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THE PROBLEM OF STATUTORY DETAIL IN NATIONAL PARK ESTABLISHMENT LEGISLATION AND ITS RELATIONSHIP TO POLLUTION CONTROL LAW

ROBERT L. FISCHMAN*

INTRODUCTION

Legal scholarship examining national park management focuses almost exclusively on the so-called "Organic Act" describing the overarching mandate for the National Park Service ("NPS" or "Service"). Title 16 of the United States Code prominently proclaims in its first section the famous kernel of this 1916 law, significantly clarified in 1978, that the purpose of national parks, monuments, and reservations is

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.¹

This visionary mandate is what most commentators home in on when they discuss national park management.² Certainly, it is what Wallace Stegner had in mind when he referred to the national parks as "the best idea we ever had."³

But the bright fame of this broad statement of purpose has blinded many scholars to several hundred sections that follow it in Title 16. These are the

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1. 16 U.S.C. § 1 (1994) [hereinafter Organic Act].

2. See, e.g., Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 4 (1992); Robert B. Keiter, *National Park Protection: Putting the Organic Act to Work*, in OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 75 (David J. Simon ed., 1988); John Lemons & Dean Stout, *A Reinterpretation of National Park Legislation*, 15 ENVTL. L. 41, 42 (1984); William Andrew Shutkin, Note, *The National Park Service Act Revisited*, 10 VA. ENVTL. L.J. 345, 361 (1991); see also Clayton L. Riddle, Comment, *Protecting the Grand Canyon National Park from Glen Canyon Dam: Environmental Law at Its Worst*, 77 MARQ. L. REV. 115, 126-29 (1993) (describing constraints on NPS power to protect parklands).

3. William J. Lockhart, *External Park Threats and Interior's Limits: The Need for an Independent National Park Service*, in OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS 3, 3 (David J. Simon ed., 1988) (quoting Wallace Stegner, *The Best Idea We Ever Had*, 46 WILDERNESS 4 (1983)).

sections that establish to which lands the overarching mandate will apply and, increasingly in recent years, detail how the Organic Act will apply to the specifically reserved units managed by the Service. The Organic Act would be nothing more than a distant vision, with no on-the-ground application, were it not for the establishment statutes that have created 54 national parks, 73 national monuments, and a variety of other reservations in the 374-unit national park system.⁴

There are good reasons why the literature on national park management focuses on the Organic Act. Certainly, the overarching mandate is one of the most important statements of American cultural values enacted as environmental law. Also, it is the fundamental interpretive rule in exercising and reviewing the proprietary management discretion of the Service. The Organic Act, unlike establishment legislation, applies comprehensively to the entire geographic sweep of the national park system.⁵ Finally, the Organic Act sets up an elegant tension between providing for enjoyment (often interpreted as recreation) and leaving units unimpaired (often interpreted as preservation). This tension has stoked the furnace of countless heated arguments over management direction for the Service.⁶

Unfortunately, this deserved interest in the NPS organic legislation has almost completely eclipsed searching analysis of establishment legislation. This Article is an initial step toward addressing the importance of establishment legislation. Although examination of establishment legislation cannot substitute for application of the Organic Act, it is critical to understanding the changing role of Congress in the actual management of the national park system and important trends in environmental law. The first Section of this Article outlines the importance of establishment legislation to legal scholarship. Section Two describes the general trend in environmental law for Congress, through greater statutory detail, to assume an ever larger role in specifying how agencies should implement delegated programs. This Section also

4. *List of Units in the National Park System* (visited Nov. 10, 1996) <<http://www.nps.gov/legacy/npslist.html>> [hereinafter *List*]. All of the reserved lands managed by the Service, not just designated "national parks," are part of the national park system. 16 U.S.C. § 1c(a) (1994). All national park system units are subject to the same organic legislation to the extent that it does not conflict with provisions specifically applicable to them. *Id.* § 1c(b)7. Specifically applicable provisions generally appear in establishment legislation.

5. 16 U.S.C. § 1c(b). Units of the park system range from the modest, such as Fort Stanwix National Monument, New York, to the vast, such as Wrangell-St. Elias National Park, Alaska. *List*, *supra* note 4. Delaware is the only state unrepresented in the over 80 million acres of the national park system. *Id.*

6. *Compare* Herman, *supra* note 2 (arguing for narrow Service discretion in balancing competing interests), with Douglas O. Linder, *New Direction for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49, 49 (1990) (arguing for a new balancing approach emphasizing the human experience), and Riddle, *supra* note 2 (arguing for legislative restructuring of park management), and Robin Winks, *Dispelling the Myth*, NAT'L PARKS, July/Aug. 1996, at 52 (arguing that the tension is contrived because unimpairment concerns supersede all else). *See generally*, George Cameron Coggins, *Protecting the Wildlife Resources of National Parks from External Threats*, 22 LAND & WATER L. REV. 1, 15-27 (1987) (proposing legislative changes and approaches to reduce external threats); Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 296-312 (1994) (discussing the current state of ecosystem management under the Organic Act).

reviews the trend as it has appeared in pollution control legislation and describes the parallel trend in establishment legislation, highlighting similarities and differences. Section Three explores the reasons for the growth in statutory detail in environmental law, and establishment legislation in particular. In both the pollution control and national park context, specific congressional management mandates become more prevalent in legislation addressing second-generation problems. Second-generation problems are those that remain after Congress and agencies address the relatively low-cost, easy issues in a field. Section Four discusses the effects of the growth of statutory detail on the NPS. On balance, this growth frustrates the objective of systemic management of national park units. Section Five outlines a course of reform to facilitate systemic management.

SECTION I: LEARNING FROM NPS ESTABLISHMENT LEGISLATION

There are two reasons why scholars should turn their attention to NPS establishment legislation. First, from a purely descriptive point of view, establishment legislation indicates the changing attitude of Congress toward parks. Establishment legislation is an increasingly important but almost uniformly overlooked source of objectives for management of the national park system. One simply cannot understand the priorities and decisions that guide planning for the national park system without reviewing establishment legislation. Second, as a classic example of the proprietary strand of environmental law,⁷ establishment legislation provides an instructive contrast with pollution control law. Existing literature describing the reasons for and the effects of statutory detail in pollution control law provides a benchmark for evaluating the role of Congress in the management of the national park system. The study of establishment legislation highlights important areas of unity in these two disparate strands.

A. *The Role of Congress in the Management of the National Park System*

Any single statute is a snapshot of the congressional landscape at the time of its enactment. Important legislation, such as the Organic Act, conveys a great deal about the compromises and accommodations necessary to secure enactment. However, because Congress seldom amends overarching legislation, these statutes have limited use as indicators of trends. Establishment statutes, because Congress regularly enacts them, serve well as indicators of the expanding role of congressional involvement in national park system management. Perhaps the most important trend revealed by establishment legislation over the past few decades is the expansion in the number of units composing the national park system.⁸

Less noted but equally important, however, is the tendency in recent de-

7. The proprietary strand of environmental law governs management of publicly owned resources.

8. See *infra* note 53 and accompanying text.

cares for Congress to specify in greater detail the management tasks for newly established units of the national park system. In its simplest form, establishment legislation would specify the metes and bounds of an area to be reserved or acquired for management by the Service under the Organic Act.⁹ However, during the past twenty-five years, Congress has rarely limited its lawmaking to simple area designation in establishment legislation. As the discussion in Section Two of this article will show, Congress increasingly tailors management instructions to the Service for each unit established. Congress may specify management constraints on park administration with respect to visitor activities such as fishing, hunting, or grazing.¹⁰ It also may set out a particular process for planning, involving public hearings and consultations; and, it may require the management plan itself to address certain issues.¹¹

The greater congressional attention to management detail in establishment legislation gives rise to an increasingly important but frequently overlooked source of law for management of the national park system. Although the Organic Act remains an important interpretive tool, Service decision-makers must look first to establishment legislation to determine whether it speaks to an issue that an NPS unit needs to deal with.¹² In the past decade, commentators have increasingly called for management reform to strengthen the Service's efforts in preservation. As the biological diversity of the United States continues to erode, for instance, the national park system becomes ever more valuable to maintain the biological integrity of representative ecosystems throughout the country.¹³ An examination of establishment legislation reveals that simple clarification of the Organic Act to stress the preservation prong of the Service's dual mandate, or even amending the Organic Act to embrace explicitly biological diversity, would not be sufficient to achieve comprehensive reform. Establishment legislation, which guides the management and planning for individual parks would also need to be revisited.¹⁴

9. The establishment legislation for Haleakala National Park illustrates this bare-bones approach. See 16 U.S.C. § 396b, c (1994).

10. The establishment legislation for Great Basin National Park for instance, discusses zoning waters for fishing and limiting grazing. See *id.* § 410mm-1(b), (c) (1994).

11. The establishment legislation for Channel Islands National Park, for instance, provides a deadline for a management plan, requires consultation with certain interested parties, mandates certain contents of the plan, requires public hearings in particular locations to discuss certain issues, specifies low-intensity and limited entry management, prohibits entry fees, and mandates certain studies. See *id.* § 410ff, ff-2, ff-3, ff-6.

12. *Id.* § 1c(b); NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, MANAGEMENT POLICIES 2:6 (1988) [hereinafter MANAGEMENT POLICIES] ("Congressionally directed plans will be given a priority that enables their completion within the required time frame."). See, e.g., NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, FINAL GENERAL MANAGEMENT PLAN/ENVIRONMENTAL IMPACT STATEMENT: CARLSBAD CAVERNS 4 (1996) [hereinafter FINAL GENERAL MANAGEMENT PLAN] (recognizing establishment legislation to describe park purpose); Todd Wilkinson, *Crowd Control: With a Pilot Program at Arches National Park, the National Park Service Is Charting a Promising New Course for Visitor Management*, NAT'L PARKS, July/Aug. 1995, at 36, 39 (describing a resource management program in Arches National Park that begins with a re-examination of the establishment legislation).

13. See Robert B. Keiter, *The Old Faithful Protection Act: Congress, National Park Ecosystems, and Private Property Rights*, 14 PUB. LAND L. REV. 5, 5-8 (1993); Linder, *supra* note 6, at 63-69.

14. Organic Act reform could, say, mandate restoration and preservation of biological diver-

Furthermore, the current climate of fiscal austerity heightens the importance of establishment legislation. As federal budgets for NPS management constrict, the Service has ever-diminishing resources to dedicate to discretionary activities.¹⁵ Management mandates contained in establishment legislation are always a high funding priority compared to discretionary activities; but, as budgets become tighter, the mandates may be the only activities that the Service can afford. Even where the establishment legislation contains recommendations and not mandates, these expressions of congressional preference must be accorded high priority. As federal budgets chop lower priority programs off the Service's agenda, increasingly the activities actually funded will be those mentioned in establishment legislation. These establishment activities are the inner core of programs most protected from the fiscal ax.

Perhaps most important from a park management perspective, the trend of increasing congressional management through establishment legislation thwarts efforts to manage the national park system as a *system* rather than a mere collection of lands. Whether to conserve representative ecosystems or create an outdoor university for environmental and cultural appreciation, any comprehensive attempt at management of the national park system must stumble over the scores of hurdles erected by establishment legislation provisions. To some extent, this is precisely the design of increased congressional involvement in NPS unit management: to impede executive branch power to change the course of land management policy.

But, the units managed by the Service purport to be part of a national park *system*. A system is a group of interrelated elements forming a collective entity;¹⁶ a complex unity formed of many diverse parts subject to a common plan or serving a common purpose; an aggregation or assemblage of objects joined in interdependence.¹⁷ Establishing a framework within which units can interrelate is important not simply to fulfill the semantic promise of a national park system. It also allows each unit to contribute to a purpose broader than mere individual conservation of a unit's particular resources in its local context. At its outset, the national park system was infused with cultural meaning:

sity. If Congress provided that this mandate superseded all establishment legislation provisions incompatible with achieving the biological diversity goals, it might solve the problem of amending each establishment statute separately. This blanket solution, however, would not express congressional intent as clearly as identifying just which establishment legislation provisions should be deemed incompatible. In any event, the existence of the establishment legislation management provisions cannot be overlooked in any reform proposal. See *infra* Section IV for consideration of a wider range of possible Organic Act reforms.

15. When the NPS celebrated its 75th anniversary, it participated in an intensive evaluation of its performance, commonly identified by the name of the town where the park management symposium was held: Vail, Colorado. At the time, the results of the study were published in 1993, the core operating budget of the agency had "remained flat in real terms since 1983" while recreational visits to the system had risen 25 percent. NATIONAL PARK SERVICE STEERING COMMITTEE, NATIONAL PARKS FOR THE 21ST CENTURY: THE VAIL AGENDA 11 (1993) [hereinafter THE VAIL AGENDA]. In 1994, the Service fielded one ranger for every 80,000 visitors to the system, compared with one ranger for every 59,000 visitors in 1980. Michael Milstein, *National Park Service Is Put on a Starvation Diet*, HIGH COUNTRY NEWS, May 16, 1994, at 3.

16. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1823 (3d ed. 1992).

17. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2322 (1986).

monumentalism was the principle that linked park units.¹⁸ Over time, the principle of protecting healthy functioning ecosystems emerged as an aspirational, systemic theme.¹⁹ However, as this theme emerged, scores of new units were added to the system, many (such as the 112 historical parks and sites) with no monumental scenery or ecological significance.

In recent years, many critics of the national park system have called for paring down the number of units managed by the Service.²⁰ However, without a clear consensus on just what is the purpose of the system, any effort to decommission units will miss the mark. This points to the need for reform and clarification of the Organic Act to better describe the goals of the national park system. After that is accomplished, the critics who complain of dilution of the mission of the Service through pork-barrel parks can look to establishment legislation for clues as to which units are the least consistent with the broad charge of the NPS. Extensive management mandates in establishment legislation may be an indication that a unit does not fit very well within the existing framework of the national park system.

B. *The Instructive Contrast with Pollution Control Law*

The relative silence in legal scholarship on the trend toward more detailed management mandates in establishment legislation for the NPS contrasts starkly with the widely noted trend in pollution control law of more congressional involvement in regulatory matters. One task of this Article is to describe the extent to which these two trends are actually manifestations of a single development in the relationship between Congress and agencies in environmental law.²¹ The contrast in the literature reflects a wider gulf between the pollution control and the natural resource management strands of environmental law. This gulf frustrates the borrowing of insights from one strand that might apply to the other. This Article explores the extent to which fruitful cross-fertilization may result from efforts to reweave these divergent strands of environmental law.

Beginning with the proliferation of federal statutes regulating polluting activities in the early 1970s, environmental law commentary and practitioners have split into two distinct branches, or strands. The first, and newest, deals with pollution control. It is generally characterized by legislation authorized by the Commerce Clause²² that employs agencies to regulate activities to control

18. ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 33-35 (2d ed. 1987).

19. See *id.* at 65-67; Robert B. Keiter & Mark S. Boyce, *Greater Yellowstone's Future: Ecosystem Management in a Wilderness Environment*, in THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 379, 379-82, 402-07 (Robert B. Keiter & Mark S. Boyce eds., 1991).

20. See 141 CONG. REC. H9085 (daily ed. Sept. 18, 1995) (statement of Rep. Hansen); JAMES M. RIDENOUR, THE NATIONAL PARKS COMPROMISED: PORK BARREL POLITICS AND AMERICA'S TREASURES 16-19 (1994).

21. See *infra* Section III. The broader trend of increasing statutory detail outside of environmental law is undeniable but beyond the scope of this article.

22. U.S. CONST. art. I, § 8, cl. 3.

pollution. The other strand, with roots in the conservation movement of the early twentieth century, is generally characterized by legislation authorized by the Property Clause²³ that employs agencies to act as proprietors of natural resources. These distinctions are reflected in the organization of agencies as well as the committee structures of Congress.

Historically, pollution control law has focused on controlling use of the environment as a sink for environmentally undesirable substances. Natural resources law has focused on controlling use of the environment as a source of environmental goods. Increasingly, however, these distinctions are fading. One reason for this merging is that, after early, relatively easy successes, each strand now requires coordination with the other to achieve its goals. For instance, reducing water pollution in order to sustain high quality uses of a river may require restrictions on public logging in the watershed (natural resources law) as well as the application of best technology to dischargers along the river (pollution control law).²⁴ Similarly, maintaining viable populations of wildlife essential to a national park (natural resources law) may require restrictions on air emissions (pollution control law).²⁵

Another trend pulling together the divergent strands of environmental law is the heightened recognition of ecological integrity (or biological diversity) as a goal that undergirds the maintenance of environmental quality. Ecological integrity depends upon resource use that both designates for preservation core refuge areas and minimizes destructive impacts of commodity uses. It also depends upon pollution control that considers effects of pollutants on wildlife and plants as well as the more traditional human health criterion.²⁶ Many environmental law programs, such as regulating dredge or fill activities,²⁷ blur the distinction in the sense that they employ the tools of one field (such as permitting from pollution control) to zone and manage natural resources (such as wetlands). These programs complicate the simplified model of two distinct strands but nonetheless may be placed on a spectrum defined by the two branches.

23. U.S. CONST. art. IV, § 3, cl. 2.

24. Siltation is the leading cause of impairment of rivers and streams in the United States. U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL WATER QUALITY INVENTORY: 1992 REPORT TO CONGRESS 3. In its 1992 inventory, the Environmental Protection Agency [EPA] attributed impairment through silviculture as the source of seven percent, and resource extraction as the source of eleven percent, of the assessed river miles impaired by pollution. *Id.* at 20. In many states, these activities are managed on federal public lands. Another example of a public land management activity that impacts ambient environment quality is prescribed burning, which contributes to air pollution problems in many parts of the country. *See, e.g.*, GRAND CANYON VISIBILITY TRANSPORT COMMISSION, PROPOSED RECOMMENDATIONS ii, 49-51 (April 1996 Draft for Public Comment); JANICE PETERSON & DAROLD WARD, USDA FOREST SERVICE PACIFIC NORTHWEST RESEARCH STATION, AN INVENTORY OF PARTICULATE MATTER AND AIR TOXIC EMISSIONS FROM PRESCRIBED FIRES IN THE UNITED STATES FOR 1989.

25. Atmospheric deposition of mercury interferes with the reproductive success of Florida panthers in Everglades National Park. C. Facemire et al., *Impacts of Mercury Contamination in the Southeastern United States*, 80 WATER AIR & SOIL POLLUTION 923, 925 (1995).

26. Robert L. Fischman, *Biological Diversity and Environmental Protection: Authorities to Reduce Risk*, 22 ENVTL. L. 435, 487-88 (1992) (addressing biological resource protection through the use of EPA authorities).

27. 33 U.S.C. §§ 1344(a)-(t) (1994).

National park legislation, however, is not such a complicated program. In fact, it illustrates the classic natural resources law characteristics. The Service is an agency in the Interior Department with a proprietary ethic, operating under legislation that focuses on allowing certain uses of public resources. Therefore, the extent to which aspects of NPS law currently are converging with aspects of pollution control law demonstrates the strength of their fundamental affinity after twenty-five years of isolated specialization. The convergence is partly driven by issues such as the effects of polluting activities on NPS goals (e.g., visibility of scenic wonders in the Southwest), and the effects of NPS resource management on ambient environmental standards (e.g., winter air quality in West Yellowstone, Montana).

This Article reveals another respect in which NPS law illustrates convergence. Establishment legislation, the day-to-day, on-the-ground guidance for Service management, has come to resemble, more and more, pollution control statutes in its level of detail. Congress is far more engaged today in the details of park management in a manner similar to its increased involvement in setting pollution control standards. Certainly, some of the explanations for this trend in national park system management are not applicable to the pollution control context. However, many of them are. A more integrated view of environmental law aids in the understanding of both the similarities and differences.

Finally, this analysis of establishment legislation raises the normative question of how much detail Congress ought to inscribe in statutes delegating authority for agencies to implement. A pluralist model of interest group negotiation might suggest that there is little to say about what Congress should prescribe to agencies: whatever compromise is reached by a fair political process is appropriate for legislation. But, a comparison of Congress and agencies suggests that too much statutory detail impedes an agency from realizing its institutional strengths in technical expertise and flexibility. Section Four of this Article will outline the benefits and detriments of statutory detail in environmental law. The most serious problem with statutory detail in establishment legislation is that it thwarts systemic management for the national park units.

SECTION II: A DESCRIPTION OF THE TREND TOWARD GREATER STATUTORY DETAIL

Establishment legislation, at its core, delegates to the NPS authority to manage a unit of the national park system. But, at the same time that Congress gives power to the Service, it also limits that power through management mandates. In a similar way, in pollution control legislation, Congress typically creates the framework for a regulatory program and delegates its implementation to the Environmental Protection Agency (EPA). Increasingly, Congress specifies details about how, what, and when the EPA should regulate. This Section describes and compares the ways in which Congress has limited discretion of the NPS in establishment legislation and the EPA in pollution control statutes.

A. Congressional Management of Pollution Regulation

Many commentators have observed the rise of statutory detail in pollution control law.²⁸ For anyone who works with these "statutes of numbing complexity and detail"²⁹ it is a difficult trend to ignore. The increased congressional involvement in the details of pollution regulation takes many guises.

From the earliest days of modern federal pollution control legislation, Congress established deadlines to constrain the discretion of the EPA. Instead of delegating entirely to the agency the task of prioritizing activities, Congress mandated that certain actions, especially standard-setting, be conducted within certain time frames. The 1970 Clean Air Act established deadlines for overall compliance, and, within the framework of those deadlines, created strict timetables for state preparation and EPA review of implementation plans.³⁰ The 1972 Clean Water Act called for "fishable, swimmable" waters everywhere by July 1, 1983,³¹ and more detailed deadlines for the implementation of technology-based standards for over 500 separate categories of industries.³² By 1989, Congress and the courts had imposed 800 deadlines on the EPA.³³ Subsequent enactments brought yet more deadlines.³⁴

Most of these deadlines were too ambitious for the EPA to meet.³⁵ As a result, the agency missed many deadlines and also adopted more streamlined procedures for standard-setting than those "apparently contemplated by the statute."³⁶ Still, the deadlines aided congressional oversight of the EPA by

28. See, e.g., ROGER W. FINDLEY & DANIEL A. FARBER, *CASES AND MATERIALS ON ENVIRONMENTAL LAW* v (4th ed. 1995); ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 102-114 (2d ed. 1996); ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* xxvii-xxix (1992); 1 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW: AIR AND WATER* § 3.1A, at 43-44 (Supp. 1996); J. William Futrell, *Environmental Law History*, in *SUSTAINABLE ENVIRONMENTAL LAW* 3, 43 (Celia Campbell-Mohn et al. eds., 1993); Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819. See generally, Joseph L. Sax, *Environmental Law in the Law Schools: What We Teach and How We Feel About It*, 19 ENVTL. L. REP. 10,251 (1989) (discussing professors' frustration with teaching environmental law in light of complex, changing statutes).

29. Sax, *supra* note 28, at 10,251.

30. WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* § 3.6, at 198 (2d ed. 1994).

31. 33 U.S.C. § 1251(a)(2) (1994).

32. *Id.* § 1311(b) (1994).

33. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 323 (1991) (citing William K. Reilly, *The Turning Point: An Environmental Vision for the 1990s*, Address for the Marshall Lecture before the Natural Resources Defense Council, Nov. 27, 1989, in 20 ENV'T REP. (BNA) 1386, 1389 (Dec. 8, 1989)); see Shapiro & Glicksman, *supra* note 28, at 828-30 nn.42-48 (citing numerous deadlines established by Congress for the EPA).

34. RODGERS, *supra* note 28, § 3.1A, at 44 ("The 1990 Clean Air Act Amendments call for more than one hundred seventy-five new regulations, in excess of thirty guidance documents, some thirty-five studies and reports, and more than fifty new research and investigation initiatives."). A substantial number of these requirements have deadlines attached to them.

35. Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1651-52 (1991) (discussing the many reasons why agencies fail to meet deadlines).

36. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 122-36 (1977) (upholding the EPA's technology based effluent limitations under § 301 of the Clean Water Act even though they were promulgated without prior adoption of § 304 guidelines to set out the methodology the agen-

establishing clear benchmarks. They also facilitated environmental group monitoring and enforcement of the pollution control programs through citizen suit provisions.

Beginning in the 1980s, particularly with reauthorization legislation for the Resource Conservation and Recovery Act (RCRA)³⁷ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),³⁸ and continuing into the 1990s, with the Clean Air Act revision,³⁹ Congress began to employ with greater frequency statutory tools that restricted EPA discretion more than mere deadlines.⁴⁰ Congress employed "hammer" provisions to improve the EPA's compliance with deadlines. A hammer provision operates by providing a draconian (prohibitive) rule that will take effect on a particular date unless the agency has promulgated a substitute regulation. For instance, the 1984 RCRA amendments would have virtually banned the land disposal of any hazardous waste for which the EPA had not promulgated a treatment standard by a specified date.⁴¹ A hammer provision creates incentives for regulated entities to promote compromise to ensure swift agency action rather than delay. The hammer provisions of RCRA were entirely successful in spurring the EPA to meet the deadlines for promulgating treatment standards.⁴²

In some instances, Congress goes beyond time frames and specifies in detail which substances the EPA should regulate. This is what Professors Shapiro and Glicksman label restriction of regulatory discretion.⁴³ While Congress determines for the agency whether to regulate certain pollutants, it gives the agency discretion over how to regulate the pollutants. For instance, in the 1984 RCRA amendments, Congress specified particular solvents, dioxins, and "California-list" wastes for the EPA to establish treatment standards by certain dates.⁴⁴ The EPA, though, retained a great deal of control over the process for setting the treatment standards themselves. Similarly, the 1990 Clean Air Act amendments listed 189 hazardous air pollutants for the EPA to establish emission standards.⁴⁵ Before Congress established the list of pollutants, the EPA had promulgated emission standards for only six hazardous air pollutants since Congress first authorized it to regulate these contaminants.⁴⁶

In other instances, Congress specified *how* the EPA should regulate pollu-

cy would use in determining § 301 standards).

