only the forty acres surrounding the ruin. . . . Somebody [would see] a ruin and fenc[e] off twenty acres, ten, five, forty around it. And you begin looking across this landscape and say: "Hey, wait a minute. This isn't about a ruin here or there. Don't you see, it's about a whole, interwoven landscape? It's about communities that were living in and on this land . . . and drawing their living and their inspiration and their spirituality from a landscape.[404]

Secretary Babbitt concluded with the provocative question, "Doesn't it make sense in light of a subsequent 100 years of understanding to say that we have room in the West to protect the landscape, if you will, an anthropological ecosystem?"[405]

Third, the President's authority under the Act to take prompt measures to preserve the status quo in the face of imminent threats to special landscapes might generate additional support.[406] Whereas the President can act in a matter of weeks or months, congressional debate over landscape protection might continue for years or even decades.[407] One district court judge considered a challenge to the

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403 Bruce Babbitt, From Grand Staircase to Grand Canyon Parashant: Is There a Monumental Future for the BLU? Transcript of Remarks: University of Denver College of Law Carver Lecture (Feb. 17, 2000), *in* 3 U. DENV. WATER L. REV. 223, 227 (2000).

404 *Id.*

405 *Id.* at 227–28. Professor John Brinckerhoff Jackson documents the American desire to "preserve wilderness or natural areas as fragments of what we might call the original design of creation." JOHN BRINCKERHOFF JACKSON, THE NECESSITY FOR RUINS 100–01 (1980). Professor Brinckerhoff notes that the "instinct behind the drive is very similar to that which inspires our architectural restorations: to restore as much as possible the *original* aspect of the landscape." *Id.* at 101. He connects this landscape preservation impulse to an emerging concept of history. *See id.* at 100–02.

406 *See infra* notes 408–09 and accompanying text.

407 *See* Getches, *supra* note 37, at 304–05 (discussing executive designation of Jackson Hole National Monument in reaction to eighteen-year congressional impasse); James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 492–98 (1999) (discussing designation of Grand Staircase-Escalante National Monument in reaction to decades-long congressional impasse over wilderness designation in Utah). Former Secretary of the Interior Bruce Babbitt noted:

> [I'm saying,] "It would be great to get these protection issues resolved in the Congressional, legislative process." But if that's not possible, I'm prepared to go back to the President, and not only ask, not only advise, but also implore him to use his powers under the Antiquities Act. I'm prepared to say to him: "Mr. President, if they don't, and you do, you will be vindicated by history for generations to come." Just as President Harrison, President Cleveland, Woodrow Wilson, Taft, notably Teddy Roosevelt, Franklin D. Roosevelt, Jimmy Carter, virtually every President in the past century has done, often in the midst of intense controversy, but in every single case, validated by history and the generations of Americans who have this passion for the western landscape.

Babbitt, *supra* note 403, at 227.

actions of the President and the Secretary of the Interior to preserve vast tracts of Alaskan lands in the face of a congressional impasse over pending protective legislation.[408] The court concluded that invalidation of the executive actions would hinder the public interest, which could best be served by maintaining the lands in their present condition until Congress could pass protective legislation.[409]

The Executive's prompt action in situations such as these has assisted the legislative process on numerous occasions. Many treasured national parks—including the Grand Canyon National Park—were protected first by the Executive under the Antiquities Act.[410] If a President has erred on the side of caution, then Congress has the ability to reverse the unwanted monument designation.[411] But, if the Executive has failed to take prompt action to protect important landscapes, then there is little that Congress can do to rectify that inaction. Decisions to develop land are irreversible and should be made with care, as Aldo Leopold observed: "Wilderness is a resource which can shrink but not grow."[412]

The Antiquities Act delegates authority directly to the President, rather than to an executive official such as the Secretary of the Interior.[413] Some have viewed this arrangement as a fourth core value of the Act, subjecting the nation's highest leader to direct public accountability for the designation of monuments. For example, one federal district court declined to overturn President Franklin D. Roosevelt's designation of a 221,610-acre monument in Wyoming.[414]

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408 *See* Alaska v. Carter, 462 F. Supp. 1155, 1157–58 (D. Alaska 1978) (considering a challenge to executive action under the Antiquities Act and secretarial action under the Federal Land Policy and Management Act); *supra* Part I.B.4.

