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## Clinton's National Monuments: A Democrat's Undemocratic Acts

Albert C. Lin

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# CLINTON'S NATIONAL MONUMENTS: A DEMOCRAT'S UNDEMOCRATIC ACTS?

*Albert C. Lin\**

*This article explores the consistency of Antiquities Act authority with democratic values in the context of President William Clinton's designation or expansion of twenty-two national monuments. The article concludes that, contrary to the views of some of the Act's detractors, neither the Antiquities Act, nor the manner in which President Clinton exercised its authority, can accurately be described as undemocratic. The Act provides for resource-protective decisions to be made by the elected leader of the American people, subject to further debate and disposition by the people's elected representatives in Congress. Although the chief executive's ability to act quickly in emergency situations to protect resources on the public lands does not by itself provide a satisfying justification for his broad powers under the Act, his distinction as the one leader elected by all the American people places him in a unique position to exercise long-term and broad-scale judgments regarding the national and historical significance of public lands.*

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#### INTRODUCTION

President William J. Clinton made generous use of authority granted by the Antiquities Act to protect "objects of historic or scientific interest" on federal lands by designating or expanding twenty-two national monuments via presidential proclamation. These monument proclamations provoked widespread controversy, particularly in the states and rural communities of the West where many of the new or expanded monuments are located. The debate surrounding President Clinton's use of the Act, not unlike debates that accompanied use of the Act by some of Clinton's predecessors, included charges that the Act itself and the manner in which it was used were "undemocratic."

This article explores the consistency of Antiquities Act authority with democratic values in the context of the Clinton designations. The article concludes that although the Act stands in contrast to more recently enacted public natural resource laws that explicitly provide for public participation in decision-making and management, it is consistent with basic principles of representative democracy. This does not mean that the Act's authority cannot be exercised in a manner that provides for greater public input; however, contentions that the Act is "undemocratic"—as written and as exercised—are mistaken.

I.  
BACKGROUND

A. *Federal Land Management*

Approximately 27.7% of the land area of the United States, or some 630 million acres, is under federal ownership.<sup>1</sup> The federal agencies responsible for managing the most acreage are the Bureau of Land Management (267.1 million acres), the U.S. Forest Service (191.6 million acres), the U.S. Fish and Wildlife Service (87.5 million acres), and the National Park Service (76.6 million acres).<sup>2</sup> How these lands are managed is a matter of great concern both to the various direct users of the lands and to the American public as a whole, for whom the lands have concrete as well as symbolic value.<sup>3</sup>

The Property Clause of the Constitution declares the plenary authority of the Federal Government to manage the public lands:<sup>4</sup> "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."<sup>5</sup> This plenary authority to make laws concerning the public lands has been described by the Supreme Court as "not of a legislative character in the highest sense of the term," but rather akin to "mere rules prescribed by an owner of property for its disposal."<sup>6</sup> Despite arguments to the contrary, courts have uniformly affirmed Congress' unfettered discretion over the federal lands.<sup>7</sup>

Historically, absent withdrawal or reservation for specific purposes, federal lands were considered to be in the public domain, i.e., subject to the operation of public land laws and generally available for entry or settlement.<sup>8</sup> Since the nation's founding, the Federal Government has

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1. U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 208 (121st ed. 2001).

2. GAO, Rep. No. GAO/RCED-96-40, LAND OWNERSHIP: INFORMATION ON THE ACREAGE, MANAGEMENT, AND USE OF FEDERAL AND OTHER LANDS 3 (1996).

3. See GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW §§ 1:4-1:6 (1990, rev. 2002) [hereinafter COGGINS & GLICKSMAN] (noting the public's deep interest and strong opinions regarding public natural resources).

4. Throughout this article, the term "public lands" refers only to federally owned lands.

5. U.S. CONST., art. IV, § 3, cl. 2. Although it was sometimes initially argued that the Property Clause required Congress to dispose of any lands acquired by the United States, the Clause has been consistently interpreted to allow Congress to make any use of federal lands, including conservation uses. See George C. Coggins & Robert L. Glicksman, *Evolution of Federal Public Land and Resources Law*, in PUBLIC LAND LAW II 1-1, 1-5 (1997). As the Supreme Court has noted, "the power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

6. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

7. See COGGINS & GLICKSMAN, *supra* note 3, § 3:12, and cases discussed therein.

8. GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCE LAW 2, 44 (3d ed. 1993) (quoting COGGINS & GLICKSMAN, *supra* note 3, at § 1.02). All public lands have now been withdrawn from entry for the purpose of settlement. *Id.* at 285.

protected public lands or set them aside for particular uses through legislative or executive withdrawals of land from the public domain.<sup>9</sup> "Withdrawal" generically refers to the designation of land as unavailable for homesteading or resource extraction by statute, executive order, or administrative order.<sup>10</sup> The executive authority to effect withdrawals was historically rooted both in explicit delegations in specific statutes, and in an implicit delegation derived from congressional acquiescence in executive withdrawals.<sup>11</sup> Withdrawal remains one of the most effective tools for setting aside lands for a particular use.<sup>12</sup>

The 1976 passage of the Federal Land Policy and Management Act ("FLPMA") drastically curbed and modified the executive branch's withdrawal authority.<sup>13</sup> FLPMA repealed all or part of twenty-nine statutes that had given the President authority to create, modify, or terminate withdrawals for such purposes as reclamation, native purposes, power site reserves, town sites, stock driveways, and public water reserves.<sup>14</sup> FLPMA also repealed the implied general withdrawal authority that had been recognized by the Supreme Court in *United States v. Midwest Oil*.<sup>15</sup> Congress noted that this implied authority was the main authority that the executive branch had used to make withdrawals.<sup>16</sup>

9. See CHARLES F. WHEATLEY, ET AL., STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS 1 (1969); David Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RES. J. 279, 279 (1982).

10. COGGINS ET AL., *supra* note 8, at 285. The Federal Land Policy and Management Act defines withdrawal as "withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular purpose or program . . ." 43 U.S.C. § 1702(j) (1994). The terms "withdrawal" and "reservation" are often used interchangeably; strictly speaking, a reservation is an immediate dedication of lands to a predetermined purpose, whereas a withdrawal can either be a reservation or a setting aside of land pending a subsequent decision as to its disposition. See WHEATLEY ET AL., *supra* note 9, at A-1 to A-2.

11. See COGGINS ET AL., *supra* note 8, at 288-89. The withdrawal statutes included the General Withdrawal Act, 43 U.S.C. § 141 (1994) (a.k.a. "The Pickett Act"), which delegated to the President general authority to make temporary land withdrawals that would remain in force until revoked either by the President or by Congress. See WHEATLEY ET AL., *supra* note 9, at 4, 88-130. Withdrawal pursuant to implied acquiescence was recognized in *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915), where the Supreme Court noted the longstanding and frequent practice of executive withdrawals "without express statutory authority,—but under the claim of power so to do," and concomitant Congressional acquiescence. *Id.* at 474.

12. See Getches, *supra* note 9, at 279.

13. Pub. L. No. 94-579, § 704, 90 Stat. 2743, 2792 (1976).

14. *Id.*; H.R. REP. NO. 94-1163, at 29 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6203; see Richard M. Johannsen, Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 442 (1981). FLPMA expanded the executive withdrawal authority, however, to the extent that it repealed an earlier statute that forbade the executive from withdrawing lands from metalliferous mineral development. See John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 298 (2001).

15. 236 U.S. at 469-74; Pub. L. No. 94-579, § 704, 90 Stat. 2743, 2792 (1976).

16. H.R. REP. NO. 94-1163, at 29.

FLPMA provided to the Secretary of the Interior a new, more limited withdrawal authority and subjected it to congressional veto and other procedural restrictions.<sup>17</sup> This authority cannot be used to modify or revoke a withdrawal previously made by Congress, or to make withdrawals “which can be made only by Act of Congress.”<sup>18</sup> Subject to these restrictions, FLPMA allows the Secretary to make withdrawals of any acreage for up to twenty years, unless Congress rejects such a withdrawal within ninety days.<sup>19</sup> FLPMA’s sweeping changes, however, did not affect the President’s withdrawal authority under the Antiquities Act.<sup>20</sup>

### B. *The Antiquities Act*

The Antiquities Act empowers the President to withdraw lands for the establishment of national monuments. Specifically, the Act authorizes the President “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 . . . .”<sup>21</sup> Under the Act, the President “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>22</sup> Once the President establishes a monument, he is without power to revoke or rescind the reservation,<sup>23</sup> although it

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17. See 43 U.S.C. § 1714 (1994) (requirements of notice, congressional review of withdrawals aggregating 5000 acres or more, and public hearings); see also COGGINS ET AL., *supra* note 8, at 292; Johannsen, *supra* note 14, at 442–46.

18. 43 U.S.C. § 1714(j).

19. 43 U.S.C. § 1714(c)(1).

20. See Pub. L. No. 94–579, § 704, 90 Stat. 2743, 2792 (1976). The other exceptions to FLPMA’s broad repeal of executive withdrawal authority pertain to native and public interest withdrawals in Alaska pursuant to the Alaska Native Claims Settlement Act, withdrawals of grazing districts under the Taylor Grazing Act, and withdrawals under the Defense Withdrawal Act of 1958. H.R. REP. NO. 94–1163, at 29, reprinted in 1976 U.S.C.C.A.N. 6175, 6203.

21. 16 U.S.C. § 431 (2000).

22. *Id.*

23. See Proposed Abolishment of Castle Pinckney Nat’l Monument, 39 Op. Atty. Gen. 185, 187 (1938) (concluding that President lacks authority to abolish a monument entirely); see also James A. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 625 (2001) [hereinafter Rasband] (distinguishing between executive order issued pursuant to President’s Article II executive powers, which may be revoked, and executive order issued pursuant to Antiquities Act, which is exercise of power specifically delegated by Congress that does not include power to revoke existing monument). FLPMA seemed to confirm the absence of executive authority to modify or revoke an Antiquities Act withdrawal. See 43 U.S.C. § 1714(j) (1994) (prohibition on Secretary of the Interior’s modification or revocation of existing monument). *But see* Jim Woolf, *Monuments Rescindable, Says Expert*, SALT LAKE TRIBUNE, Sept. 3, 2000, at B1 (reporting comments by Prof. George Coggins that power to “de-withdraw” national monument may be implicit in Antiquities Act).

remains uncertain whether the President may reduce a monument in size.<sup>24</sup> Early in its term, the George W. Bush Administration reviewed whether it could undo various monument designations made by the preceding administration, and concluded that it could not.<sup>25</sup>

The president designating the monument has the discretion to delineate permissible uses within that monument, but those uses must satisfy the Act's requirement of "proper care and management of the objects to be protected."<sup>26</sup> Thus, activities such as grazing and vehicle use may be permitted in particular instances so long as they are not detrimental to the objects to be protected.<sup>27</sup> Although management of national monuments has been vested for the most part in the National Park Service ("Park Service"), such management responsibilities have also been delegated to other agencies, including the Bureau of Land Management ("BLM") and the Forest Service.<sup>28</sup>

24. See Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Atty. Gen. at 187 (noting that "President from time to time has diminished the area of national monuments established under the Antiquities Act by removing or excluding lands therefrom, under that part of the act which provides that the limits of the monuments 'in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected'"); Rasband, *supra* note 23, at 627–28 (suggesting that reduction of acreage of landscape monuments is "akin to modifying a withdrawal based on *implied* executive authority rather than on a specific act of Congress").

25. See Michelle Cole, *Norton: Interior Can't Ease Land Rule*, THE OREGONIAN (Portland), Aug. 13, 2001, at E01.

26. 16 U.S.C. § 431 (2000); see James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 512 (1999) [hereinafter Rasband II].

27. For example, the proclamation establishing the Ironwood Forest National Monument provided that "[l]aws, regulations, and policies followed by the [BLM] in issuing and administering grazing permits or leases on all lands under its jurisdiction shall continue to apply with regard to the lands in the monument." Proclamation No. 7320, 65 Fed. Reg. 37,259, 37,260 (June 9, 2000). In contrast, the contemporaneously issued proclamation establishing the Hanford Reach National Monument, "[f]or the purpose of protecting the objects identified" in the monument, prohibited livestock grazing. Establishment of the Hanford Reach National Monument, Proclamation 7319, 65 Fed. Reg. 37,253, 37,255 (June 9, 2000). Other activities permitted in some of the monuments recently established by President Clinton include mining, oil and gas drilling, and hunting. See Sanjay Ranchod, Note, *The Clinton National Monuments: Protecting Ecosystems With the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 538 (2001).

28. See, e.g., Establishment of the Giant Sequoia National Monument, Proclamation 7,295, 65 Fed. Reg. 24,095, 24,098 (Apr. 15, 2000) (to be managed by Forest Service); Establishment of the Grand Staircase-Escalante National Monument, Proclamation 6,920, 61 Fed. Reg. 50,223 (Sept. 24, 1996) (to be administered by BLM); Establishment of the Hanford Reach National Monument, Proclamation 7319, 65 Fed. Reg. 37,253 (June 9, 2000) (to be administered by U.S. Fish & Wildlife Service and Department of Energy); see also Robert B. Keiter, *The Monument, the Plan, and Beyond*, 21 J. LAND RESOURCES & ENVTL. L. 521, 530 (2001) (noting that twelve monuments established by President Clinton are under BLM jurisdiction); Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L. J. 477, 507–12 (1998).

