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# Whose Lands? Which Public?

## The Shape of Public-Lands Law and Trump's National Monument Proclamations

*Jedediah Britton-Purdy\**

*President Trump issued a proclamation in December 2017 purporting to remove two million acres in southern Utah from national monument status, radically shrinking the Grand-Staircase Escalante National Monument and splitting the Bears Ears National Monument into two residual protected areas. Whether the President has the power to revise or revoke existing monuments under the Antiquities Act, which creates the national monument system, is a new question of law for a 112-year-old statute that has been used by Presidents from Theodore Roosevelt to Barack Obama to protect roughly fifteen million acres of federal land and hundreds of millions of marine acres. If President Trump's shrinkages stand, they will be the largest removal of public lands from protected status in U.S. history, and will put the remaining national monuments on the chopping block.*

*This Article advances a novel theory showing that the President lacks the power to revise or revoke monuments. The Antiquities Act gives a power only to protect public lands, not to remove them from protection. Arguments developed so far in litigation and scholarship fail to recognize a general feature of public-lands law: It consistently denies the President the power unilaterally to remove lands from statutorily protected categories once they are placed within those*

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categories. *The Antiquities Act should be read to be consistent with this field-wide pattern.*

*The Article explicates the reasons for this pattern. Generally speaking, public-lands law has been very little theorized; but it needs a theory now. Public-lands law is a field defined by structured normative pluralism. It integrates a range of deeply conflicting public-lands purposes, from mining and drilling to wilderness preservation, across a range of statutes and agencies and acreage totaling nearly a third of the land area of the United States. The asymmetric premise against any presidential power to remove lands from protection is rooted in this structure, specifically the President's obligation to preserve for Congress the option of protecting lands, and the dangers of hasty or corrupt presidential action. The Article traces these rationales across the history of statutory, executive, and judicial articulations of public-lands law and shows that they apply to the present Antiquities Act dispute.*

*The Article also highlights the political and cultural dimensions of the dispute: a series of three-way conflicts among "public-lands populists" who seek increased use of and access to public lands (whose agenda the Trump Administration has incorporated into its economic and ethno-national populism), recreationists and environmentalists, and indigenous communities in the Bears Ears region. Conflicts among these groups amount to fights over collective identity—the nature of the "public" that public lands should serve. This dimension of the conflict does not fall outside the doctrinal analysis of the Antiquities Act. Rather, with a clear theoretical view of public-lands law, it is possible to see that these agendas are already integral to the field itself. They are central threads of its pluralism, and their competing claims fit within its structure. An account of the larger field of cultural conflict both enriches the theory of public-lands law and helps to show how the field should resolve the present fight.*

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## INTRODUCTION

When Secretary of the Interior Ryan Zinke visited Bears Ears National Monument in San Juan County, Utah, in May 2017, he was greeted by supporters whose baseball caps urged, “Make San Juan County Great Again.”<sup>1</sup> The demonstrators meant that Secretary Zinke should advise President Trump to revise or revoke the protected status of the 1.35 million acres of federal land that President Obama had designated a national monument in 2016.<sup>2</sup> In December, President Trump issued a proclamation removing about 1.15 million acres (about 85 percent) of Bears Ears from monument status and separating the residual monument into two tracts. On the same day, he issued a second proclamation reducing the size of Utah’s Grand Staircase-Escalante National Monument by 861,000 acres, leaving slightly over one million acres within the monument.<sup>3</sup>

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1. See Julie Turkewitz, *Battle over Bears Ears Heats up as Trump Rethinks its Monument Status*, N.Y. TIMES (May 14, 2017), <https://www.nytimes.com/2017/05/14/us/bears-ears-ryan-zinke.html>.

2. See Coral Davenport, *Obama Designates Two New National Monuments, Protecting 1.65 Million Acres*, N.Y. TIMES (Dec. 28, 2016), <https://www.nytimes.com/2016/12/28/us/politics/obama-national-monument-bears-ears-utah-gold-butte.html>.

3. See Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument (Proclamation of President Trump), 82 Fed. Reg. 235 (Dec. 4, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-grand-staircase-escalante-national-monument/>.

The two proclamations potentially opened substantial reserves of oil and gas, uranium, and coal to mining and drilling.<sup>4</sup> President Trump's decision was a victory for a network of public lands activists and local resource users who have long criticized federal land management for usurping local control and denounced national monuments, in particular, as abuses of presidential power. Environmental groups, Native tribes, and the Patagonia corporation, among others, filed suit in federal district court seeking to have the Trump proclamations declared illegal as beyond the power Congress has delegated to the President to govern federal public lands.<sup>5</sup>

The monuments proclamations present a question of judicial first impression concerning the central language of the Antiquities Act of 1906. This Act, which was adopted in response to the looting of Native American sites on public lands, authorizes the President to create protected national monuments on federal lands simply by issuing a proclamation doing so.<sup>6</sup> The Act is silent on how a national monument, once proclaimed, might be revised or revoked.<sup>7</sup>

The Administration has not yet fully articulated the legal theory of its proclamations in litigation, but its position is adumbrated in the arguments of its supporters.<sup>8</sup> The heart of the pro-Administration argument is a structural premise that the power to revise or revoke monuments is implied by Congress delegating to the President the power "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments."<sup>9</sup> According to this argument, the power to make law generally implies the power to revisit it, whether in withdrawing regulations, repealing legislation, or declaring an end to hostilities.<sup>10</sup> Besides this general interpretive principle, the Administration's interpretation of the Act also

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4. See, e.g., Eric Lipton & Lisa Friedman, *Oil Was Central to Shrink Bears Ears Monument, Emails Show*, N.Y. TIMES, Mar. 2, 2018; Hiroki Tabuchi, *Uranium Miners Pushed Hard for a Comeback. They Got Their Wish*, N.Y. TIMES, Jan. 13, 2018 (on opening of potential uranium mining around Bears Ears); Brian Maffly, *Oil and Coal Drove Trump's Call to Shrink Bears Ears and Grand Staircase, According to Insider Emails Released by Court Order*, SALT LAKE TRIB., Mar. 2, 2018.

5. See, e.g., Thomas Burr, *Bears Ears, Grand Staircase Lawsuits Will Stay in D.C.*, SALT LAKE TRIBUNE, Sept. 24, 2018 (on suits by tribes and environmental groups) (<https://www.sltrib.com/news/politics/2018/09/24/bears-ears-grand/>); David Gelles, *Patagonia v. Trump*, N.Y. TIMES, May 5, 2018, <https://www.nytimes.com/2018/05/05/business/patagonia-trump-bears-ears.html> (on Patagonia's participation in Bears Ears suit).

6. See 16 U.S.C. § 431 (2012).

7. In this Article, I treat the kind of substantive revision that the Trump proclamations attempt as presenting the same interpretive question as an outright revocation. The scope of revision power that the Trump Administration claims in its Bears Ears proclamation—cutting over 80 percent of the monument's acreage and breaking it into two new monuments—suggests a power different only in form from the power of revocation. I do not intend any sleight-of-hand by this elision.

8. See Todd Gaziano & John Yoo, *Presidential Power to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617, 618 (2018).

9. See 16 U.S.C. § 431.

10. See Gaziano & Yoo, *supra* note 8, at 639 (arguing for "a background principle of American law" that "the power to execute a discretionary government power usually includes the power to revoke it").

finds support in history. In the first fifty years of the Act's existence, presidents made substantial revisions in national monuments, shrinking a few by tens or hundreds of thousands of acres and other (much smaller) ones by large fractions of their total area.<sup>11</sup> Surely, the argument goes, what the Act was long taken to authorize is good evidence of what it authorizes today.

On the other side, the core of the plaintiffs' case against the Trump proclamations is a strict textual one: The Antiquities Act delegates the power that it names—to “declare” monuments—and no more.<sup>12</sup> Congress knew how to grant a two-way power to withdraw or reserve lands reversibly and did so explicitly in major public-lands statutes from the same period. The Forest Service Organic Act of 1897 authorized the President to “revoke, modify, or suspend” the national-forest status of public lands.<sup>13</sup> The General Withdrawal Act of 1910 (Pickett Act) authorized the President to make temporary withdrawals of public land, which, by the statute's terms, remained in effect until revoked by the President or by Congress.<sup>14</sup>

The argument of this Article is that the larger structure of public-lands law supports the plaintiffs' arguments by showing why it makes sense to treat Congress's delegation of power to the President in the Antiquities Act as exclusively for proclaiming monuments, not for revising or revoking them. Public-lands law has developed over decades a strong premise of an *asymmetric* presidential power, a preference for presidential decisions that bring public land within protected categories, and a corresponding wariness of presidential actions that unilaterally make formerly protected lands available for drilling, mining, and other privatizing regimes. This asymmetric premise reflects the *structured normative pluralism* of the field—put more plainly, the way it integrates competing purposes and management regimes from a centuries-long series of statutes into a relatively coherent system of governance. Of course, a court need not read the Antiquities Act in light of the broader body of law in which it fits. Its language might perfectly well be read as a free-standing interpretive object. I hope to show, however, that reading the Act as part of a relatively coherent statutory scheme helps to make the best sense of it.<sup>15</sup>

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11. See *infra* Part I.A.

12. See Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, Case 1:17-cv-02591-TSC, Doc. 21-1 (Jan. 20, 2018) at 24–26 (advancing this plain-language argument); Mark Squillace, Eric Biber, Nicholas Bryner & Sean Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 57–59 (2017) (so arguing).

13. Pub. L. No. 2 (1897). First delegated in the General Revision Act of 1891, the Presidential power to establish national forests by proclamation had, by 1909, been used to designate more than 194 million acres as national forest. See PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 580, 598 (1968).

14. 36 Stat. 847 (1910). The Pickett Act's withdrawal power was repealed, along with most other executive-branch powers of withdrawal and reservation, with the passage of the Federal Land Policy and Management Act of 1976.

15. Readers may recognize in this formulation an echo of the late Ronald Dworkin's call to pursue “integrity” in law and to interpret it to make it the best it can be. This interpretive approach is often associated with the view that for any legal question there is a unique right answer, and with a morally

Once lands are placed in specially protected categories such as monument status, the very strong pattern across public-lands law is that only Congress, not the President, may act to open them to extraction or, historically, other forms of privatization of public resources.<sup>16</sup> This pattern has developed for two chief reasons: (1) a worry about precipitate executive privatization and the possibility of inappropriate motives for such action, a worry sometimes described as corruption; and (2) a recognition that extractive uses of land, once authorized, may destroy the land's unique value (scientific, historical, or scenic) and effectively preempt Congress's decision whether to preserve that value. The protective purpose of the Antiquities Act does not itself show that the President cannot strip protected status from national monuments, but it does fit monuments within the field's general reasons for the premise that the President may not unilaterally open lands to extractive privatization.

The general account of public-lands law that this Article advances also makes space for themes that are vividly present in the Trump proclamations, but which the arguments now on public offer do not find ways to incorporate. As noted earlier, it is widely recognized that the Trump proclamations open the Utah monuments to mining and drilling, and media coverage assumes that this fact bears on the appropriateness of the proclamations. Nonetheless, the entanglement of the Administration's monuments decisions with extractive interests has not made its way into the legal analysis of the case. Yet it is worry over precisely this sort of presidential permission for extraction that grounds the asymmetric premise of presidential power over public lands. Critical focus on this issue reflects an inchoate normative idea about public-lands governance that, in fact, has footing in the field. Extractive interests occupy a major place within the structure of public-lands law but, a place that is cabined by the premise against presidential privatization.

The law of federal public lands governs nearly 30 percent of the country's acreage, including vast mineral and timber wealth and iconic scenic and

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perfectionist view of the law as striving toward a particular substantive view of justice. *See generally* RONALD DWORKIN, *LAW'S EMPIRE* (1986). The approach I take here treats public-lands law as a *pluralist* rather than a perfectionist enterprise, whose integrity, if that is the word, consists in a specific structure for the ongoing integration of perennially conflicting goals for and interests in the public lands. *See generally* Jedediah Purdy, *American Natures: The Shape of Conflict in Environmental Law*, 36 *HARV. ENVTL. L. REV.* 169 (2012) (characterizing the plural goals of environmental law, including aspects of public lands law).

16. Throughout this paper, I use *privatization* to refer to the creation of vested private claims on public-lands resources, whether through the traditional means of transferring acreage (with or without mineral or water rights) as real estate, or through today's regimes authorizing mining, drilling, and timbering. I sometimes refer to the latter as "extractive privatization," and use "extractivism" to refer to the political position that both advances extractive interests and links them to accounts of national interest or collective identity. My reason for linking rather different regimes under the "privatization" rubric is that they have presented the same core dangers in public-lands law all along, the risk that precipitate or opportunistic executive-branch transfer of public resources will irreversibly compromise competing values and pre-empt Congress's ultimate authority in governing public lands. For this reason, they play a unified structural role in public-lands law.

recreational sites, and implicates divisive environmental questions from the governance of mining to the protection of endangered species.<sup>17</sup> Formed from a palimpsest of statutes adopted between 1785 and 1976, it integrates competing public purposes across deep conflicts over both the value of the natural world and the makeup of “the public” itself.

