

# When Congress Fails to Do Its Job: How Congressional Acquiescence Has Allowed Criticism of the Antiquities Act to Flourish

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## I. INTRODUCTION

In August 2023, President Biden established the Baaj Nwaajvo I'tah Kukveni-Ancestral Footprints of the Grand Canyon National Monument in Arizona.<sup>1</sup> At over 900,000 acres in size, the monument contains “some of the greatest natural wonders on the planet” including the sweeping plateaus and watersheds of the Grand Canyon.<sup>2</sup> It is also home to many Tribes of the American Southwest and contains “over 3,000 known

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1. Proclamation No. 10606, 88 Fed. Reg. 55331 (Aug. 8, 2023).

2. *Id.*

[Native American] cultural and historic sites.”<sup>3</sup> President Biden designated this federal land as a national monument not only because of a need to preserve “the broader Grand Canyon region” and “the integrity of vital natural resources important to the Nation’s health and well-being,” but also to preserve “its profound historical, cultural, and religious significance” to many Native American tribes in the area.<sup>4</sup>

The monument was created under an early twentieth-century law known as the Antiquities Act. It is a relatively short piece of legislation that grants the President “in his discretion, [the ability] to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments[.]”<sup>5</sup> The only notable limitation to this discretion is that all designations “shall be confined to the smallest area compatible with proper care and management of the objects to be protected.”<sup>6</sup> Despite its short length, the Act has played an enormous role in the preservation of America’s natural resources and wonders. As of May 2019, the Act had been used to create over 158 national monuments and has preserved millions of acres of federal land.<sup>7</sup> While many laude the Act as an avenue for preserving public lands for current and future generations, many critics believe its modern usage is a massive presidential overstep that harms local communities.<sup>8</sup> This has led to uncertainty regarding the Antiquities Act’s future and has prompted calls for its amendment as well as a change in how it is used by the President and overseen by Congress.

This Comment aims to examine the Antiquities Act and the controversy surrounding it. Pursuant to this, Part II details the history of the Act, including the debate surrounding its passage in 1906 as well as its actual implementation (including the increase in designation size as well as congressional and judicial response to such massive designations). Part III then addresses several disputes regarding the Act that have continued into present day, such as whether it violates the non-delegation doctrine as well as disputes involving the President’s authority to create expansive monuments and to modify or revoke existing ones. Finally,

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3. *Id.* at 55333.

4. *Id.* at 55331.

5. 54 U.S.C. 320301.

6. *Id.*

7. Erin H Ward, Cong. Research Serv., R45718, *The Antiquities Act: History, Current Litigation, and Considerations for the 116th Congress*, (2019), <https://crsreports.congress.gov/product/pdf/R/R45718>.

8. See Tatiana Schlossberg, *What Is the Antiquities Act and Why Does President Trump Want to Change It?*, THE HILL (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/climate/antiquities-act-federal-lands-donald-trump.html>.

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Part IV addresses the likely possibility of the Supreme Court stepping in to significantly limit the reach of the Act and proposes a solution to ensure the Act's viability for the future. Specifically, it calls on Congress to amend the Antiquities Act to address its ambiguities and to play a more present role in providing oversight to presidential monument designations.

## II. HISTORY OF THE ANTIQUITIES ACT

### A. *Drafting of the Act*

The origins of the Antiquities Act stem from early twentieth-century archaeologists' desire to preserve archaeological sites and the land surrounding them.<sup>9</sup> In the late nineteenth and early twentieth centuries, the stories of American settlers traveling west of the Mississippi sparked an interest in the "antiquities"—or Native American and aboriginal artifacts—that were being discovered in the area.<sup>10</sup> This led to widespread looting and vandalism of archaeological sites on public land and created a demand for private possession of such artifacts.<sup>11</sup> As such practices began to grow in popularity, many policy officials began to agree that these practices had to be stopped and that artifacts and archaeological sites needed to be protected and preserved.<sup>12</sup>

The Department of the Interior pushed for broader reform at the time that would have granted it more authority to deal with this problem.<sup>13</sup> Several bills of varying scope were introduced in the House of Representatives to attempt to solve this issue, including a bill that would have protected "any prehistoric or primitive works . . . and also any formation of scientific or scenic value of interest."<sup>14</sup> Another proposed bill would have merely outlawed harm to an aboriginal antiquity caused by an unauthorized person on public land.<sup>15</sup>

The exact wording and the extent of the proposed legislation, however, were not easily agreed upon.<sup>16</sup> Binger Hermann—the Commissioner of the General Land Office at the time—for example,

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

10. *Antiquities Act of 1906*, NAT'L PARK SERV., <https://www.nps.gov/subjects/archeology/antiquities-act.htm> (last visited February 18, 2024).

11. *Id.*; Richard H. Seamon, *Dismantling Monuments*, FL. L. REV. 553, 562-63 (2018).

12. Squillace, *supra* note 9, at 477-78.

13. *Id.* at 478.