409 *Carter*, 462 F. Supp. at 1165.

410 *See* Bryner, *supra* note 390, at 2 (stating that "[m]any of America's most beloved parks began as national monuments" and citing as examples Grand Canyon National Park (1919), Olympic National Park (1938), Bryce Canyon National Park (1924), Grand Teton National Park (1950), Zion National Park (1956), Arches National Park (1971), Denali National Park (1980), and Death Valley National Park (1994)); *see also* Rasband, *supra* note 407, at 490–92 (noting that all Utah national parks except Canyonlands began as national monuments, and concluding that although those parks "are now among the crown jewels of Utah's tourism industry, . . . the embers of resentment toward unilateral federal preservation efforts continue[ ] to smolder").

411 Congress has found it desirable to reverse the designation of monuments on only a few occasions. *See* Bryner, *supra* note 390, at 2. Admittedly, it might be difficult for Congress to pass legislation repealing a monument designation against the threat of an executive veto by the very President who established the monument in the first instance. *See* Pendley, *supra* note 12, at 11 (describing President Franklin D. Roosevelt's veto of legislation to abolish the Jackson Hole National Monument in Wyoming). However, it is often the case that presidents establish monuments at the end of their terms to firm up their environmental legacy, and the succeeding president might have less incentive to veto repealing legislation. *See* Bryner, *supra* note 390, at 2.

412 ALDO LEOPOLD, *Wilderness*, *in* A SAND COUNTY ALMANAC 199 (1949).

413 *See supra* note 30 and accompanying text.

414 *See supra* Part I.B.2.

The court found that the President was directly accountable to the "propaganda" of the press and to Congress, making judicial interference undesirable.[415]

Recent practice supports the notion that presidents are indeed cognizant of their public accountability and that they modify their behavior accordingly. For example, President Clinton's designation of the Grand Staircase-Escalante Monument in Utah received extensive coverage in prominent national newspapers, including strident criticism.[416] Opponents claimed that President Clinton deliberately avoided notifying local politicians, citing the fact that the Utah monument ceremony was actually conducted in the neighboring state of Arizona.[417] Subsequent actions of the President were more solicitous of local concerns, suggesting that the first-term President was mindful of the public reaction to his monument proclamation. Accordingly, President Clinton took the unusual step of assigning to the BLM, an agency typically responsive to local commodity producers on the public lands, the task of managing the monument.[418] Moreover, the President ordered the BLM to promulgate a management plan pursuant to regulations, which would necessarily entail public notice and comment.[419] The planning team included both federal and state officials, relying heavily upon the participation of local communities.[420] Upon completion, the plan drew "muted praise" from both environmentalists and local leaders.[421] Among other things, the plan allows for lim-

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415 *See supra* note 101 and accompanying text.

416 *See, e.g., supra* notes 8–9 and accompanying text.

417 *See* Pendley, *supra* note 12, at 8; *see also* Hilary Stout & Bruce Ingersoll, *Clinton Shields Utah Lands from Development*, WALL ST. J., Sept. 19, 1996, at A4 (observing that "[b]ecause Utah happens to be the most Republican of all the states, Mr. Clinton played to the rest of the West, traveling to Arizona to sign the presidential proclamation [of the Grand Staircase-Escalante Monument of Utah] at the rim of the Grand Canyon"). Supporters of President Clinton refute the charge that his monuments were proclaimed without "sufficient public discourse." *See Leave Antiquities Act Alone: Don't Hang Beltway Bias Around Our Monuments*, ARIZ. REPUBLIC, Mar. 25, 2001, at B10 (observing that "[t]here is a perception among some that the Clinton administration designated various national monuments in a vacuum, without sufficient public discourse" and concluding that at least "[a]s far as Arizona's five new monuments are concerned, that's just plain wrong").