In Part I, I outline the creation and putative revision of the Bears Ears and Grand Staircase-Escalante national monuments. I argue that the Trump proclamations do not support the Administration’s presentation of its revisions as merely implementing the Antiquities Act’s requirement that monuments occupy the smallest area compatible with protection of the designated objects. Rather, the proclamations revisit and revise the substantive scope of the monuments’ protective purposes, and arguably presuppose a narrowing of the scope of values eligible for protection under the Act. The Trump proclamations thus squarely raise the question of the President’s power to revise monuments substantially. In Part II, I describe the Trump proclamation’s debt to public-lands populism and outline the ideological field, network of activists and public officials, and vision of “the public” that together generate this program for public lands. In Part III, I turn to the question of how to interpret the Antiquities Act. After surveying the arguments that have emerged in the current dispute, I propose a framework for understanding public-lands law and locating the question of the President’s proclamation power within it. The field displays a structured normative pluralism, integrating competing public-lands goals in definite patterns that enable their coexistence across uses ranging from mining to wilderness preservation. Once public resources are subjected to vested private claims—a reclassification that for economy’s sake I call *privatization* whether or not it permanently converts federal land into private real estate—these claims survive and are immune to later reclassification. When, however, land is reclassified into a categorically protected status, such as a national park, wilderness, or wilderness study area, only Congress may reopen it to new private claims. Finding that the President can reclassify monuments to open them to new private claims would make the Antiquities Act a departure from the way that public-lands law otherwise integrates competing values through its statutory allocation of powers. In Part IV, I set out a long-standing reason for this structure of public-lands powers: preventing precipitate and potentially opportunistic presidential opening of public resources to favored constituents—in a word, corruption, which is especially troubling when its effect on protected lands would be irreversible. I argue that this rationale applies to the Antiquities Act and helps to explain the Act’s delegation of a one-way power to proclaim monuments, but not to revoke or revise them. In Part V, I turn to the early presidential monument revisions and show that they took place against a background of expansive claims of presidential power to reclassify federal land—a power generally articulated

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17. See generally GATES, *supra* note 13 (far-ranging account of the origin, scope, and structure of the public lands and the legal regimes governing them).

and exercised in ways that acknowledged the presumption against presidential privatization, but which otherwise pushed executive control over public lands to its limit and perhaps beyond. That claimed power accounts for the plausibility of most of the early revisions in their times. They would not be plausible today as exercises of the delegated power of the Antiquities Act.

#### I. THE ANTIQUITIES ACT AND THE TRUMP PROCLAMATIONS

The President's power to create national monuments arises under the Antiquities Act of 1906, which provides:

That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>18</sup>

National monuments comprise over fifteen million predominantly inland or coastal acres (including the contested portions of Bears Ears and Grand Staircase-Escalante), with most of the land area in the mountain West and Alaska, as well as more than 750 million chiefly marine acres.<sup>19</sup> Monuments range from White Sands and portions of the Grand Canyon and the Marianas Trench (including the deepest point in the world's oceans) to the Pullman factory, site of the iconic 1894 strike, and Stonewall, honoring the watershed "riot" against antigay police harassment in Manhattan's West Village.<sup>20</sup> Many early national monuments later became national parks, and most current monuments are administered by the National Park Service, although some are entrusted to the Forest Service, the Fish and Wildlife Service, the Bureau of Land Management (BLM), and the National Oceanic and Atmospheric Administration.<sup>21</sup> Although Presidents enjoy considerable discretion in prescribing the management of the monuments they designate, monument status has typically entailed withdrawal from the various privatization schemes that operate by default on public lands, making them eligible for conversion to private real estate (before most such regimes were suspended in 1934, then repealed in 1976) or mining, drilling, and timbering.

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18. 16 U.S.C. § 431 (2012).

19. See *Antiquities Act: 1905-2006*, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm> (National Park Service inventory of national monuments in order of their dates of creation and size, noting which agencies are responsible for their administration and which have been converted to national parks or otherwise reclassified).

20. See *id.*

21. See *id.*

*A. Bears Ears and Grand Staircase-Escalante*

President Obama's 2016 Bears Ears proclamation withdrew the newly designated monument from eligibility for timber sales, oil and gas leases, and mining, along with other federal schemes for private extraction from the public lands.<sup>22</sup> The proclamation also directed the Forest Service and BLM to govern the Monument in consultation with a pair of advisory committees, one drawn from a set of "local stakeholders" including government officials, landowners, recreational users of the region, business owners, and tribes, the other composed entirely of members of local tribes: including members of the Hopi and Navajo nations, two tribes of the Ute people, and the Zuni tribe.<sup>23</sup> The monument designation thus entailed both substantive changes in land use, particularly limits on extraction, and procedural changes in governance of the region.

President Trump's 2017 proclamation removing 1.15 million acres of Bears Ears from monument status and separating the residual monument into two tracts also restricted the formal input of the local tribal commission to one of the two tracts, reopened the 1.15 million acres to various federal extraction regimes, and made the residual monument subject to private grazing rights.<sup>24</sup> As described in the Introduction, Trump's simultaneous proclamation reduced the size of Utah's Clinton-era Grand Staircase-Escalante National Monument by 861,000 acres, leaving slightly over a million acres in the monument.<sup>25</sup> The proclamations arose from a review that began in April 2017, when President Trump issued an executive order directing Secretary Zinke to review major monument designations made since 1996, with attention to their compatibility with the Act's scope (protecting "objects of historic or scientific interest" within "the smallest area compatible" with their protection) and to "concerns of state, tribal, and local governments . . . including [their] economic development and fiscal condition."<sup>26</sup>

The memorandum that Secretary Zinke produced in response, after criticizing the breadth of "landscape area designation" of protected objects in the Clinton and Obama proclamations, charged these monument reservations with economic harm to local communities that depend on "grazing, mining, and timber production," and other land uses that monument proclamations tend to restrict.<sup>27</sup> The memorandum emphasized that, "Local governments raised issues

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22. See Proclamation No. 9558, 89 Fed. Reg. 1139, 1143 (Jan. 5, 2017).

23. See *id.* For a splendid treatment of the novelty and importance of this use of the Antiquities Act, with both granular and thematic richness, see Sarah A. Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, HARV. C.R.-C.L. L. REV. (forthcoming 2018).

24. See Proclamation No. 9681, 82 Fed. Reg. 58081, 58085 (Dec. 8, 2017).

25. See Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument, *supra* note 3.

26. Presidential Executive Order on the Review of Designations Under the Antiquities Act (Executive Order No. 13792, Apr. 26, 2017).

27. See Ryan K. Zinke, Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act (memorandum to President Trump), 6-7 (criticizing "landscape area designations" and expressing concern with protecting extractive uses) available at [https://www.eenews.net/assets/2017/12/05/document\\_pm\\_01.pdf](https://www.eenews.net/assets/2017/12/05/document_pm_01.pdf).

relating to lost jobs and revenue” arising from “the limitations placed on land development . . . especially when there has been a lack of meaningful consultation and public process before monuments are designated.”<sup>28</sup> The recommendations underlying the Trump proclamations thus directed attention to a set of economic and procedural questions that form no part of the Antiquities Act’s requirements or even its scope of concern, but which matter a great deal to certain Western constituencies.

### *B. The Scope of the Trump Proclamations*

The Trump Administration presents these proclamations as implementing the Antiquities Act by enforcing its requirement that monuments include only “the smallest area” compatible with the preservation of protected “objects of historic or scientific interest.” If this were correct, the Trump proclamations might not raise the question of whether the President can substantially revise or revoke earlier monument designations. They might be justified on a narrower power to adjust the implementation of earlier proclamations without revisiting their substantive judgments. The issue of the President’s power to revise or revoke monuments would still be interesting and important, but it would not be squarely presented in the Trump proclamations.

The Trump Administration’s proclamations, however, sweep further than that, excluding substantial categories of protected objects from the earlier proclamations. Read in conjunction with Secretary Zinke’s underlying memo, they even suggest a reinterpretation of the Antiquities Act itself to restrict its scope of authorized protection to a narrow version of “objects of . . . scientific interest,” excluding much of what monuments protect.<sup>29</sup> Either way, the proclamations are not a ministerial correction within the terms of the earlier proclamations that established the monuments. They can stand only if the President enjoys a full-dress power under the Act to revise or revoke earlier monuments.

An “object of scientific interest” under the Antiquities Act may be a landscape-scale phenomenon.<sup>30</sup> After 1906, presidents immediately began to treat the Act’s “smallest area” requirement as compatible with landscape-scale monument proclamations, including President Theodore Roosevelt’s 1908 creation of the Grand Canyon National Monument (more than 800,000 acres) and 1909 proclamation of Mount Olympus National Monument (over 600,000 acres).<sup>31</sup> The Grand Canyon reservation was affirmed by the Supreme Court in

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28. *Id.* at 8.

29. *Id.*; Proclamation No. 9558, 89 Fed. Reg. at 1143.

30. See *Cameron v. United States*, 252 U.S. 450, 455–56 (1920); *Tulare Cty. v. Bush*, 306 F.3d 1138, 1142 (2002) (affirming broad scope of Presidential discretion, including eligibility of ecosystems for protection).

31. Proclamation No. 794, 34 Stat. 225 (1908) (Grand Canyon); Proclamation No. 869, 35 Stat. 2247 (1909) (Mount Olympus).

1920, and since then presidential discretion to designate landscape-scale areas as national monuments has been consistently accepted against occasional legal challenges.<sup>32</sup> The Court rejected the argument that “there was no authority for [the] creation” of the first Grand Canyon National Monument under the Act, explaining that the canyon was eligible for monument status because, “[it] . . . affords an unexampled field for geologic study [and] is regarded as one of the great natural wonders.”<sup>33</sup> So interpreted, the “smallest area” may be enormous, so long as it corresponds to a qualifying “object of scientific interest.” A monument’s permissible size is a function of the size of the object it protects. The “smallest area” requirement implies no restriction of the statute’s protection to small objects. This much is long settled.

The Trump proclamations raise the question of what scope of “scientific interest” can anchor landscape-scale preservation. President Obama’s proclamation creating the Bears Ears monument spends eight paragraphs describing the area’s “diversity of . . . soils and microenvironments,” its many plants (inter alia, low sage, winterfat, cliff rose, greasewood, common mallow, low larkspur, needle and thread, the Kachina daisy, sand verbena, the straight bladderpod, and Durango tumble mustard) and animals (ferruginous hawk, flammulated owl, pallid bat, side-blotched lizard, bobcats, and “the occasional mountain lion”), as well as the role of distinctive riparian and mesa settings in assembling these ecological “communities.”<sup>34</sup>

The proclamations shrinking Bear Ears and Grand Staircase-Escalante argue that the original designations exceeded the Act’s “smallest area” requirement by reserving more land than was necessary to protect the core geological and archaeological features of the sites.<sup>35</sup> President Trump’s Bears Ears proclamation devotes all but two sentences of its discussion of qualifying objects to archaeological and dramatic geological features of the monument, the exception being a set of mesa plant communities that the proclamation identifies as unique to the site.<sup>36</sup> Much of the ecological basis of the Obama declaration appears to fall by implication under the Trump proclamation’s complaint that, “Some of the objects Proclamation 9558 identifies are not unique to the monument, and some of the particular examples of these objects within the monument are not of significant scientific or historic interest.”<sup>37</sup> The Trump proclamation continues, “Moreover, many of the objects Proclamation 9558

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32. See *Cameron*, 252 U.S. at 465; *Tulare Cty.*, 306 F.3d at 1140 (affirming broad scope of Presidential discretion, including eligibility of ecosystems for protection).

33. *Cameron*, 252 U.S. at 456.

34. Proclamation No. 9558, 89 Fed. Reg. at 1141–43.

35. See *id.* at 1143.

36. Proclamation No. 9681, 82 Fed. Reg. at 58084 (“The Indian Creek area [one of the two remnant monuments left by the Trump proclamation] also includes 2 prominent mesas . . . which are home to relict plant communities . . . that exist only on these isolated islands in the desert sea and are, generally, unaltered by humans.”).

37. *Id.* at 58081.

identifies were not under threat of damage or destruction before designation such that they required a reservation of land to protect them.”<sup>38</sup> (There is no statutory requirement that Antiquities Act proclamations identify objects that are “under threat of damage or destruction.”).<sup>39</sup> The Administration’s view of the Act appears to be that qualifying objects do not include ecosystems, plant communities, etc., except where these are unique to the place or hold extraordinary scientific interest for some other reason.

President Clinton’s proclamation of the Grand Staircase-Escalante monument devoted one of five paragraphs (and about a third of its total words) to describing among its qualifying objects the area’s varied “life zones” of soils, flora, and fauna.<sup>40</sup> President Trump’s proclamation shrinking the monument in pursuit of the “smallest area” requirement makes no reference to ecology or biodiversity, instead devoting its discussion of qualifying objects (fourteen paragraphs, though not much longer in sum than the Clinton proclamation) to geological, paleontological, archaeological, and historical features of the area.<sup>41</sup> The Trump proclamation does note the prior proclamation’s attention to “animal and plant species” and observes that the “revised boundaries contain the majority of the habitat types originally protected,” but gives no indication that it regards this partial continued protection as legally obligatory, and indeed appears to claim that these are, by and large, not qualifying objects, being neither unique nor “under threat or damage or destruction.”<sup>42</sup>

The Trump Administration’s new monument boundaries, especially in Bears Ears, do not plausibly delimit the “smallest area” necessary to protect the objects that President Obama designated as of scientific or historic interest. They delimit an area fitted to a new set of protected objects, smaller than and qualitatively different from Obama’s. President Trump’s monument reductions are not adjustments of the monuments’ sizes to the “smallest area” that preserves their protected objects but rather a substantive revisiting of which objects within the monuments are eligible for protection. They can be justified only by the power to revise or revoke earlier monument proclamations. They therefore squarely present the question whether that power exists under the Antiquities Act.

I next turn in Part II to the political context and ideological drivers of the Trump proclamations before engaging, in Part III and thereafter, the question of how best to interpret the Antiquities Act.

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38. *Id.*

39. *See* 16 U.S.C. § 431.