14. H.R. 8066, 56th Cong. 1900; *see also* Squillace, *supra* note 9, at 478.

15. Squillace, *supra* note 9, at 479.

16. *See generally, id.* at 479-85.

supported granting the President broad authority to set aside public land as national parks in the interest of science and preservation of “scenic beauties and natural wonders and curiosities.”<sup>17</sup> Hermann did support narrower legislation that would protect archaeological sites from vandalism, however, he also thought it necessary to “protect a wide range of resources” for conservation purposes.<sup>18</sup> While a far-reaching bill that embodied Hermann’s ideal version of the law never passed, its more expansive language was embraced by the soon-to-be Antiquities Act.<sup>19</sup> Despite the main goal of the Act to preserve archaeological sites, the language of the bill encompassed several of Hermann’s suggestions such as references to “objects of scientific or historic interest” and the failure to include a limit on the size of the area that could be proclaimed a monument.<sup>20</sup>

There was considerable opposition to such broad language, however. Many members of Congress, especially those from western states with large swaths of federal land within their borders, were hesitant to grant the President broad authority to establish federal reserves in their states (a criticism that has extended well past the enactment of the Antiquities Act).<sup>21</sup> The actions of the President Theodore Roosevelt, were a driving force that encouraged this criticism of earlier attempts at legislation. Under the General Revision Act of 1891, Roosevelt set aside massive tracts of public land as forest reserves as part of his conservation policies.<sup>22</sup> As a result, proposed drafts that allowed the President to protect “any natural formation of . . . scenic value or interest” for “the suitable enjoyment of said reservation” were met with opposition.<sup>23</sup> In fact, many such critics attempted to emphasize the Act’s original goal of preserving small, discrete archaeological sites by including language that would limit the size of any monument designation to at most 320 or 460 acres.<sup>24</sup> The

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17. *Id.* at 479.

18. *Id.*

19. *Id.* at 480-81.

20. *Id.* at 483.

21. *Id.* at 481-82; *see also e.g.*, Press Release, Mike Lee, Senate, Senator Mike Lee Takes on Monument Overreach (Sept. 14, 2023), <https://www.lee.senate.gov/2023/9/senator-lee-takes-on-monument-overreach> (detailing the Utah senator’s opposition to the current broad interpretation of the Antiquities Act which has allowed “designations that far exceeds [the Act’s original goal of protecting archaeological ruins and sites], impacting millions of acres . . . in the West”) [hereinafter *Lee Press Release*].

22. Squillace, *supra* note 9, at 481-82.

23. Levi Tenen, *How Much Land Can Be Included in a National Monument?—Analyzing the “Smallest Area Compatible” Requirement in the Antiquities Act*, 53 ENV’T L. 707, 713-14 (2023).

24. *Id.* at 714.

final version of the Act, which is still in effect today, establishes a middle ground between the views of Hermann and those he disagreed with by allowing for the designation of “objects of historic or scientific interest” as long as that designation is limited to “the smallest area compatible with the proper care and management” of the objects.<sup>25</sup>

*B. Presidential Implementation and Congressional Acquiescence*

The modern expansive reading and use of the Antiquities Act is, in large part, the result of Theodore Roosevelt’s progressive views on government, especially in the area of conservation.<sup>26</sup> President Roosevelt was very sympathetic to those in the late nineteenth century calling for restrictions on the exploitation of natural resources and the preservation of those resources for future generations,<sup>27</sup> and as the President at the passage of the Act, his interpretation and implementation would set a precedent for how the Act would be employed by future administrations.

Roosevelt’s initial designations under the Antiquities Act were relatively small and seemed to be in line with the interpretation of the Act that called for minimal designations to protect specific objects.<sup>28</sup> His first monument—Devil’s Tower National Monument in Wyoming—for example, was 1,152 acres and his next two—El Morro in New Mexico and Montezuma Castle in Arizona—were only 160 and 161 acres respectively.<sup>29</sup> This timidity did not last long, however, as Roosevelt soon began designating monuments of larger and larger sizes,<sup>30</sup> culminating in the designation of the massive 808,120-acre Grand Canyon National Monument.<sup>31</sup>

Following Roosevelt’s time in office, subsequent presidents began to reserve large swaths of lands as national monuments in the name of conservation, including William Howard Taft’s Mukuntuweap National Monument in Utah (today Zion National Park), Woodrow Wilson’s Sieur de Monts National Monument in Maine (today Acadia National Park), and William Harding’s Bryce Canyon National Monument.<sup>32</sup> Important

25. *Id.*; 54 U.S.C. 320301.

26. Squillace, *supra* note 9, at 489-90.

27. *Conservation in the Progressive Era*, LIBR. OF CONG., <http://lcweb2.loc.gov/ammem/ndlpedu/features/timeline/progress/conserved/conserved.html> (last visited Feb. 24, 2024).

28. Ward, *supra* note 7, at 7-8.

29. *Id.*

30. *Id.* at 8. This includes the 20,629-acre Chaco Canyon National Monument as well as the 60,776-acre Petrified Forest National Monument in Arizona.