418 Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996). One staunch critic noted that the preservationist-oriented National Park Service managed nearly all monuments, and conceded that with regard to grazing, hunting, and other local concerns, "the BLM is much more respectful than the [National Park Service]"). *See* Pendley, *supra* note 12, at 9–10.

419 Proclamation No. 6920, 61 Fed. Reg. at 50,225.

420 *See* Paul Larmer, *Is the Grand Staircase-Escalante a Model Monument?*, HIGH COUNTRY NEWS (Paonia, Colo.), Nov. 22, 1999, at 13; *see also* Jim Woolf, *Counties to Get Cash for Monument Planning*, SALT LAKE TRIB., Oct. 23, 1996, at A6 (noting that the Grand Staircase-Escalante proclamation "contains few details about how the area would be managed, relying instead on a team of local, state and federal representatives to develop a long-term plan for the area").

421 Larmer, *supra* note 420.

ited development in the surrounding communities.[422] Moreover, the Clinton administration successfully negotiated a fourteen million dollar federal buyout of a private coal company's leases[423] and a fifty million dollar federal purchase of school trust lands owned by Utah and located within the boundaries of the monument.[424] Overall, the example suggests that the Antiquities Act, as written, creates powerful incentives for presidents to act in a politically accountable manner, crafting compromises that protect both the national interest in expeditious land preservation and local financial needs.

Thoughtful commentators have suggested that the Antiquities Act should include formal public notice and comment as a prerequisite to the creation of new monuments,[425] raising the issue of whether the Act's scheme of public *accountability* by the President is an effective substitute for public *participation* before an administrative agency. There is a credible body of evidence that suggests a cautious, but not overwhelming, response in the affirmative. Through several statutes, Congress has indicated its intention to impose procedural safeguards upon federal administrative agencies, but not upon presidents themselves. For example, the Administrative Procedure Act (APA) requires public notice and comment for agency rulemaking,[426] a requirement that courts have deemed inapplicable to the President.[427] Moreover, NEPA requires an environmental impact statement of all "agencies" of the federal government.[428] One federal court found "absurd" the claim that the President's consultation with the Secretary of the Interior concerning national monuments rendered the President subject to the requirements of NEPA.[429] Even in the modern, post-NEPA era, Congress has passed legislation indicating its awareness that in certain cases, it may be desirable to empower high-level, accountable officials to take prompt actions without first providing an opportunity for pub-

422 *See id.*

423 *See id.*

424 *Id.*; *see also* Utah Ass'n of Counties v. Clinton, Nos. 2:97CV479, 2:97CV492, 2:97CV863, 1999 U.S. Dist. LEXIS 15852, at *24–28 (D. Utah Aug. 12, 1999) (discussing congressional ratification of land exchange and $50 million cash payment to Utah).

It appears that President Clinton took increasing care to provide for advance public notice and comment concerning monument designations during his second term of office. *See Secretary Babbitt Makes Monument Recommendations to President Clinton*, U.S. NEWSWIRE, Jan. 8, 2001, *available at* 2001 WL 4138720 (giving notice in press release of two proposed national monuments and stating that "[i]n the past few weeks, Secretary Babbitt has visited each area and discussed protection options with local elected officials and residents").

425 *See, e.g.*, Rasband, *supra* note 407, at 560–61; Zellmer, *supra* note 71, at 1043–47.

426 5 U.S.C. § 553 (2000).

427 *See* Zellmer, *supra* note 71, at 1044 & n.581 (citing cases indicating that the President is not an agency within the meaning of the APA).

428 *See* 42 U.S.C. § 4332 (1994).

429 *See supra* note 124 and accompanying text.

lic hearings.[430] This position seems to recognize that, in some situations, the value of landscape protection may outweigh the value of advance public notice and comment, particularly where an accountable official merely freezes the status quo to facilitate subsequent congressional action.[431]

C. Recognizing Wild Landscapes as Cultural Antiquities

Presidents have been criticized harshly for using the Antiquities Act to protect not only human artifacts, but also expansive landscapes.[432] The criticism reflects the assumption that Congress did not intend to preserve both nature and civilization under the same statutory scheme. Leaving aside for the moment actual congressional intent, one might wonder whether such an interpretation would even be *possible* under our cultural norms and traditions. A brief survey of natural resource thinkers suggests that there is solid philosophical precedent for the unification of nature and culture. This line of inquiry indicates that the Antiquities Act—zealously interpreted and applied by presidents—might not represent merely a rogue interpretation created out of whole cloth; rather, it draws upon venerable, holistic narratives scattered throughout Western culture and elsewhere.