Concern over the destruction of Native American artifacts and sites in the Southwest prompted passage of the Act in 1906.<sup>29</sup> In contrast to the laws of most European countries at the time, U.S. laws offered almost no protection to antiquities prior to the Act.<sup>30</sup> Although earlier proposed antiquities legislation would have offered protection only to prehistoric and historic antiquities,<sup>31</sup> the language of the Antiquities Act referred to "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest."<sup>32</sup> In addition, rather than capping the size of reserved areas to 320 or 640 acres, as earlier bills had proposed,<sup>33</sup> the Act merely limited the size of monuments "to the smallest area compatible with the proper care and management of the objects to be protected."

### C. *Application of the Act*

From the outset, and notwithstanding the primary motivations behind the Act's passage, presidential exercise of the Act's authority has not been limited to protecting archaeological objects or small geographical areas. The first monument designation under the Act, President Theodore Roosevelt's designation encompassing Devil's Tower in Wyoming, involved an arguably "scientific" rather than archaeological object.<sup>34</sup> President Roosevelt went on to make seventeen other monument designations, including the reservation of over 800,000 acres within the Grand Canyon National Monument in 1908.<sup>35</sup> Despite its broad scope, that reservation was upheld by the Supreme Court, which reiterated the President's statement that the Grand Canyon was "an object of unusual scientific interest."<sup>36</sup> In addition to the Grand Canyon, a

29. See, e.g., H.R. REP. NO. 59-2224, pt. 1, at 1-8 (1906); S. REP. NO. 59-3797 (1906); RONALD F. LEE, NATIONAL PARK SERVICE, THE ANTIQUITIES ACT OF 1906 47-77 (1970); 40 CONG. REC. 7888 (1906) (statement of Rep. Lacey (Tex.) that the bill "will merely make small reservations where the objects are of sufficient interest to preserve them . . . It is meant to cover the cave dwellers and the cliff dwellers . . . It is to preserve these old objects of special interest and the Indian remains in the pueblos in the Southwest . . ."); COGGINS ET AL., *supra* note 8, at 306; Matthew W. Harrison, *Legislative Delegation and Presidential Authority: The Antiquities Act and the Grand Staircase-Escalante National Monument—a Call for a New Judicial Examination*, 13 J. ENVTL. L. & LITIG. 409, 413-14 (1998).

30. See LEE, *supra* note 29, at 49-50.

31. See *id.* at 74.

32. *Id.* The inclusion of the phrase, "other objects of historic or scientific interest," apparently reflected Interior Department efforts to broaden the scope of the Act beyond archaeological sites. See *id.*

33. See *id.* at 75.

34. See Proclamation 658, 34 Stat. 3,236, 3,237 (Sept. 24, 1906) (declaring Devil's Tower to be "a natural wonder and an object of historic and great scientific interest").

35. See Proclamation 794, 35 Stat. 2,175 (1908); *Cameron v. United States*, 252 U.S. 450, 455 (1920); LEE, *supra* note 29, at 90; Justin J. Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 79-80 (1999).

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

quarter of our national parks, including Arches, Bryce, Death Valley, Glacier Bay, and Zion, were first established as national monuments under the Antiquities Act before Congress later converted them into national parks.<sup>37</sup> Thirteen presidents have created a total of 123 national monuments since the Act's inception.<sup>38</sup> Only four presidents (Nixon, Reagan, and Bush (father and son)) have refrained from exercising the Act's authority.<sup>39</sup> On the following page is a table summarizing the number of monuments established and the total acreage designated by each president since the Act's passage.

The few reported judicial challenges to monument designations, including challenges that authority under the Act is limited to the protection of archaeological sites, have been uniformly unsuccessful. In *Cappaert v. United States*, for example, the Supreme Court held that an underground pool—and the rare desert fish that inhabited it—fell within the protective authority granted by the statute as “objects of historic or scientific interest.”<sup>40</sup> More recently, the U.S. Court of Appeals for the D.C. Circuit rejected the argument that President Clinton did not reasonably identify “objects of historic and scientific interest” in establishing the Giant Sequoia National Monument.<sup>41</sup> The court observed that the proclamation had identified giant sequoias, various geological features, limestone caverns, and paleontological resources, in addition to archaeological sites.<sup>42</sup>

Though the relative infrequency of legal challenges might suggest otherwise, exercise of presidential authority under the Act has long been surrounded by controversy. John D. Rockefeller's proposal to make a personal gift of 33,000 acres to the United States if the land would be preserved and made a part of Grand Teton National Park was met with opposition by the State of Wyoming and its residents, who expressed concern about a diminished tax base and complications to wildlife management.<sup>43</sup> After some eighteen years of debate in Congress over

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37. See COGGINS ET AL., *supra* note 8, at 307; Rasband II, *supra* note 26, at 490 & n.27; John J. Fiakla, *Clinton Is Likely to Leave the Presidency With Record of Having Protected Lands*, WALL ST. J., Dec. 29, 2000, at A18.

38. See Ranchod, *supra* note 27, at 585–87 Appendix A.

39. *Id.* President Ford expanded the Buck Island Reef National Monument, but did not establish any new national monuments. See Proclamation 4,346, 40 Fed. Reg. 5,127 (Feb. 4, 1975).

40. *Cappaert v. United States*, 426 U.S. 128, 142 (1976); see also *Anaconda Copper Co. v. Andrus*, 14 Env't. Rep. Cas. 1853, 1854–55 (D. Alaska 1980) (finding “matters of scientific interest which involve geological formations or which involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act” and noting that authority is not limited to historic landmarks, “but is much enlarged by the extent of authority to declare . . . public monuments for other objects of historic or scientific interest”).

41. See *Tulare County v. Bush*, 306 F.3d 1138 (D.C.Cir. 2002).

42. See *id.* at 1141.

43. See Getches, *supra* note 9, at 302–05; Harrison, *supra* note 29, at 419–20.

**Table 1.**

<b>PRESIDENT</b>	<b>Number of monuments established</b>	<b>Total acreage (when established)</b>
Theodore Roosevelt	18	1.54 million
William H. Taft	11	32,114
Woodrow Wilson	13	1.18 million
Warren G. Harding	8	8,990
Calvin Coolidge	13	1.24 million
Herbert C. Hoover	9	1.36 million
Franklin D. Roosevelt	11	1.52 million
Harry S Truman	1	1,000
Dwight D. Eisenhower	2	4,802
John F. Kennedy	2	1,160
Lyndon B. Johnson	1	26,080
Richard M. Nixon	0	0
Gerald R. Ford	0	0
Jimmy Carter	15	54.0 million
Ronald W. Reagan	0	0
George H.W. Bush	0	0
William J. Clinton	19	5.03 million

SOURCES: U.S. General Accounting Office, Federal Land Management: Information on Usage of the Antiquities Act, GAO/RCED-99-244R (1999); Ranchod, *supra* note 27 at 585-87 Appendix A.

Note: Table does not include proclamations that expanded previously established monuments.

what to do with the proposed gift, including repeated failure to pass legislation that would include the area within the Park, Rockefeller threatened to withdraw his proposal and otherwise dispose of the lands.<sup>44</sup> In response, President Franklin D. Roosevelt proclaimed the area to be part of the Jackson Hole National Monument in 1943.<sup>45</sup> The designation led not only to a legal challenge,<sup>46</sup> but also to Congressional proposals to limit and amend the Act generally.<sup>47</sup> Although these general amendments were never enacted, Congress did pass an amendment that, as part of legislation incorporating lands in Jackson Hole National Monument into Grand Teton National Park, barred the "further expansion or

44. See WHEATLEY ET AL., *supra* note 9, at 464-65; Quigley, *supra* note 35, at 81.

45. Proclamation 2,578, 57 Stat. 731 (Mar. 15, 1943).

46. See *Wyoming v. Franke*, 58 F. Supp. 890, 895-96 (D. Wyo. 1945). The designation was upheld by the district court, which found that it was supported by "substantial evidence."

47. See Quigley, *supra* note 35, at 84 (summarizing proposals to amend or repeal presidential power to establish monuments); Harrison, *supra* note 29, at 420 n.78.

establishment of national monuments in Wyoming . . . except by express authorization of Congress."<sup>48</sup>

Objections also followed President Dwight D. Eisenhower's designation of the Chesapeake & Ohio Canal National Monument in 1961. Eisenhower established the monument after a Democrat-controlled Congress had refused to protect the land in question; Congress responded to the designation by blocking the appropriation of funds for managing the monument for ten years.<sup>49</sup> And President Lyndon Johnson, during his last hours in office in 1969, signed Antiquities Act proclamations that enlarged Arches and Capitol Reef National Monuments.<sup>50</sup> Johnson's last-minute proclamations provoked reactions similar to the ones that followed President Clinton's designation of Grand Staircase-Escalante National Monument. In both instances, Utah's Senators criticized the "unilateral" and "arbitrary" manner in which the monuments were enlarged (in Johnson's case) or created (in Clinton's case).<sup>51</sup>

Even more controversy surrounded President Jimmy Carter's establishment of fifteen new national monuments and his expansion of two preexisting monuments in Alaska in 1978. In 1971, Congress passed the Alaska Native Claims Settlement Act ("ANCSA"),<sup>52</sup> which authorized the Secretary of the Interior to withdraw up to eighty million acres ("d-2 lands"), but provided that any such withdrawals would expire on December 16, 1978 unless ratified by Congress.<sup>53</sup> As the deadline approached, Congress was working on a bill to protect some one hundred million acres as federal land, but opposition from the Alaska state government and congressional delegation stalled its passage.<sup>54</sup> On December 1, 1978, with expiration of the withdrawals looming just two weeks away, President Carter reserved approximately 56 million acres through the Antiquities Act.<sup>55</sup> This action, along with an earlier temporary withdrawal of 105 million acres by Secretary of the Interior Cecil Andrus, maintained the status quo until Congress could pass

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48. Act of September 14, 1950, 16 U.S.C. §§ 406d-1, 431a (2000); *see also* Getches, *supra* note 9, at 305.

49. *See* Les Blumenthal, *Presidents as Preservationists: Antiquities Act gives chief executive free hand in creating national monuments*, MORNING NEWS TRIB. (Tacoma), May 28, 2000, at A1.

50. Rasband II, *supra* note 26, at 490-91.

51. *See* Rasband II, *supra* note 26, at 490-91 & nn. 30-32.

52. 43 U.S.C. §§ 1601-1624 (1994).

53. *See* 43 U.S.C. § 1616(d)(2) (1994). ANCSA also granted Alaskan Natives the right to select 44 million acres and allowed the State of Alaska to continue its selection of 104 million acres pursuant to the Alaska Enabling Act. COGGINS ET AL., *supra* note 8, at 143.

54. COGGINS ET AL., *supra* note 8, at 308.

55. *See* Proclamations No. 4,611-4,627, 43 Fed. Reg. 57,009-57,131 (Dec. 1, 1978); Quigley, *supra* note 35, at 82-83.

legislation addressing the disposition of federal lands in Alaska.<sup>56</sup> The Alaska National Interest Lands Conservation Act ("ANILCA"),<sup>57</sup> which rescinded all the national monuments established by Carter, but included almost all the lands within federal preservation systems, resolved the disposition of these lands.<sup>58</sup> ANILCA also made potential future withdrawals in Alaska under the Antiquities Act of more than 5,000 acres subject to congressional approval.<sup>59</sup> Notably, attempts to pass legislation more generally limiting the President's withdrawal authority under the Antiquities Act did not succeed.<sup>60</sup>

President Clinton wielded Antiquities Act authority aggressively. He designated more new monuments than any other president (19 new monuments totaling over five million acres), and he expanded three others (the expansion acreage totaling over 600,000 acres).<sup>61</sup> The first,

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56. See COGGINS ET AL., *supra* note 8, at 308; Getches, *supra* note 9, at 306; Johannsen, *supra* note 14, at 462 n.151 (noting that much of Carter's Antiquities Act withdrawals duplicated Secretary Andrus' prior reservations).

57. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 U.S.C. §§ 3101-3233 (2000), 43 U.S.C. §§ 1631-1641 (1994), among others).

58. See 16 U.S.C. § 3209 (2000); COGGINS ET AL., *supra* note 8, at 308. The lands were set aside as national parks (e.g., Gates of the Arctic, Lake Clark), national wildlife refuges (e.g., Becharof, Yukon Flats), additions to national forests, a national conservation area, a national recreation area, and national wild and scenic rivers. See Pub. L. No. 96-487, 94 Stat. 2371 (1980).

59. See 16 U.S.C. § 3213(a) (2000).

60. See Quigley, *supra* note 35, at 84-85 (describing proposal to strictly limit use of Act to archaeological objects and to require Congressional approval for monuments larger than 5,000 acres).