31. *Id.*

32. See Squillace, *supra* note 9, at 493-96.

among these vigorous presidential conservationists was Franklin D. Roosevelt, Theodore Roosevelt's distant cousin.<sup>33</sup> Among his expansion of many previously designated monuments, FDR also made several new designations including the Joshua Tree National Monument, the Badlands National Monument, and the 221,610-acre Jackson Hole National Monument in Wyoming.<sup>34</sup>

Jackson Hole specifically was met with intense criticism from Congress for several reasons—specifically, because it included private land in the designation and because many members of Congress believed that the area lacked historic or scientific interest due to its use for “livestock, and for farming purposes and nothing more.”<sup>35</sup> Many Wyoming politicians opposed the designation and the state even petitioned courts to invalidate it because it removed state control over the land.<sup>36</sup> These complaints were the driving force that led Congress to take its first steps at limiting presidential power under the Antiquities Act.<sup>37</sup> After its first attempt to abolish the monument failed due to a pocket veto by FDR, in 1950 Congress succeeded in passing legislation that added much of the designated land to the Grand Teton National Park and amended the Antiquities Act to prohibit further designations in Wyoming without congressional approval.<sup>38</sup>

This legislation and its effects demonstrate the role Congress can play in limiting presidential use of the Act when it believes designations have gone too far. The rate of designations by ensuing presidents after FDR slowed considerably, likely due in part to fears of congressional rebuke.<sup>39</sup> For example, in response to President Eisenhower's designation of the C&O Canal National Monument in 1961, a Colorado Congressman who chaired the House Committee on Interior and Insular Affairs blocked any funding of the monument for several years.<sup>40</sup> Such actions sent a message to presidents that continuing to designate large monuments might preserve the status quo, but there was no guarantee that Congress

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33. *See id.* at 494-98.

34. *Id.* at 494-95.

35. *Id.* at 495-96; A Bill to Abolish the Jackson Hole National Monument: Hearings on H.R. 2241 Before the House Comm. on Public Lands, 78th Cong. 5 (1943).

36. Squillace, *supra* note 9, at 498; Laura Pousson, Comment, *The Battle Has Just Begun: Monumental Issues of Implied Powers Within the Antiquities Act of 1906*, 7 LSU J. ENERGY L. & RES. 193, 195 (2019).

37. Squillace, *supra* note 9, at 498.

38. *Id.*; 54 U.S.C. § 320301(d) (“No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress.”).

39. *See* Squillace, *supra* note 9, at 499-501.

40. *Id.* at 500.

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would step in and provide funding to actually conserve the land.<sup>41</sup> Heeding this warning, presidents such as Lyndon Johnson began to limit the number and size of their designations out of fear that those deemed outside the scope of the Antiquities Act would not receive congressional protection.<sup>42</sup>

Presidential acquiescence to these concerns continued until President Jimmy Carter's administration and its designation of seventeen monuments in Alaska covering an astounding 56 million acres of land.<sup>43</sup> The monuments were designated in response to Congress's failure to timely respond to the Secretary of the Interior's recommendation pursuant to the Alaska Native Claims Settlement Act (ANCSA) to preserve around 83.5 million acres of Alaskan nature that the Secretary had previously withdrawn under ANCSA.<sup>44</sup> Had Carter allowed the five-year consideration period to lapse, the land would have been reopened and there likely would have been considerable entry and mineral development.<sup>45</sup> To prevent this, he withdrew over 100 million acres of land under the Federal Land Policy and Management Act (FLPMA) in addition to designating an additional seventeen national monuments.<sup>46</sup> Like the response to the Jackson Hole designation, there was considerable backlash to Carter's actions; two years following the designations Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), which limited additional withdrawal of land in Alaska under the Antiquities Act to 5,000 acres, and also included language that required congressional approval for such withdrawals.<sup>47</sup> However, while ANILCA did limit future Antiquities Act action in Alaska, it also tacitly gave its approval of Carter's monuments by designating new parklands, wildlife refuges, and other conservation areas out of much of the area protected by his executive orders, lessening the bite of its attempted rebuke.<sup>48</sup>

Following the lead of the Carter administration, modern presidents—excluding President Trump<sup>49</sup>—have taken extraordinary

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41. *Id.*

42. *Id.* at 501.

43. *Id.* at 502.

44. *Id.* at 502-03. Separate legislation out of the House and the Senate Energy and Natural Resources Committee would have protected the land, however, neither was ever passed into law.

45. *Id.* at 503.

46. *Id.* at 504.

47. *Id.* at 505.

48. *Id.* at 504.