37. Hazardous and Solid Waste Amendments for 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6992 (1994)).

38. Pub. L. No. 96-510, 94 Stat. 2767 (1980); Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)).

39. Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended at 42 U.S.C. §§ 7401-7671 (1994)).

40. See, Lazarus, *supra* note 28, at 340-42 (commenting on congressional prescription).

41. 42 U.S.C. § 6924 (1994).

42. ROBERT L. FISCHMAN ET AL., AN ENVIRONMENTAL LAW ANTHOLOGY 130-31 (1996).

43. Shapiro & Glicksman, *supra* note 28, at 822.

44. 42 U.S.C. § 6924(e)-(f). "California-list" wastes were regulated at the time under a California state land disposal program. Schedule for Land Disposal, 51 Fed. Reg. 19,300 (1986) (codified as amended at 42 U.S.C. § 6924(d)).

45. 42 U.S.C. § 7412(b)(1). The EPA can modify or accept petitions to modify the list. *Id.* § 7412(b)(2).

46. See RODGERS, *supra* note 30, at 135-37.

tion. This type of statutory detail restricts what Shapiro and Glicksman call legislative discretion.⁴⁷ For instance, in the 1984 RCRA Amendments, Congress gave the EPA some discretion in classifying certain substances as hazardous. But, once the agency classifies a substance as hazardous, it must require tanks used to store the substance to obtain approved leak detection and other protective systems.⁴⁸

More commonly in pollution control statutes, when Congress restricts legislative discretion it also restricts regulatory discretion.⁴⁹ For instance, the 1984 RCRA amendments outright banned the disposal of bulk or noncontainerized liquid hazardous wastes in any landfill.⁵⁰ This approach leaves virtually no discretion for the agency outside of enforcement. Congress was exceedingly specific on what the regulations regarding disposal of containerized liquid hazardous wastes in landfills should state: "Such regulations shall also prohibit the disposal in landfills of liquids that have been absorbed in materials that biodegrade or that release liquids when compressed as might occur during routine landfill operations."⁵¹ In these 1984 RCRA Amendments, Congress went so far as to set out design standards for hazardous waste landfills.

B. *Congressional Management of NPS Units*

During the same period when modern federal pollution control law emerged and amassed layers of statutory details through amendments and reauthorizations, NPS establishment legislation similarly evolved toward greater statutory detail. Although the pollution control field has displayed a proliferation of statutes protecting various media and dealing with a diverse assortment of polluting activities, most of the statutory detail has encrusted on the dozen or so central statutes, which Congress revisits periodically for planned reauthorizations and occasional amendments. In contrast, although Congress has amended several existing NPS establishment statutes to add specific management mandates,⁵² it is legislation establishing new units that best manifests the trend toward increased statutory detail.

Before illustrating the trend of increased statutory detail in NPS establishment legislation, it is important to acknowledge two related, but different and more widely noted trends. First, in recent decades Congress has added a great

47. Shapiro & Glicksman, *supra* note 28, at 822.

48. 42 U.S.C. § 6924(o)(4); *see* Shapiro & Glicksman, *supra* note 28, at 837 n.86.

49. Shapiro & Glicksman, *supra* note 28, at 837.

50. 42 U.S.C. § 6924(c)(1).

51. *Id.* § 6924(c)(2).

52. Congress frequently amends establishment statutes to adjust boundaries. But, for the purposes of this Article, I am concerned only with amendments that mandate or constrain specific management activities. *See, e.g.,* Acadia National Park, Pub. L. No. 99-420, 100 Stat. 955 (1986) (codified as amended at 16 U.S.C. § 341 (1994)); Voyageurs National Park, Pub. L. No. 97-405, 96 Stat. 2028 (1983) (codified as amended at 16 U.S.C. § 160a-1 (1994)); Redwood National Park, Pub. L. No. 95-250, 92 Stat. 163, 163-66 (1978) (codified as amended at 16 U.S.C. § 79b (1994)); Canyonlands National Park, Pub. L. No. 92-154, 85 Stat. 421 (1971) (codified as amended at 16 U.S.C. § 271a (1994)).

many units to the national park system. A review of park unit establishment shows a surge in the early- and mid-1930s,⁵³ followed by lull until the modern heyday in the 1960s and 70s. The rate of new park unit establishment then dropped with the start of the Reagan Administration, but remained greater than the lull of the 1940s and 50s.

Second, the national park system has evolved from the basic bipartite design of parks and monuments to a diverse taxonomy of fifteen different categories, including a miscellaneous category for *sui generis* units such as the White House and Prince William Forest Park, Virginia.⁵⁴ Although these sheer numbers and categories account for much of the proliferation of provisions in the first part of the Conservation Title of the U.S. Code,⁵⁵ the focus of this Section is a shift in the content of the establishment legislation toward greater specificity in management instructions to the Service. Although this shift appears in the full range of national park system categories, this Section limits discussion of statutory detail to national parks and monuments.⁵⁶ Because these units are the oldest categories, there is a longer span of history to observe. Even more importantly, the purposes of these reservations tends to provide a better fit with the Organic Act goals than do any of the other categories.⁵⁷ If there is a true system to be discerned in the assemblage of national park units, it should be manifest in national parks and monuments.

Many of the statutory tools Congress uses to limit the proprietary discretion of the NPS bear a close resemblance to the ones in pollution regulation. For instance, Congress has increasingly employed deadlines to limit the Service's discretion.⁵⁸ Deadlines most frequently set time limits on the Service to publish mandated studies and management plans. The use of deadlines in establishment legislation was relatively rare until the 1980s.⁵⁹

53. Contributing significantly to this surge was the transfer of over 30 military parks and cemeteries from the War Department to the Service in 1933.

54. See *infra* text accompanying note 173 for a description of many of these categories.

55. See, e.g., 16 U.S.C. §§ 21-460 (1994).

56. Unlike the other categories of reserved units of the National Park System, which are designated by Congress, the President may exercise authority under the 1906 Antiquities Act to reserve as national monuments landmarks, structures, and other objects of historic or scientific interest situated on public lands. *Id.* § 431 note. Many national monuments, however, have establishment legislation endorsing their designation. Where they do not, the executive orders serve as substitutes for establishment statutes. A small number of national monuments are not managed by the Service and are therefore not part of the national park system. See, e.g., Proclamation No. 4611, 3 C.F.R. § 69 (1978) (establishing Admiralty Island National Monument, managed by the U.S. Forest Service); Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996) (establishing Grand Staircase-Escalante National Monument, managed by the Bureau of Land Management).

57. Some categories, such as national historic sites, national battlefields, and national memorials are too small to be key elements in a system. Other categories, such as military parks, scenic trails, and parkways serve purposes too specific to contribute significantly to understanding the systemic relationship between establishment legislation and the Organic Act. Still other categories, such as national lakeshores, national seashores, national preserves, and national recreation areas, are excluded from the analysis because they contain few units or are relatively recent inventions, and therefore frustrate reasonable comparison of trends through time. See generally 16 U.S.C. §§ 21-460 (identifying the park system categories).

58. MANAGEMENT POLICIES, *supra* note 12, at 2:6 ("Congressionally directed plans will be given a priority that enables their completion within the required time frame.").

59. An interesting topic for further research would be to determine how many of the con-

Just as Congress has restricted the EPA's regulatory discretion by specifying what substances will be subject to restrictions, so too it has restricted the Service's discretion by specifying what uses will be addressed by studies and plans. Commentators frequently call for more research on the condition of park resources and the effects of visitors and environmental stressors on the national park system.⁶⁰ Chronically tight budgets make the congressionally mandated studies the top funding priorities. Common subjects specified in establishment legislation for study are suitability of lands for inclusion in a park unit,⁶¹ potential wilderness designations,⁶² transportation,⁶³ and park resources.⁶⁴ In the absence of this statutory detail, the Service would have greater discretion for setting its research priorities systemically. In many cases, the subjects mandated by Congress reflect key issues that the Service would be remiss in neglecting, such as the study of rock art in Petroglyph National Monument or erosion and sedimentation in Redwood National Park. However, Congress does mandate action on other subjects that might not warrant a great deal of attention from the standpoint of system management in an era of fiscal austerity. One example is the 1988 mandate in amendments to the Olympic National Park establishment legislation to study the location, size, and costs of

gressional deadlines the NPS actually met. If the Service's compliance record is better than the EPA's, it may explain the absence of the more draconian tools, such as hammers, in the establishment statutes.

60. See COMMISSION ON RESEARCH AND RESOURCE MANAGEMENT POLICY IN THE NATIONAL PARK SYSTEM, NATIONAL PARKS: FROM VIGNETTES TO A GLOBAL VIEW 6-8 (1989) [hereinafter VIGNETTES] (calling for broad-based, on-going research by the NPS); THE VAIL AGENDA, *supra* note 15, at 32 ("The National Park Service must engage in a sustained and integrated program of natural, cultural, and social science resource management and research aimed at acquiring and using the information needed to manage and protect park resources."); Herman, *supra* note 2, at 6-11 (discussing that from the inception of the National Park System, preservationists warned of the dangers of excessive use); National Parks and Conservation Association, *Parks in the Next Century*, NAT. PARKS, Mar/Apr. 1988, at 18, 20 (calling for a threefold increase in natural, cultural, and social science research staff).

61. See, e.g., Grand Canyon National Park, Pub. L. No. 93-620, 88 Stat. 2090 (1975) (codified as amended at 16 U.S.C. § 228b(c) (1994)).

62. See, e.g., Death Valley National Park, Pub. L. No. 103-433, 108 Stat. 4485 (1994) (codified as amended at 16 U.S.C. § 410aaa (1994)); Conagree Swamp National Monument, Pub. L. No. 100-524, 102 Stat. 2606 (1988) (codified as amended at 16 U.S.C. § 431 note (1994)); Biscayne National Park, Pub. L. No. 96-287, 94 Stat. 600 (1980) (codified as amended at 16 U.S.C. § 410gg-3 (1994)); Channel Islands National Park, Pub. L. No. 96-199, 94 Stat. 77 (1980) (codified as amended at 16 U.S.C. § 410ff-5 (1994)); Voyageurs National Park, 84 Stat. 1972 (codified as amended at 16 U.S.C. § 160f(b)).

63. See, e.g., Grand Canyon National Park, 88 Stat. 2091 (codified as amended at 16 U.S.C. § 228b(c)) (regulating dangerous or detrimental aircraft use); Arches National Park, Pub. L. No. 92-155, 85 Stat. 422 (1971) (codified as amended at 16 U.S.C. § 272c (1994)) (designating driveways); Voyageurs National Park, 84 Stat. 1973 (1971) (codified as amended at 16 U.S.C. § 160j(1)) (authorizing provisions for roads); Canyonlands National Park, Pub. L. No. 88-590, 78 Stat. 938 (1964) (codified as amended at 16 U.S.C. § 271c (1994)) (providing for construction of roads).

64. See, e.g., Petroglyph National Monument, Pub. L. No. 101-313, 104 Stat. 276 (1990) (codified as amended at 16 U.S.C. § 431 note (1994)) (establishing a Rock Art Research Center); Channel Islands National Park, Pub. L. No. 96-199, 94 Stat. 75 (1980) (codified as amended at 16 U.S.C. § 410ff-2 (1994)) (providing for a natural resources study report); Capitol Reef National Park, Pub. L. No. 92-207, 85 Stat. 740 (1971) (codified as amended at 16 U.S.C. § 273b (1994)) (discussing grazing privileges); Redwood National Park, Pub. L. No. 90-545, 82 Stat. 931 (1968) (codified as amended at 16 U.S.C. § 79c(e) (1994)) (discussing erosion and sedimentation).

a year-round visitor center in the Kalaloch area.⁶⁵

Mandated studies on particular subjects are related to planning, because new information on the condition of resources or the effects of activities will raise issues that a plan must address. For instance, a study of the effects of grazing is likely to lead to information relevant to restricting, expanding, and/or zoning with respect to grazing in the park unit. Congress increasingly goes beyond specifying what the Service should study to list topics that the Service must address in its management plan. Beginning in 1978, Congress has required every unit of the national park system to prepare and "revise in a timely manner" a general management plan (GMP).⁶⁶ Congress requires that each plan include, but not limit itself to, four items: measures for resource preservation, indications of types and intensities of development, identification of and implementation commitments for visitor carrying capacities for all areas of the unit, and potential boundary modifications.⁶⁷ These 1978 requirements replaced an older provision which mandated plans that focused on development of visitor facilities.⁶⁸ After 1978, planning has been more broadly directed toward resource management and conservation. Although Service policy commits units to discuss a more detailed list of topics in plans, such as zoning and environmental impacts,⁶⁹ Congress supplements the four-part planning mandate only through establishment legislation.⁷⁰ Although Congress did not explicitly mandate that the GMPs bind the subsequent management actions of the Service, as it has done with planning mandates for the BLM and the Forest Service,⁷¹ the GMPs nonetheless play a principal role in guiding management.