Prior to the passage of the Antiquities Act, American writers and artists had reflected upon the interconnectedness of humans and nature. Some Native American writings describe a close relationship with the land. For example, in resisting white encroachment onto the Great Plains in the late nineteenth century, one Comanche elder stated to a congressional commission:

> I was born upon the prairie, where the wind blew free, and there was nothing to break the light of the sun. I was born where there were no enclosures . . . I want to die there, and not within walls. I know every stream and every wood between the Rio Grande and the Arkansas.[433]

In the early nineteenth century, artist Thomas Cole praised the American wilderness as worthy of painting, noting its prominent historical

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430 *See* FLPMA § 204(e), 43 U.S.C. § 1714(e) (allowing Secretary of the Interior to make emergency withdrawals for periods up to three years); Alaska v. Carter, 462 F. Supp. 1155, 1161 (D. Alaska 1978) (holding that emergency withdrawals under section 204(e) of FLPMA do not trigger NEPA's environmental impact statement requirement).

431 *See generally* Zellmer, *supra* note 71, at 1046–47 (arguing that a notice and comment requirement should be imposed upon monument designations, but conceding that "[a] substantive draw-back [of such required procedures] is that the imposition of extensive preliminary requirements may result in fewer desiguations, and less federal land ultimately placed in protective status").

432 *See* Rasband, *supra* note 407, at 483–87, 490–92, 515–19.

433 Ten Bears, Speech Before the Congressional Peace Commission (Oct. 10, 1867), *in* DISTANT HORIZON: DOCUMENTS FROM THE NINETEENTH-CENTURY AMERICAN WEST, at 217 (Cary Noy ed., 1999).

and legendary associations.[434] Henry David Thoreau, who extolled the virtues of wild nature, also valued the intermingling of wildness and civilization.[435] Thoreau observed: "It is in vain to dream of a wildness distant from ourselves. There is none such. It is the bog in our brains and bowels, the primitive vigor of Nature in us, that inspires that dream."[436] During the discussion that preceded the creation of Yellowstone National Park in 1872, Thoreau argued that both wildlife and native human settlements should be protected together in "national preserves."[437] Landscape designer Frederick Law Olmsted believed that the national character was reflected in the American landscape.[438] Olmsted sought to incorporate nature into urban environments through the presence of parks, broad avenues, and greenways, an approach perhaps best exemplified by his plans for Central Park in New York City, the Stanford University campus in California, and the U.S. Capitol grounds in Washington, D.C.[439]

In the post-Antiquities Act period, still other American philosophers continued to call for a closer synthesis of nature and society. Aldo Leopold, who articulated a strong wilderness ethic, also worked for the protection of nature in areas marked by a human presence.[440] In *A Sand County Almanac*, Leopold called for a new land ethic synthesizing both humans and nonhumans.[441] In 1942, Leopold expounded upon this land ethic: "'Who is the land? We are, but no less the meanest flower that blows. Land ecology discards at the outset the fallacious notion that the wild community is one thing, the human community another.'"[442] More recently, the late Harvard Professor of zoology and geology Stephen Jay Gould made the "humanistic confes-

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434 *See* HUTH, *supra* note 228, at 50–51.

435 Holly Doremus, *The Rhetoric and Reality of Nature Protection: Toward a New Discourse*, 57 WASH. & LEE L. REV. 11, 24–25 & n.76 (2000) (observing that "[a]t Walden Pond, Thoreau hardly was removed from civilization. His cabin lay just steps from the railroad track, and he dined weekly at the family home in Concord.").