40. *See* Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument, *supra* note 3.

41. *See id.*

42. *Id.*

## II. THE TRUMP PROCLAMATIONS AND PUBLIC-LANDS POPULISM

The Trump executive order opening the process of revisiting the monuments, and the Zinke memorandum prepared in response, emphasize the effects of monuments on local economies and the level of local feedback and support for monument designations. The Zinke memorandum takes a particularly sharp tone of advocacy. Zinke observes that, although the monument designations under review were sometimes preceded by public meetings, “these meetings were not always adequately noticed [sic] to all stakeholders and instead were filled with advocates organized by non-governmental organizations to promote monument designations.<sup>43</sup> (It is worth noting that this dynamic is similarly reflected in the public comment process for this review . . .).”<sup>44</sup> The memorandum seeks to rebut the views of monument supporters, asserting that their view that “monument designation [can] prevent the sale or transfer of public land . . . is false and has no basis in fact,” while faithfully transmitting the views of monument opponents, “often local residents,” whose concerns were unfortunately swamped by “a well-orchestrated national campaign organized by multiple organizations.”<sup>45</sup> The Trump Administration documents, then, take the side of a local and regional constituency that favors increased extractive access to the public lands. The next subpart sketches that constituency and its relation to the Trump Administration.

*A. Public-Lands Populism and Extractivist Nationalism*

While issuing his proclamations in Salt Lake City, Utah, President Trump delivered a brief address on control of federal public lands. He denounced “abuses of the Antiquities Act [that] give enormous power to faraway bureaucrats at the expense of the people who actually live here, work here, and make this place their home . . . where they raise their children . . . the place they love.”<sup>46</sup> The Obama and Clinton monuments, he said, had brought “harmful and unnecessary restrictions on hunting, ranching, and responsible economic development,” preventing ranching families from “passing on their businesses and beloved heritage to the children.”<sup>47</sup> President Trump continued, “These abuses of the Antiquities Act have not just threatened your local economies; they’ve threatened your very way of life. They’ve threatened your hearts.”<sup>48</sup> Future land management, he promised, would “give back your voice,” prioritize

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43. Zinke, *supra* note 27, at 8.

44. *Id.*

45. *Id.* at 2–3.

46. See President Donald Trump, Remarks on Signing Proclamations Affecting Prior Designations Under the American Antiquities Act of 1906 in Salt Lake City, Utah, 2017 DAILY COMP. PRES. DOC. 3 (Dec. 4, 2017)

47. *Id.*

48. *Id.*

“the local communities that knows [sic] the land the best and that cherishes the land the most,” and make public land open to “public use.”<sup>49</sup>

President Trump’s remarks highlight a key aspect of his monument proclamations: the embrace and elevation of a long-running strand of Western politics. This politics, which I will call *public-lands populism*, contests the question of whose lands the federal public lands should be—that is, whether they should be federally administered, transferred to state and local control, or privatized. Like all populism, this variety also contests the question of just who count as part of “the public.”<sup>50</sup> Its answers have consistently favored state and local control; extractive policies such as mining, drilling, and timbering; and political, material, and symbolic primacy for local landholders and employees in the extractive industries. This set of views has circulated for decades in rural and activist networks and finds more formal development in intermittent litigation by local governments and property-rights organizations such as the Pacific Legal Foundation.<sup>51</sup>

### B. *Public-Lands Populism: What and Who It Is*

Public-lands populism combines its substantive priorities for use of federal lands with a dissenting constitutional account of authority over those lands. These themes link populist agitation across decades and topical flashpoints as well as counties and states, providing a flexible but unifying set of tropes for antifederal and antiregulatory politics.<sup>52</sup>

#### 1. *The Ideological Orientation of Public-Lands Populism*

Public-lands populism’s adherents frequently voice a constitutional and historical narrative about Western public lands: Congress ought to have

49. *Id.*

50. In my discussion of President Trump’s nationalism, I am influenced by Jan-Werner Müller’s formulation of “populism,” which escapes various fuzzy tropes (anti-elitism, etc.) to hone in on a form of political appeal that identifies the normative character of the nation, the “true” nation, with a subset of the actual population, thus making possible various antidemocratic, majority-trumping or illiberal, minority-subordinating moves on behalf of the “true” people. See JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016). A characterization of how one qualifies as a member of that elect is thus essential; public-lands populism trades on such an account, emphasizing the local, rural, hardworking/extractive, and implicitly or explicitly Anglo character of its actual and ideal constituencies.

51. Jeffrey W. McCoy, *PLF Urges the Administration to Reverse Antiquities Act Abuses*, PACIFIC LEGAL FOUNDATION (May 26, 2017), <https://pacificlegal.org/plf-urges-administration-reverse-antiquities-act-abuses/>.

52. In this description, I mean to emphasize that I am not describing merely a “protest” movement, and, indeed, that such an image implies a false picture. Protest of the kind I am describing here advances an alternative account of legality, and in that sense is jurisgenerative. See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006) (describing the role of social movements in opening up settled points of interpretation in legal culture and bringing new, or old, commitments to previously settled debates); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (exploring the “jurisgenerativity” of non-legal actors, such as messianic religious communities and radicals of various stripes).

privatized these lands or turned them over to the states, as it did with Eastern and Midwestern acreage.<sup>53</sup> Its failure to do so is not just dereliction but usurpation: the Constitution's Property Clause grants only the administrative powers necessary to Congressional disposal of federal lands to states or individuals, not their permanent retention and management.<sup>54</sup> Permanent federal land requires the consent of the state in which the land is set and federal purchase of that land.<sup>55</sup> All federal public land, then—nearly 70 percent of Utah, for instance—represents an illegal form of domestic colonialism, in which lands and resources that should be controlled by state governments and local residents are instead ruled from Washington, D.C., subjecting local resource users to unaccountable bureaucratic oversight and relative poverty in a rich terrain.<sup>56</sup> These arguments for the constitutional illegitimacy and historical injustice of federal reservations are aligned with accounts of the political and scientific illegitimacy of resource preservation. Denial of anthropogenic climate change is a recurrent theme in these networks, as is the view that wild-lands preservation and nonmotorized outdoor recreation are the pet agendas of small but wealthy coastal elites, which capture the political process to engineer “land-grabs” such as the controversial monument proclamations.<sup>57</sup> While none of this constitution-in-exile theory appears in the official documents of the Trump Administration, it may exercise a gravitational tug, helping to account for denunciations of landscape-scale protection and of federal management of natural resources that some local interests would prefer to use differently. The more concrete commitments of public-lands populism, as we have seen, are front-and-center in the substance and rhetoric of the Administration's monuments proclamations.

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53. See, e.g., Michael S. Coffman, *Powerful Forces: More than a Century of Eastern Control of the West's Natural Resources*, RANGE MAGAZINE, Fall 2016, at 16–19 (“The U.S. cannot ‘own’ this land constitutionally, even though it claims it does. Upon entering the United States the new western states should have been given land not claimed by the settlers.”).

54. See, e.g., Michael S. Coffman, *Original Intent*, RANGE MAGAZINE, Summer 2016, at 14–17 (so arguing).

55. See *id.*

56. See, e.g., Coffman, *Powerful Forces*, *supra* note 53, at 19 (“An incredible war between the federal government and western ranchers has been going on since 1891, mostly under the radar, pushed and funded by powerful northeastern progressive financiers and industrialists . . . It has led to a very corrupt legal system that tragically has no fidelity to the restrictions imposed by the U.S. Constitution.”).

57. Michael S. Coffman, *Hope! Need Reform Could Be Coming to the EPA Swamp*, RANGE MAGAZINE, Summer 2017, at 10–12 (describing EPA as “probably the most corrupt agency in the federal government” and asserting that, although “[v]ery few urbanites understand the depth of its corruption and list for more and more power that’s at the heart of the EPA . . . President Trump does”); Michael S. Coffman, *Climate Racketeering*, RANGE MAGAZINE, Winter 2017, at 15–16 (“hard empirical evidence strongly suggests that man’s use of fossil fuel has little to do with global warming”); Dave Skinner, *Unforgettable*, RANGE MAGAZINE, Spring 2017, at 18–19 (welcoming Trump’s election by recalling the Clinton Administration’s “post-Grand Staircase orgy of national monuments designations”).

## 2. *The Networks of Public-Lands Populism*

This ideology connects lawmakers with lawbreakers in a circuit of dissent and affirmation. For instance, Ammon Bundy, the leader of the notorious 2016 occupation of the Malheur Wildlife Refuge in southeastern Oregon, recently joined elected San Juan County officials in a favored form of protest: riding all-terrain vehicles into areas of federal land that land-management agencies have closed to motorized traffic.<sup>58</sup> The state legislatures of both Utah and Nevada have passed resolutions endorsing the constitutional theories and land-management agendas of the movement, and Utah's now-retiring Senator Orrin Hatch has long been regarded as a protector at the federal level.<sup>59</sup> It was San Juan County Commissioner Calvin Black, not a militia member, who announced at a BLM hearing in 1979:

We had enough of you guys telling us what to do. I'm not a violent man, but I'm getting to the point where I'll blow up bridges, ruins, and vehicles. We're going to start a revolution. We're going to get back our lands. We're going to sabotage your vehicles. You had better start going out in twos and threes because we're going to take care of you BLMers.<sup>60</sup>

Black's threats came amid the 1970s blooming of this ideology that is often called the Sagebrush Rebellion, which counted among its allies presidential candidate Ronald Reagan and his first-term Secretary of the Interior, James Watt.<sup>61</sup> The Sagebrush Rebellion was the incubator for later resistance to monument proclamations and was itself a recasting of a long-standing set of antiregulatory themes that run back to the very beginning of federal withdrawals of public land.<sup>62</sup>

Public-lands populism has been a jurisgenerative movement; that is, it has propagated a vision of public-lands law, from the statutory to the constitutional

58. See Jonathan Thompson, *A Reluctant Rebellion in the Utah Desert*, HIGH COUNTRY NEWS, May 13, 2014 (detailing Bundy involvement in motorized trespass protest and arrest of County Commissioner).

59. See Raymond Wheeler, *War on the Colorado Plateau*, HIGH COUNTRY NEWS, Sept. 12, 1988, at 17–18 (describing Utah Senator Orrin Hatch's patronage of the so-called Sagebrush Rebellion and seeing of BLM land-use agendas between Carter and Reagan Administrations).

60. See *id.* (reporting the April 12, 1979 statement of San Juan County Commissioner Calvin Black).

61. See R. MCGREGGOR CAWLEY, *FEDERAL LANDS, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* 71–91 (1993) (tracing the origins and effects of the Sagebrush Rebellion of the mid-1970s and 1980s).

62. See, e.g., 7 Cong. Rec. 1719–23, 1861–69 (1878) (Congressional attacks on Interior Secretary Carl Schurz's early efforts to limit private commercial timbering on federal land); *id.* at 1722 (Statement of Senator Blaine) (“I know of nothing in the world to parallel it except that great assertion in our immortal Declaration of Independence that the King of England ‘has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.’”); *id.* (Statement of Senator Teller) (“I claim that nothing is demanded by the people in the Territories now that has not been conceded to all settlers in the [previous] new Territories.”); *id.* at 1721 (Statement of Senator Blaine) (“[T]he hardy pioneer who goes forth and bears the flag of civilization onward. . . shall have the air and the water and the wood . . .”).

level, that expands the possible meaning of this body of law and connects it with the lived experience of certain communities in the American West.<sup>63</sup> But the question for adjudication is always how far conflicting visions of the law can coexist or be integrated, and which ones must give way.<sup>64</sup> To address this question, we now turn to the interplay between the Antiquities Act and the structure of public-lands law.

### III. INTERPRETING THE ANTIQUITIES ACT ON THE TERRAIN OF PUBLIC-LANDS LAW

On their face, all the major arguments now in play for and against the Trump proclamations have some plausibility. The text of the Antiquities Act can support the view that it withholds the power of monument revision or revocation from the President, and also the view that it implicitly grants that power. The early decades of presidential practice under the Act seem to support a power of revision, but that practice was never tested in court and stands in some tension with a 1938 Attorney General opinion denying any presidential power to revoke monuments.<sup>65</sup> The purpose of the Antiquities Act is to preserve public lands, but that purpose, without more, does not say whether a later President may reverse an earlier President's preservationist proclamation. Traction comes from setting the question of the Trump proclamations' legality within the larger landscape of public-lands law. In this Part, I first briefly rehearse the arguments for the Trump Administration's monument proclamations, then turn to developing an account of public-lands law as the interpretive frame for the question.

#### *A. Text versus History: For and Against the Trump Proclamations*

The straightforward case that the President may not revoke or substantially revise earlier monument proclamations rests on the text of the Act itself. The Antiquities Act authorizes the President to "declare" national monuments but makes no mention of revising or revoking earlier monument proclamations.<sup>66</sup> The first premise of textual interpretation is that a statute should be read to say only what it says, and no more.<sup>67</sup> On this account, the Antiquities Act confers only the power it names: a one-way power to withdraw and reserve public lands, but no power to reverse those actions.

Textualist interpretation seeks to enforce rule-of-law values of predictability and accountability by inhibiting ("preventing" seems optimistic) judges and other interpreters from reading into statutes the policies that they

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63. See generally Cover, *supra* note 52 (developing the theory of jurisgenerativity).

64. See *id.* (so arguing).

65. See Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Atty. Gen. 185, 188 (1938).

66. See 16 U.S.C. § 431 (2012).

67. See WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW 3 (2016) (summarizing textualism as the idea "that the alpha and omega of statutory interpretation in the enacted text of the statute").

prefer.<sup>68</sup> This posture invites use of certain interpretive canons, signally *expressio unius*, the presumption that a statute's stating one thing implies its exclusion of things not stated.<sup>69</sup> The textual argument against the Trump proclamations is that the Antiquities Act does not do what it does not say.