61. Establishment of the Agua Fria National Monument, Proclamation 7,263, 65 Fed. Reg. 2,817 (Jan. 11, 2000); Boundary Enlargement and Modification of the Buck Island Reef National Monument, Proclamation 7,392, 66 Fed. Reg. 7,335 (Jan. 17, 2001); Establishment of the California Coastal National Monument, Proclamation 7,264, 65 Fed. Reg. 2,821 (Jan. 11, 2000); Establishment of the Canyons of the Ancients National Monument, Proclamation 7,317, 65 Fed. Reg. 37,243 (June 9, 2000); Establishment of the Carrizo Plain National Monument, Proclamation 7,393, 66 Fed. Reg. 7,339 (Jan. 17, 2001); Establishment of the Cascade-Siskiyou National Monument, Proclamation 7,318, 65 Fed. Reg. 37,249 (June 9, 2000); Boundary Enlargement of the Craters of the Moon National Monument, Proclamation 7,373, 65 Fed. Reg. 69,221 (Nov. 9, 2000); Establishment of the Giant Sequoia National Monument, Proclamation 7,295, 65 Fed. Reg. 24,095 (Apr. 15, 2000); Establishment of the Governors Island National Monument, Proclamation 7,402, 66 Fed. Reg. 7,855 (Jan. 19, 2001); Establishment of the Grand Canyon-Parashant National Monument, Proclamation 7,265, 65 Fed. Reg. 2,825 (Jan. 11, 2000); Establishment of the Grand Staircase-Escalante National Monument, Proclamation 6,920, 61 Fed. Reg. 50,223 (Sept. 24, 1996); Establishment of the Hanford Reach National Monument, Proclamation 7,319, 65 Fed. Reg. 37,253 (June 9, 2000); Establishment of the Ironwood Forest National Monument, Proclamation 7,320, 65 Fed. Reg. 37,259 (June 9, 2000); Establishment of the Kasha-Katuwe Tent Rocks National Monument, Proclamation 7,394, 66 Fed. Reg. 7,343 (Jan. 17, 2001); Establishment of the Minidoka Internment National Monument, Proclamation 7,395, 66 Fed. Reg. 7,347 (Jan. 17, 2001); Boundary Enlargement of the Pinnacles National Monument, Proclamation 7,266, 65 Fed. Reg. 2,831 (Jan. 11, 2000); Establishment of the Pompeys Pillar National Monument, Proclamation 7,396, 66 Fed. Reg. 7,351 (Jan. 17, 2001); President Lincoln and Soldiers' Home National Monument, Proclamation 7,329, 65 Fed. Reg. 43,673 (July 7, 2000); Establishment of the Sonoran Desert National Monument, Proclamation 7,397, 66 Fed. Reg. 7,354 (Jan. 17, 2001); Establishment of the Upper Missouri River Breaks

and perhaps most controversial, of his designations established the Grand Staircase-Escalante National Monument in southern Utah. As established, the monument encompassed approximately 1.7 million acres of federal land, including such features as the Grand Staircase, the Escalante Natural Bridge and Canyons, and the Kaiparowits Plateau.<sup>62</sup> The proclamation establishing Grand Staircase-Escalante followed years of Congressional debate regarding wilderness designation in Utah.<sup>63</sup> Minimal consultation with Utah's governor or its congressional delegation, and minimal prior public notice, however, preceded the actual announcement of the monument designation at the South Rim of the Grand Canyon in Arizona.<sup>64</sup> The designation met with the approval of the environmental community and many urban residents of the West,<sup>65</sup> but many Utahns attacked Clinton for this virtually unilateral withdrawal.<sup>66</sup> Following the designation of Grand Staircase-Escalante, several bills were proposed to repeal or limit Antiquities Act authority.<sup>67</sup> Typical of these bills was a bill titled the "National Monument Fairness Act of 1997."<sup>68</sup> Sponsored by Senators Hatch and Bennett of Utah, the bill proposed that all monument proclamations greater than 5,000 acres be approved by Congress and preceded by consultation with the governor of the affected state.<sup>69</sup> Another bill, under the same title and introduced by Representative Hansen of Utah, provided that monuments greater than 50,000 acres could not be designated until thirty days after the President transmitted the proposed proclamation to the affected

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National Monument, Proclamation 7,398, 66 Fed. Reg. 7,359 (Jan. 17, 2001); Vermillion Cliffs National Monument, Proclamation 7,374, 65 Fed. Reg. 69,227 (Nov. 9, 2000); Establishment of the Virgin Islands Coral Reef National Monument, Proclamation 7,399, 66 Fed. Reg. 7,364 (Jan. 17, 2001). For a brief description of each of these new monuments, see Ranchod, *supra* note 27, at 555-68.

62. See Fried, *supra* note 28, at 477. As a result of subsequent adjustments and land exchanges, the monument now contains approximately 1.9 million acres. See Bureau of Land Management, *Grand Staircase-Escalante National Monument Visitor Information*, at [http://www.ut.blm.gov/monument/Visitor\\_Information/visitor\\_information.html](http://www.ut.blm.gov/monument/Visitor_Information/visitor_information.html) (last updated July 23, 2001).

63. For a detailed discussion of the Utah wilderness designation debate, see Rasband II, *supra* note 26, at 492-98 and Fried, *supra* note 28, at 482-86. The primary bills introduced during the course of this debate are summarized in Quigley, *supra* note 35, at 67-72.

64. See Rasband II, *supra* note 26, at 484-85 & n.5 (describing how Utah delegation learned of designation via *Washington Post* article published eleven days prior to proclamation); William Booth, *A Slow Start Built to an Environmental End-Run*, WASHINGTON POST, Jan. 13, 2001, at A1, A8 (describing how Utah Governor Mike Leavitt learned of proclamation).

65. See, e.g., C. David Kotok, *Clinton Tells Coloradans of Government's Role*, OMAHA WORLD-HERALD, Oct. 13, 1996, at 1A.

66. See *infra* Sec. II.

67. See Quigley, *supra* note 35, at 93-96 (describing proposed legislation); Rasband II, *supra* note 26, at 530.

68. 143 CONG. REC. S2563-01 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch).

69. *Id.*

state's governor to solicit written comments.<sup>70</sup> Under this bill, the President could designate a monument after following such procedures, but any such designation would become ineffective after two years unless approved by Congress.<sup>71</sup> None of these bills became law.

With the Antiquities Act powers threatened but left intact, President Clinton went on to designate another eighteen new monuments in his last thirteen months in office. Apparently taking to heart some of the lessons from the controversy that followed the establishment of Grand Staircase-Escalante, the Clinton Administration opened a dialogue with local communities before making subsequent monument designations.<sup>72</sup> In some instances, the dialogue resulted in the resolution of issues of concern to state and local interests.<sup>73</sup> In other instances, however, congressmen and state officials expressed outrage at the President's designations,<sup>74</sup> and disgruntled parties turned to the courts to challenge the designations, though none successfully so far.<sup>75</sup>

## II. OBJECTIONS TO THE CLINTON DESIGNATIONS

President Clinton's vigorous use of the Antiquities Act triggered a variety of objections from affected interests and rekindled debates concerning the Act's legitimacy. The most frequent objections fall into one of two categories: proceduralist (i.e., objections to the manner in which the designations were made), or substantive (i.e., objections to the effects of the designations). The proceduralist objections stem from a concern that the Act disregards democratic principles and usurps power from state and local authorities, whereas substantive objections focus on economic and social effects on state and local communities and

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70. H.R. 1127, 105th Cong. (1st Sess. 1997). The bill was first introduced with a 5,000 acre limit and subsequently amended to 50,000. LIBRARY OF CONGRESS, THOMAS: Legislative Information on the Internet, <http://thomas.loc.gov/>.

71. H.R. 1127, 105th Cong. (1st sess. 1997).

72. See Keiter, *supra* note 28, at 530.

73. For example, prior to Clinton's designation of the Kasha-Katuwe Tent Rocks National Monument in New Mexico, the Administration addressed issues involving monument access, private inholdings, revenue sharing, and maintenance, and thereby obtained the approval of both U.S. Senators and various local interests. See Carolyn Appelman, *Tent Rocks Request Official*, ALBUQUERQUE J., Jan. 5, 2001, at 1.

74. See, e.g., James Peck, *Arizona Monuments: The Controversy Over President Clinton's New Designation Under the Antiquities Act*, 36 ARIZONA ATT'Y 10 (2000), available at <http://www.azbar.org/ArizonaAttorney/July00/toc.cfm> (last visited Oct. 3, 2002) (describing reactions of Arizona governor and congressional delegation to designation of Grand Canyon-Parashant and Agua Fria National Monuments).

75. E.g., *Tulare County*, 306 F.3d 1138 (rejecting challenge to Giant Sequoia National Monument); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (affirming dismissal of complaint challenging establishment of six monuments as unconstitutional and ultra vires actions).

industries.<sup>76</sup> To provide context for the discussion to follow concerning the democratic legitimacy of the Act, the account below presents a sampling of the objections, primarily in the context of the Grand Staircase-Escalante designation.

### A. Proceduralist

Highlighting the absence of any procedural requirements in the Antiquities Act, President Clinton's proclamation establishing Grand Staircase-Escalante National Monument was preceded by little advance notice. Not surprisingly, Senator Orrin Hatch (R-Utah), Utah Governor Mike Leavitt (R), and other Utah politicians criticized the Administration's limited consultation with State officials, congressmen, and local residents.<sup>77</sup> Among the more hyperbolic protests was Senator Hatch's comparison of the designation to "the attack on Pearl Harbor" in its suddenness.<sup>78</sup> Governor Leavitt, in a meeting with the White House just prior to the designation, expressed a shared concern for protecting the land, but objected to the lack of process and public deliberation.<sup>79</sup> Similarly, Representative Bill Orton (D-Utah), later voted out of Congress largely because of the designation, protested that the designation "would cut out the local people from the decision-making process."<sup>80</sup>

President Clinton followed a more politically savvy approach in his subsequent monument designations. That approach, generally, was to announce a potential designation and to invite Congress and the affected state and communities to develop related legislation in the shadow of that potential designation.<sup>81</sup> While hardly consensual, this new approach offered some opportunity for public deliberation and input regarding

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76. These sorts of objections are not unique to the Antiquities Act, as debates over the public lands have long been characterized by "the rhetoric of public rights talk," with rival interests each claiming a voice in the democratic process and further asserting that their preferences are in the public interest. See James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. COLO. L. REV. 241, 243-45 (1994).

77. See, e.g., 143 CONG. REC. S2563-01 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); Rasband II, *supra* note 26, at 484 & n.4 (describing reaction of Utah congressmen); Quigley, *supra* note 35, at 57.

78. 143 CONG. REC. S2563-01.

79. See Laurie Sullivan Maddox, *It's a Monumental Day for Utah; Clinton Plans to Set Aside Scenic Lands*, SALT LAKE TRIB., Sept. 18, 1996, at A1.

80. *Id.* Orton, who had held a substantial lead in the polls prior to the designation, appeared to voters to have no clout with the White House because he had no advance notice of the intended designation. See Judy Fahys, *Governor's Race: Amble, Scramble*, SALT LAKE TRIB., Oct. 1, 2000, at B1; Pauline Arrillaga, *Outrage Over Clinton Land Proposals*, AP ONLINE, Sept. 27, 2000.

81. It has been noted that this approach provided local citizens and local governments greater input in use of the Antiquities Act than prior administrations, but that it nevertheless "has not been collaborative in any real sense." Rasband, *supra* note 23, at 621-22.

how monuments might be established. Indeed, in several instances, the approach spurred the proposal and passage of legislation addressing the resource concerns at issue.<sup>82</sup> In most instances, however, presidential designation followed Congressional inaction or failed attempts to reach consensus.<sup>83</sup> Notwithstanding the opportunity for state and local input, some criticized the process as coercive and unrepresentative.<sup>84</sup> The designation or expansion of some twenty monuments in the Administration's last year suggests that local opposition, where present, ultimately did not prevent designation decisions.<sup>85</sup>

The George W. Bush Administration has echoed the criticisms of the procedures, or lack of procedures, followed by the Clinton Administration. Having concluded that it could not directly "undesignate" the Clinton monuments (whether for political or legal reasons),<sup>86</sup> the Bush administration claims that *its* new approach addresses the alleged procedural faults in Clinton's designations. Secretary of the Interior Gale Norton, for example, sent letters to state and local officials asking for suggestions on how the new monuments should be used and managed and offered to open lines of communication "with local people that were not always properly fostered in the past."<sup>87</sup>

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82. See Leshy, *supra* note 14, at 293 & n.17 (noting legislation passed regarding several areas identified by Secretary of the Interior Babbitt, including Steens Mountain Cooperative Management and Protection Area, Santa Rosa Mountains National Conservation Area, and Las Cienegas National Conservation Area); Fiakla, *supra* note 37, at A18 (describing passage of law to protect Hawaiian coral reefs, after Clinton proposed monument); see also James R. Rasband, *The Rise of Urban Archipelagos in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 87 n.427 (2001) [hereinafter Rasband III] (describing pending legislation).

83. The Upper Missouri River Breaks National Monument, for example, was designated after failed efforts by Secretary of the Interior Babbitt to reach consensus through numerous meetings with representatives, citizens, and stakeholders in Montana. The Carrizo Plain National Monument in California, which was the subject of 1999 legislation supported by the local Resource Advisory Council, was designated after Congress failed to act on the legislation. See Charles Levandosky, *Clinton, Babbitt Face Deadline On National Monument Protection*, DENVER POST, Jan. 7, 2001, at H06.

84. See, e.g., David Foster, *New National Monuments Alter the Face of Western Conservation*, LOS ANGELES TIMES, Aug. 13, 2000, at B1, (reporting remarks of Sen. Larry Craig (R-Idaho): "It's a matter of 'If you don't legislate it, I'm going to decree it.' I don't think that's the way a representative republic does it."); see also Rasband III, *supra* note 82, at 86-87 & n.426 (describing collaboration offered as "largely illusory" and noting Clinton Administration's opposition to proposed amendments to Antiquities Act that contained minimal requirements of consultation and public participation).

85. See Keiter, *supra* note 28, at 530. Some changes were made to proposals, however, based on objections of local residents and representatives. See Rasband III, *supra* note 82, at 88 n.429.