The specific mandates for plan content in establishment legislation vary widely but demonstrate the same trend of increased congressional involvement over the past few decades. Congress began mandating the contents of plans two years before it required GMPs for all units.⁷² Since then, it has increasingly specified certain topics that must be addressed in the GMPs. Common topics include identification of adjacent lands necessary to accomplish the

65. Olympic National Park Wilderness Act, Pub. L. No. 100-668, 102 Stat. 3961 (1988).

66. 16 U.S.C. § 1a-7(b).

67. *Id.*

68. Act of Oct. 7, 1976, Pub. L. No. 94-458, 90 Stat. 1942 (codified as amended at 16 U.S.C. § 1a-7 (1994)).

69. MANAGEMENT POLICIES, *supra* note 12, at 2:8.

70. Congress has mandated additional details in comprehensive planning for units established or expanded under the Alaska National Interest Lands Conservation Act of 1980. 16 U.S.C. § 3191. Also, the National Environmental Policy Act requires that the Service consider a range of alternatives and their environmental consequences when proposing a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332 (1994). Service policy is to prepare environmental impact statements for all GMPs. 42 U.S.C. § 4332(2)(C).

71. 2 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 10F.02[3] (1995).

72. Congaree Swamp National Monument, 90 Stat. 2518 (codified as amended at 16 U.S.C. § 431 note) (requiring the Service to prepare a management plan indicating: property adjacent or related to the monument which is necessary to fulfill monument purposes, the number of visitors and the uses which the monument should accommodate, and the location and cost of facilities on the monument site).

purposes of the unit, location and cost of facilities, and the carrying capacity of the unit for different types of activities. These topics all would likely be addressed in a GMP even without a congressional mandate. Other establishment statutes, however, specify contents for the plan that seek to focus the attention of the Service on particular management issues that might not otherwise receive special consideration. The 1978 amendments to the Redwood National Park establishment legislation, in addition to mandating the usual topics to be covered in the GMP, also required the Service to include:

the specific locations and types of foot trail access to the Tall Trees Grove, of which one route shall, unless shown by the Secretary to be inadvisable, principally traverse the east side of Redwood Creek through the essentially virgin forest, connecting with the roadhead on the west side of the park east of Orick.⁷³

This is an example of deeper congressional involvement in park management. Similarly, Congress required Petroglyph National Monument to prepare a GMP containing an implementation plan for the American Indian Religious Freedom Act of 1978,⁷⁴ proposals for a visitor's center, and a plan for a Rock Art Research Center.⁷⁵

Another type of congressional mandate specifies not what the subjects of park unit management should be but rather how the Service should engage in management and planning decisionmaking. This type of statutory detail is analogous to the restrictions on legislative discretion of the EPA discussed above.⁷⁶ Congress imposes procedural mandates primarily in three ways. First, many establishment statutes require Service *consultation* with a state or tribe in preparing a management plan⁷⁷ or a study.⁷⁸ The establishment legis-

73. 16 U.S.C. § 79m(b)(4) (1994).

74. 42 U.S.C. § 1996, as amended by Pub. L. No. 103-344, 108 Stat. 3125 (1994).

75. 104 Stat. 276 (codified as amended at 16 U.S.C. § 431 note (1994)).

76. See *supra* Section IIA.

77. See Joshua Tree National Park, Pub. L. No. 103-433, 108 Stat. 4487 (1994) (codified as amended at 16 U.S.C. § 410ff-3(c) (1994)) (requiring that the Secretary of State consult with the Metropolitan Water District in developing emergency access plans); Petroglyph National Monument, 104 Stat. 272 (1990) (codified as amended at 16 U.S.C. § 461 note (1994)) (stating that the management plan be prepared in consultation with the New Mexico Preservation Office, an advisory committee, and other interested parties); El Malpais National Monument, Pub. L. No. 100-225, 101 Stat. 1539 (1987) (codified as amended at 16 U.S.C. § 460uu-41 (1994)) (requiring management plans to be developed in consultation with the Advisory Council on Historic Preservation, local Indian people, the New Mexico Historic Preservation Office, and the State of New Mexico); Acadia National Park, Pub. L. No. 97-335, 96 Stat. 1627 (1982) (codified as amended at 16 U.S.C. § 341 note (1994)) (requiring the preparation of a report establishing the carrying capacity for the Isle au Haut portion of Acadia National Park in consultation with the town); Channel Islands National Park, 94 Stat. 76 (codified as amended at 16 U.S.C. § 410ff-3(c)) (stating that the Secretary must consult with the Nature Conservancy and the State of California in preparing a GMP); Congaree Swamp National Monument, 90 Stat. 2517 (1976) (codified as amended at 16 U.S.C. § 431 note (1994)) (requiring consultation with the governor of South Carolina in preparing GMP).

78. See Channel Islands National Park, 94 Stat. 75 (codified as amended at 16 U.S.C. § 410ff-2(a)) (requiring consultation with the Secretary of Commerce, the State of California, and others on a study of natural resources); Arches National Park Establishment Act, 85 Stat. 422 (codified as amended at 16 U.S.C. § 272) (requiring consultation with appropriate State and Federal entities on a study of road alignments); Canyonlands National Park, 85 Stat. 421 (codified as

lation for Great Basin National Park is typical, requiring consultation with appropriate state agencies before implementation of the GMP.⁷⁹ Frequently, Congress will require the Service to consult with an appropriate state agency before restricting fishing in a park unit.⁸⁰

Second, a strong trend in recent establishment legislation (particularly since 1986) is the creation of *advisory commissions* for unit management.⁸¹ Congress can shape national park system management by specifying the compositions of advisory committees to oversee and offer management advice to park units. For instance, the establishment legislation for the Little Bighorn Battlefield National Monument stipulates that its eleven-member advisory commission include six representatives from Native American tribes that participated in the Battle of Little Bighorn or now live in the area, two nationally recognized artists, and three individuals with knowledge of history, historic preservation and landscape architecture.⁸² Advisory commissions generally are given the duty to advise the NPS on matters of park management,⁸³ as well as to help develop and implement a new or revised GMP.⁸⁴

Third, and less commonly, establishment legislation may require the Service to *report back* to Congress itself.⁸⁵ For example, the 1978 Redwood National Park amendments required that the NPS submit its GMP to the relevant House and Senate committees by Jan. 1, 1980.⁸⁶ In addition, Congress mandated the Service to submit annual written reports to Congress for ten years on

amended at 16 U.S.C. § 271) (requiring consultation with the Secretary of Commerce, the State of California, and others on a study of natural resources).

79. Great Basin National Park, Pub. L. No. 99-565, 100 Stat. 3181, 3182 (1986) (codified as amended at 16 U.S.C. § 410mm-1 (1994)) (prohibiting adoption of GMP provisions relating to grazing, and fish/wildlife management until after consultation with the State agency having jurisdiction over fish and wildlife).

80. See Great Basin National Park, 100 Stat. 3181; Biscayne National Park, 94 Stat. 599 (codified as amended 16 U.S.C. § 410gg-2(a)); Congaree Swamp National Monument, 90 Stat. 2517 (codified as amended at 16 U.S.C. § 410mm-1); Voyageurs National Park, 84 Stat. 1970 (1971) (codified as amended at 16 U.S.C. § 160g).

81. See Death Valley National Park, 108 Stat. 4487 (codified as amended at 16 U.S.C. § 410aaa-6); Joshua Tree National Park, 108 Stat. 4489 (codified as amended at 16 U.S.C. § 410aaa-27); Little Bighorn Battlefield National Monument, 105 Stat. 1631 (1991) (codified as amended at 16 U.S.C. § 431 note); American Samoa National Park, 102 Stat. 2879, 2882 (1988) (codified as amended at 16 U.S.C. § 410qq-2(g)); Poverty Point National Monument, 102 Stat. 2803, 2804 (1994) (codified as amended at 16 U.S.C. § 431 note (1994)); Acadia National Park, Pub. L. No. 99-420, 100 Stat. 955, 959 (1986) (codified as amended at 16 U.S.C. § 341 note).

82. Little Bighorn Battlefield National Monument, 105 Stat. 1631 (1991) (codified as amended at 16 U.S.C. § 431 note).

83. See American Samoa National Park, 102 Stat. 2882 (codified as amended at 16 U.S.C. § 410qq-2(g) (1994)); Acadia National Park, 100 Stat. 959 (1986) (codified as amended at 16 U.S.C. § 341 note).

84. See Joshua Tree National Park, 108 Stat. 4489 (codified as amended at 16 U.S.C. § 410ff-27); Death Valley National Park, 108 Stat. 4487 (codified as amended at 16 U.S.C. § 410aaa-6).

85. See Petroglyph National Monument, 104 Stat. 276 (codified as amended at 16 U.S.C. § 431 note) (requiring report to Congress on location, condition, and technical assistance needed for care of related rock art located outside of the monument boundaries); Grand Canyon National Park Enlargement Act, 88 Stat. 2091 (codified as amended at 16 U.S.C. § 228g) (requiring report to Congress of any dangerous or detrimental aircraft use); Canyonlands National Park, 85 Stat. 42 (codified as amended at 16 U.S.C. § 271f) (requiring report to Congress on road alignments).

86. 16 U.S.C. § 79m(b).

the status of: payment for property acquired; actions taken regarding land management practices and watershed rehabilitation efforts; efforts to mitigate adverse economic impacts; special employment requirements; a new bypass highway and an agreement for the donation of state lands; and the GMP.⁸⁷

Finally, just as Congress has become more assertive by regulating directly in pollution statutes, it has also in some establishment legislation made zoning and management decisions directly. This contrasts with the traditional, and still-predominant, approach of delegating management decisions in reliance on the expert judgment of the Service and/or on the procedural safeguards of planning and consultation. Consider Congress's approach to the question of an entrance fee to Channel Islands National Park. Use of the approaches described above might require the NPS to study the issue of an entrance fee, or even to make the fee decision in consultation with an advisory committee or some other entity (such as a state agency). Instead, though, Congress simply declared: "Notwithstanding any other provision of law, no fees shall be charged for entrance or admission to the park."⁸⁸

In the western contiguous states, newly established or enlarged parks and monuments often occur where ranchers have existing federal permits to graze cattle. Congress frequently specifies precisely how much longer grazing will be allowed in these units.⁸⁹ Although the Service retains authority to regulate the conditions of grazing, Congress here makes the principal management decision of condoning grazing use for a specified period of time.

Two observations emerge from this Section's exploration of statutory detail in establishment legislation. First, and more important, the establishment statutes manifest a strong trend of increased congressional involvement in national park system management. This Section discussed only provisions unambiguously containing requirements or mandates. These provisions contain the statutory term "shall." There are additional provisions in establishment legislation that illustrate the trend of statutory detail but that use the more permissive terms, "may" or "is authorized to."⁹⁰ Congress likely uses these

87. *Id.* § 79m(a).

88. *Id.* § 410ff-6 (1994).

89. *See, e.g.*, Death Valley National Park, 108 Stat. 4486 (codified as amended at 16 U.S.C. § 410aaa-5) (stating that "grazing shall continue at no more than the current level"); El Malpais National Monument, 101 Stat. 1542 (codified as amended at 16 U.S.C. § 460uu-32) (extending existing permits until December 31, 1997); Great Basin National Park, 100 Stat. 3182 (codified as amended at 16 U.S.C. § 410mm-1) (allowing grazing to the same extent as permitted on July 1, 1985); Fossil Butte National Monument, 86 Stat. 1069 (grazing shall be allowed for at least ten years); Capitol Reef National Park, 85 Stat. 740 (codified as amended at 16 U.S.C. § 273(b)) (grazing permits to be allowed for one lease period with the possibility for one renewal); Arches National Park, 85 Stat. 422 (codified as amended at 16 U.S.C. § 272b) (permitting grazing privileges to continue for the remainder of the term and one subsequent period); Canyonlands National Park, 78 Stat. 938 (codified as amended at 16 U.S.C. § 271b) (permitting grazing privileges to continue for the remainder of the term and one period subsequent).