But what does it say? What meaning is fairly attributable to a statute that confers a power without reference to its potential obverse? The *expressio unius* canon has not produced any authoritative rule of statutory construction to the effect that a grant of power is one-way unless a power of reversal is explicit. Examples to the contrary are ordinary enough that Yoo and Gaziano propose the opposite: a "background principle. . .that the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation."<sup>70</sup> Their examples, however, mainly concern constitutional powers—Congress's power to repeal a statute, the President's power to remove a discretionary appointee—as well as the power of agencies to withdraw previously issued regulations.<sup>71</sup> It is commonsensical to suggest, as they do, that government could not go on if today's officials were generally bound by the actions of their predecessors (or their own earlier acts), either as a bare functional matter or as a matter of legitimacy as new public attitudes and elections put new tasks on the agenda of government and remove others. They give no reason to think, however, that these considerations should produce a uniform rule of interpretation for all congressional grants of power to the President, nor have courts ruled that it does.

Textualism generally takes support from both predictability and democratic legitimacy inasmuch as its advocates can say in good faith that Congress knew how to grant the President a power to revoke or revise monuments and didn't do so. In this case, that claim has some historical weight. The Antiquities Act's silence on the reversal of monument proclamations is in contrast to two major contemporaneous public-lands statutes. The Forest Service Organic Act of 1897 authorized the President to create national forests on federal lands and also to "reduce the area. . .or . . .vacate altogether any order creating such reserve."<sup>72</sup> Representative John Lacey, who would become the sponsor and architect of the Antiquities Act, argued in floor debate that the Organic Act's revocation power was necessary because it revised an 1891 act that gave the President "power to create a reserve, but no power to restrict or annul it, and there ought to be such

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68. See *id.* (role of textualism in maintaining "rule of law values" such as constraining "judicial discretion" and making "statutory interpretation more predictable").

69. See *id.* at 78–81 (discussing this canon and its relation to textualist values).

70. Gaziano & Yoo, *supra* note 8, at 639.

71. See *id.* at 640–47 (providing constitutional examples of the implied relation between a power to do and a corresponding power to undo a legal act).

72. See 30 Stat. 11, 36 (1897).

authority vested in the President.”<sup>73</sup> Similarly, the General Withdrawal Act of 1910, passed in response to a request from President Taft to clarify his power in this respect, authorized the President to withdraw federal land temporarily from privatization for public purposes, and stated that such a withdrawal would remain in effect until either the President or Congress revoked it.<sup>74</sup>

Apart from the argument that grants of power should be presumed to include the powers of revocation and revision, the case for the legality of the Trump Administration’s proclamations rests mainly on the history of presidential practice in the decades after the Antiquities Act was enacted. Orders shrinking monuments went unchallenged in the early and middle decades of the twentieth century. Most dramatically, President Wilson in 1915 cut 313,280 acres from President Roosevelt’s 639,200-acre Mount Olympus monument.<sup>75</sup> President Truman cut 4700 acres from Santa Rosa Island National Monument, which had been established at just over twice that size by President Franklin Roosevelt, and President Eisenhower cut 8920 acres from the Great Sand Dune National Monument.<sup>76</sup> Smaller monument revisions were often measures to accommodate conflicting private claims under then-extant homesteading laws, and no substantial presidential reduction took place between 1956 and 2017.<sup>77</sup>

I’ll return in Part V to these early presidential revisions. First, however, I will detail the setting of public-lands law in which, I argue, all these arguments belong.

#### *B. Locating the Antiquities Act Question Within Public-Lands Law*

Public-lands law displays a structured normative pluralism. It integrates a range of competing values: privatization and extraction; motorized recreation and hunting; scenic preservation, hiking, and solitude; and ecological preservation and biodiversity. Public-lands law is substantially structured by centuries of statutes, adopted between 1785 and 1976, and the key to understanding a hard question today lies in the way the various statutes have integrated these goals into a single regime.

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73. Representative Lacey (IA), “Sundry Civil Appropriations Bill.” *Congressional Record* 29: 2677 (Mar. 2, 1897), available at <https://www.govinfo.gov/content/pkg/GPO-CRECB-1897-pt3-v29/pdf/GPO-CRECB-1897-pt3-v29.pdf>.

74. Act of June 25, 1910, 36 Stat. 847 (1910) (repealed 1976).

75. Proclamation No. 1293, 39 Stat. 1726 (1915) (transferring portions of Mount Olympus National Monument to management as national forest).

76. Proclamation No. 2659, 10 Fed. Reg. 10275 (Aug. 22, 1945) (finding that the lands removed from the monument were “now needed by the War Department for military purposes” and that their elimination from the monument “would not seriously interfere with its administration”); Proclamation No. 3138, 21 Fed. Reg. 4035 (June 13, 1956) (finding that “retention of certain lands within the monument is no longer necessary” for “the preservation of the great sand dunes and additional features of scenic, scientific, and educational interest”).

77. See *infra* notes 157–165 and accompanying text (discussing history and variety of previous monument revisions).

*1. Public-Lands Law's Eras, Constituencies, and Ideologies*

Public-lands law has developed through a series of distinct eras, each of which generated distinctive statutory regimes. Many of these regimes persist today in a kind of statutory palimpsest. Between 1785 and the last three decades of the nineteenth century, the overriding agenda of the field was privatization in service of economic (and political) development.<sup>78</sup> Statutes made public lands available for sale, as grants to railroad companies, and to individual settlers in return for homesteading, timbering, timber-planting, mining, draining wetlands, irrigating drylands, and, generally, domesticating the terrain and extracting commodities from it.<sup>79</sup> President Franklin Roosevelt closed most public lands to homesteading in 1934 and 1935, and in 1976, Congress, in the Federal Land Policy and Management Act (FLPMA), repealed the remaining homesteading statutes and other regimes for disbursing federal acreage as real estate.<sup>80</sup> Nonetheless, extensive mining, drilling, and timbering continue on the multi-use public lands.<sup>81</sup> Grazing rights and certain motorized access routes also persist as legal survivals from the period of development-oriented public-lands law.<sup>82</sup>

Beginning in 1872 with the congressional creation of Yosemite National Park, a second mode of public-lands law entered the field: permanent reservation of land under federal management to serve one or another version of public interest.<sup>83</sup> (Previous development statutes had provided for federal retention of land for post offices and military sites, but these were ancillary to development-oriented privatization, not alternatives to it.)<sup>84</sup> The first statute authorizing such reservation apart from special acts of Congress was the 1891 provision delegating to the President the power to reserve timberlands, later replaced by the Forest Service Organic Act of 1897.<sup>85</sup>

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78. See generally GATES, *supra* note 13 (describing the rich history of the political processes and interests at play in the disbursement of the U.S. public domain); JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915*, 13–61, 571–91 (1st ed., 1964) (setting out in detail the extraction of wealth from public lands that powered nineteenth-century economic development).

79. See, e.g., General Mining Law of 1872, 30 U.S.C. § 22 (2012) (“[A]ll valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States . . .”).

80. See Gates, *supra* note 13 at 612–13 (narrating withdrawal of public lands from settlement under Taylor Grazing Act of 1934); see also 43 U.S.C. § 1714(a) (restricting withdrawals of lands to the procedures set forth in FLPMA).

81. See Exec. No. Order 6910 (Nov. 26, 1934) (withdrawing lands from settlement in the Western states).

82. See Taylor Grazing Act of 1934, 43 U.S.C. § 315 et seq. (governing grazing on public lands); *S. Utah Wilderness All. v. BLM*, 425 F.3d 735, 746–47 (10th Cir. 2005) (claims of public access arising under pre-FLPMA Revised Statute 2477 to be adjudicated by courts on common law basis, rather than initially decided by the BLM and reviewed under administrative law standards).

83. See An Act to Establish a National Park Service, 16 U.S.C. § 1 (2006) (repealed 2014).

84. See Rock Island Military Reservation, 10 Op. Atty. Gen. 359 (1862) (referring to such measures).

85. See 30 Stat. at 32–35 (1897).

These permanent reservation statutes pursued two distinct families of purposes. Conservation statutes promoted utilitarian management of resources that were thought to be vulnerable to wasteful private extraction. Preservation statutes removed land from the pressures of economic use in certain unique and irreplaceable locations. As the next subpart describes, these two sets of goals became central to the shape of public-lands law because they were embodied in two distinct classes of statutes: *multiple-use* statutes that gave administrative agencies considerable discretion in setting and revising priorities and permissible uses for the acreage they governed, and *categorical* statutes that set aside land for specific purposes—in practice almost always preservation purposes—and forbade other uses.

Each of these strands or layers of public-lands law has its constituencies. Extractive industries, their employees, and communities that identify culturally with them are core supporters of the regimes of privatization, often advocating significant expansion of extraction, sometimes proposing reopening sale of public acreage as real estate.<sup>86</sup> Topical advocacy groups such as the Sierra Club and the Wilderness Society played key roles in preserving the lands devoted to their aesthetic and recreational values, and remain the organized core of a constituency for wild lands.<sup>87</sup> These constituencies are, of course, cross-cutting and dynamic. Environmentalists, although still sometimes criticized as unduly fixated on Hudson River School images of American terrain, frequently support preserving less obviously charismatic landscapes and dimensions of biodiversity, such as wetlands. Industries that stand to benefit from extractive privatization may prefer taking resources from public lands to holding the full liability of private ownership.<sup>88</sup>

## 2. *The Normative Structure of Public-Lands Law*

Public-lands law integrates these competing values through a system of statutes that are distinguished by their goals and governance regimes. Lands governed by the Forest Service and BLM under the National Forest Management Act and FLPMA are, in the parlance of the field, multiple-use acreage, statutorily dedicated to diverse purposes that are frequently mutually incompatible on any one tract: “recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.”<sup>89</sup> These goals are not exhaustive,

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86. See R. MCGREGGOR CAWLEY, FEDERAL LAND, WESTERN ANGER 71–91 (1993) (outlining sources and orientation of “Sagebrush Rebellion” objections to federal policy); Philip Shabecoff, *Watt Announces Plan to Sell 5% of U.S. Lands*, N.Y. Times, June 15, 1982.

87. See Jedediah Purdy, *The Politics of Nature*, 119 YALE L.J. 1122, 1145–73 (2010) (tracing certain of these developments).

88. See, e.g., PHILIP O. FOSS, POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN (1960) (classic study of the public-choice dynamics of access to public lands).

89. See 43 U.S.C. § 1702(c) (FLPMA). See also Nat’l Forest Mgmt. Act, Pub. L. No. 94-588 (Oct. 22, 1976) (establishing “multiple use” goals of “in particular . . . outdoor recreation, range, timber,

and they are not organized by reference to any master-value such as wealth-maximization.<sup>90</sup> These pluralist regimes require what is in effect ongoing landscape-scale zoning, with very substantial agency discretion. A typical management area in one of these land categories encompasses tens or hundreds of thousands of acres and is governed by a comprehensive plan, produced by the Forest Service or BLM in consultation with community members and interest groups and updated periodically.<sup>91</sup> Such a plan might dedicate a valley or forest to wilderness preservation, hiking, and camping; open other parts of a region to motorized access and hunting; and provide for timber sales or mineral leases in selected areas (likely including the areas open to motorized recreation). The competing uses are not formally mutually exclusive. For example, it is quite ordinary that an established hiking trail might pass through areas that are grazed and periodically logged; but mineral extraction tends to exclude much outdoor recreation, wilderness management precludes motorized activity and extraction, and wildlife and watershed values are in perennial tension with any other uses more intensive than wilderness.

The statutory regimes governing lands set aside as national parks (each one by an act of Congress) neither permit nor oblige so much pluralistic integration. The National Park Service Organic Act of 1916 directs the agency “to conserve the scenery and the natural and historic objects and the wild life [sic] 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.”<sup>92</sup> Most acts creating national parks simply hand them over to the parks regime: Glacier National Park (1910), for instance, is to be preserved in “a state of nature” with an eye to “the care and protection of the fish and game,” while Grand Canyon National Park (1919) is dedicated to “the benefit and enjoyment of the people” in keeping with the terms of the intervening Organic Act.<sup>93</sup> While parks administration involves complex and contentious issues of ecosystem management and conflicts between public access and preservation, these decisions operate within a far narrower range of potential uses than those governing multiple-use lands, and extractive uses are almost categorically off the table in parklands. A similarly focused set of purposes governs the National Wildlife Refuge system, much of it established by presidential withdrawal. Ecosystem management for habitat health and biodiversity is the touchstone of

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watershed, wildlife and fish”); 16 U.S.C. § 528 (2012) (setting goals for national forest management of “outdoor recreation, range, timber, watershed, and wildlife and fish purposes”).

90. See 43 U.S.C. § 1702(c) (land planning shall proceed “not necessarily [with reference] to the combination of uses that will give the greatest economic return or the greatest unit output”).

91. See, e.g., Bureau of Land Management, Southeastern Oregon Resource Management Plan and Record of Decision (Sept. 2002), <https://www.blm.gov/or/districts/vale/plans/files/seormp/SEORMP-Rec.of.Decision.pdf> (520-page document outlining uses of 4.6 million acres).