86. See *supra* note 25 & accompanying text.

87. Cat Lazaroff, *Norton Opens Door to Overturning Monuments*, ENV'T NEWS SERV., Mar. 29, 2001; see also Lee Davidson, *Hansen Vows a Lands Fight*, DESERET NEWS (Salt Lake City), Jan. 4, 2001 (reporting statements of Rep. Hansen (R-Utah) that he plans to seek input from House members, governors, state legislatures, and local officials regarding whether they approve of monuments designated by Clinton, and to introduce bills to redraw boundaries where disapproval expressed).

Inextricably linked to the complaints about lack of process were protests that the designation of Grand Staircase-Escalante constituted a massive federal “land grab” or even the “mother of all land grabs.”<sup>88</sup> Some residents near the new monument charged the President and Secretary of the Interior Babbitt with tyranny and burned them in effigy.<sup>89</sup> There was little substance to the “land grab” charges, as the land in question already belonged to the federal government and was therefore subject to disposition under the Property Clause.<sup>90</sup> What such characterizations emphasized, however, was that certain state and local parties were accustomed to using the public lands as their own—and viewed them as such—and that the new land designation had suddenly disrupted their expectations concerning permitted uses of those lands.

Critics also charged that a desire for political gain, rather than sincere concern for threatened resources, motivated the designation of Grand Staircase-Escalante.<sup>91</sup> The designation does appear to have had political motivations. Internal administration memoranda and e-mails, as well as the timing of the designation just six weeks before the 1996 presidential election, reflect a desire to secure the votes of conservation-minded Americans.<sup>92</sup> Whether political motivations led to the designation of an undeserving monument, however, is doubtful.<sup>93</sup> The presence of a political motivation and the appeal to a sector of the electorate, moreover, weakens critics’ argument that the monument designation was “undemocratic,” as is discussed below.<sup>94</sup>

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88. Senator Hatch provided this particularly polemic characterization. 143 CONG. REC. S2563-01 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch); *see also* Quigley, *supra* note 35, at 57.

89. *See* Rasband II, *supra* note 26, at 485 & nn. 6-7.

90. *See supra* notes 4-7 and accompanying text.

91. *See* Quigley, *supra* note 35, at 89-90. To some degree, monument designations are “inherently political decisions” in that they often reflect the president’s assertion of will against Congress’ resistance or inaction. *See* Ranchod, *supra* note 27, at 573.

92. *See* Rasband II, *supra* note 26, at 509-10 (noting appeal of proposed designation in urban areas of West where Clinton had best opportunity for capturing votes, and expected opposition from rural constituencies and Utahns, who were unlikely to vote for him anyway); Quigley, *supra* note 35, at 89-90. The House Committee on Resources later issued reports critical of the Administration’s “political” motives behind the designation. *See* MONUMENTAL ABUSE: THE CLINTON ADMINISTRATION’S CAMPAIGN OF MISINFORMATION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, H.R. REP. NO. 105-824 (1998); COMMITTEE ON RESOURCES, SUBCOMMITTEE ON NATIONAL PARKS & PUBLIC LANDS, 105TH CONG., BEHIND CLOSED DOORS: THE ABUSE OF TRUST AND DISCRETION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT (Comm. Print 1997) (discussing memoranda and e-mails), *available at* <http://www.house.gov/resources/105cong/parks/staircase.htm> (last visited June 28, 2002).

93. *See infra* Sec. III (A)(1).

94. *See infra* Sec. III.

## B. Substantive

### 1. Economic

The substantive criticisms of the Clinton monument designations were both economic and social. On the economic side, states and localities asserted lost revenues for schools and potential jobs. Governor Leavitt claimed that Utah's education system might lose up to \$1 billion from the Grand Staircase-Escalante designation.<sup>95</sup> These figures were likely on the high side, as an earlier study by the State of Utah had estimated that planned coal development on the Kaiparowits Plateau would create 599 jobs on an annual payroll of \$16.7 million, with only \$18 million in total royalties over the life of the mine.<sup>96</sup> While approximately 200,000 acres of state school trust lands and mineral interests were located within the boundaries of the monument, the monument proclamation itself did not bar development of the trust lands. Although the monument designation may have made such development economically impractical or politically difficult,<sup>97</sup> these potential economic impacts on the State were subsequently addressed in a land exchange approved by Congress.<sup>98</sup>

In addition, potential employment losses in mining or other resource industries are likely to be offset, at least to some degree, by increased tourism resulting from monument declarations.<sup>99</sup> Despite initial local opposition to the establishment of Arches, Capitol Reef, and Canyonlands National Parks, local communities near these parks have come to appreciate and, in fact, become economically dependent on them.<sup>100</sup> The new monument reservations may thus simply reflect a new

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95. See Frederick Turner, *Oh, Wilderness*, OUTSIDE MAGAZINE, Apr. 1997, available at <http://www.outsidemag.com/magazine/0497/9704fewild.html> (last visited Oct. 1, 2002); see also, e.g., Howard Fischer, *Babbitt's plan for 2 new monuments is effort to 'downsize' state*, HULL SAYS, ARIZONA DAILY STAR, Dec. 14, 1999, at 2B (reporting Arizona Governor Jane Hull's remarks that Agua Fria and Grand Canyon-Parashant National Monument proposals were "downsizing Arizona" without worrying about impacts on state).

96. See Rasband II, *supra* note 26, at 523.

97. See Quigley, *supra* note 35, at 91-92.

98. See Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139 (1998). Under the exchange, the State of Utah received \$50 million in cash, \$13 million generated from the sale of an unleased coal tract, approximately 160.3 million tons of coal resources, and 118,045 acres of federal land in exchange for 376,739 acres of land and 65,852 acres of mineral interests previously owned by the State within the boundaries of the national park system, national forest system, and the Grand Staircase-Escalante Monument. See Quigley, *supra* note 35, at 90-91.

99. This has been true especially with national monuments that were subsequently converted into national parks. See Liz Thomas, *Dealing With Wilderness*, 21 J. LAND RESOURCES & ENVTL. L. 593, 596 (2001).

100. See *id.* Notwithstanding continued resentment of the new monuments, local communities can find ways to share the economic benefits that can result. See, e.g., Jim Matson,

reality in which the economic benefits of recreation on the public lands exceed economic benefits of alternative uses.<sup>101</sup>

The monument designations were also claimed to have effected takings of private property compensable under the Fifth Amendment. The alleged property interests at issue include mining claims, grazing permits, and water rights.<sup>102</sup> However, because all of the Clinton monument designations withdrew lands explicitly “subject to valid existing rights,”<sup>103</sup> it would be nearly impossible to prove that a taking occurred. While it has been suggested that the “valid existing rights” condition “offers less protection to the holder of a right . . . than might initially appear” because existing rights are subject to a variety of current and potential restrictions,<sup>104</sup> that condition would likely protect whatever rights are protected by the Fifth Amendment.<sup>105</sup> Moreover, interests such as grazing permits have generally not been deemed a property right.<sup>106</sup> Nevertheless, even if effects on such interests ultimately do not give rise to takings, the monument designations admittedly have adverse economic impacts on certain users of the federal lands.<sup>107</sup>

## 2. *Social*

Economic impacts often relate to impacts on local residents' accustomed ways of living. The latter sort of impacts may include, for example, decreased access to federal lands for traditional commodity or recreation purposes, and resultant emigration; increased property values; an influx of tourists, employees, and new residents, resulting in a loss of

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*Community Perspectives on the Monument*, 21 J. LAND RESOURCES & ENVTL. L. 557 (2001) (describing compromise between rural southern Utah communities to share economic benefits of Grand Staircase-Escalante designation).

101. See Rasband III, *supra* note 82, at 26–27 (noting various revenue estimates, including Forest Service estimate that outdoor recreation constitutes 74% of economic benefit on Forest Service lands).

102. See Fried, *supra* note 28, at 522–28.

103. See, e.g., Establishment of the Grand Staircase-Escalante National Monument, Proclamation 6,920, 61 Fed. Reg. 50,223, 50,225 (Sept. 24, 1996); Establishment of the Agua Fria National Monument, Proclamation 7263, 65 Fed. Reg. 2,817, 2,818 (Jan. 11, 2000); Establishment of the Grand Canyon-Parashant National Monument, Proclamation 7,265, 65 Fed. Reg. 2,825, 2,827 (Jan. 11, 2000).

104. See Rasband II, *supra* note 26, at 518–19.

105. See *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979) (BLM may regulate land use subject to actually existing, valid uses); Rasband II, *supra* note 26, at 520 & n. 169.

106. See, e.g., *Alves v. United States*, 133 F.3d 1454 (Fed. Cir. 1998) (neither grazing permits issued by BLM nor grazing preference attached to permittee's fee simple property constituted Fifth Amendment “property interest”); see also Fried, *supra* note 28, at 522–23 (suggesting that grazing interests are less likely to assert successful takings claims than mining interests); Rasband III, *supra* note 82, at 56 & n.275.

107. See, e.g., Eric Pianin, *Long Arm of the Government Rankles Western Landowners*, WASHINGTON POST, Apr. 29, 2001, at A5 (describing conflict between BLM and ranchers over conditions of grazing permits).

rural character; and increased burdens on local law enforcement and search and rescue units.<sup>108</sup> Local residents have expressed concern that monument designations will end their cherished isolation and solitude, and that with the arrival of "industrial tourism," the only resultant jobs would be low-wage service jobs.<sup>109</sup> Indeed, the more significant changes may not be economic, but rather social and cultural. Distinctive characteristics of the rural West, the sense of place and community, may potentially be undermined.<sup>110</sup>

### III.

#### ANALYSIS: WERE CLINTON'S MONUMENT DESIGNATIONS UNDEMOCRATIC?

The controversy that followed Clinton's monument designations can be viewed as merely the latest skirmish in the longstanding and continuing battle in the rural West over federal control,<sup>111</sup> which often reflects fundamental struggles between competing interests over valuable natural resources. Against that historical backdrop, the anti-monument discourse advocating local governance and democratic participation potentially reveals itself as no more than a rhetorical front for interest groups seeking to achieve particular policy outcomes.<sup>112</sup> However, Antiquities Act conflicts involve more than struggles over resources.<sup>113</sup>

108. See, e.g., Turner, *supra* note 95 (monument manager describing locals' being accustomed to ranching and hunting on federal lands); Pianin, *supra* note 107, at A5 (describing grazing permit dispute "as much a clash of values and customs as a battle over the specific terms of the government's grazing permits"); Rasband III, *supra* note 82, at 49-52. The bitter rhetoric over the lifestyle changes is exemplified by the following statement from Louise Liston, Chairman of the Garfield County (Utah) Commission: "It has been very difficult for me to see a way of life nurtured by generations of hard-working, dedicated stewards of the land systematically being destroyed by scheming, selfish, special interest groups whose funding is generated by lies and deceit, and by an administration so out of touch with the basic principles of our Constitution that they [sic] are willing to sacrifice people in the guise of preserving the land." Louise Liston, *Sustaining Traditional Community Values*, 21 J. LAND RESOURCES & ENVTL. L. 585, 592 (2001).

109. See Turner, *supra* note 95; Pianin, *supra* note 107, at A5.

110. See Rasband III, *supra* note 82, at 50-52 (suggesting that remoteness and isolation of rural West fostered distinctive culture of volunteerism and community participation).

111. See Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647 (1997) (describing hostile and even violent behavior directed at federal land management efforts).

112. Cf. DANIEL PRESS, *DEMOCRATIC DILEMMAS IN THE AGE OF ECOLOGY* 91 (1994) ("the locus of decision making is an instrumental, not a philosophical, consideration for most activists"); WILLIAM L. GRAF, *WILDERNESS PRESERVATION AND THE SAGEBRUSH REBELLIONS* 262 (1990) ("The issue of states' rights has usually been a stalking horse for the sagebrush rebels seeking increased influence in the management of federal lands."). Undoubtedly, some of the criticisms directed at President Clinton fall within that category. E.g., William Perry Pendley, *Grand Staircase-Escalante National Monument: Protection of Antiquities or Preservationist Assault?*, 10 UTAH BAR J. 8 (Oct. 1997) (article by Mountain States Legal Foundation president).

113. See, e.g., Huffman, *supra* note 76, at 276, for a discussion of public lands politics, which he contends "is finally about distributing the benefits of public land resource use to individual members of the community."

They touch on critical questions of governance, including the balance between federal and local influence; the roles of the legislative, executive, and judicial branches; and the degree to which the federal government's land management policies and decisions reflect public participation. However transparent some of the rhetoric concerning local participation and democratic governance may be, its widespread nature, and the passion with which disgruntled citizens—and not just grandstanding politicians—express it, suggest the need for closer examination. Whether the Antiquities Act provides for public natural resource issues to be addressed in a manner consistent with democratic principles is a valid and important question. The discussion below concerning the objections to Clinton's use of the Act addresses that issue and explores whether recent objections to uses of the Act may be symptoms, at a more general level, of a tension between resource protection and democratic values.<sup>114</sup>

### A. *Prima Facie Legitimacy*

#### 1. *Clinton's Proclamations*

Perhaps the most dramatic accusation levied against President Clinton by critics of his monuments was that his exercise of Antiquities Act authority was antidemocratic. At first glance, the charge appears readily dismissible. First, the American people elected President Clinton, and then re-elected him in 1996 after he made perhaps the most controversial of his monument designations, Grand Staircase-Escalante. Second, the withdrawals by President Clinton were, at least on their face, made in a manner authorized by a statute duly passed by Congress.<sup>115</sup> As required by the Act, the monument proclamations identified historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest on the federal lands in question.<sup>116</sup> Indeed,

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114. The discussion below, without attempting to define the term "democratic" as applied to a representative democracy, assumes the term connotes characteristics such as decision-making by elected representatives, a balancing of majoritarian views with core individual rights, and deliberative discourse. Cf. James S. Fishkin, *Conflicting Ideals of Democracy: Reflections on Reform of the Democratic Process*, 18 HOFSTRA L. REV. 395, 395-96 (1989) (noting competing democratic theories).