90. *See, e.g.*, Petroglyph National Monument, 104 Stat. 272 (codified as amended at 16 U.S.C. § 431 note) ("is authorized to undertake research and assist in the management and protection of Rio Grande style rock art sites"); Everglades National Park and Expansion Act, 103 Stat. 1947 (codified as amended at 16 U.S.C. § 410r-6) ("is authorized to enter" into concession contracts with owners of tour and airboat facilities); North Cascades National Park, 102 Stat. 3963 (codified as amended at 16 U.S.C. § 1132 note) ("is authorized" to remove and dispose of trees to

terms to indicate a desire for, without actually mandating, the Service to engage in a particular task. Congress may even express this desire explicitly, as when it states that the Service "is authorized and encouraged to enter into cooperative agreements . . . for the protection and interpretation of the Grand Canyon."⁹¹ Even where Congress does not link permissive language with explicit encouragement, it still may influence NPS management. The Service generally seeks the good favor of Congress, particularly for appropriations or boundary expansion. The Service likely would try to avoid harsh congressional oversight hearings. Noncompliance with permissive statutory details in itself may not create problems for the agency in Congress. However, the Service surely would first seriously consider management preferences expressed in establishment legislation and then establish a record to justify noncompliance. This, in itself, helps shape national park system management.

Second, the statutory detail Congress has incorporated into establishment legislation parallels in kind the statutory details circumscribing the EPA's discretion in implementing pollution regulation. The common use of deadlines, the specification of what substances or subjects to address in implementation and management, and the specification of how the agencies are to proceed with their tasks suggest that the better ventilated discussion of the increased statutory detail in pollution control may illuminate issues associated with management of the national park system. The next Section reviews explanations offered to explain this trend in the pollution control field and discusses whether they may aid in understanding the similar trend in NPS legislation. It also offers an explanation that ties together both strands of environmental law.

protect power lines); Olympic National Park, 102 Stat. 3961 (codified as amended at 16 U.S.C. § 1132 note) ("is authorized" to upgrade, maintain, and replace an underground pipeline); El Malpais National Monument, 101 Stat. 1548 (codified as amended at 16 U.S.C. § 460mm-1) ("is authorized and encouraged" to enter into cooperative agreements with other Federal, state, and local agencies, Indian tribes, and non-profit entities; "is authorized" to establish an advisory committee comprised of Indians to help implement access rules); Great Basin National Park, 100 Stat. 3182 (codified as amended at 16 U.S.C. § 410mm-2) ("may" maintain existing water-related range improvements); Kenai Fjords National Park, 94 Stat. 2379 (codified as amended at 16 U.S.C. § 431 note) ("is authorized" to develop access to and allow use of mechanized equipment on the Harding Icefield); Grand Canyon National Park Enlargement Act, 88 Stat. 2090 ("is authorized to" enter into cooperative agreements with other entities to protect the canyon); Voyageurs National Park, 84 Stat. 1970 (codified as amended at 16 U.S.C. § 160 (1994)) (authorizing roads as are needed for public access); Voyageurs National Park, 84 Stat. 1972 (codified as amended at 16 U.S.C. § 160 (1994)) ("may" include subjects of winter sports, seaplane use, and watercraft use in comprehensive plan; "is authorized" to make provisions for any roads as are necessary for public access); Great Smoky Mountains National Park, 83 Stat. 100 (codified as amended at 16 U.S.C. § 403h-15) ("is authorized to" convey rights-of-way to Tennessee; "is authorized to" construct an entrance to the park in North Carolina); Canyonlands National Park, Pub. L. No. 88-590, 78 Stat. 934 (codified as amended at 16 U.S.C. § 271) ("may" select the location(s) for entrance road(s) and construct any structure necessary for the park; "is authorized" to consult with the Secretary of Agriculture on the location and extension of a forest development road); Carlsbad Caverns National Park, 77 Stat. 818 (codified as amended at 16 U.S.C. § 407e-407h) ("is authorized to" convey a right-of-way to New Mexico); Wupatki National Monument, Pub. L. No. 87-136, 75 Stat. 337 ("may" accept donation of a road right-of-way).

91. 16 U.S.C. § 228e (1994).

SECTION III: EXPLANATIONS FOR THE GROWTH IN STATUTORY DETAIL

The literature that describes the trend of increasing statutory detail in pollution control law also offers a range of explanations for the trend. While many of these explanations apply as well to the parallel trend in national park system management, a comparison of the two strands of environmental law reveals a broader pattern that accounts for increasing statutory detail. In both the pollution control and the national park system legislation, increased statutory detail is associated with second-generation problems. Second-generation problems arise after initial approaches that address abatement or conservation have reached the limits of relatively low-cost solutions. This Section will describe the transition from first- to second-generation legislation after first reviewing the more frequently offered, specific explanations for increased statutory detail.

As a preliminary matter, we can reject some explanations for the rise in statutory detail in the pollution control area which are not applicable to national park establishment legislation.⁹² Professors Shapiro and Glicksman explain increased congressional management of the EPA beginning in the 1980s, in part, as a reaction to shifts in oversight by federal courts and the president's Office of Management and Budget (OMB). President Reagan's appointments of judicial conservatives, increased deference to agencies under these judges and the *Chevron*⁹³ doctrine, and tightening standing requirements for citizens seeking review of agency action⁹⁴ all left a void in judicial oversight of the EPA that Congress sought to fill by establishing more specific requirements in legislation.⁹⁵ At the same time, Congress sought to counter-balance more intensive scrutiny of EPA's proposed regulations by the OMB, an executive

92. We can also put aside a possible explanation for statutory detail generally, which has little application in pollution control law. When Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 959 (1983), declared unconstitutional the legislative veto, Congress lost a tool of retrospective oversight. Although this might contribute somewhat to the greater prospective limitations through statutory mandates, the legislative veto was not a common tool in pollution control law before *Chadha*. ENVIRONMENTAL LAW INSTITUTE, 1 LAW OF ENVIRONMENTAL PROTECTION 4-9, 4-10 (Sheldon M. Novick, ed. 1996) (citing only two legislative veto provisions in pollution control law: the Federal Insecticide, Fungicide, and Rodenticide Act § 25, 7 U.S.C. § 136(w) (1994), and the Comprehensive Environmental Response, Compensation, and Liability Act § 305, 42 U.S.C. § 9655 (1994)). In natural resources law, the legislative veto appears significantly and repeatedly in the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1994), but I found no trace of it in NPS establishment legislation. Retrospective oversight through reporting requirements, however, does appear in establishment legislation. See, e.g., Petroglyph National Monument, 104 Stat. 276 (requiring a report to congressional committees of the location, condition, and the technical assistance needed for care of related rock art located outside of the monument boundaries); Redwood National Park, 92 Stat. 170 (codified as amended at 16 U.S.C. § 79m) (requiring Service to submit plan to congressional committees); Grand Canyon National Park Enlargement Act, 88 Stat. 2090 (codified as amended at 16 U.S.C. § 228g) (requiring a report to Congress of any dangerous or detrimental aircraft use); Canyonlands National Park, 85 Stat. 421 (codified as amended at 16 U.S.C. § 271f) (requiring a report to Congress on a road alignment study).

93. *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984).

94. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Fed.*, 497 U.S. 871 (1990).

95. Shapiro & Glicksman, *supra* note 28, at 845-70.

office closely controlled by the White House and widely viewed as hostile to strict pollution abatement.⁹⁶

While these developments certainly can spur Congress to assert greater control over agency behavior through more specific mandates in statutes, they are of little relevance to national park system management. Proprietary management of federal resources has traditionally enjoyed greater deference than the regulation of the private sector that EPA conducts. In particular, the Service has never been a popular target for judicial review. Interest groups hardly relish the prospect of challenging the agency that retains a wholesome reputation in the public mind. Moreover, the Service has always enjoyed great deference by the federal courts, even as other land management agencies have lost some of their traditional insulation from judicial oversight.⁹⁷ Therefore, the trends that diminished the oversight role of courts over the EPA have had little impact on NPS behavior, which has been enjoined by courts only in exceptional cases.⁹⁸

Furthermore, OMB oversight has focused on "notice and comment," informal rulemaking under section 553 of the Administrative Procedure Act.⁹⁹ Most management decisions and all national park unit GMPs are made outside of this regulatory framework.¹⁰⁰ So, the Service has not faced the intense oversight by the OMB that has shaped the behavior of the EPA.

Another role played by the OMB, however, the compilation of the president's proposed federal budget, has had some, though minor, relevance in explaining increased statutory detail. Historically, an important tool of congressional control over agency behavior has been appropriations. If Congress is displeased with the direction an agency is taking, it may threaten to reduce the agency's budget. This tool, however, became less effective in the environmental area throughout the Reagan and Bush administrations because budget requests by the executive branch consistently fell below actual appropriations. The congressional threat of reducing budgets is a less effective tool when the administration actually wants lower appropriations than Congress in the first place. With reduced maneuverability in the appropriations process for shaping environmental policy, Congress might turn to actual authorization legislation in order to influence agencies. This may explain some of the increased statutory detail in both pollution control and in NPS establishment legislation.

Regardless of the disparity between executive budget requests and con-

96. *Id.* at 842; Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 194-97 (1991); see *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (providing a specific example of OMB hostility to environmental regulation). Recent charters for OMB oversight can be found in Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *reprinted as amended* in 5 U.S.C. § 601 (1994); and Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993), *reprinted as amended* in 5 U.S.C. § 601.

97. See 2 COGGINS & GLICKSMAN, *supra* note 71, at §§ 10F.02[3], 14.01, 14.02[2].

98. See, e.g., *Sierra Club v. Lujan*, 716 F. Supp. 1289, 1293 (D. Ariz. 1989) (enjoining the Service from allowing construction of new facilities on the north rim of the Grand Canyon until it complied with the National Environmental Policy Act and its own management policies).

99. Administrative Procedure Act, 5 U.S.C. § 553 (1994).

100. *Id.* § 553(a)(2).

gressional appropriations, the overall fiscal austerity of the past fifteen years created a vicious cycle that now drives Congress to impose ever more mandates on both the EPA and the NPS. As budgets get tighter, agencies are able to do less.¹⁰¹ Therefore, statutory mandates, which are always a priority for agencies, command a greater proportion of total agency activities. With a diminishing likelihood that agencies will have the resources to engage in discretionary tasks, a member of Congress seeking to influence an agency to do something will be more motivated to place a mandate in legislation than to lobby the agency informally. The cycle worsens as Congress legislates more mandates and squeezes further the agency's ability to engage in discretionary activities. This dynamic has been noted in the context of legislative deadlines for the EPA.¹⁰² Every time Congress imposes a new deadline on the EPA, the agency is less able to accomplish tasks for which no statutory deadline exists. Therefore, Congress must continue to impose deadlines whenever it wants the agency actually to do something. The EPA priorities are now so driven by meeting congressional deadlines that the agency cannot comprehensively plan effectively to implement broad goals, such as reducing exposure to contaminants that generate the greatest health risks.¹⁰³ The growth in statutory detail in NPS establishment legislation evinces this same dynamic, especially in the deadline and mandated study provisions.

The most widely noted reason why Congress has not given the EPA flexibility to set its own priorities based on broad principles, such as risk reduction, is distrust of the ability and the resolve of the agency to achieve the goals of environmental protection. Although distrust is a characteristic tension of divided government, when one party controls the White House and another the Congress, the policies and appointments of the Reagan administration raised the level of distrust in the environmental area to unprecedented heights.¹⁰⁴ Professors Shapiro and Glicksman document the extensive legislative history showing that Congress believed that the EPA refused to act when it should have, delayed regulations, and implemented pollution control programs in a manner inconsistent with the intent of authorizing legislation.¹⁰⁵ The scandals involving EPA Administrator Anne Gorsuch-Burford and her deputies also severely eroded congressional trust.¹⁰⁶ The polarization of congressional-executive relations in the early 1980s accelerated the momentum of the trend of increased statutory detail.

101. See *supra* note 15 and accompanying text (describing NPS budget trends).

102. William D. Ruckelshaus, *Risk, Science, and Democracy*, ISSUES IN SCI. & TECH., Spring 1985, at 19.

103. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR THE ENVIRONMENTAL PROTECTION AGENCY 8, 131 (1995).

104. James J. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351, 352-53 (1986); Percival, *supra* note 96, at 147-54; Erik H. Corwin, Note, *Congressional Limits on Agency Discretion: A Case Study of the Hazardous and Solid Waste Amendments of 1984*, 29 HARV. J. ON LEGIS. 517, 524-28 (1992). The antecedents to the rise in congressional distrust of the EPA in the 1980s date back to the birth of the agency. See Lazarus, *supra* note 33, at 323.

105. Shapiro & Glicksman, *supra* note 28, at 826-27.

106. Futrell, *supra* note 28, at 50.

Although Congress distrusted Secretary of the Interior James Watt to implement an environmental agenda at least as much as Anne Gorsuch-Burford, the NPS did not become a lightning rod for implementation controversy to the extent that the EPA did. Certainly, the Department of the Interior made a number of controversial decisions that undercut national park system stewardship.¹⁰⁷ However, with its longer tradition of non-partisan professionalism, its widespread public support for conservation, and its less threatening proprietary mandate, the NPS found itself more insulated from both stark policy reversals and intense congressional reaction than the EPA.¹⁰⁸ Still, it is likely that the spirit of distrust in the pollution control area permeated NPS establishment legislation somewhat and amplified the trend toward statutory detail.