436 Henry David Thoreau, *Journal*, Aug. 30, 1856, epigraph to SIMON SCHAMA, LANDSCAPE AND MEMORY (1995).

437 Doremus, *supra* note 435, at 26–27 (describing 1858 article published by Thoreau in the *Atlantic Monthly*).

438 *See generally* WITOLD RYBCZYNSKI, A CLEARING IN THE DISTANCE: FREDERICK LAW OLMSTED AND AMERICA IN THE NINETEENTH CENTURY (1999) (describing the work of Frederick Law Olmsted, who lived from 1822–1903).

439 *See id.* at 21, 192–93, 320–21, 368–72.

440 *See* Aldo Leopold, *The Wilderness and Its Place in Forest Recreational Policy*, 19 J. FORESTRY 718, 719 (1921); *see also* Doremus, *supra* note 435, at 33–35 (observing that "Leopold spent years restoring a worked-out farm in Wisconsin to biotic health").

441 *See* ALDO LEOPOLD, *The Land Ethic*, *in* A SAND COUNTY ALMANAC, *supra* note 412, at 201, 204 (explaining that "a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it"). *See generally* Eric T. Freyfogle, A Sand County Almanac *at 50: Leopold in the New Century*, 30 ENVTL. L. REP. (Envtl. L. Inst.) 10,058 (2000) (reassessing Leopold's work).

442 Freyfogle, *supra* note 441, at 10,066 & n.64 (quoting Leopold's 1942 speech to the seventh North American Wildlife Conference).

sion" that although he loved nature for itself—nature that is "out there"—he preferred natural areas that bear the trace of a human presence.[443] He sought his "aesthetic optimum right in the middle, where human activity has tweaked or shaped a landscape."[444] In his own defense, Professor Gould hastened to add that there is no true distinction between nature and culture, and that pure examples of either realm are scarce "when plastic flotsam pervades the seas . . . and when almost every spot perceived with rapture as 'virgin' wilderness (at least here in northeastern America) really represents old farmland reclaimed by new forest."[445] In an example reminiscent of the congressional impetus for passage of the Antiquities Act,[446] Professor Gould cited Hopi pueblo towns among his favorite landscapes, admiring their construction from "local rocks as a layer on the tops of mesas made of horizontal strata, so that the town, from a distance, can hardly be distinguished from the natural layers below, a village marked as a human construction only by vertical ladders protruding from the tops of kivas."[447] Similarly, writer Terry Tempest Williams recalls her discovery of cultural artifacts of the Colorado Plateau, concluding that human artifacts are intimately connected to the landscape: "If these artifacts are lifted from their birthplace they cease to speak. Like a piece of coral broken from its reef, they lose their color, becoming pale and brittle."[448]

This narrative of unity has even permeated American fiction. Novelist Barbara Kingsolver drew upon her childhood experiences in the Congo as the daughter of medical and public-health workers to write *The Poisonwood Bible.*[449] Told through the eyes of the children of Christian missionaries, the novel keenly observes the vast gulf between American and Congolese society.[450] Despite its status as fiction, the work is rooted in history and fact.[451] One of the novel's young protagonists learns of the Congolese word *muntu,* which encompasses both humans and nature. Her young African friend tells her that the word means more than just *man,* for "[t]he word of the ancestors is pulled into trees and men . . . and this allows them to stand and live as

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443 STEPHEN JAY GOULD, LEONARDO'S MOUNTAIN OF CLAMS AND THE DIET OF WORMS: ESSAYS ON NATURAL HISTORY 2–6 (1998).

444 *Id.* at 3.

445 *Id.* at 2.

446 *See supra* note 33 and accompanying text.

447 GOULD, *supra* note 443, at 3.

448 TERRY TEMPEST WILLIAMS, PIECES OF WHITE SHELL: A JOURNEY TO NAVAJOLAND 125 (1984).

449 BARBARA KINGSOLVER, THE POISONWOOD BIBLE, at ix–x (1998).

450 *See, e.g., id.* at 167.