115. See David Negri, *Grand Staircase-Escalante National Monument: Presidential Discretion Plus Congressional Acquiescence Equals a New National Monument*, 10 UTAH BAR. J. 20 (Dec. 1997) (analyzing proclamation and concluding that it presents a legally sound and "compelling picture of the historic and scientific values found within the Monument").

116. See, e.g., Proclamation 6,920, 61 Fed. Reg. 50,223 (Sept. 18, 1996) (noting, *inter alia*, that the Grand Staircase-Escalante "monument is a geologic treasure, . . . contains significant portions of a vast geologic stairway," "includes world class paleontological sites" such as the Circle Cliffs, and "is an outstanding biological resource" that "contains an abundance of unique, isolated communities such as hanging gardens, tinajas, and rock crevice, canyon bottom, and dunal pocket communities").

Clinton's proclamations were far more detailed than those issued by most other Presidents.<sup>117</sup> Furthermore, criticisms seizing on the Act's language that monument designations "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected"—fall flat in light of past, similarly broad designations under the Act, Congressional acquiescence in these designations, and court decisions affirming the President's broad discretion.<sup>118</sup>

President Clinton did not espouse any Antiquities Act policy in his 1992 campaign. His exercise of the statute's authority in 1996 was, given the relative obscurity of the Act and the participatory procedures accompanying typical public lands decisions, thus unexpected and even deceitful in some critics' eyes.<sup>119</sup> One might argue that if the electorate had only known how he would exercise that authority, it would not have elected him. Such an argument is unpersuasive. The public inevitably elects representatives despite incomplete knowledge as to how they will employ specific powers. In 1992, Clinton's position on public land management issues generally, and on use of Antiquities Act authority specifically, was not completely clear,<sup>120</sup> and perhaps not even fully developed. However, Clinton did not disavow use of the Act, and his running mate was an environmentalist<sup>121</sup>—a fact that suggested the likely policy direction of his administration. Moreover, by the 1996 election, the

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117. Compare, e.g., Proclamation 6,920, 61 Fed. Reg. 50,223 (Sept. 18, 1996) (Grand Staircase-Escalante), with Proclamation 658, 34 Stat. 3,236, 3,237 (Sept. 24, 1906) (Devil's Tower); see also David Williams, *Planning the BLM's First National Monument*, 21 J. LAND RESOURCES & ENVTL. L. 543, 544 (2001) (contending that "[t]his was the best Monument proclamation ever written" based on provision of five scientific reasons for monument and justification of its size).

118. See Getches, *supra* note 9, at 308 (concluding from lack of amendments to Antiquities Act and acquiescence to broad proclamations that Congress has "effectively granted the broad authority under the Act that the executive has regularly exercised"); Fried, *supra* note 28, at 514-17 (concluding that court would likely uphold Grand Staircase-Escalante designation in light of broad discretion delegated); Rasband II, *supra* note 26, at 516-18 (reaching same conclusion and noting that the proclamation had been drafted by a leading public lands scholar); see also Mountain States Legal Found., 306 F.3d, at 1137 ("the court is necessarily sensitive to pleading requirements where, as here, it is asked to review the President's actions under a statute that confers very broad discretion on the President and separation of powers concerns are presented"). But see Harrison, *supra* note 29, at 413 (arguing for *Chevron*-type review of monument designations and suggesting that "facts involved in the specific establishment of [Grand Staircase-Escalante] . . . demonstrate the president's actions probably violated the Act's limiting provisions").

119. See, e.g., David Fish, "Did Clinton Skirt Environmental Laws to Create Monument During Election?" (press release from Sen. Muskowski) (May 1, 1997).

120. See Booth, *supra* note 64, at A1 (noting that Clinton was not focused on the environment at the beginning of his term, nor did he appreciate the deep passions and long history of conflict over public lands).

121. See, e.g., Terry McCarthy, *How Green Was Bill?*, TIME MAGAZINE, Dec. 18, 2000, at 64 (noting that Clinton won 1992 election with support from environmentalists, thanks to selection of Al Gore as vice presidential candidate, but shied away from environmental issues until 1995 after the Clinton administration's attempt to raise grazing and mining royalties was defeated).

proclamation of Grand Staircase-Escalante put the public on notice that Clinton would not hesitate to wield the Antiquities Act's authority.

## 2. *The Act*

Perhaps, then, the root of the conflict is not so much Bill Clinton, but rather the Antiquities Act itself. This hypothesis comports with the history of controversy surrounding Antiquities Act withdrawals.<sup>122</sup> The Act, however, hardly provides a blank check for authoritarian action. The actual authority under the Act—the power to designate permissible uses of federal property and prohibit others—scarcely resembles the confiscation of private lands and obliteration of individual rights that critics sometimes charge.<sup>123</sup> Often overlooked by such critics is the fact that the federal lands are owned by the American public as a whole—not just the local populations whose economies may depend on them. Undoubtedly, monument designations have real, concrete impacts on individuals, potentially changing local economies and communities and disrupting long-held expectations.<sup>124</sup> The mere existence of local impacts, of course, does not necessarily indicate whether a policy was democratically enacted.

Moreover, the President's exercise of power under the Act is subject to the usual checks and balances between the three branches of government. Congress may express its disapproval of a monument designation by withholding funding for the administration of a monument, or it may take the more drastic step of modifying or even reversing a presidential designation to which it objects.<sup>125</sup> Admittedly, it may be difficult for Congress to muster the two-thirds majority necessary to overcome a presidential veto.<sup>126</sup> In the end, however, this distribution

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122. See *supra* Sec. I (C).

123. See *supra* Sec. II.

124. See *supra* Sec. II (B).

125. Cf. *Wyoming v. Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945).

[I]f the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch.

*Id.* Congress has transferred the land comprising ten monuments from the Park Service to other federal, state, or local jurisdictions. See *National Monument Proclamations Under the Antiquities Act*, at <http://www.cr.nps.gov/history/hisnps/NPSH/PROC.HTM> (last modified Sept. 6, 2001).

126. Supporters of recent efforts to amend the Antiquities Act, for example, have argued that rescinding designation of a monument is, in practice, "virtually impossible." See *Panel Debates Bringing Congress Into National Monument Decisions*, COAL WEEK, Aug. 6, 2001.

of power is consistent with the Constitution's reservation of ultimate authority over the public lands to Congress.<sup>127</sup>

Congress' modification or nullification of a President's designation on several occasions demonstrates that these checks and balances are actual and not merely theoretical.<sup>128</sup> For example, following President Franklin Roosevelt's designation of Jackson Hole National Monument, Congress attached riders on Interior Department appropriation bills from 1944 to 1948 that forbade federal spending to manage the monument.<sup>129</sup> Similarly, funding and development of the C&O Canal National Monument, established in the closing days of the Eisenhower Administration, was essentially blocked for ten years until the monument was made into a national park.<sup>130</sup> President Carter's Alaskan national monument designations were rescinded by ANILCA. Most of the lands contained in those monuments were reserved under other designations, however, and the remainder was returned to the public domain.<sup>131</sup> Congress has abolished other monuments by reclassifying the land as a national park,<sup>132</sup> transferring the land to another agency,<sup>133</sup> or

127. The judicial branch also may serve as a check on abuses of Antiquities Act authority, but it is unlikely to act as a frequent check, given the discretionary language of the Act and the deferential standard of review applied, *see supra* Sec. I(C). Because the authority to declare a national monument derives from a statute, both the executive and judicial branches are, of course, subject to legislative overrule. *See* PRESS, *supra* note 112, at 37 (noting that statutorily defined environmental rights can always be overruled with new legislation) (citing JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 237–38 (1971)).

128. *Cf.* Getches, *supra* note 9, at 306 (“Congressional correction remains the most potent check on excesses under the Antiquities Act”).

129. *See* Fried, *supra* note 28, at 487 (citing WILLIAM C. EVERHART, *THE NATIONAL PARK SERVICE* 137 (1972)).

130. *See* Rasband, *supra* note 23, at 628 n.46.

131. *See* 16 U.S.C. § 3209 (2000); *see supra* notes 57–58 and accompanying text; Quigley, *supra* note 35, at 83 n.206.

132. *E.g.*, 16 U.S.C. § 228b (2000) (abolishing Grand Canyon National Monument and adding lands to Grand Canyon National Park); 16 U.S.C. § 272 (2000) (abolishing Arches National Monument and establishing Arches National Park); 16 U.S.C. § 410ff (2000) (abolishing Channel Islands National Monument and establishing Channel Islands National Park); *see* Rasband, *supra* note 23, at 629–30 & n.52; *see also* Getches, *supra* note 9, at 305, 308 (describing Congressional action, following declaration of Jackson Hole National Monument, to restore some monument lands to Teton National Forest, place some lands in elk refuge, and merge the rest into Grand Teton National Park).

133. The Fossil Cycad National Monument, for example, was deauthorized by Congress and transferred to the BLM in 1957 after the fossil resources that had served as the basis for its establishment were depleted. *See* Vincent L. Santucci & Marikka Hughes, *Fossil Cycad National Monument: A Case of Paleontological Resource Mismanagement*, available at [http://www.aqd.nps.gov/grd/geology/paleo/pub/grd3\\_3/focy1.htm](http://www.aqd.nps.gov/grd/geology/paleo/pub/grd3_3/focy1.htm) (last visited Oct. 1, 2002). Other monuments have been deauthorized because of their marginal significance. *See* Barry Mackintosh, *Former National Park System Units: An Analysis*, available at <http://www.cr.nps.gov/history/hisnps/NPSHistory/div.htm> (last modified Sept. 6, 2001) (noting that Castle Pinckney National Monument “paled in comparison” to nearby Fort Sumter, and that Verendrye National Monument was found to have no historical connection with explorer for whom it had been named).

relinquishing the land to state or local governments.<sup>134</sup> Even the threat of reversal by Congress can affect designation decisions, as it apparently did in discouraging President Clinton from designating a new national monument in the Arctic National Wildlife Refuge in the waning days of his administration.<sup>135</sup> Ultimately, of course, Congress can take even more drastic steps than modifying or rescinding a single monument designation; it can curb or repeal the executive's Antiquities Act authority itself.<sup>136</sup>

In light of Congress' express and legitimate delegation of authority through the Antiquities Act, the effectiveness of Congress' checks on that authority, and the political accountability of the wielder of that authority, the Act is *prima facie* consistent with democratic principles.

### B. What Does Democracy Require?

Despite the existence and exercise of legislative checks on the President, critics of the Act contend that Congress, and not the President, should be the only authorized arbiter of what land should be a national monument. The key presumption underlying such arguments is that the legislative process is somehow more "democratic" than executive decision-making.<sup>137</sup> One commentator, for example, has characterized the Act as a "gadget" that "devalues the ennobling qualities of a fair and democratic preservation process" by circumventing the more difficult process of crafting successful legislation.<sup>138</sup> Proponents of legislative action in lieu of executive action also point to the Property Clause's explicit entrustment to Congress of authority over the federal lands.<sup>139</sup>

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134. See Leshy, *supra* note 14, at 297.

135. See Editorial, *Nearing a Forest Legacy*, N.Y. TIMES, Jan. 8, 2001 (noting Clinton Administration's concern that last-minute designation of monument in Arctic National Wildlife Refuge ("ANWR") "could persuade Republican leaders to insist on party discipline to rebuke an outgoing president for a perceived attempt to tie the hands of an incoming president"); Fiakla, *supra* note 37, at A18 (reporting view of then-Solicitor of Interior Department that designation of ANWR monument not worth risk of provoking legislative attack on Antiquities Act). The Clinton Administration's official explanation was that monument status would not give the refuge lands any additional legal protection, since existing protections require an act of Congress to open ANWR to oil activities. See Rancho, *supra* note 27, at 576.

136. That authority has already been limited with respect to potential future monuments in the states of Alaska and Wyoming, see 16 U.S.C. § 431a (2000) (Wyoming); 16 U.S.C. § 3213(a) (2000) (Alaska), and the broad-scale amendment or repeal of the Act is proposed on occasion. See, e.g., Keiter, *supra* note 28, at 531 (describing bills proposed in reaction to designation of Grand Staircase-Escalante).

137. The validity of this presumption is explored further, *infra*, in Sec. III(B)(3).

138. See Rasband II, *supra* note 26, at 553-54.

139. See Rasband, *supra* note 23, at 631. Notwithstanding the Property Clause, Congressional exercise of detailed control over federal land use is a relatively recent phenomenon. See generally COGGINS & GLICKSMAN, *supra* note 3, § 1:18.

The fact that both the executive and legislative branches can exercise a similar power, however, does not make the exercise by the former less democratic per se, as long as that power has been democratically delegated and is subject to democratic control. Such delegation and control may be inferred, in part from congressional acquiescence in the broad exercise of Antiquities Act authority. Notwithstanding the expansive use of the Act's authority, Congress has repeatedly considered and rejected proposals to repeal or modify it,<sup>140</sup> most notably during the enactment of FLPMA.<sup>141</sup> Thus the relevant question is not whether there has been a legitimate delegation of authority, but whether the potential loss of deliberation results in a democratic deficiency. The remainder of this article explores that latter question in detail.