Another contributing factor noted in the pollution control area also helps explain increased congressional management of the national park system. Congress legislates more detailed management mandates because it can. The proliferation of professional committee staffs in all areas of national legislation increases statutory detail.¹⁰⁹ Longstanding or ambitious committee or subcommittee chairs may also sponsor investigations and long-term projects that lead to detailed legislation.¹¹⁰

For all the applicability of the manifold explanations for statutory detail in pollution control law to NPS establishment legislation, there are still a couple of missing pieces to the puzzle. One explanation for the statutory detail in establishment legislation relates to the Organic Act, which has no analog in pollution control. It may well be that the tension between providing for enjoyment (recreation) and leaving units unimpaired (preservation) creates an impossible paradox for the NPS to solve. When important issues are irreconcilable under the Organic Act (including the 1978 clarifying amendments), Congress needs to intervene with specific instructions for the Service. This may be an important factor in major NPS issues, such as restoration of the Everglades.¹¹¹ However, it fails to explain the majority of the statutory mandates

107. JONATHAN LASH ET AL., *A SEASON OF SPOILS: THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT* 279-298 (1984); John Kenney, *Interior Sub Rosa: Political Appointees Use the Parks as Pawns*, NAT. PARKS, Sept./Oct. 1989, at 12.

108. Congress legislated, in part, in response to a high level of public concern about the dangers of toxic pollution. See Shapiro & Glicksman, *supra* note 28, at 842; Corwin, *supra* note 104, at 532.

109. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 43-45 (1982); James P. Hill, *The Third House of Congress Versus the Fourth Branch of Government: The Impact of Congressional Committee Staff on Agency Regulatory Decision-Making*, 19 J. MARSHALL L. REV. 247, 247-48 (1986); Shapiro & Glicksman, *supra* note 28, at 841.

110. Examples include former representatives Philip Burton and John Seiberling in the area of NPS establishment legislation and former representative James Florio in the area of hazardous waste legislation. Congressional oversight of the EPA is particularly zealous. Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA*, 54 LAW & CONTEMP. PROBS. 205, 206, 210-12 (1991).

111. The 1989 amendments to the establishment legislation expanded the size of Everglades National Park; closed the park to the operation of airboats, subject to certain variances; and modified water delivery projects in the region to restore the natural hydrologic conditions. Everglades National Park, 103 Stat. 1946 (codified as amended at 16 U.S.C. §§ 410r-5 to 410r-8).

that involve less profound issues of national park system management, such as the establishment of advisory commissions or the preparation of particular studies. It does highlight, though, the close relationship between the lack of statutory detail in the overarching mandate and the need for greater elaboration in the implementing statutes.

The second missing piece of the puzzle of statutory detail more robustly applies to both pollution control and natural resource management. In both areas, Congress turns to greater statutory detail after it has delegated to agencies the straightforward, "first-generation," problems. "Second-generation"¹¹² problems are those that remain after Congress and agencies address the relatively lower-cost, easier issues in a field. In the pollution control context, the classic first-generation problems were the stationary point sources of contamination that were employing virtually no abatement technology before 1970. Professor Elliott observes that these "easy sources: the large coal-fired utility boilers, the large chemical plants, the refineries," have been successfully regulated to reduce large discharges.¹¹³ We are then left with "small, diffuse sources that will prove very difficult to regulate using traditional techniques."¹¹⁴ When Congress legislated in general terms that the EPA should begin requiring polluters to apply abatement technology, the "first burst" of marginal environmental improvement was great. However, as Professor Krier observes, the next increment of improvement is more difficult to accomplish due, in part, to increased marginal costs of abatement and, in part, to polluters learning how to evade expensive regulation.¹¹⁵ Therefore, Congress returns to draft more elaborate schemes to catch evaders, squeeze less environmental improvement out of greater marginal costs, exempt industries that face severe financial hardship, and experiment with new programs to prospect for new "first bursts."

In the NPS context, the first-generation problems were the earlier-designated units which had fewer existing uses that would be incompatible with national park system status.¹¹⁶ There have always been some political conflicts over foreclosing potential economic uses of lands designated as national

112. Other commentators have used the terms "first-generation" and "second-generation" to refer to different aspects of environmental law. See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1352-55 (1985) (describing two phases of a reform proposal to create a market-based system of pollution control through tradeable permits).

113. E. Donald Elliott, *Environmental Law at a Crossroad*, 20 N. KY. L. REV. 1, 10 (1992).

114. *Id.*; see also, Samuel A. Bleicher, *Regulation of Pollution: Is the System Mature or Senile*, 10 VA. ENVTL. L.J. i, iii (1990) (noting that the first wave of environmental statutes "quickly ran up against many economic and technical realities that made enforcement politically unacceptable").

115. See James E. Krier, *The Political Economy of Barry Commoner*, 20 ENVTL. L. 11, 17, 23-24 (1990) ("[G]enerally speaking, the marginal costs of control go up the more one has already controlled. It is one thing to cut emissions from a source by ninety percent, for example, and quite another to cut the remaining ten percent by ninety percent again . . ."); Arnold Reitze Jr., *Environmental Policy—It Is Time for a New Beginning*, 14 COLUM. J. ENVTL. L. 111, 116-117 (1989).

116. See generally JOHN ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* (1961) (presenting a thoroughly comprehensive history of park administration that describes all of the serious conflicts affecting the first-generation park units).

parks or monuments. Alfred Runte makes a strong case for the "worthless lands" hypothesis, that Congress was willing to withdraw from economic development as national parks only those areas for which there was no evidence of commercial value for mining, farming, and logging.¹¹⁷ He reviews the legislative history of a number of early parks, including Yellowstone,¹¹⁸ Sequoia,¹¹⁹ Mt. Rainier,¹²⁰ and Crater Lake,¹²¹ to show that boundaries and park proponents' arguments were crafted to avoid the taint of economic development obstructionism.

But, beginning in the 1960s and 1970s, conflicts which had been mapped outside of park boundaries began creeping into existing units as well as creating problems for additions to the park system. For instance, in 1933, when President Hoover established Death Valley National Monument, a portion of the eastern border was shifted to exclude an existing mining operation.¹²² By 1975, Tenneco Corp. was poised to increase mining on claims it owned within the monument. Congress held hearings on mining in the parks and enacted the National Park Mining Regulation Act.¹²³ The legislation struck a compromise between mining interests and preservationists, who sought a prohibition of mining in the national park system. For Tenneco, the new law did little more than regulate its mining, which it could continue on all claims it was currently working.¹²⁴ Congress also required the Service to identify portions of the monument that might be abolished "to exclude significant mineral deposits and to decrease possible acquisition costs."¹²⁵ Alfred Runte notes that "[t]hose portions of Death Valley that survived, in short, apparently would contain nothing of lasting economic value."¹²⁶

Over the past thirty years, as economic development and other forms of use incompatible with national park system status have pervaded more of the public domain, the conflicts over uses to be allowed in new units have increased. Congress already has added the easy lands to the national park system.¹²⁷ Newly designated units are more difficult in the sense that there are more stakeholders who currently use the land. More people have more expectations of continued use of the public lands than ever before. Users of lands subject to proposed establishment legislation, which might interfere with or prohibit continued use, face an easier task organizing to gain special provi-

117. RUNTE, *supra* note 18, at 1-9.

118. *Id.* at 48-55.

119. *Id.* at 60-64.

120. *Id.* at 65-67.

121. *Id.* at 67-68.

122. *Id.* at 193.

123. 16 U.S.C. §§ 1901-1912 (1994).

124. The statute gave the Service authority to regulate mining to ensure that it is conducted so as to prevent or minimize damage to the environment and park resources. *Id.*

125. Act of Sept. 28, 1976, Pub. L. No. 94-429, 90 Stat. 1342 (codified as amended at 16 U.S.C. § 1905 (1994) (expired two years after enactment)). The California Desert Protection Act, discussed *infra* notes 151-155 and accompanying text, abolished Death Valley National Monument in 1994. 90 Stat. 1342.

126. RUNTE, *supra* note 18, at 194.

127. *Id.* at 213.

sions than do the more diffuse interests concerned about the collective benefits of the national park system.¹²⁸

Even relatively small units, such as Petroglyph National Monument may present Congress with complex land use problems because of their proximity to development which may threaten park unit resources. Petroglyph National Monument's 7000 acres lie on an escarpment along the western edge of Albuquerque. Residential development bumps up against the eastern boundary of the monument, and development of the city is planned to leapfrog over to the west of the monument as well.¹²⁹ The close proximity of such a large number of people creates intense disputes over the appropriate balance between recreation (in this case, access to pristine areas of the monument, and horse and bicycle trails) and preservation (in this case, protection of rock art from vandalism and erosion).¹³⁰ Perhaps the most acute conflict arises over proposals to develop more trails in and to build a new road through the monument. These proposals generate heated opposition from those who want the monument managed to accommodate the earth-based religious practices of local Pueblo Indians, who view the monument area as sacred.¹³¹ Not surprisingly, these conflicts shaped the 1990 establishment legislation. To protect the rock art, Congress mandated not only a resource protection program in the GMP but also a plan to establish a Rock Art Research Center.¹³² Congress also authorized the Service to participate in the dispute over the proposed road through the monument.¹³³ Finally, the establishment legislation includes avenues for Native Americans to advance their interests in monument management.¹³⁴

To compromise with ranchers holding federal grazing permits in the area established as Great Basin National Park in 1986, Congress required the NPS to allow grazing to continue to the same extent as was occurring on July 1, 1985.¹³⁵ In addition to removing management discretion to reduce grazing from the Service, Congress also required the agency to submit, within three

128. Professors Krier and Gillette note this problem of collective action in the pollution control context. James E. Krier & Clayton P. Gillette, Essay, *The Un-Easy Case for Technological Optimism*, 84 MICH. L. REV. 405, 426 (1985). See generally, RUSSELL HARDIN, COLLECTIVE ACTION (1982) (analyzing the theory of collective action itself); MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION (1965) (analyzing the general theory of collective action).

129. Tony Davis, *Sunbelt Confrontation*, HIGH COUNTRY NEWS, Nov. 1, 1993, at 1, 10-13.

130. *Id.*; Ruth Haas, *An Urban Park Is Surrounded by Controversy*, HIGH COUNTRY NEWS, Dec. 12, 1994, at 13.

131. Haas, *supra* note 130, at 13.

132. Petroglyph National Monument, Pub. L. No. 101-313, § 108, 104 Stat. 272, 276 (1990) (codified as amended at 16 U.S.C. § 431 note (1994)).

133. *Id.* § 106, 104 Stat. 275. "The Secretary may participate in land use and transportation management planning conducted by appropriate local authorities for lands adjacent to the monument and may provide technical assistance to such authorities and affected landowners for such planning." *Id.*

134. *Id.* § 108(c), 104 Stat. 276 (consultation on GMP with Indian tribes); *id.* § 110, 104 Stat. 277 (establishment of an advisory commission including "one member, who shall have professional expertise in Indian history or ceremonial activities, appointed from recommendations submitted by the All Indian Pueblo Council"); *id.* § 108(a)(4), 104 Stat. 276 (inclusion in the GMP of a plan to implement the Native American Religious Freedom Act).

135. 16 U.S.C. § 410mm-1(e) (1994).

years, to relevant congressional committees a management plan that included discussion of grazing.¹³⁶ The establishment legislation also states: "Existing water-related range improvements inside the park may be maintained by the Secretary or the persons benefitting from them, subject to reasonable regulation by the Secretary."¹³⁷ A final provision on grazing authorizes negotiations to occur for the purpose of exchanging grazing permits on land within the park for allotments outside of the park.¹³⁸ In these restrictions, Congress established an oversight mechanism, substituted its own mandate for the agency's judgment on grazing, and limited the agency's ability to respond to public opinion.¹³⁹

The Petroglyph and Great Basin examples from the past decade illustrate, in part, the trend of greater statutory detail described in Section Two of this Article. But, they also illustrate how the second-generation problem of a more complex existing land use overlay for park units creates conflicts that Congress addresses in establishment statutes. Although Congress has addressed land use conflicts in the national park system for many decades, the increasing numbers of conflicts generate more detailed amendments to existing units and more elaborate establishment statutes for new units. Congressional mandates often may be the only way to win the necessary support to create new park units.¹⁴⁰ Nonetheless, the statutory detail does hamper systemic management of the national park system by the Service. The next Section considers this and other burdens of statutory detail, as well as the benefits.

SECTION IV: THE EFFECTS OF STATUTORY DETAIL

Statutory detail in establishment legislation benefits the national park system in many respects. Most important, as the second-generation problem illustrates, statutory detail that manifests delicate political compromise allows meritorious additions to the system that, without compromise, might not garner sufficient support for establishment. As a representative democratic institution, Congress might give voice to interests that would otherwise go unrecognized by the Service. Particularly in national park system management, where application of the Organic Act may not offer clear management guidance, statutory detail can provide helpful guideposts for agency discretion.¹⁴¹

Agency decision-makers often welcome congressional mandates on controversial issues because the mandates relieve the officials of responsibility for politically sensitive decisions. For instance, in the Barataria Marsh Unit of Jean Lafitte National Historical Park and Preserve establishment legislation,

136. *Id.* § 410mm-1(c).