92. See An Act to Establish a National Park Service, 16 U.S.C. § 1 (2006) (repealed 2014).

93. See *id.*; Act of May 11, 1910, Pub. L. No. 171, 36 Stat. 354; Act of Feb. 26, 1919, Pub. L. No. 277, 40 Stat. 1175.

the system, which is chiefly managed by the National Fish and Wildlife Service, and permission for recreational and hunting access and right-of-ways is conditional on compatibility with these overriding goals.<sup>94</sup>

The most categorical of the public-lands statutes, the Wilderness Act dedicates about 110 million acres to “solitude” and “primitive and unconfined. . . recreation” by mandating the preservation of its “wilderness character.”<sup>95</sup> Wilderness areas are designated by separate acts of Congress and are protected from motorized access, road construction, and permanent structures.<sup>96</sup> While no single agency administers the federal wilderness system, and wilderness designations overlie prior designation as national park or national forest, the Wilderness Act’s categorical requirements impose a uniform management regime on all lands that it governs.<sup>97</sup>

One can say, then, that along this spectrum, the hyper-categorical Wilderness Act all but administers itself (not literally true, of course, but it imposes relatively little need for administrative agencies to balance interests or choose among values), while the multiple-use statutes demand pervasive, ongoing, and very basic judgments of value across the acreage managed by the Forest Service and BLM. Between the two poles, national parks and wildlife refuges lean substantially toward the categorical end of the spectrum, permitting and pragmatically requiring a variety of management decisions, but organizing these around overriding and all-but-exclusive values of preservation and public recreation.

### *C. The Stakes and Structure of Reclassifying Public Lands*

Reclassifying acreage among these categories is a high-stakes affair. It brings constituencies into the decision-making process or excludes them, gives their goals priority (sometimes absolute priority) or throws them into the scrum with competing interests. As noted earlier, the weight of these concerns is evident in Secretary Zinke’s memorandum recommending shrinking Bears Ears and other monuments, and in President Trump’s remarks upon issuing his monument proclamations. Both concentrated on the way that establishing a monument excludes certain extractive and, frequently, recreational interests from the land’s governance procedures. Secretary Zinke expressly contrasted monument status with the multiple-use planning process typical of BLM governance, praising the

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94. See 16 U.S.C. § 661.

95. See 16 U.S.C. § 1131 (2012); KATIE HOOVER, CONG. RESEARCH SERV., RL31447, WILDERNESS: OVERVIEW AND STATISTICS I (2014).

96. See 16 U.S.C. § 1133 (2012).

97. See 16 U.S.C. § 1133(b) (governing use of wilderness areas across agencies); *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1056, 1061–62 (9th Cir. 2003) (en banc) (emphasizing the categorical requirements of the Wilderness Act, which override discretionary agency judgments, even those arguably consistent with “wilderness values”).

latter for its inclusiveness and flexibility.<sup>98</sup> The effect of the revisions that he recommended, and which the President adopted, was to return hundreds of thousands of acres to multiple-use planning. The next three subparts ask how those revisions fit within the structure of public-lands law, which is defined by certain patterns in which the powers of reclassification are granted and exercised.

### *1. Intergenerational Integration*

One pattern forms a scheme of intergenerational synthesis that integrates earlier and later public-lands regimes.<sup>99</sup> Across time, public acreage may be subject to a series of mutually inconsistent statutory regimes. For instance, virtually all such acreage was at one time eligible for mining claims and homesteading. National parks and wilderness lands were reserved for purposes incompatible with such claims, and all public lands were later withdrawn from homesteading. What is to be done with potentially competing claims arising from statutory regimes with different goals and administrative mechanisms? In practice, withdrawal and reservation are limited by previous creation of private claims. Where privatization statutes have created inholdings and other conflicting claims, withdrawal and reservation statutes have directed land-management agencies to accommodate these or to address them by purchase or exchange. These principles developed under homesteading-style regimes that privatized acreage as real estate, and have continued into the modern era of extractive privatization. Thus parks and wilderness areas have generally been created subject to previously established private rights, even those new private claims cannot arise on lands that have been placed under these statutory regimes.<sup>100</sup>

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98. See Zinke, *supra* note 28, at 8 (noting the importance of multi-use regimes to economic development in communities surrounding public lands).

99. Bruce Ackerman develops the idea of intergenerational synthesis among “moments” of constitutional lawmaking in *WE THE PEOPLE: FOUNDATIONS* 150–59 (1991) (characterizing, e.g., *Griswold v. Connecticut* as the product of integrating the libertarian commitments of the Bill of Rights with the New Deal’s empowerment of the social-administrative state), and William Eskridge and John Ferejohn treat the accumulated normative weight of statutes as “precedent” for the reorientation of fields of law to new purposes or balances among purposes in *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 224–53 (2010) (on changing models of family and interpersonal commitment). In using the term “intergenerational synthesis,” I don’t mean to take on any highly specified account of legal change, authority, or interpretation, but to indicate that my account of public-lands law has affinities with these ways of achieving coherence across time and among multiple sources of law. While my account is less theorized, it is also more specific. The structured priorities among the eras, and their expression in separation of powers with respect to reclassification, make my account more determinate in its interpretive recommendations than their far-reaching hermeneutics.

100. See 16 U.S.C. § 1133 (c) (wilderness area created “subject to existing private rights”); 16 U.S.C. § 161 (in creation of Glacier National Park, “Nothing . . . shall affect any valid claim, location, or entry existing under the land laws of the United States . . . or the rights of any . . . claimant . . . to the full use and enjoyment of his land”).

## 2. Separation of Powers

The second pattern structuring public-lands law's integration of competing purposes is the *presumption against presidential privatization*. Although the President over the twentieth century enjoyed a variety of pre-FLPMA powers to move multiple-use lands in and out of availability for one purpose or another, such as mineral leasing, stock-watering, and irrigation, and to sequester land for national-security purposes, Congress has never authorized the President to remove land unilaterally from a categorical regime and open it to extraction under multiple-use management. The reason is not elusive: the categorical regimes serve preservationist goals, protecting historic, ecological, scenic, and recreational (wilderness) values that are marked by their vulnerability to substantially irreversible disruption. It takes only one row of derricks or copper-mining pit to spoil a Yosemite Valley, one road to destroy a wilderness area (in terms of both the cultural meaning of wilderness and the statutory requirements of the Wilderness Act), one ill-formed or opportunistic digging expedition to wreck an archaeological site. Opening such a site to extraction runs the risk of surrendering the option to preserve other values there.

For these reasons, public-lands law has long been structured to avert precipitate executive privatization, especially of lands set aside categorically for preservationist purposes. Such privatization, whether in the traditional homesteading form or, more recently, through timber sales and mineral leases, is the likeliest way for reclassification to destroy vulnerable values and preclude later implementation of management regimes aimed at those. Where Congress has brought lands into a categorical regime, such as under the national parks or wilderness system, the President has no power to change that status. Even where the President has enjoyed implicit power to reclassify public lands, such as the Supreme Court found in *Midwest Oil*, this power has asymmetrically favored preservation over privatization.<sup>101</sup>

FLPMA, passed in 1976, also contains a major example of the conjunction I am describing: the one-way ratchet of presidential reclassification power, authorizing movement of lands into categorical and preservation-oriented regimes, but not out of those regimes into multiple-use classifications. FLPMA extends the potential for wilderness classification to BLM acreage, which was omitted from the 1964 Wilderness Act.<sup>102</sup> FLPMA directs the Interior Department to inventory BLM lands with "wilderness characteristics" and the President to convey to Congress a recommendation as to which of those lands should be permanently designated as wilderness.<sup>103</sup> Once a tract has been identified by Interior as potential wilderness (whether or not the President

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101. See *infra* Part IV.B.2 (discussing implied presidential power).

102. See, e.g., Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2012) (creating framework for establishing wilderness by subsequent legislation and authorizing creation of wilderness areas within national parks and national forests, but omitting land managed by BLM).

103. See 43 U.S.C. § 1782(a) (2012).

recommends permanent designation), FLPMA directs BLM to manage it “so as not to impair the suitability. . . for preservation as wilderness, subject, however, to the continuation of existing mining uses and mineral leasing in the manner and degree in which the same was being conducted [at the time of FLPMA’s passage].”<sup>104</sup> This management directive continues until Congress decides whether to designate the land permanently as wilderness or to release it into the general pool of multiple-use BLM lands.<sup>105</sup> The Executive has no power to move the same land back into multiple-use, and so into eligibility for new extractive and privatizing claims; only Congress can do that.

### 3. *The Antiquities Act in the Public-Lands Setting*

The following distinction helps to make sense of the textual differences between the Antiquities Act, which does not grant the President express power to revoke or revise monument classifications, and the Forest Service Organic Act (the Organic Act), which did grant that power for national-forest reservations. According to the arguments supporting the Trump Administration, this textual difference is immaterial to the statutes’ actual grant of power: although the Organic Act otiosely states the obvious, both statutes grant the power to reverse earlier reclassifications. But there is a difference between the statutes that makes better sense of the difference in drafting by assuming that the Antiquities Act did not confer the power of reversal. National forests have always been designated for multiple-use management, and the decision to move them back into the default regime of public lands would not essentially change this status. By contrast, reclassifying categorically protected for into multiple-use management does essentially change their status.

The Organic Act is the paradigm of a multiple-use statute, one assigning the management of a class of resources to an expert-staffed government agency charged with administering it to serve the long-run interest of the public.<sup>106</sup> It was passed in response to worry about exhaustion of economically essential resources, and presupposed that the executive branch would use a variety of techniques to balance timbering, long-term forest productivity, and management of watersheds that were dependent on headwaters forests for erosion and flood control and yearlong flows.<sup>107</sup> The point was to allow private extractive activity on public lands, under appropriate regulation. Executive discretion,

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104. See 43 U.S.C. § 1782(c).

105. See *id.*

106. See 30 Stat. 11, 36 (1897). (“No public forest reservation shall be established except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of waterflows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”); Purdy, *supra* note 15, at 189–99 (discussion of conservation statutes).

107. See 21 Cong. Rec. 2537 (1890) (entering into the record a memorial from the American Forestry Association, urging adoption of interconnected regime for managing forests and watersheds); DEP’T OF THE INTERIOR, REPORT OF THE SECRETARY OF THE INTERIOR 14 (1891) (urging use of the President’s timber-conservation power to conserve both forests and watersheds).

appropriately informed by expertise and utilitarian purposes, was the core governance technique of the statute, replacing a regime of private “entry” onto timber lands that had produced wasteful, even disastrous over-harvesting.<sup>108</sup>

The Antiquities Act, by contrast, was a categorical land-classification statute. Its purpose was to protect certain resources from extraction or other transformation by removing them categorically from the public lands laws’ schemes of sale and privatization.<sup>109</sup> The reason for this approach lay in the character of the objects that the Antiquities Act protected: they were valuable for their unique and irreplaceable qualities, rather than for their fungible and instrumental uses.<sup>110</sup> The Antiquities Act of 1906 combined language from two earlier legislative proposals that had failed between 1900 and 1905. One comprised bills drafted and promoted by the American Association for the Advancement of Science and the Smithsonian Institution, respectively, which sought to preserve Native American relics.<sup>111</sup> Such relics had been devastated by development in the Midwest and were then being actively looted in the Southwest by settlers, tourists, and freelance scientific expeditions, some of the largest of which removed the artifacts (and human remains) from the country to stock European collections.<sup>112</sup> The second legislative proposal, which came from the General Land Office in the Department of the Interior, would have authorized the President to create national parks to preserve “scenic beauty, natural wonders or curiosities [and] objects of scientific or historic interest.”<sup>113</sup> In extending its scope to “historic landmarks, historic and prehistoric structures” and “objects of historic or scientific interest,” the Antiquities Act adopted both strands of the preservationist program.<sup>114</sup>

It fits the patterns of public-lands law that the Antiquities Act withheld the same revocation power that the Organic Act granted because of the distinct purposes and instruments of the two statutes. For the national forests, presidential reservation was delegated as a tool in a flexible scheme aimed at increasing the long-term benefit of a fungible resource by publicly managing the timing and terms of private extraction. For the national monuments, reservation served to put unique and irreplaceable objects outside the scheme of extraction and privatization.

If courts now found that the Antiquities Act authorized the President unilaterally to reclassify monument lands, they would have identified (or

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108. See, e.g., Purdy, *supra* note 15, at 99 (describing regulatory strategy of this paradigm conservation statute).

109. See RONALD F. LEE, DEP’T OF THE INTERIOR, THE ANTIQUITIES ACT OF 1906 13–46 (describing motivations for passage of Antiquities Act) (1970).

110. See *id.* (awareness of irreplaceability of artifacts).

111. See *id.* at 47–77 (detailing drafting history of Antiquities Act and parallel, contemporaneous proposals).

112. See *id.* at 29–38, 47–51 (1970).

113. *Id.* at 52–53.

114. See 16 U.S.C. § 431 (2012).

created) an anomalous power that cuts against the patterned logic of the rest of the public-lands regime by authorizing the President to unmake national monuments as he may not national parks or wilderness areas. The silence of the Antiquities Act on presidential power to revise or revoke monuments is not simply a standard case of Congress's having known how to grant a power and declining, through silence, to do so; it is a case of Congress's having acted consistently with a well-justified and consistent pattern of not authorizing unilateral presidential declassifications of categorically protected lands.

#### IV. THE ANTI-CORRUPTION GOALS OF PUBLIC-LANDS LAW

The presumption against presidential privatization also roots in worries about corruption. The concern with corruption had particular weight in eras when public-lands law was essentially a wealth-disbursement regime that created private property out of the public domain. Favoritism remains a danger whenever discretionary power governs the disbursement of valuable public resources. While courts have scarcely ever directly reviewed executive or legislative action for "corrupt" motives, and nothing in this argument suggests they should behave differently in the public-lands setting, statutory design and the separation of powers can serve as structural anticorruption devices by removing the instruments of favoritism and self-dealing.