### *1. Setting the Stage: Comparing Antiquities Act Withdrawals With Agency Land Management*

This article next compares the Act's delegation of withdrawal authority with Congress' delegation (to executive agencies) of more general decision-making power over federal lands.<sup>142</sup> The validity of the latter sort of delegation is rarely questioned,<sup>143</sup> and thus this comparison may shed light on why use of the Antiquities Act has been particularly subject to protest. When delegating land management authority to executive agencies, Congress has sometimes narrowly defined the range of management objectives and permissible activities for certain areas such as wilderness or national parks.<sup>144</sup> On the majority of federal lands, however, Congress has left tremendous discretion to the executive branch. In particular, the lands administered by the two primary federal land management agencies, the BLM and the Forest Service, are managed under a "multiple use" rubric.<sup>145</sup> Land use decisions made by

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140. See *supra* Sec. I (C).

141. See *supra* notes 13–20 and accompanying text.

142. Cf. COGGINS ET AL., *supra* note 8, at 298–300 (discussing whether decision not to authorize activity on federal land is a withdrawal).

143. See, e.g., *Sierra Club v. Hickel*, 433 F.2d 24, 28 (9th Cir. 1970) (noting Congress' plenary power under Property Clause, including power to delegate management of federal lands to executive branch) (citing *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336–38 (1963)); see also *Sabin v. Berglund*, 585 F.2d 955, 958 (10th Cir. 1978).

144. See, e.g., 16 U.S.C. § 1 (2000) (National Park Service Act) (lands are to be managed for preservation and recreation); 16 U.S.C. §§ 1131–1133 (2000) (Wilderness Act) (preservation and protection of lands in their natural condition).

145. See 43 U.S.C. § 1701(a)(7) (1994) (BLM); 16 U.S.C. §§ 528–531 (2000) (Forest Service). Court decisions recognize the wide range of discretion granted to these "multiple use" agencies. See, e.g., *Big Hole Ranchers Ass'n v. United States Forest Service*, 686 F. Supp. 256, 264 (D. Mont. 1988) ("MUSYA [Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528–531] contains 'the most general clauses and phrases' and 'can hardly be considered concrete limits upon agency discretion. Rather, it is language which breathes discretion at every pore.'") (quoting *Perkins v. Berglund*, 608 F.2d 803, 806 (9th Cir. 1979)).

these two agencies can have as dramatic an impact as a monument designation in defining the range of activities permitted on particular lands.<sup>146</sup>

Agency land management decisions are not quite analogous to Antiquities Act withdrawals, however. First, these agency decisions are more readily reversed through executive action, at least as a legal matter. Assuming that a prior decision has not irreversibly changed the landscape, a new administration (or even the same administration) may generally reverse a land management decision, or designation for a particular use, subject to applicable substantive and procedural requirements. This stands in contrast to monument designations, which are generally not subject to revocation by the President.<sup>147</sup> As a result, the establishment of national monuments, while still subject to reversal by Congress, has a greater degree of permanence.

Second, land management decisions by the executive agencies are subject to various procedural requirements, including the National Environmental Policy Act ("NEPA"),<sup>148</sup> unlike Antiquities Act withdrawals.<sup>149</sup> The public notice and participation requirements of NEPA have a strong democratic element in their emphasis on direct citizen participation. In fact, NEPA has been hailed for "institutionaliz[ing] the Progressive Era idea of participatory democracy."<sup>150</sup> The inapplicability of NEPA to Antiquities Act proclamations (and the absence of a similar process for public participation prior to Antiquities Act proclamations) stands in stark contrast to the manner in which agency land management decisions are

146. The degree to which administrative agency management pursuant to "multiple use" statutes is itself democratic is open to question, given the discretionary allocative power that is delegated to such agencies. See COGGINS & GLICKSMAN, *supra* note 3, § 16:5.

147. See *supra* notes 23–25 and accompanying text.

148. 42 U.S.C. §§ 4321–4370 (1994).

149. It is generally accepted that NEPA does not apply to Antiquities Act withdrawals because NEPA's requirements apply only to federal agencies, and the President is not a federal "agency" under NEPA. See 42 U.S.C. § 4332(2) (1994); *Alaska v. Carter*, 462 F. Supp. 1155, 1159–60 (D. Alaska 1978); *Tulare County*, 306 F.3d, at 1143.

150. Lorna Jorgensen, *The Move Toward Participatory Democracy in Public Land Management Under NEPA: Is It Being Thwarted by the ESA?* 20 J. LAND RESOURCES & ENVTL. L. 311, 311 (2000); see also, e.g., *California v. Block*, 690 F.2d 753, 770–71 (9th Cir. 1982).

NEPA's public comment procedures are at the heart of the NEPA review process. NEPA requires responsible opposing viewpoints to be included in the final [Environmental Impact Statement]. This reflects the paramount Congressional desire to internalize opposing viewpoints into the decision-making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision. To effectuate this aim, NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action.

*Id.* (citations omitted).

made.<sup>151</sup> Perhaps ironically, some of Clinton's harshest critics, ordinarily vexed by NEPA when it is an obstacle to resource extraction activities, contended that the monument proclamation establishing Grand Staircase-Escalante was "specifically intended to evade the provisions of NEPA and other Federal administrative requirements."<sup>152</sup>

Do these differences between Antiquities Act withdrawals and agency land management decisions shed light on whether the Antiquities Act is "undemocratic"? Since Presidential withdrawals are "more permanent," they arguably should be subject to greater procedural requirements and more thorough deliberation to ensure careful and well-informed decisions. The Antiquities Act contains no procedural requirements, however. The next section explores possible justifications in a democratic system for an executive withdrawal authority not subject to procedural strictures.

## 2. *Emergency Justification?*

Given the preference, held by some, for legislative rather than executive action, one might postulate an executive withdrawal authority limited to situations where time constraints or other matters prevent the legislature from addressing imminent threats to public lands or natural resources. Such circumstances would justify withdrawals of sufficient scope and duration to provide adequate protection until appropriate legislative action could be taken. Although such an "emergency" rationale for withdrawal authority may be facially appealing, it does not provide a satisfying justification for Antiquities Act authority, as explained below.

FLPMA generally provides emergency withdrawal authority along the lines just suggested.<sup>153</sup> Although FLPMA greatly narrowed executive withdrawal authority,<sup>154</sup> it authorized the Secretary of the Interior (and

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151. Senator Craig of Idaho criticized the Clinton Administration's efforts to solicit public input prior to its post-Grand Staircase-Escalante proclamations as a pale imitation of such public comment processes, describing, for example, the Administration's three meetings regarding the proposed expansion of the Craters of the Moon National Monument as the equivalent of "a drive-by shooting." See Foster, *supra* note 84, at B1.

152. MONUMENTAL ABUSE: THE CLINTON ADMINISTRATION'S CAMPAIGN OF MISINFORMATION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT, H.R. REP. NO. 105-824, at 5 (1998); cf. GAO, GAO/RCED-99-244R, INFORMATION ON USAGE OF THE ANTIQUITIES ACT (July 9, 1999) (report requested by Senate Committee on Energy and Natural Resources on use of Act and environmental documentation and public participation requirements).

153. In the debate leading to the enactment of FLPMA, conservationists generally supported vigorous executive withdrawal authority as essential to land and resource protection. COGGINS ET AL., *supra* note 8, at 291. Similar arguments regarding the necessity of acting quickly in a sufficiently grave situation supported the inherent executive withdrawal power that was expressly eliminated by FLPMA. See WHEATLEY ET AL., *supra* note 9, at 134-38.

154. See *supra* Sec. I (A).

specific committees of Congress) to make emergency withdrawals limited in duration to three years.<sup>155</sup> Such emergency withdrawals are not subject to the procedural requirements of NEPA.<sup>156</sup> Some commentators have argued that the emergency withdrawal authority of FLPMA, combined with FLPMA's general executive withdrawal authority (which is subject to legislative veto),<sup>157</sup> provides an adequate mechanism for the protection of public lands by the executive branch.<sup>158</sup> Antiquities Act proclamations likewise can be exercised quickly by the executive,<sup>159</sup> but they occur outside of FLPMA's broader scheme. Thus, the argument goes, Antiquities Act withdrawals pose a potential for inconsistency with other land planning efforts.<sup>160</sup>

The risk of such inconsistency may not be much greater than the risk already presented by FLPMA. First, Congress has delegated land planning decisions to executive agencies to an extensive degree.<sup>161</sup> That fact undermines the assumption of greater consistency through congressional control. Second, because the BLM retains jurisdiction over many recently established monuments,<sup>162</sup> those lands remain subject to the planning requirements of FLPMA and other laws applicable to that agency.<sup>163</sup>

Moreover, FLPMA's emergency withdrawal authority may not be wholly adequate. Take, for example, President Carter's withdrawal of 56 million acres in Alaska. As discussed earlier, the imminent expiration of extensive withdrawals under the Alaska Native Claims Settlement Act, which would have left the lands open to disposal and development, motivated the withdrawal.<sup>164</sup> Made in the midst of Congressional debate

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155. 43 U.S.C. § 1714(e) (1994).

156. See *Alaska v. Carter*, 462 F. Supp. 1155, 1161 (D. Alaska 1978).

157. In *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the Supreme Court invalidated a one-house legislative veto contained in the Immigration Act. The applicability of *Chadha* to FLPMA's bicameral legislative veto provision, which may violate the Presentment Clause, is unsettled. See COGGINS & GLICKSMAN, *supra* note 3, § 4:2.

158. See Rasband, *supra* note 23, at 631-32; Johannsen, *supra* note 14, at 448, 462. It is argued, further, that the Antiquities Act is essentially a vestige of the pre-FLPMA executive withdrawal authority, and that Antiquities Act withdrawals are inconsistent with the principles underlying FLPMA's withdrawal scheme. See Johannsen, *supra* note 14, at 457-62; Harrison, *supra* note 29, at 433.

159. Cf. WHEATLEY ET AL., *supra* note 9, at 131 (executive power is "most spontaneously responsive to emergency conditions") (quoting EDWIN S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* 3 (4th ed. 1957)).

160. See Johannsen, *supra* note 14, at 446 & n.63 (arguing that "congressional control will lead to stable and consistent national planning," in contrast to pre-FLPMA executive withdrawals, which have been used "in an uncontrolled and haphazard manner").

161. See *supra* Sec. III (B)(1).

162. See *supra* note 28.

163. See, e.g., Williams, *supra* note 117, at 543-44 (noting that FLPMA and existing BLM planning regulations applied to development of management plan for Grand Staircase-Escalante).

164. See *supra* Sec. I (C).

that was not resolved until two years later, Carter's Antiquities Act withdrawals preserved these areas intact to allow final action by Congress.<sup>165</sup> The withdrawals were criticized as "a glaring example of . . . executive circumvention" of FLPMA's three-year limit to emergency withdrawals.<sup>166</sup> There was no assurance at the time of the withdrawals, however, that emergency withdrawals pursuant to FLPMA would have sufficed because final legislation resolving the Alaskan land issues might well have taken more than three years to complete.<sup>167</sup>

Extending the time limit under FLPMA's emergency withdrawal provision would help address the need for sufficient executive authority to address time-critical situations. Nevertheless, the unpredictable pace of congressional action<sup>168</sup> makes it all but impossible to balance the desire to set meaningful time limits on emergency withdrawals with the need to provide sufficient time for Congress to act. In any case, inadequacies in FLPMA's present emergency withdrawal authority logically call for amendments to that authority. However, such inadequacies, by themselves, are insufficient to justify a separate executive withdrawal authority under the Antiquities Act.<sup>169</sup>

Furthermore, as an empirical matter, the "emergency" justification does not apply to many of the monuments established under the Antiquities Act.<sup>170</sup> President Clinton noted the need to protect the Kaiparowits Plateau from a pending coal mining operation in his remarks accompanying the proclamation establishing Grand Staircase-Escalante National Monument,<sup>171</sup> but this rationale applied only to a portion of the area included in the monument.<sup>172</sup> Clinton's other national monument

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165. *See id.*

166. Johannsen, *supra* note 14, at 462.

167. FLPMA prohibits the extension of such withdrawals under the emergency withdrawal provision. *See* 43 U.S.C. § 1714(e) (1994).

168. *Cf. Leshy, supra* note 14, at 302 (noting in context of federal land management, that "the legislative process is designed less to lead change than it is to slow it down and ameliorate its effects").

169. FLPMA provides another mechanism for executive withdrawals: the Secretary of the Interior is authorized to make a withdrawal of any acreage for a period of up to twenty years unless Congress, within ninety days, rejects it by concurrent resolution. *See* 43 U.S.C. § 1714(c)(1) (1994). As one commentator has pointed out, this mechanism addresses the argument that the majority will in Congress—which supports greater preservation—tends to be thwarted by long-standing committee chairmen from public lands states who can block protective legislation in committee. *See* Rasband, *supra* note 23, at 631.

170. *See* Rasband, *supra* note 23, at 631 (arguing that "emergency" rationale for Antiquities Act authority is a red herring, given FLPMA's emergency withdrawal authority and fact that President's Clinton's proclamations were primarily due to continuing activities or trends, rather than changes in public land uses that created an immediate threat).

171. *See* Fried, *supra* note 28, at 479; Establishment of the Grand Staircase-Escalante National Monument, Proclamation 6,920, 61 Fed. Reg. 50,223 (Sept. 24, 1996).