137. *Id.* § 410mm-1(g).

138. *Id.* § 410mm-1(f).

139. Jon Christensen, *A Bitter Rancher and a Failed Compromise*, HIGH COUNTRY NEWS, Apr. 3, 1995, at 11 ("Since Great Basin National Park was put on the map, staff have been inundated with complaints" about grazing.).

140. *See id.*

141. Shapiro & Glicksman, *supra* note 28, at 844 (citing the benefit of congressional mandates in pollution control statutes).

Congress explicitly commanded the Service to continue to permit hunting, fishing, and trapping.¹⁴² This shields the NPS from the criticism it would receive if it resolved the land use dispute itself.¹⁴³ Professors Shapiro and Glicksman observe that “[d]eadlines can assist agency decisionmaking by mitigating outside pressures to avoid reaching a decision and giving the agency a reason to end its analysis and make a difficult, but necessary decision.”¹⁴⁴ Particularly because the effects of many resource management decisions are indeterminate,¹⁴⁵ deadlines may speed the process of formulating and implementing management plans.

Of course, there are problems associated with all of these benefits. Although Congress is, indeed, a democratically elected institution, its committee structure operates much like medieval fiefdoms. Committees wield power, particularly over issues such as park establishment that are not at the fore of social controversy, that receive little scrutiny by Congress at large, and that therefore create “serious problems of political responsibility.”¹⁴⁶ The splintered jurisdiction and closely guarded turf of congressional committees, which drive the routine legislative process, insulate much establishment legislation from the deliberative spotlight.¹⁴⁷ As Professor Stewart observes, this leaves the statutory details to “a submerged micropolitical process without open and regular procedures.”¹⁴⁸ In establishment legislation, this process favors stakeholders with concentrated interests in park unit management, who can most easily organize to lobby subcommittee chairs and staff.¹⁴⁹ Thus, the “Christmas Tree” provisions criticized in detailed pollution control statutes and designed to benefit particular regions and stakeholders¹⁵⁰ also appear in detailed establishment legislation.

For instance, the detailed California Desert Protection Act¹⁵¹ grandfathers specific mining claims, by name, to protect them from more stringent regulation resulting from the designation of the Mojave National Preserve.¹⁵² Congress sought to satisfy regional concerns by establishing advisory commissions with members that include an elected official for each county within the

142. Jean Lafitte National Historical Park, Pub. L. No. 95-625, 92 Stat. 3536 (1978) (codified as amended at 16 U.S.C. § 230(d) (1994)). See note 89 for other examples of congressional grazing prescriptions.

143. Professor Yaffee observed that statutory prohibitions, although they restrict agency discretion, may help agencies that would otherwise not muster the political will to drive a hard bargain with stakeholders. STEVEN LEWIS YAFFEE, *PROHIBITIVE POLICY* 149-62 (1982).

144. Shapiro & Glicksman, *supra* note 28, at 830.

145. Professor Latin discusses this as a reason why environmental agencies avoid resolving disputed issues. Latin, *supra* note 35, at 1659.

146. Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 332 (1987).

147. See J. William Futrell, *The Administration of Environmental Law*, in *SUSTAINABLE ENVIRONMENTAL LAW*, *supra* note 28, 93, 97-102.

148. Stewart, *supra* note 146, at 332.

149. See *supra* note 128 and accompanying text.

150. See David Schoenbrod, *Goal Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 748-51 (1983); Stewart, *supra* note 146, at 332.

151. Death Valley National Park, Pub. L. No. 103-433, 108 Stat. 4471 (1994) (codified as amended at 16 U.S.C. §§ 410aaa to 410bbb-6 (1994)).

152. Death Valley National Park, 108 Stat. 4491 (codified as amended at 16 U.S.C. § 410aaa-49 (1994)).

unit and representatives of private property owners, grazers, and miners, for Death Valley National Park,¹⁵³ Joshua Tree National Park,¹⁵⁴ and Mojave National Preserve.¹⁵⁵ These commissions advise the Service on the development and implementation of comprehensive management plans. Also, tacked onto the end of the statute are provisions establishing a New Orleans Jazz National Historical Park, and a "Christmas Tree" provision (however worthy) that has no bearing on California desert protection.

Moreover, the statutory mandates inserted by the congressional committees assert control of national park system management at the expense of the president. The Department of the Interior officials would otherwise exercise discretion in the service of the chief executive. Professor Mashaw asserts that:

The president has no particular constituency to which he or she has special responsibility to deliver benefits. Presidents are hardly cut off from pork-barrel politics. Yet issues of national scope and the candidates' positions on those issues are the essence of presidential politics. Citizens vote for a president based almost wholly on a perception of the difference that one or another candidate might make to general governmental policies.¹⁵⁶

Although this might be true as a general matter, the particular issues of park management are so low on the national agenda that the Service might be as susceptible to the compromise of national interests for parochial politics as Congress.¹⁵⁷

An important criticism of statutory detail contrasts the review for rationality that agency regulations would need to pass before these sorts of provisions could be implemented. This criticism applies more strongly in the pollution control area, where the EPA makes most of its decisions through rulemaking, and where the OMB is extensively involved in cost-benefit review. Even in the area of judicial review, the NPS enjoys an especially high degree of deference.¹⁵⁸ Still, judicial review, even of informal unit-specific management, will nonetheless require an administrative record showing that the agency's decision was "based on a consideration of the relevant factors,"¹⁵⁹ and "a reasoned assessment of competing values."¹⁶⁰ Of course, statutory management prescriptions need not meet even this deferential standard.

In the case of the NPS, far more important than the relative benefits of an agency's national political agenda and judicial oversight, is its technical expertise. However strengthened the staffs of congressional committees have be-

153. 16 U.S.C. § 410aaa-6.

154. *Id.* § 410aaa-27.

155. *Id.* § 410aaa-58.

156. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

157. See, e.g., Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 *ECOLOGY L.Q.* 207 (1987).

158. See 2 COGGINS & GLICKSMAN, *supra* note 71, at § 10F.02[3].

159. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

160. See Mashaw, *supra* note 156, at 93.

come over the past thirty years, they still cannot compare with the thousands of people employed by the Service in positions both to observe resources and people, and to engage in scientific management. The literature on the relative institutional strengths of agencies (as compared to Congress) stresses the superior managerial efficiency and expertise of agencies.¹⁶¹

Former Representative Florio notes that decisions in Congress are based on compromise rather than application of technical expertise to answer important questions.¹⁶² Certainly, some of the issues addressed in establishment legislation are value judgments not susceptible to the application of physical or social science expertise. However, many are not. The increase in management mandates comes at a time when the Service, like the other federal land management agencies, must transform from an agency driven by the seat-of-the-pants experience of hierarchical managers to one that applies the interdisciplinary findings of technical staff who specialize in a range of fields.¹⁶³ Statutory detail hampers the ability of the NPS to base its decisions on the findings of biologists, ecologists, educators, geologists, archeologists, historians, anthropologists, and economists. The National Research Council describes the potential benefits of a science-based management model: "Although an adequate science program alone cannot ensure the integrity of the national parks, it can enable faster identification of problems, greater understanding of causes and effects, and better insights about the prevention, mitigation, and management of problems."¹⁶⁴ The Council also notes that, although a dozen major reviews of NPS science and management over a period of 30 years all advocated strengthening science to improve management, few of the recurring recommendations have been implemented.¹⁶⁵

Furthermore, statutory detail impairs the flexibility required to manage resources in the face of changing (usually growing) public demands to use park units, and increased scientific understanding of the condition of resources and the impacts of use on resources. Once management issues are resolved by Congress, they are frozen in place and much more difficult to modify than agency decisions.¹⁶⁶ The emerging consensus favoring the use of adaptive management as a form of ecosystem planning necessitates continual monitoring and iteration of management decisions as hypotheses.¹⁶⁷ Professor Keiter notes that ecosystem management must draw heavily on scientific principles and research so that it "can be designed and adjusted to minimize disruption

161. See Mashaw, *supra* note 156, at 82; Shapiro & Glicksman, *supra* note 28, at 844; Corwin, *supra* note 104, at 521-22.

162. Florio, *supra* note 104, at 379. This may be one of the few issues on which former Democratic Representative Florio and former Republican Senator Symms agreed. *Id.* at 371.

163. THE VAIL AGENDA, *supra* note 15, at 11.

164. NATIONAL RESEARCH COUNCIL, SCIENCE AND THE NATIONAL PARKS 2 (1992).

165. *Id.* at 6; see also VIGNETTES, *supra* note 60, at 1 (recommending both a new research program to support ecosystem management and a shift in NPS professional staffing from generalists to specialists); THE VAIL AGENDA, *supra* note 15, at 107 (recommending more research to aid management);

166. Florio, *supra* note 104, at 379-80.

167. See KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT 53 (1993).

of natural processes."¹⁶⁸

Statutory detail frustrates more than just the ability to adapt and apply technical expertise to changing circumstances and new information with respect to individual units. It also frustrates the ability of the Service to set priorities for comprehensive planning. The VAIL AGENDA cited "new, costly, and sometimes ill-conceived responsibilities" that thwart the Service's ability to set funding priorities.¹⁶⁹ Austere budgets force the agency to direct its precious resources toward politically mandated activities rather than toward activities that are most rational from a scientific management perspective. If the Service is to shift from its traditional, reactive role as a custodian without a comprehensive agenda, it must have broad flexibility to set its own priorities.¹⁷⁰ Statutory constraints limit the Service's capability to realize the potential of the GMP process to set priorities for individual park units.

Even more deleterious is the manner in which Congress frustrates the ability of the Service to manage its units together in an integrated system.¹⁷¹ Commentators have criticized congressional management in the pollution control area, where statutory detail thwarts comprehensive planning that would focus EPA regulation in areas where the greatest amount of environmental benefits result per unit of agency effort (or national expense).¹⁷² The relatively slight benefit of clarifying management objectives on the scale of a park unit that comes from detailed establishment legislation counterbalances a fundamental problem with the national park system. The combination of a vague Organic Act mandate coupled with the bewildering assortment of unit categories makes coordinated system management a Herculean task. Like a rotten roof riddled with leaks, the current framework cries out for replacement. Although one can applaud Congress's actions to patch individual holes through establishment statutes, the overall effort ultimately is ill-suited to curing the structural defect.

Over the past 75 years, a proliferation of land management categories have accreted around the core national park and monument units of the national park system. The national park system now includes units designated as:

National Preserve: National preserves are areas having character-

168. Keiter, *supra* note 6, at 302; *see also* National Parks and Conservation Association, VIGNETTES, *supra* note 60, at 20 (recommending adequate funding for scientific research to provide effective resource management); NATIONAL RESEARCH COUNCIL, *supra* note 164.

169. THE VAIL AGENDA, *supra* note 15, at 36.

170. Marion Clawson identified custodial management as a predominant theme in federal public land policy in the middle of this century. MARION CLAWSON, THE FEDERAL LANDS REVISITED 31-37 (1983). I borrow the term to suggest management focused on responding to particular issues that arise rather than management that takes an active role in setting the agenda for a system of lands.

171. THE VAIL AGENDA notes that, in addition to the hurdles created by statutory details, the "Service, partly through its own inaction and partly due to constraints emanating from the executive branch during the 1970s and 1980s, has lost the credibility and capability it must possess in order to play a proactive role in charting its own course, in defining and defending its core mission." THE VAIL AGENDA, *supra* note 15, at 11.

172. *See, e.g.*, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 103, at 1, 132; Alden F. Abbott, *The Case Against Federal Statutory and Judicial Deadlines: A Cost-Benefit Appraisal*, 39 ADMIN. L. REV. 171, 192 (1987); Shapiro & Glicksman, *supra* note 28, at 844.

istics associated with national parks, but in which Congress has permitted continued public hunting, trapping, [and] oil/gas exploration and extraction. Many existing national preserves, without sport hunting, would qualify for national park designation.

National Historic Site: Usually, a national historic site contains a single historical feature that was directly associated with its subject. Derived from the Historic Sites Act of 1935, a number of historic sites were established by secretaries of the Interior, but most have been authorized by acts of Congress.

National Historic Park: This designation generally applies to historic parks that extend beyond single properties or buildings.

National Memorial: A national memorial is commemorative of a historic person or episode; it need not occupy a site historically connected with its subject.

National Battlefield: This general title includes national battlefield, national battlefield park, national battlefield site, and national military park. In 1958, an NPS committee recommended national battlefield as the single title for all such park lands.

National Cemetery: There are presently 14 national cemeteries in the National Park System, all of which are administered in conjunction with an associated unit and are not accounted for separately.