The Antiquities Act's asymmetric grant of presidential power to confer protection but not to remove it makes sense if Congress's withholding the removal power is in part a structural prophylaxis against corrupt executive action. While the simplest reason not to give the President removal power is that he does not need it to accomplish the Act's purpose of preservation, this is buttressed by the danger of misusing the power to undercut the Act's preservation goal.

Several interlocking considerations support this interpretation. First, in 1906 reformers had agitated for decades against opportunistic privatization of public land and its resources, focusing on executive-branch officials' complicity in privatization that, while often not technically illegal, amounted to wealth-grabs from the public domain.<sup>115</sup> Second, the Antiquities Act itself was intended to prevent opportunistic privatization in the form of expropriation of artifacts or destruction by development of irreplaceable sites.<sup>116</sup> Third, landmark interpretations of presidential power over the public lands, including the major twentieth-century Attorney General's account of the Antiquities Act, have recognized the following asymmetry: The presidential power to protect land in order to avert destructive or opportunistic privatization does not imply presidential discretion to privatize public resources (including making them available for extraction). Taken together, these considerations support an

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115. See *infra* discussion in Part IV.A.

116. See LEE, *supra* note 112, at 29–38, 47–51.

interpretation of the Antiquities Act as a structural anti-corruption device, designed to protect irreplaceable public resources by enabling the President to prevent their privatization, but not to privatize them himself.

*A. The Concern with Corruption in Public-Lands Law*

Public-lands corruption was a point of fixation for public debate in much of the nineteenth and early twentieth centuries, and was particularly salient when the Antiquities Act was debated and passed. The federal privatization of North American land, timber, and minerals is one of the great disbursements of wealth in world history, and it is hardly surprising that it prompted fierce conflict over the question of who should get the resources and the various forms of legerdemain that grew up around every privatization scheme. To give a sense of the scale of the matter: an 1886 House of Representatives report found that fraudulent claims and illegal fencing of Western grazing lands had brought more than twenty-one million acres under the control of British and European cattle capital, including 1.75 million acres in the hands of the memorably titled Marquis of Tweeddale.<sup>117</sup> A reformist commissioner of the General Land Office (GLO) reported in the mid-1880s that some 40 percent of homesteading claims were fraudulent but tolerated by the office.<sup>118</sup> He reported that; “conspicuously fraudulent” claims under the Timber Culture Act had been protected by official rulings of his predecessors and false claims and open looting of public timber were “universal, flagrant, and limitless.”<sup>119</sup> The conflict was not chiefly between privatizing claimants and federal regulators. It was, rather, a matter of the GLO’s tolerating or collaborating with large extractive investors’ manipulation of privatization statutes. So the reformist GLO of the 1880s returned tens of millions of acres to eligibility for “entry” under statutes governing homesteading and other small-scale settlement after determining that railroads had locked them up by abusing the vast grants that were meant to finance their westward expansion.<sup>120</sup> The GLO’s commissioner emphasized that executive-branch discretion had been the key to a use of the office’s power “to the advantage of

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117. See H.R. REP. NO. 2445 at 2 (1886); cf. GATES, *supra* note 13, at 483 n.58 (suggesting the report was somewhat sensationalistic but pointed to a real phenomenon; even an exaggerated documentation highlights the intensity of political sentiment around the issue).

118. See GATES, *supra* note 13, at 459 (summarizing report of General Land Office Commissioner William A.J. Sparks).

119. *Id.*

120. See *id.* at 460. As Gates notes, the open class-and-faction battles over railroad grants included incidents such as the following in 1860s Kansas: “raids on the railroad offices, destruction of all the equipment of surveying parties, public whipping of the officers . . . burning of ties, and the gutting of the office of a newspaper subsidized by the railroad. Two men who bought land from the railroad were murdered, a sheriff was arrested and convicted of insanity for aiding the railroad, and defenders of the railroad were stoned and burned in effigy.”

speculation and monopoly, private and corporate rather than the public interest.”<sup>121</sup>

The same issues remained highly salient during Theodore Roosevelt’s presidency, when the Antiquities Act became law. President Roosevelt in his 1902 State of the Union address denounced widespread abuse of public-lands laws and appointed an investigatory commission that found the great majority of land claims in regions rich in timber or minerals were made by catspaws, then transferred to speculators or extractive interests.<sup>122</sup> President Roosevelt warned that “ample notice has now been given to the trespassers, and all the resources that the command of the Government will hereafter be used to put a stop to such trespassing.”<sup>123</sup>

Reformers were keenly focused on which legal maneuvers made corruption possible and what measures might prevent corruption in the disbursement of public lands.<sup>124</sup> In its 1905 report, the Public Lands Commission described extensive opportunistic privatization.<sup>125</sup> Under the Timber and Stone Act, “many of these [claims] were made by nonresidents . . . who could not use the land nor the timber upon it . . . and it is apparent that they . . . will eventually follow the course taken by many similar entries and become part of some large timber holding.”<sup>126</sup> The Commission found that a privatization-for-hire system had developed: “poor men” filed lands claims, which they transferred to timber companies, receiving only hourly wages for the time spent on paperwork, resulting in “the sale of the lands far below their real value.”<sup>127</sup> Thus, “timber lands which should have been preserved for the use of the people are withdrawn from such use” in favor of corporate profit-taking.<sup>128</sup> The Commission found that the Homestead Act had been “perverted” by a similar claims-for-hire system in which ostensible settlers (often women or, in the Northern Rockies and Pacific Northwest, transient Canadians) flipped their claims to speculators.<sup>129</sup> Similar transfers were frequent under the Desert-Land Law.<sup>130</sup> In sum, the public-lands laws had become vehicles for “the shrewd business man who aims to acquire large properties,” and the majority of privatization served “speculators and corporations.”<sup>131</sup>

121. *Id.* at 472 (quoting General Land Office Commissioner Sparks). Sparks wrote of GLO officers, “if they do not corruptly connive at fraudulent entries, [they nonetheless do] modify their instructions and exceed their discretionary powers in examinations of final proof.” DEP’T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, 50 (1885).

122. See GATES, *supra* note 13, at 487–92; President Theodore Roosevelt, Second Annual Report to Congress (Dec. 2, 1902).

123. Roosevelt, Annual Report, *supra* note 122.

124. ELTING E. MORISON, 4 THE LETTERS OF THEODORE ROOSEVELT 1217–18 (1951).

125. See REPORT OF THE PUBLIC LANDS COMMISSION, S. Doc. No. 189 (1905).

126. *Id.* at vi.

127. *Id.* at xvi.

128. *Id.* at xvi–xvii.

129. *Id.* at xvii–xviii.

130. *Id.* at xviii–xx.

131. *Id.* at xxiii.

Executive-branch corruption was integral to the Commission's account of the problem. The Public Lands Commission Report concluded, "Almost without exception collusion or evasion of the letter and spirit of the land laws was involved" in the privatization it criticized.<sup>132</sup> For example, abuses of the Homestead Act were frequently facilitated by federal land officials who doubled as principals in loan companies, who lent the capital to ease each stage of the claims-and-transfers system that they oversaw, "eager first to induce settlement and then to make these loans on account of the double commissions received."<sup>133</sup> The commission's recommendations were chiefly structural changes to public-lands laws to inhibit these opportunistic transactions by restricting hasty transfers of claimed land and blocking the extension of the Homestead Act to mountainous regions rich in timber, stone, and minerals, but with little prospect for genuine 160-acre farming settlements in the Midwestern mold.<sup>134</sup> It was a time of efforts to rein in the legal powers that enabled the executive branch to collude in favoritistic or opportunistic disbursements of the wealth of the public lands.

### *B. Anti-Corruption in Prior Interpretation*

#### *1. The Attorney Generals' Opinions as Anti-Corruption Reasoning*

Concern over corruption and opportunistic privatization was ambient among reformers and provided the major motive for the Antiquities Act. The same concern emerged as an important feature of the interpretation of the executive power to reclassify public lands. The concern to check corruption structurally found expression in a persistent asymmetry, in authoritative discussions of the President's public-lands power, between the use of presidential power to preserve public lands (favored), and uses of presidential power to tailor or expand privatization and extraction (disfavored).

In 1938, President Franklin Roosevelt asked Attorney General Homer Cummings to assess a proposal to abolish a small national monument altogether.<sup>135</sup> Cummings concluded that the President lacked the power to do so.<sup>136</sup> Cummings assumed the legality of the earlier presidential reductions in monument size, describing them as implementing the Act's requirement that monuments be "confined to the smallest area compatible" with protecting their objects.<sup>137</sup> In denying that the President may outright declassify a monument, he contrasted the Antiquities Act with the Forest Service Organic Act of 1897, which (as noted earlier) "expressly provides that the President at any time may modify any executive order establishing any forest reserve by reducing its area

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132. REPORT OF THE PUBLIC LANDS COMMISSION, *supra* note 125, at xxiv.

133. *Id.* at xviii.

134. *See id.* at iv–v.

135. *See* Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Atty. Gen.

136. *See id.* at 188.

137. *Id.*

or by vacating it altogether.”<sup>138</sup> In Cummings’s reasoning, the absence of an express congressional grant of revocation power in the President implied that Congress had granted the President only a one-way power of classification: once the President had classified a site as a monument, “the power conferred by the act was exhausted.”<sup>139</sup>

In that last phrase, Cummings quoted his predecessor Edward Bates, who had written a Civil War-era Attorney General’s opinion finding that President Lincoln lacked power to make available for privatization a site reserved under statute by earlier presidential action. In his opinion, Bates argued that presidential power to reserve federal land should be interpreted as one-way rather than reversible to prevent corruption.<sup>140</sup> Bates’s opinion addressed the question whether the Secretary of War could release an unused fort to the Treasury Department for disposal under federal preemption law (a species of nineteenth-century federal land-privatization that gave priority to the claims of settlers in actual possession of public land by enabling them to “preempt” other claims), where the fort had been established by presidential proclamation under congressional authorization.<sup>141</sup> Elaborating on his already-quoted conclusion that the President’s “power . . . was exhausted” upon reserving the land, and did not extend to revoking the reservation, Bates argued that discretionary revocation would invite executive-branch officials to “enrich some speculating favorite” who could qualify to claim the land as a settler.<sup>142</sup> In other words, once lands had been removed from privatization schemes, the danger of their being selectively reclassified to favor the patrons or proteges of the executive branch provided a strong reason not to read Congressional delegation as authorizing such re-classification.

This concern applied with special force to lands that had been developed at federal expense, as the fort at Rock Island had been. It would also apply with special force to land that had been reserved because of its unique and irreplaceable qualities. Either would be susceptible to ill-motivated discretionary privatization, and in both cases the loss from such corruption would be particularly high. There is, then, a snug fit between the basis of the drafting difference between the Antiquities Act and the Forest Service Act and the reasoning behind the executive branch’s long-running opinion that national monument declarations are irrevocable.

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138. *Id.* Attorney General Cummings also distinguished the General Withdrawal Act, which authorized temporary presidential withdrawals, reversible by executive action. *Id.*

139. *Id.* at 187 (quoting Rock Island Military Reservation, 10 Op. Atty. Gen. 359, 364 (1862)).

140. *See* Rock Island, 10 Op. Atty. Gen. at 363.

141. *See id.* at 363–67.

142. *Id.* at 366.

## 2. *Midwest Oil as an Anti-Corruption Opinion*

*United States v. Midwest Oil* is the Supreme Court's most important treatment of presidential power over public lands.<sup>143</sup> In the course of affirming implied executive power to reclassify federal land, it notes the asymmetric presumption against privatization and ties it to anti-corruption concerns.

In September of 1909, the Director of the U.S. Geological Survey reported to the Secretary of the Interior that, amid a crowded oil rush, California's oil lands would soon be fully privatized under the Oil Placer Act of 1897.<sup>144</sup> The Director expressed concern that the privatization of oil lands would leave the Navy "obliged to repurchase the very oil" the federal government was then disbursing.<sup>145</sup> On the Secretary's recommendation, and in anticipation of Congressional legislation, President Taft then issued a proclamation of "temporary withdrawal," removing more than three million acres in California and Wyoming from eligibility for Placer Act claims.<sup>146</sup> Oil operators who filed claim thereafter on a portion of the affected lands then sued the United States, asserting that President Taft lacked power to withdraw the lands without explicit Congressional authorization and in the teeth of an extant statute giving private parties the right to claim oil lands.<sup>147</sup> The Court held that the President had the power to withdraw the lands from oil claims.<sup>148</sup> The power might not inhere in the office "as an original question," but a long practice of Congress's accepting presidential withdrawal for bird reserves, military reservations, and ancillary support of the latter (such as hay, water, timber, and target ranges) implied that the President could withdraw lands "as agent" of Congress and acting "in the public interest."<sup>149</sup>

After marshaling instances of unchallenged presidential withdrawal, Justice Lamar took pains to emphasize that, "These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a railroad more than had been authorized by Congress in the land grant act."<sup>150</sup> The distinction here is between withdrawing land for purposes of preserving it and, on the other hand, withdrawing it to create private rights. The latter class of action is effectively irreversible. It forecloses Congress's future options in exercising its ultimate power over public lands. It is also especially susceptible to corruption, as it offers the President the opportunity to disburse economic assets from the public lands to favored industries and entities. Both concerns apply to reclassification of monuments that opens them to mining, drilling, and logging.

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143. See *United States v. Midwest Oil*, 236 U.S. 459 (1915).

144. See *id.* at 466.

145. *Id.* at 467.

146. See *id.*

147. See *id.* 468–69.

148. See *id.* at 469.

149. See *Midwest Oil*, 236 U.S. at 475.

150. *Id.* at 472–73.