172. *See* Quigley, *supra* note 35, at 96–100. The cited need for protection of the Kaiparowits Plateau itself was questioned in light of a preliminary draft environmental impact statement regarding the proposed coal mine, which suggested that impacts to potential wilderness

designations are even less dependent on an “emergency” rationale; the fact that they were preceded by (unrequired) public hearings and the like precludes the argument that imminent action was required. Nevertheless, given the sometimes glacial progress of proposed legislation, there is some value to a process that can react seasonably to time-sensitive, though not “emergency,” matters.

### 3. *President as Democratic Representative of the American Electorate*

The “emergency” rationale falls short of providing a satisfactory justification for Presidential authority under the Act. Thus, we return to the central presumption underlying the preceding discussion: legislative decisions are more democratic than Presidential decisions, and hence should be preferred.<sup>173</sup> As discussed below, this presumption oversimplifies matters and overlooks the unique role of the President as elected representative of the American people.

A primary explanation for the preference of legislative action is the assumption that congressional land management policy is likely to be more responsive to the public interest because members of Congress are more readily held accountable.<sup>174</sup> Local concerns are voiced by legislators from districts containing or dependent on public lands, and are thus less easily overlooked or dismissed.<sup>175</sup> In support of this argument, some cite the Antiquities Act withdrawals made in the last days of the Eisenhower and Johnson administrations as instances of land management decisions made in the absence of public accountability.<sup>176</sup> President Clinton’s first and boldest exercise of Antiquities Act authority, however, came *just weeks before* the 1996 election. Although the designation of Grand Staircase-Escalante was not made in direct response to a public outcry, it was expressly placed before the American electorate to render judgment. Moreover, while many of Clinton’s subsequent proclamations occurred in the final year of his second term—and thus at first glance may appear to provide for less accountability—he announced his intent to make those

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designation would be generally minor and that socioeconomic benefits would be significant. See Fried, *supra* note 28, at 479.

173. James Rasband has compared participation in the process of crafting legislation to woodcraft:

Preservationists should not turn to the Antiquities Act as a substitute for the harder task of legislation simply because the Act insures security from poor legislative choices and does not call upon them to use their still-developing skills in the woodcraft of democracy. When they do so, the result—preservation—is surely pleasing, but it is unfortunately robbed of much of its nobility.

Rasband II, *supra* note 26, at 552.

174. See Johannsen, *supra* note 14, at 446 & n.64.

175. See Rasband III, *supra* note 82, at 63.

176. See *id.*

proclamations during the 2000 campaign. Thus, the President put the issue in play for his would-be successors.<sup>177</sup>

Antiquities Act withdrawals, moreover, may be the very kinds of decisions that are more suitably made by the chief executive in our representative democracy. The President serves a national constituency, certainly more so than individual members of Congress,<sup>178</sup> and the federal lands are owned by the American public as a whole. The President, being less subject to pressures from local interests, is arguably better situated to make decisions from a national perspective.<sup>179</sup> Not surprisingly, national polls indicating the popularity of these measures (notwithstanding regional pockets of intense opposition) reflected the role of the popular will in motivating the Clinton monument designations.<sup>180</sup>

The role of elected officials is not merely to follow the results of national polls, of course. Officials are elected not only to represent and respond to the popular will, but also to make decisions as stewards of the public interest.<sup>181</sup> On this basis, too, the President has at least as legitimate a claim as Congress does to making land withdrawal decisions. The question of what "objects" on federal lands are "of historic or scientific interest" is not a judgment that should be left solely to local determination, but rather is a judgment properly made from a national perspective because it recognizes what is significant to the nation, i.e., the national patrimony.<sup>182</sup> Congress can also make these national-level and

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177. See Rasband, *supra* note 23, at 624 (noting Al Gore's support of Clinton's proclamations, as well as Republican promises to involve Congress and state and local interests in monument decisions). In fact, Vice President Gore made the initial announcements of the designations of Hanford Reach and Cascade-Siskiyou National Monuments during the 2000 presidential campaign. See Ranchod, *supra* note 27, at 575-76.

178. See Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193 (1994).

179. See *id.* ("Members of the House of Representatives and, albeit to a lesser extent, members of the Senate, can less afford to antagonize interest groups with a stake in the particulars of a regulatory policy than can the President, who is less vulnerable to targeted appeals by interest groups to his constituents."); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 99 (1994) ("Presidential governments . . . will protect the national commons from regional selfishness.").

180. See Booth, *supra* note 64, at A1, A8; Rasband III, *supra* note 82, at 22 & n.104 (describing "poll after poll" in the West supporting land preservation). See generally *id.* at 92 (noting that Secretary of the Interior Babbitt's approach to public land management was "carried along by the strong underlying current of public preference").

181. This distinction is the same as Jean-Jacques Rousseau's distinction between the "general will," i.e., what reasonable men would regard as the proper course and in the community interest, setting aside self-interest, and the "will of all," i.e., the aggregation of individual preferences based on self-interest. See WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* 150-51 (1977).

182. See Leshy, *supra* note 14, at 302 (arguing that President, as the only official elected by the entire American public, can take a longer and broader view); cf. 16 U.S.C. § 470(b)(1) (2000) (Congressional declaration in National Historic Preservation Act that "the spirit and direction of the Nation are founded upon and reflected in its historic heritage"). In addition, the President may be better able than members of Congress to make appropriate long-term judgments as to

long-term judgments as a collective body, but its individual members—particularly those with federal lands within their state or district—may be subject to short-term thinking and the disproportionate influence of commodity interests.<sup>183</sup> The force of these tendencies is magnified because individual members often have a “near-veto power” over properties directly concerning their districts—and are likely to exercise that power in favor of local rather than national interests.<sup>184</sup> Other individual members may use land withdrawals to deliver pork to their constituents by setting aside areas of little or no merit.<sup>185</sup> As an elected representative of the national interest, the President is uniquely placed to render judgments from a national perspective—one that incorporates local interests without giving them undue weight.

#### 4. *Public Participation*

The question remains whether the Antiquities Act’s lack of a requirement for public participation undermines its democratic legitimacy. Public participation is at the root of democracy.<sup>186</sup> However, the assumption that the absence of participation is therefore undemocratic does not necessarily follow.

##### a. *Whether Participation May Foster Democratic Values*

The protests regarding the lack of local input in the Grand Staircase-Escalante designation underscore the degree to which procedures for public notice and comment, such as those required by NEPA or the Administrative Procedure Act (in the context of rulemaking),<sup>187</sup> have become engrained in the public’s understanding of democratic norms. The Clinton Administration’s response to the outcry (the adoption of

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environmental significance, because term limits allow him to think beyond the next electoral cycle.

183. See, e.g., OPHULS, *supra* note 181, at 190 (noting that government decisions consistently favor producer over consumer interests because the former have a direct and substantial financial interest in legislation and regulation and are strongly motivated to organize in pursuit of their interests); Ranchod, *supra* note 27, at 583 (“congressional decision-making usually favors local interests, who may oppose restrictions on extractive use over national interests”).

184. See Leshy, *supra* note 14, at 301–02 (noting that congressional decision-making usually favors local interests over national interests and that members tend not to support legislation directly aimed at a particular district where local opinion and representatives of that district are strongly opposed).

185. See Lowry, *Presidential Powers*, NAT’L PARKS, July 1, 2001, at 42 (discussing congressional manipulation of site selection of parks and other areas and citing as an example Rep. Joe McDade’s (R-Pa.) successful efforts to designate the Steamtown National Historic Site in Pennsylvania to commemorate railroading, over the objections of historians).

186. See, e.g., Robert J. Putnam, *Bowling Alone: America’s Declining Social Capital*, 61 J. DEMOCRACY 65, 66–67 (1995), available at [http://muse.jhu.edu/journals/journal\\_of\\_democracy/v006/6.1putnam.html](http://muse.jhu.edu/journals/journal_of_democracy/v006/6.1putnam.html).

187. See 5 U.S.C. § 553 (2000).

NEPA-like public hearings prior to its later monument designations) offers further evidence of this understanding. Such a politically more palatable approach allowed the Administration to blunt criticisms that Clinton was undermining democratic values by ignoring local concerns. These ad hoc procedural adaptations, however, hardly provided for a deep or extensive dialogue. The announcement of a potential designation, followed by an invitation to the affected state and community to develop legislation addressing desired uses for the land, cannot be described as a particularly collaborative or voluntary process.<sup>188</sup>

Even if public input had been solicited in a more open-ended way, however, the process or outcome would not necessarily have been more democratic. Within the field of administrative law, greater participation is generally viewed as contributing to democracy and to the quality of bureaucratic decision-making.<sup>189</sup> And with respect to federal land policy specifically, "the idea that the people who own and who use the federal lands should participate in the management planning and decision making for these lands is a deceptively simple and attractive one."<sup>190</sup> Certainly, a process that incorporates some level of public participation is likely to be more democratic than one that does not.<sup>191</sup> But as discussed below, democracy-related benefits to the public stemming from increased participation in the President's decision-making process for establishing national monuments may be modest.

*b. Applicability of Standard Rationales for Public Involvement to the Antiquities Act*

Standard rationales for broad-based public involvement in agency decision-making include: (1) promoting agency accountability and oversight; (2) reducing the potential for agency capture; (3) providing better quality information; and (4) enhancing proceduralist goals.<sup>192</sup> These rationales, taken from the administrative context, are of somewhat limited applicability to the Antiquities Act to the extent that the

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188. See *supra* Sec. II(A); Rasband, *supra* note 23, at 622.

189. See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 175 (1997).

190. MARION CLAWSON, *THE FEDERAL LANDS REVISITED* 254 (1983).

191. Increased participation may at some level result in diminished deliberation, and thus reduce democratic value, under certain circumstances. This may occur, for example, where participation is used strategically to delay or to thwart agency programs, and not to engage in democratic dialogue. See Rossi, *supra* note 189, at 179–80. Moreover, "public involvement programs . . . may easily mobilize dissent" and thereby increase polarization and public frustration. Gail L. Achterman & Sally K. Fairfax, *Public Participation Requirements of the Federal Land Policy Management Act*, 21 ARIZ. L. REV. 501, 508 (1979).

192. See Rossi, *supra* note 189, at 182–88. Proceduralist goals include providing for a fair consideration of participants' views and promoting an understanding of the decision-making process. *Id.*

President, rather than administrative agencies, exercises the Act's authority.

First, with respect to accountability, the President is already directly accountable to majoritarian political processes. So the Chief Executive does not need to be subject to an additional oversight mechanism. In the absence of procedures for public participation, administrative agencies, by contrast, may be sheltered from, and thus unresponsive to, public views.<sup>193</sup> Indeed, in requiring that the President himself, rather than land management agencies, make sometimes difficult and controversial decisions, the Antiquities Act prevents the abdication of decision-making responsibility to the less accountable bureaucracy.<sup>194</sup>

Second, with respect to participation's role in impeding agency capture, the risk of Antiquities Act authority being "captured" by industry and used inappropriately is minimal. Agency capture, defined as the domination of bureaucratic decisionmaking by powerful factions, is a phenomenon that is largely inapplicable to the Presidency.<sup>195</sup> Capture most typically occurs at the hands of regulated industries, and the President does not "regulate" any one industry. Conceivably, the President could be induced to *not* use Antiquities Act authority in circumstances where designation may be appropriate; nevertheless, an act that provides only the authority necessary to *protect* resources is less useful to industry.<sup>196</sup>

The information-providing rationale is a stronger argument for public participation. Public participation prior to monument declarations would likely provide more, if not better quality, information.<sup>197</sup> Such information may relate to the nature and significance of the actual resources at stake, or to the potential effects of a designation on local citizens and local economies. Its submission to the President may enable

193. See Rossi, *supra* note 189, at 182–83.

194. Cf. EDWIN T. HAEFELE, REPRESENTATIVE GOVERNMENT AND ENVIRONMENTAL MANAGEMENT 122 (1973) (contending that citizen participation provisions in environmental statutes allow politicians to pass decision-making—and political heat—off to bureaucracy). Presidential control of agencies does provide for some accountability and a counterweight to influence by powerful private groups. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 98 (1994).

195. The general dominance of politics by corporate and other monied interests, however, is a separate matter with somewhat different causes.

196. The Act's authority might still be exercised in inappropriate ways. The George W. Bush Administration's proposal to establish a monument encompassing Utah's San Rafael Swell, for example, has been viewed skeptically by environmental organizations that are concerned that the designation may be used to accommodate off-road vehicle use and mineral development. See Deborah Schoch & Elizabeth Shogren, *National Monument In Utah Proposed Land: The Move Would Protect The San Rafael Swell. Environmentalists Find The Administration's Motives Suspect.*, LOS ANGELES TIMES, Jan. 29, 2002, at A1.