49. See discussion *infra* subpart III.C.

steps toward increasing the reach of the Antiquities Act.<sup>50</sup> President Clinton, in designating many diverse monuments such as the California Coastal National Monument and the massive Grand Staircase-Escalante National Monument,<sup>51</sup> pioneered a new justification under the Antiquities Act for expansive monuments; the idea of so-called “national landscape monuments.”<sup>52</sup> Under this model, large swaths of land could be designated as national monuments because of the historical and scientific value of the landscape itself, not just specific objects within it.<sup>53</sup> This led Clinton to designate protection of monuments such as the Grand Staircase-Escalante Monument because of its “vast and austere landscape” that consists of paleontological sites of “remarkable specimens of petrified wood” and “geologic treasure[s] of clearly exposed stratigraphy and structures.”<sup>54</sup> Both Presidents Bush and Obama have relied on this newer interpretation of the Antiquities Act to designate or expand monuments of over 200 million acres to protect their “dynamic ecosystem[s] with more than 7,000 marine species”<sup>55</sup> or their “rich mosaic[s] of forests, grasslands, shrublands, and wet meadows.” As precedent continues to encourage presidents to create larger and larger monuments, it is becoming increasingly clear that the scope of the Antiquities Act is extending well beyond the protection of specific archaeological artifacts and sites.

### C. *Judicial Response to Presidential Action Under the Act*

The first case to address the legality of a proclamation made under the Antiquities Act was *Cameron v. United States* in 1920.<sup>56</sup> *Cameron* involved a defendant who was attempting to charge access to dubious mineral mining claims located in the recently designated Grand Canyon National Monument.<sup>57</sup> When the Santa Fe Railroad company, and later the Department of the Interior, attempted to enjoin Cameron from charging access to the public land, he challenged the designation of the

50. See Squillace, *supra* note 9, at 507-10 (detailing President Clinton’s use of the Act); Seamon, *supra* note 11, at 569-71 (detailing both President Bush and President Obama’s use of the Act to create monuments of up to over 500 million acres).

51. Squillace, *supra* note 9, at 508-09.

52. Seamon, *supra* note 11, at 569.

53. *Id.*

54. Proclamation No. 6920, 61 Fed. Reg. 50223, 50223 (Sept. 18, 1996).

55. Proclamation 8031, 71 Fed. Reg. 36443, 36443 (June 15, 2006) (designating the Papāhānaumokuākea Marine National Monument); Proclamation 9564, 82 Fed. Reg. 6145, 6145 (Jan. 12, 2017) (expanding the Cascade-Siskiyou National Monument).

56. 252 U.S. 450 (1920).

57. *Id.* at 454-55; Squillace, *supra* note 9, at 490-91.

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monument as a whole and brought the case before the Supreme Court.<sup>58</sup> Specifically, he argued that the Antiquities Act did not legally grant the president the authority to designate the area as a national monument.<sup>59</sup> The Court quickly rejected this argument, however, finding that the Grand Canyon was clearly “an object of unusual scientific interest,” as the Act required.<sup>60</sup> Notably, *Cameron* did not address the “smallest area compatible” requirement in the Act, implying that a monument’s size is irrelevant if it has a significant enough scientific or historic import.<sup>61</sup>

This favorable interpretation of the Act was also present in the Wyoming district court case that spawned as a result of the controversy regarding the Jackson Hole designation.<sup>62</sup> In *Wyoming v. Franke*, the state of Wyoming claimed that the president did not have power under the Antiquities Act to create the Jackson Hole National Monument because the area lacked “historic landmarks, historic or prehistoric structures or objects of historic or scientific interest.”<sup>63</sup> The defendant, the Department of the Interior, responded in detail regarding the scientific and historic importance of the area:

[T]he defendant’s evidence was to the effect that there were trails and historic spots in connection with the early trapping and hunting of animals formulating the early fur industry of the West, structures of glacial formation and peculiar mineral deposits and plant life indigenous to the particular area, a biological field for research of wild life in its particular habitat within the area, involving a study of the origin, life, habits and perpetuation of the different species of wild animals, all of which it is claimed constitute matters of scientific interest within the scope and contemplation of the Antiquities Act.<sup>64</sup>

The district court ultimately deferred to the department’s characterization of Jackson Hole and upheld the designation because the evidence it presented was “of a substantial character” to create a sufficient basis for the president to exercise his discretion under the Act.<sup>65</sup> However, had the department been unable to present such sufficient evidence of

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58. Squillace, *supra* note 9, at 491-92.

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

60. *Id.* at 455-56. (“It is the greatest eroded canyon in the United States, if not the world, . . . [it] affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.”).

61. See Squillace, *supra* note 9, at 492.

62. *Wyoming v. Franke*, 58 F.Supp. 890, 892 (D. Wyo. 1945).

63. *Id.* at 895.