Both, moreover, distinguish such reclassification from the initial monument proclamation, which preserves the resources in public hands for any future contravening (or confirmatory) congressional decision and does not create any private economic claim on the land.

*C. The Anti-Looting Motives of the Antiquities Act's Adoption*

It was in this reformist ferment around the public-lands laws that the Antiquities Act was adopted. The problem to which the Act responded was an aspect of a general and long-running crisis that was then regarded as having entered an acute phase: the looting of the public lands by various forms of corrupt or opportunistic privatization. The 1904 Senate Committee hearings on a predecessor bill focused on a legacy that was “being obliterated every day” by “commercial speculators and excavators.”<sup>151</sup> Artifacts were leaving the West in “carloads” daily during the seasons that permitted excavation.<sup>152</sup> Some of the losses were due to commercial “[v]andals,” and others to archaeological expeditions launched by European institutions, which had exported “hundreds of car loads of objects which should have been preserved, as far as possible, in the condition in which they are found, or which at least have been retained in this country.”<sup>153</sup> With unreserved public lands open to anyone to enter and remove artifacts as they saw fit, the law effectively invited these forms of commercial looting and willy-nilly export.

The country's scientific community mobilized around the looting crisis. Both the Smithsonian Institution and the Archaeological Institute of America were closely involved in advocacy and legislative drafting to meet the emergency, which they aptly expected to intensify as excavators hurried their efforts in anticipation of regulation.<sup>154</sup> There was little comfort in the thought that artifacts might end up in the hands of museums and collectors, because their greatest value as public goods was as a source of knowledge about prehistory, which required their systematic study in their original location.<sup>155</sup>

The Antiquities Act is part of a family of reforms intended to secure the public interest in federal lands by raising barriers to opportunistic and corrupt privatization that undercut that interest. Understanding its origin and purpose casts light on the way the presidential public-lands power it creates has been interpreted in the past: as an asymmetric power to preserve public lands and their

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151. *Preservation of Historic and Prehistoric Ruins, Etc.: Hearing on S. 427 and S. 5603 Before the Subcomm. of the Comm. on Public Lands, 58th Cong. 5* (1904).

152. *See id.* at 4–5.

153. *Id.* at 18.

154. *See* LEE, *supra* note 112, at 9, 47.

155. *See* T. MITCHELL PRUDEN, *The Prehistoric Ruins of the San Juan Watershed in Utah, Arizona, Colorado, and New Mexico*, 5 AM. ANTHROPOLOGIST 225, 237, 288 (1903) (“to gather or exhume specimens—even though these be destined to grace a World's Fair or a noted museum—without at the same time carefully, systematically, and completely studying the ruins from which they are derived . . . is to risk the permanent loss of much valuable data and to sacrifice science for the sake of plunder”).

resources from certain kinds of privatization, but not to reclassify those lands so as to make them newly available for privatization. The asymmetry is a structural measure to prevent the forms of executive “collusion” with rent-seekers that privatization statutes had long invited.

*D. The Asymmetric Premise Against Presidential Privatization*

Anti-corruption concerns, then, form a second and complementary basis of the asymmetric premise against presidential privatization. Reclassifying protected lands as eligible for privatizing extraction presents a set of interlocking dangers. Given the nature of the values typically protected in categorically preserved land, such as historic and scientific interest and ecological health, extraction may irremediably compromise those values, effectively denying Congress the option to preserve them in the future. Given the structure of intergenerational synthesis in public-lands law, creating private claims also burdens subsequent Congressional decisions to preserve lands even where it does not substantively undercut eligibility for preservation (as roads undercut eligibility for wilderness designation, for instance). Before 1934, when homesteading effectively ended, privatization of the land itself was the primary concern of this form. Today, the concern is not that the Executive will literally sell land out from under Congress, but rather that private rights to mining, oil leasing, and other extraction, once issued, will burden subsequent management options.

These reasons for the presumption against privatization find reinforcement in the threat of corruption: the Executive’s capacity to act quickly and decisively, the basis of many functionalist assertions of presidential powers, has the downside risk that a subordinate official—or the President—may opportunistically disburse private rights in public lands. Both executive interpretation of Congressional delegations of power (including of the Antiquities Act itself) and the Court’s interpretation of the President’s implied power over public lands have taken account of this danger through the structural anticorruption device of a presumption in favor of a one-way presidential power of reclassification, toward greater protection, but not toward greater eligibility for private claims. The same reasons support a conclusion that the President’s power of proclamation under the Antiquities Act is a power to protect but not a power to remove protection.

V. MONUMENT REVISIONS AND THE ERAS OF PUBLIC-LANDS POWERS

What, then, to make of the presidential revisions of monument proclamations in the first fifty years of the Antiquities Act’s operation? These revisions must be understood in the larger context of shifting congressional and presidential powers over the public lands. The Antiquities Act has operated against a changing backdrop of interbranch allocation of power over the public lands, and this backdrop casts light on the significance of the early presidential

revisions. The early revisions took place against a background of expansive claims of presidential power to reclassify federal land. That claimed power helps to account for the plausibility of the early revisions in their times. It is, however, no longer part of public-lands law, having been repealed in FLPMA's sweeping 1976 consolidation of the reclassification power in Congress. Presidents in the early days of the Antiquities Act had reason to think they could reclassify monuments in certain cases regardless of whether the Act delegated that power. That is very different from the question after 1976, when presidential power depends entirely on the scope of the Act's delegation.

#### *A. Early Presidential Revisions*

Early presidential monument revisions were mostly boundary adjustments, modest in absolute acreage terms (although they sometimes represented a substantial percentage of small, site-specific monuments).<sup>156</sup> In some cases, the revisions made corrections to initial proclamations that had relied on hastily gathered or incomplete information about the character of the protected objects and the surrounding site.<sup>157</sup> In other cases, revisions accommodated pre-existing private land claims that fell within or were impeded by the monument.<sup>158</sup> As noted in the earlier discussion of intergenerational synthesis, such accommodation is characteristic of all federal land-reservations schemes; even the sweepingly antidevelopment Wilderness Act acknowledges existing property rights.<sup>159</sup> Federal land agencies are typically authorized to seek acreage-swaps with private or state-government landholders to consolidate preserved federal land without eliminating vested existing rights. Many early revisions simply carried out these policies to accommodate private rights.<sup>160</sup> A handful of revisions facilitated road-building in the monument or its vicinity, a management measure consistent with then-current practices in managing national parks and other lands preserved for scenery and recreation.<sup>161</sup> None of these revisions

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156. See John Ruple, *The Trump Administration and Lessons Not Learned from Prior National Monument Modifications*, 43 HARVARD ENVTL. L. REV. 66–80 (2019) (describing handful of relatively large revisions).

157. See, e.g., Proclamation No. 873, 36 Stat. 2491 (1909) (Proclamation of President Taft, initially setting aside Navajo National Monument); Proclamation No. 1186, 37 Stat. 1733 (1912) (revising boundaries of same); Proclamation No. 2681, 11 Fed. Reg. 2623 (1946) (Proclamation of President Truman, reducing size of monument by more than 1800 acres of an initial 46,034 because of errors in initial survey).

158. See, e.g., Proclamation No. 1191, 37 Stat. 1737 (1912) (Taft) and Proclamation No. 1862, 45 Stat. 2984 (1929) (Coolidge) (each modifying Mount Olympus National Monument to exclude a preexisting homestead); Exec. Order 3897 (Sept. 5, 1923) (excluding land from the Katmai National Monument to accommodate a prior mining claim).

159. See *supra* Part III.C.1.

160. See *Lee*, *supra* note 112, at 9, 47; see also Ruple, *supra* note 156 at 55–65 (collecting instances of monument revisions to accommodate previously existing private rights).

161. See Ruple, *supra* note 156 at 64–66 (describing revisions to accommodate limited infrastructure improvements).

displaced the basic judgments of earlier presidential proclamations as to the purpose or scale of preservation.

Several more substantial presidential monument revisions pursued national security interests in wartime—either formally declared or openly anticipated after major attacks on U.S. assets. In 1915, President Woodrow Wilson removed 313,280 acres from Mount Olympus National Monument, transferring them to the Olympic National Forest.<sup>162</sup> The order came on May 11, four days after a German submarine sank the British ocean liner *Lusitania*, killing near 1200 people, including 128 Americans.<sup>163</sup> As John Ruple has noted in a survey of early presidential revisions, the Olympic Peninsula was a key U.S. source of Douglas fir for ships and Sitka spruce for airplanes, and the U.S. soon dispatched the “Spruce Production Division” of the Army to the Olympic National Forest to contribute to timbering and build railroads for shipping trees to sawmills.<sup>164</sup> In March of 1945, President Truman removed 4700 acres from the Santa Rosa National Monument in Florida to expand an airfield that had become an important training and testing site for the Army Air Force.<sup>165</sup> President Eisenhower’s 1951 reduction of Glacier Bay National Monument acknowledged a secret, presidentially authorized airfield that had been built within the monument during World War Two.<sup>166</sup> As I’ll explain in more detail later, these reductions need not have rested on an Antiquities Act delegation of power to shrink monuments. They might well be seen as exercising an implied presidential power to reclassify lands for national-security purposes, which the Supreme Court recognized in 1915’s *United States v. Midwest Oil*, and which Congress explicitly eliminated when it passed FLPMA in 1976.<sup>167</sup>

The most substantial monument revision to fall outside these interpretations is President Franklin Roosevelt’s 1940 removal of nearly 72,000 acres, or about 26 percent of the total area, from the second Grand Canyon National Monument, which President Hoover had proclaimed in 1932.<sup>168</sup> Roosevelt had earlier vetoed a bill to shrink the monument along lines different from the ones he proclaimed, and there was widespread perception that the monument should be adjusted to exclude certain private inholdings;<sup>169</sup> but Roosevelt’s action unmistakably assumed presidential power to shrink a monument upon reconsideration of the fit between its purposes and its boundaries, and on a considerably larger scale than in earlier and smaller adjustments to accommodate private property.

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162. See Proclamation No. 1293, 39 Stat. 1726 (1915); CAROL HARDY VINCENT & LAURA A. HANSON, CONG. RESEARCH SERV., R44988, EXECUTIVE ORDER FOR REVIEW OF NATIONAL MONUMENTS: BACKGROUND AND DATA 8 (2017).

163. See Ruple, *supra* note 156 at 79 (detailing timing of various monument revisions in relation to acts of war).

164. See *id.* at 82.

165. See Proclamation No. 2659, 10 Fed. Reg. 10275 (Aug. 22, 1945).

166. Proclamation No. 3089, 20 Fed. Reg. 2103 (1951).

167. See *Midwest Oil*, 236 U.S. at 459.

168. Proclamation No. 2393, 54 Stat. 2692 (1940); Proclamation No. 2022, 47 Stat. 2547 (1932).

169. See Ruple, *supra* note 156 at 66–71 (recounting political sequence of Grand Canyon revision).

Although Roosevelt's proclamation by itself does not constitute a pattern interpretation of the Antiquities Act, it stands as an important precedent of presidential monument revision without repudiation by Congress. The larger setting of presidential powers in which it happened, however, suggests that its significance may be less than has been claimed for it.

*B. The Zenith of Presidential Withdrawal and Reservation Power*

The Antiquities Act was adopted in a period of aggressive but contested presidential withdrawal and reservation. President Theodore Roosevelt in 1903 began a practice of unilaterally declaring "bird reservations" that set aside habitat. The fifty-one reservations that he had created by the end of his second term in 1909 formed the basis of the National Wildlife Refuge System, which now encompasses more than 150 million acres of land and water.<sup>170</sup> These unauthorized presidential reservations overrode congressional privatization statutes that created private rights of entry and acquisition on public lands.<sup>171</sup> Although congressional acquiescence to these reservations formed an important part of the basis of the Supreme Court's finding of an implied presidential reservation power in *Midwest Oil*, no statute formally delegated the power to create them.<sup>172</sup> The custom for decades was that proclamations of wildlife refuges either declared a new refuge without reference to any basis of the power or simply invoked "the authority vested in me as President of the United States."<sup>173</sup> As we shall soon see, much turned on the scope of the latter power, which the Franklin Roosevelt Administration in particular asserted as the basis of its public-lands decisions.

Despite its boldness in creating wildlife refuges, Theodore Roosevelt's Administration did not move to create national monuments without explicit congressional authorization. The reasons for this are not entirely clear, but almost certainly included the general impression, evident in the legislative history and subsequent administration of the Antiquities Act, that monuments resembled national parks, which had always been congressional creations.<sup>174</sup> They likely

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170. See JAMES RASBAND ET AL., *NATURAL RESOURCES LAW & POLICY* 149 (3d. ed. 2016) (recounting these facts).

171. See *Midwest Oil*, 236 U.S. at 469 (referring to the many cases in which "the Executive, by a special order, has withdrawn lands which Congress, by general statute, had thrown open to acquisition by citizens"). It was for this reason that three justices dissented from the Court's opinion, led by Justice Day.

172. See CHARLES F. WHEATLEY, JR., *FOR THE PUBLIC LAND LAW REVIEW COMMISSION, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* 244-45 (1969).

173. See, e.g., Exec. Order No. 4851 (establishing Upper Klamath Wildlife Refuge) (Pres. Coolidge, Apr. 3, 1928) ("it is hereby ordered that the unappropriated public lands . . . are hereby reserved and set apart . . . as a refuge and breeding ground for birds and wild animals."); Exec. Order No. 6924 (establishing Lake Mattamuskeet Wildlife Refuge) (Pres. Roosevelt, 1934) (reserving lands "by virtue of and pursuant to the authority vested in me as President").