197. Of course, more information will not necessarily make decision-making any easier, particularly in the context of land use decisions, which often involve a choice between conflicting and mutually exclusive options. See Achterman & Fairfax, *supra* note 191, at 508.

more appropriate tailoring of monument declarations to protect resources while responding to local concerns. Greater information exchange may also foster public understanding of and support for proposed monument designations.<sup>198</sup> In many instances, however, the informational benefits may be modest, particularly where public debate regarding the land in question has been ongoing for years.<sup>199</sup> Such informational benefits, moreover, can be obtained, at least to some degree, even in the absence of pre-designation public participation. The administrative planning process that follows monument declarations, for example, is designed to take the views of interested parties into account, and to potentially incorporate them into management plans.<sup>200</sup>

Moreover, the information gathered through greater participation does not automatically lead to more representative decisions. Information provided by participants in the planning process, whether pre- or post-decision, does not necessarily represent the views of the public at large because such participants are likely to have special interests, and consequently, the most at stake in the outcome.<sup>201</sup>

Finally, the proceduralist rationale is perhaps the most relevant to the Antiquities Act. That rationale posits that decisions are more likely to be viewed as legitimate if participants' views have been fairly considered.<sup>202</sup> Much of the criticism that followed the establishment of Grand Staircase-Escalante focused on the (lack of) participatory procedures leading up to the designation. Local citizens protested that they were not consulted, and Utah's politicians complained that they had been blindsided.<sup>203</sup> The Clinton Administration's attempt to address these

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198. See Rossi, *supra* note 189, at 185–86 (noting benefits of information exchange on forging understanding and consensus).

199. See Leshy, *supra* note 14, at 305–06 (noting that designation of Grand Staircase-Escalante was preceded by twenty years of public debate regarding future management of area).

200. The process of developing a resource management plan for Grand Staircase-Escalante National Monument, for example, enabled the consideration of state and local views. See Williams, *supra* note 117, at 543–47. Although the latitude for decision-making in the administrative process, or decision space, will be limited in each instance by the proclamation itself, see Steven Daniels, *Patterns of Collaboration in Public Land Issues*, 21 J. LAND RESOURCES & ENVTL. L. 549, 550–51 (2001), monument designations could be modified by a subsequent administration in the course of writing or amending resource management plans. See Ranchod, *supra* note 27, at 555.

201. See Achterman & Fairfax, *supra* note 191, at 509; HAEFELE, *supra* note 194, at 20 (arguing for difficult social choices to be made by well-informed legislatures and criticizing assessment of public interest through public hearings or through committees representing various interests as “an outrage in the pure sense” that “does violence to our system of government” because “it does not aggregate individual preferences correctly into social choices”).

202. See Rossi, *supra* note 189, at 187–88.

203. Damage to proceduralist concerns are not readily remedied through post-designation participatory processes. See, e.g., Daniels, *supra* note 200, at 551 (noting that despite BLM local managers' attempts to involve local community in planning for management of Grand Staircase-Escalante, “much of the relational damage had already occurred”).

proceduralist concerns in subsequent designations was partially successful in that none of the later designations gave rise to the same degree of anger and resentment as Grand Staircase-Escalante.<sup>204</sup> The designations were nevertheless viewed in some quarters as a *fait accompli* by an administration intent on limiting uses on certain lands regardless of public views.<sup>205</sup> At bottom, the lack of public consultation with respect to Grand Staircase-Escalante, and the brief consultations with respect to subsequent designations, potentially run afoul of the principle that an environmentally "just" public lands policy requires authentic participation from rural communities, including notice and an opportunity to be heard on public lands decisions that affect them.<sup>206</sup> Giving local citizens a meaningful voice is important not only to foster democratic value, but also to defuse conflicts in a civil manner.<sup>207</sup>

### C. *Synthesis: Where the Antiquities Act Fits in the Democratic Picture*

Is the Antiquities Act an inappropriate tool for addressing natural resource issues if it undermines democratic values by not providing for public participation? This section examines the controversy through a philosophical lens reflecting the tension between democracy and environmental protection.

Philosophical underpinnings for strong executive authority in environmental and natural resource matters persist in the views of "neo-Hobbesians," or "centralists," such as Garrett Hardin and Robert Heilbroner. The centralists, beginning in the 1960s, contended that conventional democratic mechanisms (e.g., the legislative process) had become too inefficient to address increasingly complex global environmental problems.<sup>208</sup> In the centralists' view, strong social control and centralized power (perhaps even authoritarian power) would be necessary to respond quickly and decisively to impending environmental crises.<sup>209</sup> Presumably though, the curtailing of democratic values would be

204. See Leshy, *supra* note 14, at 308.

205. See, e.g., Ben White, *Monumental Disagreement; Ariz. Officials Urge Clinton Against 'Unilateral Action,'* WASHINGTON POST, Jan. 10, 2000. There may nevertheless be some value to providing for participation even in such instances. Cf. Daniels, *supra* note 200, at 550 (noting findings of social psychology studies that satisfaction levels increase where subjects are given meaningful opportunity to voice feelings, even after being told that decision had already been made).

206. See Rasband III, *supra* note 82, at 62.

207. Cf. Glicksman, *supra* note 111, at 667.

208. See PRESS, *supra* note 112, at 12-13.

209. See *id.* It should be noted that the authoritarian power called for by some centralists was not a dictatorship or tyranny, but rather a sovereign power that would allow people to enjoy the fruits of civilization by legislating temperance, rather than by imposing discipline. See OPHULS, *supra* note 181, at 155.

warranted only to the extent necessary to avert environmental crises.<sup>210</sup> In other words, the extent of the authority should be proportional to the nature of the threat and should be limited to those crises that cannot be addressed in the legislative process. That said, given the centralists' apocalyptic vision of wars, plagues, and famine, merely reformist policies would not suffice.<sup>211</sup>

The centralists further argued that modern democracies were dominated by producer interests, characterized by incremental decision-making, and generally unable to account for long-term goals.<sup>212</sup> Instead of these poorly functioning governments that were generally incapable of adequately protecting the interests of future generations, enlightened centralized governments that could better plan for and implement comprehensive action were required.<sup>213</sup> As critics of that view pointed out, however, there was little reason to assume *a priori* that centralized or authoritarian regimes would be motivated to act in an environmentally enlightened way.<sup>214</sup>

Those critics, the "decentralists," contended that authoritarian actions are rarely, if ever, justified, and are indeed contrary to a truly democratic society, no matter how laudable the ends.<sup>215</sup> Decentralists asserted that centralization tends to cause, not resolve, environmental problems for two reasons: bureaucracies' limited ability to process complex information and to respond to that information in a creative and effective manner; and the lack of any greater motivation for sound management of environmental problems in centralized governments than in any other form of government.<sup>216</sup> In addition, centralized power was potentially more vulnerable to capture, particularly by interests with little concern for the environment.<sup>217</sup> Decentralists prescribed decentralization and participation as the basis for ecologically rational solutions. A well-

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210. See PRESS, *supra* note 112, at 13.

211. See, e.g., OPHULS, *supra* note 181, at 2–3. William Ophuls predicted that reforms within the current system would do no more than postpone the inevitable crisis of ecological scarcity, and that such scarcity would force societies to revisit fundamental questions of political theory and organization. See *id.* at 3, 159–64. Only a paradigm change accompanied by a wholesale transformation of values, he argued, could avert such a result. See *id.* at 197–98.

212. See, e.g., *id.* at 191–92.

213. See PRESS, *supra* note 112, at 12.

214. See *id.* at 15. Evidence of severe environmental degradation from the Soviet Union and the former Communist bloc in Eastern Europe, for example, suggests the contrary. See Charles Campbell, *Cleanup Seen Vital for Economy, As Well As Ecology*, ASSOCIATED PRESS, Nov. 17, 1990.

215. See PRESS, *supra* note 112, at 17.

216. See *id.* at 15.

217. See DAVID W. ORR, *ECOLOGICAL LITERACY* 71 (1992).

educated and well-informed public, they argued, would make environmentally sound decisions.<sup>218</sup>

This invocation of the centralist/decentralist debate is somewhat disproportionate in the context of the Antiquities Act. The situations commonly giving rise to monument proclamations are hardly analogous in scale or urgency to the neo-Malthusian crises that the centralists envisioned. Moreover, monument proclamations are not the sort of authoritarian acts that would have worried the decentralists. All in all, use of the Antiquities Act does not pose a serious threat to the foundations of our democratic system,<sup>219</sup> and neither the centralists' nor decentralists' concerns are seriously at issue.

The centralist/decentralist debate may nevertheless help to enhance our understanding of Antiquities Act authority. First, the centralists emphasized the potential benefits of centralized power in addressing environmental challenges. This centralized power would be greater than the emergency powers FLPMA provides to the executive branch; it would have to be broad enough to account for long-term goals and allow swift and decisive action to achieve those goals.<sup>220</sup> Much of the language accompanying Clinton's monument proclamations made reference to such long-term visions and goals.<sup>221</sup> Similarly, Congress has arguably recognized and endorsed prior executives' farsighted and decisive wielding of Antiquities Act authority when it converted numerous monuments to national parks.<sup>222</sup>

Second, the decentralists warned that broad executive power would not necessarily be exercised in an environmentally enlightened way. The Antiquities Act, however, sidesteps that concern by providing the President with the authority to act quickly *in a resource-protective manner*

218. See PRESS, *supra* note 112, at 14–15; Jorgensen, *supra* note 150, at 313–14 (contending that “[a]n alternative way to look at the notion of the need for an authoritarian state is to consider that NEPA has the potential to provide a process where decisions are made that reflect the public’s desires and that these desires may translate into protection of the environment, a goal that federal agencies have been unable to achieve under current processes where citizen participation is still limited.”).

219. See *supra* Sec. III (A), (B).

220. See Rodriguez, *supra* note 178, at 1194 (“Not plagued by the difficulties associated with collective decisionmaking, the presidency is an institution of action, capable of responding in a certain voice.”). The legitimacy of such executive power is reflected to the extent that the Framers created a unitary executive structure. See Lessig & Sunstein, *supra* note 194, at 93 (“The framers believed that unitariness advanced the interests of coordination, accountability, and efficiency in the execution of the laws.”).

221. Clinton’s announcement of the Grand Staircase-Escalante National Monument, for example, referenced Theodore Roosevelt’s “farsighted” actions in setting aside the Grand Canyon. See Turner, *supra* note 95.

222. See Leshy, *supra* note 14, at 296–99 (noting that Congress has historically ratified bold executive actions protecting the public lands).

when the resource is threatened.<sup>223</sup> Because a President cannot undo a monument designation,<sup>224</sup> the risk of ecologically unwise use of that authority is minimal. In addition, the designation of a national monument is not the end of the story; the legislative process and public debate can continue with the resource protected in the interim.

Exercise of Antiquities Act authority is thus not an instance of authoritarianism. Rather, it is better characterized as an instance of “democratically coercing ourselves to behave responsibly.”<sup>225</sup> “[M]utual coercion, mutually agreed upon by the majority of the people affected,” in its simplest form suggests an agreement among resource users to limit use of a resource to protect it for continued future uses.<sup>226</sup> The critical questions on the federal lands today concern who “the people affected” are and how the lands should be used in the future. These policy questions are not readily resolved. Although use of the Antiquities Act may not bring such conflicts to a final resolution through mutual agreement, or even mutual coercion,<sup>227</sup> the Act is a mechanism that enables environmentally responsible behavior until the policy issues are resolved by Congress.<sup>228</sup> Land withdrawn pursuant to the Act is essentially put in trust.<sup>229</sup> The means of protecting the land is both coercive and democratic—coercive because decisions are made in the absence of consensus and perhaps without exhaustive public input; democratic because of the multiple checks that ultimately provide accountability.

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223. Cf. Leshy, *supra* note 14, at 305 (contrasting protective executive action that forestalls creation of new private rights in public property with executive action that creates such rights – and is thus more difficult to reverse).

224. See *supra* notes 23–25 and accompanying text.

225. OPHULS, *supra* note 181, at 155 (citing Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1247 (1968)).

226. OPHULS, *supra* note 181, at 147 (quoting Hardin, *supra* note 225, at 1247).

227. Cf. Fried, *supra* note 28, at 528 (observing that designation of Grand Staircase-Escalante “did not resolve the land use issues preceding its creation,” but instead raised “an assortment of new questions . . . as ranchers, mining companies, and the State of Utah, among others assert their legal rights and political interests through the land management process and in the courts”).

228. Cf. Anthony C. Fisher & John V. Krutilla, *Managing the Public Lands: Assignment of Property Rights and Valuation of Resources*, in THE GOVERNANCE OF COMMON PROPERTY RESOURCES 54–56 (Edwin T. Haefele ed., 1974) (noting value of preservationist, nondestructive option, where such option would be foreclosed by alternative that has irreversible effect or is remediable only at great cost).

229. This conception of the role of the President is similar to prior characterizations of the executive as a “steward” who could prevent the acquisition of the public domain by private interests if such acquisition was detrimental to public welfare, or otherwise protect the public interest when threatened by an emergency. See WHEATLEY ET AL., *supra* note 9, at 134–39. Such authority was said not to be in violation of Congress’ exclusive power to dispose of the public domain in that it constituted a “preservation from disposition” until Congress could express its will. *Id.* at 141 (citing Brief for Appellant at 91–92, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915)).

## CONCLUSION

Neither the Antiquities Act, nor the manner in which President Clinton exercised its authority, can accurately be described as undemocratic. The Act provides the elected leader of the American people the power to make resource-protective decisions subject to further debate and disposition by the people's elected representatives in Congress. While there is definite value in the Chief Executive's ability to act quickly to preserve threatened land under the Act, that alone does not justify the broad powers the Act provides. Significantly, the President's distinction as the one leader elected by all the American people places him in a unique position to exercise long-term and broad-scale judgments regarding the national and historical significance of public lands. President Clinton's efforts to solicit state and local input prior to monument designations in the aftermath of the Grand Staircase-Escalante controversy were politically prudent and addressed some of the proceduralist concerns resulting from the Act's lack of a requirement for public participation. They were not, however, a precondition to the democratically legitimate exercise of the Act's authority.