National Recreation Area: Twelve NRAs in the system are centered on large reservoirs and emphasize water-based recreation. Five other NRAs are located near major population centers. Such urban parks combine scarce open spaces with the preservation of significant historic resources and important natural areas in locations that can provide outdoor recreation for large numbers of people.

National Seashore: Ten national seashores have been established on the Atlantic, Gulf and Pacific coasts; some are developed and some relatively primitive. Hunting is allowed at many of these sites.

National Lakeshore: National lakeshores, all on the Great Lakes, closely parallel the seashores in character and use.

National River: There are several variations to this category: national river and recreation area, national scenic river, wild river, etc. The first was authorized in 1964 and others were established following passage of the Wild and Scenic Rivers Act of 1968.

National Parkway: The title parkway refers to a roadway and the parkland paralleling the roadway. All were intended for scenic motor-ing along a protected corridor and often connect cultural sites.

National Trail: National scenic trails and national historic trails are the titles given to these linear parklands (over 3,600 miles) authorized under the National Trails System Act of 1968.

Other Designations: Some units of the National Park System bear unique titles or combinations of titles, like the White House and

Prince William Forest Park.¹⁷³

The interrelationship between these categories, let alone between the units themselves, is tenuous at best. The categories provide for such diverse purposes as corridor protection, historic preservation, urban access to recreation, buffer zone maintenance (many national preserves serve this function), and scenic motoring. No other public land system is fragmented into subcategories to the extent of the national park system. The national forest system, managed by the U.S. Forest Service, for instance, consists almost exclusively of national forests managed under a mandate of multiple use and sustained yield of natural resources.¹⁷⁴ Furthermore, periodic national reports provide national strategic objectives for the national forest system.¹⁷⁵ Individual forest plans each contribute to the national objectives.¹⁷⁶ Congress has subjected few individual national forests to site-specific mandates. Even the national wilderness preservation system, where management is divided among the several federal public land agencies (including the NPS) and where each unit is established by statute, is unitary in its management nomenclature and mandate for strict preservation.

Still, it is conceivable that the multiple categories of reservations in the national park system could be managed as interrelated elements. Key to most conceptions of a system is a unifying common plan or purpose. The Organic Act mandate to conserve and provide for enjoyment serves as guidance for permissible park uses but fails to articulate an answer to the systemic question: what are parks for? Professor Sax's advocated purpose of parks to cultivate our reflective or contemplative faculties is broad enough to unify both the historical and the natural units.¹⁷⁷ But, without that or some other, more exclusive objective to provide systemic guidance, it will continue to be impossible to make comprehensive, reasoned management and funding choices. Moreover, the absence of cohesion among the units invites even more congressional tailoring of establishment statutes and "park-barrel"¹⁷⁸ additions that fall short of national significance. Over time, the vicious cycle operates to create more diffusion.

173. *Designation of National Park System Units* (visited Nov. 13, 1996) <<http://www.nps.gov/legacy/nomenclature2.html#top>>. The best discussion of this nomenclature appears in DWIGHT F. RETTIE, *OUR NATIONAL PARK SYSTEM* 40-58 (1995).

174. 16 U.S.C. §§ 528-531 (1994).

175. *Id.* §§ 1601, 1602, 1606.

176. *Id.* § 1604(e).

177. See JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 108 (1980).

178. RIDENOUR, *supra* note 20, at 16-19; James M. Perry, *A Shrine Suffers As Pork for Parks Is Larded Unevenly*, WALL ST. J., Jan. 11, 1991, at A1 (discussing, *inter alia*, Steamtown and Weir Farm National Historic Sites). Criticism of "park-barrel" politics dates at least as far back as the debate over federal funding of the Blue Ridge Parkway. ISE, *supra* note 116, at 417.

SECTION V: SYSTEMIC REFORM

The Steering Committee of the Vail Agenda despaired at structural reform. After politely characterizing the hodgepodge of units Congress has placed in the national park system as encompassing a "markedly diffuse range of public values," the group stated: "Effective management of such a diffuse system requires the abandonment of any hope for a single, simple management philosophy."¹⁷⁹ Of course, this is true if we seek to arrive at a systemic management philosophy by finding common objectives that suit the existing units in the system. If, instead, we were to create a philosophy based on normative principles of what we would wish a park system to accomplish for the nation, then we could use the systemic philosophy as a basis for deciding which units are suitable for park system management and which are better suited for other management systems.

Some units might be transferred to the Bureau of Land Management or the U.S. Forest Service for multiple use-sustained yield management.¹⁸⁰ Other units, primarily valuable as feeding, breeding, and resting refuges for particular animals might be transferred to the Fish and Wildlife Service.¹⁸¹ Lands with wilderness character could be managed as wilderness within the park system if they advanced the systemic goals; otherwise, wilderness lands could be managed by any of the federal land management agencies.¹⁸² Perhaps a new recreation-oriented agency would need to be established to manage some current park units whose characteristics would not contribute to systemic goals.¹⁸³

There are a number of possible systemic philosophies the nation could adopt for the national park system.¹⁸⁴ Commentators have discussed systemic park management goals based on an ethic of place,¹⁸⁵ a biodiversity restoration—ecosystem maintenance goal,¹⁸⁶ an educational purpose,¹⁸⁷ a cultivation of the contemplative faculties,¹⁸⁸ wilderness restoration,¹⁸⁹ and

179. THE VAIL AGENDA, *supra* note 15, at 9. Dwight Rettie observed that "[f]or all of its history, the national park system has been essentially an improvisation." RETTIE, *supra* note 173, at 14.

180. 16 U.S.C. §§ 1701-1784 (1994) (creating the Federal Land Policy and Management Act of 1976, which established management scheme for the BLM); *Id.* §§ 528-531, 1600-1614 (creating the Multiple-Use, Sustained Yield Act of 1960, Forest and Rangeland Renewable Resources Planning Act of 1974, and National Forest Management Act of 1976, which established a management scheme for the U.S. Forest Service).

181. *Id.* §§ 668dd-668ee (creating the National Wildlife Refuge Administration Act of 1966, which established a management scheme for the national wildlife refuge system).

182. *Id.* §§ 1131-1136 (creating the Wilderness Act of 1964, which established the scheme for management of the national wilderness preservation system).

183. Robin Winks suggests that "[t]he agency spends 90 percent of its budget servicing visitors (building roads and paving trails, for example) rather than protecting resources. This is the wrong ratio." Robin W. Winks, *National Parks Aren't Disneyland*, N.Y. TIMES, Apr. 19, 1993, at A19.

184. Dwight Rettie reviews many of the efforts to apply comprehensive blueprints for management of the national park system. RETTIE, *supra* note 173, at 16-37.

185. See CHARLES F. WILKINSON, *THE EAGLE BIRD: MAPPING A NEW WEST* 132-86 (1992).

186. See Dave Foreman, *Wilderness: From Scenery to Nature*, WILD EARTH, Winter 1995/96, at 8; Keiter, *supra* note 2, at 75.

187. THE VAIL AGENDA, *supra* note 15, at 108-11.

188. SAX, *supra* note 177, at 80.

maintenance of national symbols.¹⁹⁰ Choosing among these goals will be important and will instigate a long-neglected national debate. However, choose we must in order to realize the potential of the vast majority of national park system lands which ought to be valued not simply for their individual attributes but also for their contribution toward a larger systemic goal.

Congress will need to amend the Organic Act to incorporate a comprehensive systemic goal and perhaps to create new agencies. Some commentators call for a supplemental, recreation-oriented agency,¹⁹¹ others for an independent park service.¹⁹² The institutional structures must await the definition of substantive goals.

Professor Wilkinson has coined the term "lords of yesterday" to describe the "battery of nineteenth-century laws, policies, and ideas that arose under wholly different social and economic conditions but that remain in effect due to inertia, powerful lobbying forces, and lack of public awareness."¹⁹³ Wilkinson has in mind laws, such as the prior appropriation doctrine allocating water in western states¹⁹⁴ and the General Mining Law of 1872,¹⁹⁵ that promote resource extraction and are rooted in the allocation of property rights. In this respect, the 1916 Organic Act is not a "lord of yesterday" because it reflects twentieth-century ideas of public administration. Additionally, it contains the seed of modern notions of sustainable conservation. Indeed, all of the plausible goals for a systemic management philosophy implement some vision of this sustainable mandate, conservation of the parks and only such use as to leave them unimpaired for future generations.¹⁹⁶ Abolition of the sustainable, conservation mandate would disconnect the national park system from its noble and innovative history and destroy the potential for further progress.

Nonetheless, the Organic Act's systemic management mandate, enacted when only thirty-five composed the national park system¹⁹⁷ and clarified only slightly in 80 years, begs for reform. But, we must learn the lessons of the unfulfilled preservationist promise of the 1978 amendments to the Organic Act. Actual park unit management will not automatically shift direction, like a compass exposed to a new magnetic field, with the enactment of Organic Act reform legislation. Before any changes can be felt on the ground, Congress will have to lift the establishment legislation mandates that shatter the

189. See generally Michael McCloskey, Essay, *What the Wilderness Act Accomplished in Protection of Roadless Areas within the National Park System*, 10 J. ENVTL. L. & LITIG. 455 (1995) (discussing the history and protection of the National Park System under the Wilderness Act); Michael Frome, *Protecting Park Values*, DIFFERENT DRUMMER, Winter 1995, at 42.

190. Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 206 (1974).

191. Winks, *supra* note 183, at A19.

192. Lockhart, *supra* note 3, at 3; Editorial, *Serving Two Masters: Park Service's Dilemma*, ARIZ. REPUBLIC, Oct. 15, 1991, at A12.

193. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 17 (1992).

194. See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); Owen L. Anderson, *et al.*, *Prior Appropriation*, in 2 WATERS AND WATER RIGHTS 65-446 (Robert E. Beck, ed. 1991).

195. 30 U.S.C. §§ 21-42 (1994).

196. 16 U.S.C. § 1.

197. RETTIE, *supra* note 173, at 47.

Service's vision and divert the Service's resources.

Once Congress enacts a modern, comprehensive mandate that not only describes how park lands are to be managed but also sets out a purpose for the system, then the task of sorting through existing and potential units for suitability in the system may begin. Organic Act reform, by itself, will not succeed in the face of Service management primarily driven by establishment statutes. The 104th Congress acted prematurely in considering legislation to create a commission to recommend termination or modification of existing NPS management of park units.¹⁹⁸ However, reform of the national park system must ultimately examine the issue of whether park units themselves or statutory details dilute and detract from integrated management to achieve systemic goals. In the meantime, Congress should resist entangling the Service in more statutory detail, which impedes progress toward better park administration.

CONCLUSION

In addition to the recommendations for systemic reform of the statutory basis of national park system management, the lessons of this Article are twofold. First, establishment legislation plays a critical role in driving NPS management and deserves more attention from commentators. Drafting decisions for establishment legislation are the most important choices that are made for the national park system. Therefore, it is critical that legal commentators direct their attention to Congress. A conceptual framework for statute drafting, provided by a systemic mandate, is likely to have a much more profound effect than refined judicial doctrines. As a "white hat" agency, the Service has not faced the intense scrutiny by environmental groups as have other public land managers, especially the U.S. Forest Service and the Bureau of Land Management, which operate massive commodity extraction programs for minerals, timber, and range. Even where the Service has taken controversial steps, potential plaintiffs rightly hesitate to litigate against an agency with an image of purity that represents cherished American values. In those few instances of litigation, judicial review of proprietary decisions generally, and national park system management in particular, is exceedingly deferential to the agency. So, courts play a relatively insignificant role in national park system management, other than ensuring that the Service adhere to specific directives of Congress. And, of course, those specific directives are found in the establishment legislation.

Second, the relative insularity of legal scholarship in the natural resource management and pollution control fields obscures important connections. A comparative examination of trends in statute-drafting reveals parallel developments in pollution control (widely noted) and national park system administration (not widely noted). Congress has assumed a more active role in both areas of environmental law as it addresses second-generation problems where

198. H.R. 260, 104th Cong., § 103 (1995).

the stakes involved are greater (and the potential benefits relatively smaller) than in earlier lawmaking. The literature studying the trend of more pollution control statutory detail proves helpful in describing different types of congressional mandates, in understanding the reasons for the trend, and also in evaluating whether the trend is a constructive development for environmental law. The consensus in the literature that Congress has gone too far in micro-managing the EPA offers applicable wisdom for criticizing the similar behavior in park establishment legislation. More scholarship that applies lessons from the pollution control area to natural resources management¹⁹⁹ and *vice versa*²⁰⁰ will strengthen the foundations of environmental law.

199. See, e.g., Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save Our Public Lands?*, 3 WEST-NORTHWEST 193 (1996) (applying federalism lessons from pollution control law to natural resource management).

200. See, e.g., Fischman, *supra* note 26, at 439 (addressing biological resource protection through the use of EPA authorities).