64. *Id.*

65. *Id.*

scientific and historic importance—for example, if the area had only contained “a bare stretch of sage-brush prairie”—then a national monument designation “would undoubtedly be arbitrary and capricious.”<sup>66</sup>

Like *Cameron* and *Franke*, more recent cases that have examined the legality of modern monument designations make quick work of arguments claiming that the Antiquities Act should be interpreted narrowly so as to prevent the creation of massive monuments.<sup>67</sup> In *Cappaert v. United States*, for example, the Supreme Court swiftly dismissed the argument made by the plaintiffs that the Devil’s Hole National Monument in Nevada was invalid because the Act only gives the president the authority to designate archaeological sites by pointing to the historic and scientific interest of protecting the endangered species of fish located within the monument.<sup>68</sup> The D.C. Circuit has also upheld presidential authority under the Act in *Tulare County v. Bush* when it refused to invalidate the Grand Sequoia National Monument in California.<sup>69</sup> Moreover, not only did the circuit refuse to limit the Act’s applicability solely to archaeological sites like *Cappaert*,<sup>70</sup> it also lent credence to President Clinton’s idea of “national landscape monuments” by stating that the inclusion of “ecosystems and scenic vistas in the Proclamation did not contravene the terms of the statute by relying on nonqualifying features.”<sup>71</sup> Building on this, the D.C. Circuit also rejected the argument that massive monuments like Grand Sequoia do not abide by the Act’s “smallest area compatible” requirement because the petitioner’s failed to make factual allegations sufficient to demonstrate that the president designated more land than necessary.<sup>72</sup>

These cases, as well as others that have upheld and strengthened the Antiquities Act on procedural grounds,<sup>73</sup> show that courts have been wary

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66. *Id.*

67. *See Cappaert v. United States*, 426 U.S. 128 (1976); *Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002).

68. *Cappaert*, 426 U.S. at 141-42.

69. *See Tulare County*, 306 F.3d at 1141-43.

70. The D.C. Circuit makes an identical argument in *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1137 (D.C. Cir. 2002).

71. *See Tulare County*, 306 F.3d at 1141-42.

72. *Id.* at 1142.

73. *See Alaska v. Carter*, 462 F.Supp. 1155 (D. Ak. 1978) (holding that President Carter’s designation of monuments in Alaska was not subject to the National Environmental Policy Act’s (“NEPA”) environmental impact statement requirement because NEPA only requires administrative agencies to file such statements, not presidents acting under proper authority); *Murphy Co. v. Biden*, 65 F.4th 1122 (9th Cir. 2023) (holding valid an expansion of the Cascade-

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of striking down presidential action under the Antiquities Act. This, in combination with Congress's acquiescence to the vast majority of designations, has given presidents the ability to push the limits of their authority under the Act by creating bigger and bigger monuments without fear of reprisal. As monuments have begun to grow larger in size, however, so too has the political pushback against the Antiquities Act and its consequences.

## III. MODERN DISPUTES

A. *Constitutional Issues*

The primary constitutional criticism of the Antiquities Act is that it violates the non-delegation doctrine by erroneously granting the president authority to make rules and regulations regarding federal land.<sup>74</sup> Proponents of this criticism argue that the Act's delegation of legislative power under the Property Clause of the U.S. Constitution<sup>75</sup> regarding the designation of federal land grants too much discretion to the president and the executive branch.<sup>76</sup> According to these critics, modern usage of the Act to create national landscape monuments "far exceed" the original directive of Congress to protect distinct objects and landmarks.<sup>77</sup>

This criticism does not hold much water under current jurisprudence, however, as the Antiquities Act's delegation of power is justified by Supreme Court caselaw in the area. It is settled constitutional and administrative law that Congress has the authority to delegate legislative power to the executive branch as long as it sets forth an "intelligible principle" to guide that delegation.<sup>78</sup> That intelligible principle must provide the executive branch with detailed guidance regarding the general policy and the limitations of the delegation.<sup>79</sup> The

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Siskiyou National Monument that included land already governed by a previous statute with seemingly contradictory guidelines regarding commercial logging in the area).

74. See e.g., Pousson, *supra* note 36, at 202; Dewey J. Gonsoulin III, Comment, *Balancing Executive Authority and Conservation in the Exclusive Economic Zone: A Battle Between the Antiquities Act and the National Marine Sanctuaries Act*, 46 TUL. MAR. L.J. 407, 423-24 (2022).

75. U.S. CONST. art. IV § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

76. *Lee Press Release* ("[T]he Act's broad language has been used to unilaterally designate vast amounts of public land as national monuments without sufficient public input or Congressional oversight.").

77. *Id.*

78. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

79. See *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989).

Antiquities Act delineates such a guided principle.<sup>80</sup> Not only does it describe the kinds of objects that it can protect (those of scientific or historic interest), it also places a limit on the size of the monuments (the “smallest area compatible” requirement). While it is true that the limits of these constraints have been tested by recent monuments, a broad delegation of power is not necessarily considered unconstitutional.<sup>81</sup> Despite the seemingly settled nature of the Act’s delegation of authority, however, constitutional criticism remains.