451 *Id.* at ix (author's note stating that despite the novel's categorization as fiction, "the Congo in which I placed [the characters] is genuine. The historical figures and events described here are as real as I could render them with the help of recorded history.").

muntu."[452] The American girl responds in bewilderment, asking whether trees are also *muntu*, whether trees are a type of person.[453] Her Congolese friend, Nelson, puzzled by her "failure to understand such a simple thing," replies, "Of course. Just look at them. They both have roots and a head."[454]

In several instances throughout the world, this philosophical and fictional literature of synthesis has been reduced to concrete reality. The Gwaii Haanas area of the Queen Charlotte Islands of British Columbia has been the home of the native Haida people for more than ten thousand years.[455] Canada has preserved this homeland as a national park (the Gwaii Haanas National Park Reserve) that also functions as a Haida heritage site. Representatives of the Haida Nation continue to live on the islands, serving as "watchmen" who protect both the natural and cultural heritage of the park.[456] The park's visitor handbook notes that "[f]or more than 10,000 years, the Haida have been an integral part of this remarkable landscape. Their communities thrive in the close relationships of abundance between sea, sky and forest."[457]

Similarly, in Russia some thirty native families of aboriginal Evenis live within the boundaries of a five-thousand-square-mile nature park in the far eastern part of the country.[458] The families subsist by hunting, trapping, and fishing within an unspoiled tract of mountains and forests that has been designated as a United Nations world heritage site.[459] With the approval of the Russian government, the Evenis have returned to their ancestral lands in order to assist in the management and preservation of the park.[460] A representative of the World Wildlife Fund for Nature observed that the organization previously preferred to exclude people from natural areas, but that it is now successfully integrating local people and landscapes.[461]

Modern thinkers have begnn to call for the theoretical synthesis of natural and human landscapes, but have recognized that their pro-

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452 *Id.* at 209–10.

453 *Id.* at 210.

454 *Id.*

455 GWAII HAANAS NATIONAL PARK RESERVE AND HAIDA HERITAGE SITE, VISITOR HANDBOOK 5 (2000) (on file with author, only slightly moldy from an idyllic sea kayak trip through the Queen Charlotte Islands).

456 *Id.* at 36.

457 *Id.* at 5.

458 Gary Strieker, *Russia Returns Native People to Ancestral Lands in Nature Park*, CNN.COM, Sept. 20, 2000, *at* http://www.cnn.com/2000/NATURE/09/19/russia.park (noting that "the area has also been the home of aboriginal Evenis for centuries, before the Soviet government forced them into towns and villages to work on state farms").

459 *Id.*

460 *See id.*

461 *See id.*

posals may be a double-edged sword.[462] On the one hand, the integration of humans into the natural world may serve as a politically palatable excuse for the continued conquest of nature.[463] On the other hand, recognizing a bond between humans and nature may be an important step toward fostering a thoughtful discussion concerning the future of our wild lands. Such a unified approach might support a newly invigorated role for the Antiquities Act in the twenty-first century, validating a statute that presidents have consistently used to protect both human artifacts and awe-inspiring landscapes. In his book, *Landscape and Memory*, historian Simon Schama articulated perhaps the most hopeful vision of this synthesis of nature and culture:

> There is nothing inherently shameful about [the human occupation of wilderness]. Even the landscapes that we suppose to be most free of our culture may turn out, on closer inspection, to be its product. And it is the argument of *Landscape and Memory* that this is a cause not for guilt and sorrow but celebration. Would we rather that Yosemite, for all its overpopulation and overrepresentation, had *never* been identified, mapped, emparked? The brilliant meadow-floor which suggested to its first eulogists a pristine Eden was in fact the result of regular fire-clearances by its Ahwahneechee Indian occupants.[464]

The author expresses his hope that "by revealing the richness, *antiquity*, and complexity of our landscape tradition, [the book can] show just how much we stand to lose."[465] As a result of that realization, perhaps humans will comprehend the strength of their links to, and dependence upon, nature.[466] Ironically—by extension of Schama's philosophy—the most important "antiquity" preserved under the Antiquities Act may be the rich, but understated, Western tradition of landscape preservation.

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462 *See generally* Doremus, *supra* note 435, at 63–65 (discussing future steps toward integrating concepts of nature and humanity, as well as potential obstacles to this endeavor).