174. See, e.g., DEP'T OF THE INTERIOR, *GENERAL INFORMATION REGARDING THE NATIONAL MONUMENTS* 5-6 ("National Monuments differ from national parks in several respects, particularly with regard to method of creation, but it would be difficult to define one generally in terms that would exclude

also included awareness of congressional skepticism of sweeping presidential reservations, even in multiple-use categories such as national forests, which did not limit privatization as sharply as monuments declarations did. Although the President in 1906 had enjoyed unilateral power to create national forests for most of two decades under congressional acts of 1891 and 1897, Congress forbade future unilateral national forest designations in 1907.<sup>175</sup>

Congress passed the General Withdrawals Act (Pickett Act) of 1910 with the ostensible aim of clarifying the scope of presidential power in this area; however, the effect proved to be quite the opposite. Congress acted at the behest of President Taft, who sought clarification on the extent of presidential power following his controversial 1909 withdrawal of oil-producing lands from mineral-leasing programs.<sup>176</sup> The resulting legislation authorized the President “temporarily [to] withdraw from settlement, location, sale, or entry any of the public lands” and to “reserve the same for . . . public purposes to be specified in the orders of withdrawal.”<sup>177</sup>

Had the Pickett Act simply affirmed a power of temporary withdrawal parallel to whatever other powers the President held over public lands? Or instead represented an exhaustive account of the President’s power in the field, precluding subsequent withdrawal or reservation except on its express authorization or that of another statute? The question came to a head in a clash of legal and bureaucratic giants in Franklin Roosevelt’s Administration. The Pickett Act required that lands withdrawn under its authority remain open to hard-rock mining, and President Roosevelt sought to withdraw public lands in Oregon from the operation of the mining laws as well as other extraction regimes.<sup>178</sup> Attorney General Robert Jackson, asked by the President to assess the legality of the proposed action, initially concluded that the Pickett Act was intended to occupy the field and thus precluded any further implied or inherent power—which would have to provide the basis of the proposed mining withdrawal, as such withdrawal had no statutory foundation.<sup>179</sup> Besides citing legislative history suggesting that the Pickett Act was intended to “clearly define the extent of [withdrawal] authority,” Jackson argued, “If . . . the President [had] an unrestricted, inherent power to withdraw lands from the public domain for public purposes, he could avoid, *in every instance*, the restrictions upon his statutory power by simply ignoring the withdrawal statute and acting upon his

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the other. It has been the endeavor of the Interior Department to administer those monuments under its control along the lines of national-park protection and development . . .”) (1917).

175. See RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 146 (2d. ed. 2006).

176. See Charles F. Wheatley, Jr., *Withdrawals under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311, 316–18 (1979) (summarizing this debate and its aftermath).

177. Act of June 25, 1910, 36 Stat. 847 (1910) (repealed 1976).

178. Letter of Attorney General Robert Jackson to the Secretary of the Interior, July 25, 1940.

179. *Id.*

non-statutory, inherent power.”<sup>180</sup> Such a power, Jackson contended, would make the withdrawal and reservations statutes of public-lands law merely advisory, a strange result for a field of law founded on the Property Clause’s grant of power over public lands to Congress.<sup>181</sup>

From the Department of the Interior, Secretary Harold Ickes shot back, “The President in the exercise of his presumed inherent general withdrawal power has issued approximately 268 executive orders of withdrawal since 1910 . . . . It is imperative that lands set apart for national defense and other purposes should be subject to the exclusive use and jurisdiction of the Federal Government.”<sup>182</sup> Henry Stimson, the Secretary of War, chimed in, warning of “inconvenience and embarrassment” if lands withdrawn for military purposes were subject to private mining claims, and Thomas Emerson, a legal anchor of the New Deal who would go on to argue *Griswold v. Connecticut* and teach for three decades at Yale Law School, wrote a special memorandum from within the Attorney General’s office, arguing against Jackson’s conclusion.<sup>183</sup> At first Jackson stood his ground, reiterating his earlier arguments in reply to Ickes.<sup>184</sup> On June 4, 1941, under intense pressure, he reversed his position and submitted an official opinion agreeing with Ickes and Emerson that the Pickett Act left undisturbed a distinct presidential power to reserve public lands permanently.<sup>185</sup> It is not clear whether Jackson changed his mind or only his position: he submitted his own earlier letter alongside his final opinion, noting in a cover memorandum that “the question is important and may be said to be close.”<sup>186</sup> In the final opinion, Jackson recited, then repudiated, his former view that the President’s asserted general power of permanent withdrawal would leave no purpose for lesser statutory delegations of withdrawal power; but he did not refute it, instead nakedly asserting that the President could choose to exercise a lesser, statutory power if he saw fit.<sup>187</sup> At other points, the final opinion simply adopts portions of Thomas Emerson’s earlier text.<sup>188</sup> Eight days after the opinion, on June 12, 1941, President

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180. *Id.* at 4 (emphasis original).

181. *Id.*

182. Letter of Interior Secretary Harold Ickes to the Attorney General, Feb. 13, 1941, at 4–5.

183. Letter of Henry Stimson, Dec. 21, 1940; Memorandum of Thomas Emerson to Charles Fahy, Asst. Solicitor General, May 9, 1941 (arguing that the Pickett Act, in referring only to “temporary” withdrawals, left undiminished an executive power to make permanent withdrawals from and reservations of the federal public lands). *See also* Glenn Fowler, *Thomas I. Emerson, 83, Scholar Who Molded Civil Liberties Law*, N.Y. TIMES, (June 22, 1991) (obituary of Thomas Emerson), <https://www.nytimes.com/1991/06/22/obituaries/thomas-i-emerson-83-scholar-who-molded-civil-liberties-law.html>.

184. Letter of Attorney General Robert Jackson, Apr. 11, 1941.

185. *See* 40 Op. Atty. Gen. 73, 75 (1941).

186. Memorandum of Attorney General Robert Jackson, June 4, 1941.

187. *See* 40 Op. Atty. Gen. at 81.

188. *See id.* at 83 (adopting portions of Emerson’s memorandum of May 9, 1941 concern the “practical results” of constraint on the executive branch that might follow from a contrary opinion).

Roosevelt nominated Jackson to the Supreme Court, and he took the oath of office on July 11, less than a month after his nomination.<sup>189</sup>

Six months and a week after Jackson reversed his opinion and adopted the Ickes-Emerson line, the country was at war, and any concern with the niceties of presidential control over public lands was eclipsed. From then until the adoption of FLPMA in 1976, the official view of the executive branch was that the President (and by delegation the Secretary of the Interior) could withdraw or reserve lands permanently for public purposes.<sup>190</sup> Indeed, it seems to have been the position of most of the executive branch, emphatically including Ickes's Interior Department, well before Jackson came around to it. As Charles Wheatley judges in his comprehensive assessment of the withdrawal power before FLPMA, "At least from 1934, it appears to be the practice of the Executive in making . . . withdrawals which are not specifically requested by statute, but are made in his discretion, to cite both the Pickett Act and the President's general inherent authority as the legal basis for the withdrawal."<sup>191</sup> Wheatley noted that the Pickett Act was itself generally treated as authorizing indefinite withdrawals, "temporary" only in the sense that they were subject to later revocation by Congress or the President, so the "inherent" authority was coextensive with it except where withdrawals extended to mining, in which case the inherent power was taken to kick in.<sup>192</sup> This "inherent" power was little theorized in its later uses, other than invocations of *Midwest Oil* and executive practice. In the disputes leading up to *Midwest Oil*, it was generally formulated as a "stewardship" power in the President to protect the public lands on behalf of Congress, which had undisputed ultimate authority over them under the Property Clause.<sup>193</sup>

This historical exposition sheds light on the substantial monument reductions of the first fifty years of the Antiquities Act. Never tested in court, they took place in a legal landscape in which specific statutory authorizations of

189. I am aware of no evidence that Jackson's nomination was conditioned on his concession of the withdrawal power issue. As I indicate in the body text, however, it does seem to me that Jackson regarded himself as more nearly outvoted than out-argued. Ickes clearly wanted this general withdrawal power, and outflanked Jackson bureaucratically to ensure that it became executive-branch policy in a time when Roosevelt enjoyed substantial congressional majorities and a rising concern with war soon eclipsed the finer points of public-lands powers.

190. See Exec. Order No. 10,355, 17 Fed. Reg. 4831 (1952) (order of President Truman delegating to the Interior Secretary ("the authority vested in the President by [the Pickett Act] and the authority otherwise vested in him to withdraw or reserve lands . . . for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made").

191. Wheatley, *Study of Withdrawals*, *supra* note 172, at 126.

192. See *id.* at 128–29.

193. See, e.g., DEP'T OF THE INTERIOR ANN. REP. 12 (1908) ("If there be no power to affirmatively provide for the ultimate use or disposition of the public domain in accordance with the needs to the public welfare, it is the duty of the Executive to temporarily prevent its acquisition until Congress may have an opportunity to consider the question and adopt appropriate legislation. . . . [Such withdrawals over the country's history] were purely the acts of stewards farsighted enough to foresee and protect the interests of their principal, the people of the United States.").

withdrawal and reservation coexisted with a widely accepted presidential power to accomplish the same reclassifications on other, imprecisely specified grounds. There was little clear difference, if any, between what the President might do under the Antiquities Act and what he might do through the latter implied power; as we have seen, Attorney General Jackson thought there was none, and that this was evidence of trouble with the Administration's theory of presidential powers. Roosevelt's capacity to put the stamp of legality on his Grand Canyon reduction was overdetermined by a legal landscape in which the President successfully asserted a robust set of powers for reclassifying public lands.

Nonetheless, even the most aggressive account of presidential discretion in public-lands reclassification featured the asymmetric preference for preservative decisions: the whole purpose of the President's power was to hold open Congress's options for ultimate disposition of the land. This is consistent with the Court's analysis in *Midwest Oil* and, indeed, very nearly a consequence of the Property Clause's assignment of public-lands power to Congress: the President's power must be in service of Congress's, either by delegation or by implied power of preservation. This asymmetry is consistent, too, with the preference for keeping resources in categorical preservation status once they are assigned to it that I described in Part III.C, above. In these respects, public-lands law is consistent across its eras.

### *C. Early Presidential Revisions in the Arc of Public-Lands Law*

The executive-branch precedents for substantial monument revision, then, date back to a time of far more expansive presidential authority over the public lands. The powers asserted in that period were in some tension with the coherence of public-lands law overall. Soon-to-be Justice Jackson made a good case that they were incompatible with it, which was never really answered even though he abandoned it as a lost cause in bureaucratic infighting. Whatever their theoretical excesses, however, these powers were generally rationalized as executive stewardship of Congress's final authority over public-lands classification, and were mostly asserted in exercises consistent with the premise against presidential privatization. They account for the early, substantial presidential revisions of national monuments in ways that make Antiquities Act authority unnecessary in accounting for those exercises of presidential power. These powers are also consistent in the substance of their exercise, if not always in the Roosevelt Administration's maximalist and inexact articulation, with the general structure of public-lands law.

## VI. CONCLUSION

In its monuments proclamations, the Trump Administration asserts a sweeping power to reclassify fifteen million acres of protected federal land and hundreds of millions of marine acres. The burden of my argument has been that legal analysis of the monuments proclamations can take account of how the

proclamations fit within the larger and theoretically neglected terrain of public-lands law. Corruption is not a novel concern here. For well over a century, the field has been shaped by recognition that precipitate and opportunistic privatization is a perennial temptation in a body of law that governs nearly a third of the country's acreage and a great deal of its natural wealth. The executive branch's capacity for rapid, unilateral, and obscure action makes it especially suited to this form of misappropriation. Recognition of these facts is built into public-lands law in the long-standing asymmetric preference for presidential power to preserve lands over presidential power to privatize them. That preference finds expression in statutory structure (e.g., the Pickett Act, FLPMA), jurisprudence (e.g., *United States v. Midwest Oil*), and executive-branch analysis (e.g., the opinions of Attorneys General Cummings and Bates). It also informs the larger pattern of powers in public-lands law. Understanding that pattern helps to show why the Antiquities Act would be anomalous if it were read today as authorizing substantial and unilateral presidential declassification of monuments. A Court would properly consider the anomaly in deciding whether the power to create national monuments should imply the power to unmake them.

Public-lands law has been shaped by grappling with the themes that the Trump proclamations raise, and its shape contains a good part of an answer. Public-lands populists' claims on behalf of privatizing and extractive policies already have a specific legal expression that is deeply embedded in public-lands law: in long-standing public rights-of-way across the federal lands of the West, in mining and mineral-leasing regimes, in grazing rights, and in the default policy of extensive public recreational access—and, above all, in the private real estate that was substantially created under federal privatization schemes. Where they have been vested, they tend to persist within new regimes that otherwise emphasize preservation over extraction and economic use. On multiple-use lands, they play a prominent part in the statutorily mandated planning process. Where, however, they are not vested but take the form of inchoate expectations of continued access, they yield on categorically protected lands: new privatizing and extractive claims are almost uniformly excluded under preservation regimes. For such claims to get traction again, the lands themselves must be reclassified. That reclassification is generally reserved to Congress. If the Antiquities Act authorizes the President to hand a victory to public-lands populists by reclassifying hotly contested lands, then it is a dramatic anomaly in public-lands law. It would authorize perennial and shifting reopening of precisely the disputes that the field exists to structure and resolve, and through a mechanism that is procedurally orthogonal to the rest of the field.

The Trump proclamations raise a novel question concerning one of the most important public-lands statutes. Principles that are well-grounded in the structure of public-lands law give good reason to judge that the President's proclamations are not authorized by the Antiquities Act. Understanding why this is so also sheds important light on this field of law.

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