*B. Opposition to Expansive Monuments*

While arguments regarding the Act’s constitutionality have had little success, there is still ample disapproval of the national landscape monument model and the massive designations that have resulted from it. Beyond just the debate regarding the expansion of presidential power, there is also strong opposition to modern uses of the Antiquities Act because of the effects these designations have on the communities in the area.<sup>82</sup> When a designation is made there are often restrictions on how that federal land can be used and managed, including prohibitions on mineral and oil and gas leasing as well as restrictions on timber harvesting, hunting, fishing, and grazing.<sup>83</sup> These restrictions not only affect corporations who rely on such actions for profit<sup>84</sup> but also those in the community who rely on those industries to make a living.<sup>85</sup>

For example, when President Biden created the Ancestral Footprints of the Grand Canyon National Monument in 2023 many citizens with local economic interests “felt the brunt of the damage” inflicted by the monument.<sup>86</sup> As a result of the designation, no future uranium mining operations would be allowed in the area, which would severely impact the local community because that land has some of the nation’s richest

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80. *Utah Ass’n of Counties v. Bush*, 316 F.Supp.2d 1172, 1191 (D. Utah 2004).

81. *Id.* (citing *Touby v. United States*, 500 U.S. 160, 165 (1991) (“Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.”)).

82. Pousson, *supra* note 36, at 195; *see also* Diana Furchtgott-Roth & Andrew Weiss, *Biden Overreaching in Using Antiquities Act to Create Nation Monuments*, WASH. TIMES (Mar. 13, 2024), <https://www.washingtontimes.com/news/2024/mar/13/joe-biden-overreaching-in-using-antiquities-act-to/>; David McIntosh, *Supreme Court Review of Antiquities Act is Overdue*, THE HILL (Jan. 29, 2024), <https://thehill.com/opinion/judiciary/4425810-supreme-court-review-of-antiquities-act-is-overdue/>.

83. Ward, *supra* note 7, at 6-7; Pousson, *supra* note 36, at 195.

84. *See generally* *Murphy Co.*, 65 F.4th.

85. Furchtgott-Roth & Weiss, *supra* note 82.

86. *Id.*

uranium deposits.<sup>87</sup> The designation also harmed the area's cattle industry because it affected nearly 40,000 acres of land that ranchers had previously used for cattle grazing.<sup>88</sup> Impacts such as these are especially felt in the western United States because of the complicated and extensive intermingling of federal lands and local economies.<sup>89</sup>

One reason for such opposition to federal land designations under the Antiquities Act is the failure of federal executive officials to adequately consult with state and local officials prior to issuing proclamations under the Act.<sup>90</sup> Clinton's administration did take several steps to address this concern, however.<sup>91</sup> Specifically, his Secretary of the Interior, Bruce Babbitt agreed to a so-called "no surprises" policy that required him to personally visit the site of a potential national monument, to meet with local officials and interested community members to discuss the potential monument and ways to preserve the area, and to allow local politicians the opportunity to adopt legislation protecting the area before he made a recommendation to the president.<sup>92</sup> Policies such as this can play an important role in allowing communities to have a say in designation decisions and can ensure that those designations preserve important lands while also protecting the local community's interests.

### C. Presidential Power to Revoke/Diminish Monuments

The text of the Antiquities Act does not directly address whether the president has the authority to revoke previous national monument designations, nor does it address whether the president has the authority to modify existing monuments. This ambiguity led to much debate when President Trump was in office because of his stance that the Act granted him both reduction and revocation powers.<sup>93</sup> When he reduced the size of the Grand Staircase-Escalante and Bears Ears National Monuments in December 2017, many argued that he did not have the authority to do so because the Antiquities Act was meant to create monuments, not to destroy them.<sup>94</sup> Justifying his decision to reduce the two monuments by

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87. *Id.*

88. *Id.*

89. McIntosh, *supra* note 82.

90. See Squillace, *supra* note 9, at 539.

91. *Id.* at 539-42.

92. *Id.* Because of this policy, several pieces of federal legislation were passed during Clinton's presidency that protected federal land that likely would not have otherwise received protection without intervention under the Antiquities Act.

93. Schlossberg, *supra* note 8; Ward, *supra* note 7, at 1.

94. Ward, *supra* note 7, at 18-19.

millions of acres, Trump reasoned that the previous presidents who designated them failed to reserve “the smallest area [of land] compatible with the protection of the objects for which the lands were reserved.”<sup>95</sup>

The question of whether a president can diminish a national monument has been debated since the early period of the Antiquities Act’s passage. For example, in 1938 then-Attorney General, Homer Cummings issued an opinion that seemed to state that the president did not have the authority to modify a monument designation.<sup>96</sup> This was based on the view that because the Act only granted the president the power to designate monuments, Congress therefore did not also grant it the power to revoke designations.<sup>97</sup> Notably, however, the 1938 opinion does admit that there had been a past practice of presidents diminishing monument designations without any significant challenges, which would seem to undermine its primary argument that such a power is not granted by the Act.<sup>98</sup> Many subsequent Attorney General and Solicitor General opinions continued to debate this question for much of the twentieth century, with no clear answer rising above.<sup>99</sup>

Today, many of the same arguments are raised on both sides. Those who argue the Antiquities Act does not contain a power to diminish monuments—including plaintiffs challenging President Trump’s proclamations diminishing the Bears Ears and Grand-Escalante Staircase Monuments<sup>100</sup>—assert that the Act only grants the power to designate and not to diminish and that the Act’s goal is to make designation faster and easier to ensure adequate protection.<sup>101</sup> Should a designation face criticism, according to them, the proper channel of recourse should be Congress, not the president.<sup>102</sup> Modern opponents, on the other hand, argue that the “smallest area compatible” requirement inherently grants the ability to diminish monuments.<sup>103</sup> Further, they point to the

95. *Id.* at 18.