463 *See id.* Professor Doremus argues that, "[i]f progress is to be made in the law of nature protection, the political discussion must more closely address the crux of the problem, asking how humans can live with and in nature." *Id.* at 63. She urges that the "new discourse . . . should be as much about people as it is about nature. It should explain how people can fit into nature and fit nature into their lives." *Id.* at 65. However, Professor Doremus cautions that nature advocates should be wary of the rhetoric of sustainable development, which "could be used to paper over the nature problem, giving lip service to esthetic and ethical concerns while giving primacy to economic uses." *Id. But see* Wiener, *supra* note 208, at 352 & n.135 (rejecting the argument that a holistic view of the human role in nature "invites unbridled human mischief against ecosystems"). Rather, Professor Wiener asserts that "human actions still need to be judged, but judged by their consequences rather than by their categorical attributes. . . . The question is not whose hand built the dam, beaver or human, but rather what impacts will the dam have on the river?" *Id.*

464 SCHAMA, *supra* note 436, at 9.

465 *Id.* at 14 (emphasis added).

466 *See id.*

CONCLUSION: WHY EVERYONE COMPLAINS, BUT NO ONE DOES ANYTHING

Historical evidence from the past century demonstrates that the Antiquities Act may be the statute that politicians love to hate. Congressional representatives have been willing to speak out against monuments, but few have had realistic expectations of significantly amending the Antiquities Act. As one Arizona congressman acknowledged with respect to the Clinton monuments, "'Fighting over legislation to undo or rollback these regnlations may fly well with people back home, but it's a waste of our energy.'"[467] Moreover, few politicians may be willing to pay the political price associated with taking action to weaken the President's authority to designate monuments. Polls indicate strong support for environmental protection in general, and for monument designations in particular.[468]

Although beleagnered and berated, the Antiquities Act has enjoyed consistent support from a broad spectrum of forces. Presidents have zealously exercised their delegated authority to proclaim monuments, an executive prerogative that courts have been reluctant to disturb throughout the twentieth century. Congress has threatened to weaken or repeal the Antiquities Act on numerous occasions, but it has had very little success in this endeavor. Instead, Congress has often ratified executive monuments by designating them as national parks. Based upon this support by all three branches of government, John Leshy stated during his tenure as Interior Department Solicitor that the "'Antiquities Act . . . is one of the most successful environmental laws in American history.'"[469]

This Article has argned that the implicit strength of the Antiquities Act lies in its potential to protect both natural and human landscapes under the same statutory scheme. Ironically, that synthesis has also raised the ire of critics. The recognition of humans as a component part of natural systems flies in the face of a long historical tradition that recognizes a rigid dichotomy between nature and culture. This Article has presented a countervailing tradition—the narrative of

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467 Eric Pianin, *Staying Power of Clinton's Edicts: Undoing Environmental Rules Will Be Hard for Bush, GOP*, WASH. POST, Feb. 13, 2001, at A19 (quoting Republican Rep. Jim Kolbe, senior member of the House Appropriations Committee). Similarly, western Republicans have indicated that "although they are unhappy about the [monument] designations, a full-scale challenge would be time-consuming and ultimately pointless." *Id.*

468 *See supra* notes 390–92 and accompanying text; *see also* Dana Milbank & Eric Pianin, *Bush to Counter Environmental Criticism: Outrage over Regulatory Changes Pushes Administration to Tout Green Policies*, WASH. POST, Mar. 31, 2001, at A6 (noting that the criticism over President George W. Bush's attempts to weaken President Clinton's national monuments and other environmental measures "has apparently affected public opinion. The latest Washington Post/ABC News poll found that, by 61 percent to 31 percent, Americans thought Bush cared more about the interests of large corporations than ordinary people.").

469 *Hearing on H.R. 1487*, *supra* note 53, at 20.

synthesis—as reflected by the manner in which the Act has been utilized throughout the century. Congress and the courts should explicitly recognize that these special landscapes may qualify for protection as national monuments under the Antiquities Act, thereby acknowledging the interrelationship of humans and nature.