96. 39 Op. Att’y Gen. 185, 196-87 (1938) (“[T]he reservation made by the President . . . under the statute was in effect a reservation by the Congress itself and that the President thereafter was without power to revoke or rescind the reservation.”); *see also* Squillace, *supra* note 9, at 554-55.

97. Squillace, *supra* note 9, at 554.

98. Seamon, *supra* note 11, at 582-83; *see also* Squillace, *supra* note 9, at 555-56. Squillace contests this conclusion, however. He argues that such an argument would erroneously grant presidents the power to reverse a prior president’s designation and essentially render it invalid on its face for failure to abide by the “smallest area compatible” requirement.

99. Squillace, *supra* note 9, at 557-61; Seamon, *supra* note 11, at 583-84.

100. Ward, *supra* note 7, at 18-21.

101. Squillace, *supra* note 9, at 565-66.

102. *Id.* at 566.

103. Ward, *supra* note 7, at 21.

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longstanding and unbroken practice of past presidents modifying and diminishing monument designations with congressional acquiescence.<sup>104</sup> This argument alone seems to vindicate the position that the Act grants presidents the power to diminish monuments.

Similar arguments are used in the debate over whether the Act grants the president the authority to revoke a monument designation altogether. Relying on the 1938 Attorney General opinion, those against monument revocation state that the Act “grants a limited delegation of authority to the President to proclaim national monuments” and that “[i]t does not authorize [him] to abolish them.”<sup>105</sup> Because the goal of the Act is to allow presidents to quickly protect objects when Congress is unable to act, a president should not be able to undo that protection and allow a resource to be lost forever.<sup>106</sup> Those who are for monument revocation again argue that the Act grants the president broad authority to modify monuments and that the power to designate inherently implies the power to revoke when a designation is inconsistent with the Act.<sup>107</sup> The failure of any president to unilaterally revoke a monument designation, however, illustrates the strength of the anti-revocation argument today.

## IV. FUTURE OF THE ANTIQUITIES ACT

A. *Potential Supreme Court Intervention*

In 2021, the United States Supreme Court refused to grant certiorari in a case challenging President Obama’s ban on commercial fishing in the Northeast Canyons and Seamounts Marine National Monument.<sup>108</sup> The plaintiffs in that case were several commercial fishing associations whose industry was devastated by the fishing restrictions implemented by President Obama to protect the monument.<sup>109</sup> Despite being denied certiorari, this case may be an ill omen for the future of the Antiquities Act, due to Chief Justice Roberts’s statement issued alongside the denial.

In his statement, Roberts was extremely critical of the modern-day use and interpretation of the Act.<sup>110</sup> He begins his opinion by rhetorically

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104. *Id.* at 22; Squillace, *supra* note 9, at 561-65; Seamon, *supra* note 11, at 575-79. Seamon and Ward both point out that monuments have been reduced in size over eighteen times since the Act’s passage.

105. Squillace, *supra* note 9, at 552.

106. *Id.* at 553-54.

107. Seamon, *supra* note 11, at 584-90.

108. *Massachusetts Lobsterman’s Ass’n v. Ross*, 945 F.3d 535 (D.C. Cir. 2019), *cert. denied* 592 U.S. 980 (2021) (statement of Roberts, C.J. respecting the denial of certiorari).

109. *Id.* at 1.

110. *See generally, id.*

asking what the difference between “an antiquity” and “5,000 square miles of land beneath the ocean” is, demonstrating his incredulity with the modern massive designations under the Act.<sup>111</sup> This juxtaposition of what the Act was originally meant to protect (in his view) and what it currently protects was expanded upon when he detailed the reasons for the Act’s passage—“as a response to widespread defacement of Pueblo ruins in the American Southwest”—and how recent presidents have used it to protect more than just archaeological ruins in recent years.<sup>112</sup> Specifically, Roberts criticized national landscape monuments and the idea that the Act was meant to protect the “imprecisely demarcated concept” of ecosystems.<sup>113</sup> While he agreed *Massachusetts Lobsterman’s Ass’n v. Ross* did not satisfy the usual criteria for granting certiorari, Roberts made clear that the Court would be open to future challenges to the Act.<sup>114</sup> In fact, two petitions for certiorari before the Court in its October 2023 term make such similar challenges.<sup>115</sup> Thus, unless Congress acts soon, it is likely that this Court will step in and fundamentally change how the Antiquities Act is interpreted.

#### B. *What Congress Can Do*

To ensure that the Antiquities Act can continue to preserve important scientific and historic objects like ecosystems, Congress must do two things; first, it must amend the Act to clarify its ambiguities, and second, it must play a more present role in examining presidential designations. These two steps, in combination, would address the concerns of modern critics and make the Act significantly more resistant to attacks regarding its use.

An amendment to the Act must clarify three specific ambiguities; whether it protects *any* object of scientific or historic interest—including ecosystems—and by extension whether the “smallest area compatible” requirement invalidates national landscape monuments, and whether the president has the authority to modify or revoke monument designations. Because of the contention that the Act was originally meant to only protect archaeological ruins and artifacts, an amendment must make clear

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111. *Id.* at 1.

112. *Id.* at 2-4.

113. *Id.* at 3.

114. *Id.* at 4.

115. Petition for Writ of Certiorari, *Murphy Co. v. Biden*, No. 23-525 (2023); Petition for Writ of Certiorari, *Am. Forest Res. Council*, No. 23-524 (2023). While these petitions have recently been denied, their mere existence signifies an increase in similar petitions as well as the likelihood that one will eventually be taken up by the Court.

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that the Act protects *all* objects of scientific or historic interest, including natural objects like ecosystems. Such clarification would cement Binger Hermann's broad interpretation of the Act (as well as President Clinton's national landscape model) and would allow the president to protect millions of acres of unprotected federal land. This would also provide clarification for the "smallest area compatible" requirement because it would defeat the argument that the requirement invalidates massive monument designations. Should an amendment expressly allow for national landscape monuments that require massive amounts of land to be reserved, it would become much harder to argue that those designations are larger than is necessary to adequately protect them.

The proposed amendment must also address whether the president has the authority to modify or revoke monument designations. Because of the longstanding practice of diminishing and enlarging already-established monuments, modification authority should be granted to the president to ensure that prior designations continue to accomplish the Act's purpose. This provision would likely be met with little pushback because of the longstanding practice. While an amendment that rejects a president's revocation authority would likely be met with more criticism, such criticisms are neutered by Congress's Property Clause power, which grants it the authority to revoke monuments should they not comply with the Act's requirements. If an amendment denying presidential revocation power was passed, there would still be a path through Congress to challenge designations and even revoke them. Thus, an amendment clarifying presidential authority under the Act would address current criticism and ensure the Act's preservation.

Finally, Congress must do its job and provide more oversight to presidential designations. Criticisms of the Antiquities Act have been able to flourish because of Congress's inability and refusal to push back against designations when they go too far. The laws limiting the monuments in Alaska and Jackson Hole are excellent examples of this; Congress was displeased with the president's actions and took steps to limit the harmful effects of those designations. Congress needs to be more willing to examine designations when they are made and have a dialogue with the president about how best to preserve important objects. Such keen oversight would balance a presidential tendency to over-designate. This would also allow the members of Congress who represent communities where designations are made to feel heard and ensure that designations adequately protect local interests.

A more watchful Congress could also serve to quell the Supreme Court's discontent over the current reach of the Act. Because the Court's

primary concern is that presidential conservation power has grown exponentially in recent years, a reminder that Congress has at its disposal the power to step in and limit the president's authority could potentially convince the Court that they need not wade into the fray. Many of the fears fueling Roberts's opinion would be minimized if Congress ever decided to step in and check presidential excess by limiting a modern monument. Legislation *a la* Jackson Hole or Alaska that proves Congress can still do its job would send a powerful message to the Court and all of the Antiquities Act's critics. Regardless of whether any such action is ever taken, Congress's past practice can—and potentially should—provide a limiting principle for future Supreme Court intervention. Should the steps outlined in this Comment be taken in the future, however, the Antiquities Act will surely remain an important piece of presidential preservation authority and ensure the protection of America's natural wonders.

#### V. CONCLUSION

Modern usage of the Antiquities Act is controversial. Many argue that it is a vital and indispensable avenue for preserving America's natural wonders while others believe it is nothing more than a federal land grab that harms local communities and prevents natural resource extraction and development. This controversy implicates constitutional, statutory, and pragmatic criticisms that have existed since the Act's passage in 1906. As the years have gone by, presidents have used the Act to preserve and protect more and more federal land. At the same time, Congress has been less and less willing to examine these designations and impose any significant limits on the president's preservation authority. Such acquiescence has led to instability regarding the Act's use as well as fierce debate over the reach of presidential authority under it, especially in regard to regulation of the oil and gas, mining, logging, and ranching industries. To put these concerns to bed, Congress must amend the Antiquities Act and provide better oversight over actions taken pursuant to it, as it has done in the past. Failure to do so will lead to a significant reduction in the Act's scope and will signal the end of its use as a weapon raised in defense of America's vast landscapes and invaluable natural resources.