

November 15, 2018

**To:** Rebecca Doolittle, Project Manager, Bureau of Land Management

**Subject:** Bears Ears National Monument: Draft Monument Management Plans and Draft Environmental Impact Statement

**Submitted by:** the Institute for Policy Integrity at New York University School of Law<sup>1</sup>

In the Bears Ears Draft Environmental Impact Statement, the Bureau of Land Management and the U.S. Forest Service (“the agencies”) announce that they will not heed the public comments that asked the agencies to compare the environmental impacts of proposed Alternatives A through D against another alternative under which “all Federal lands that were included in the BENM as identified by Proclamation 9558” would remain in the planning area.<sup>2</sup> The agencies say they could not “carr[y] forward for detailed analysis” the alternative of a “larger Planning Area” because it would violate Presidential Proclamation 9681, which altered the boundaries of the monument.<sup>3</sup>

However, in refusing to consider the environmental impacts of shrinking the monument’s boundaries, the agencies have violated their responsibilities under the National Environmental Policy Act (NEPA). First, NEPA regulations require agencies to consider “reasonable alternatives not within the jurisdiction of the lead agency.”<sup>4</sup> As the U.S. Court of Appeals for the District of Columbia Circuit explained soon after NEPA took effect, “Congress contemplated that the Impact Statement would constitute the environmental source material for the information of the Congress as well as the Executive.”<sup>5</sup> Environmental impact statements are “not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers,” like Congress, who have power to take action outside the strict purview of individual agencies.<sup>6</sup> In this case, the agencies’ responsibility to inform Congress through their environmental impact statement is especially important, because the President alone lacks the power to diminish previous national monument designations. As explained in a recent article by Jayni Hein, only an act of Congress can legally alter the boundaries of a monument.<sup>7</sup> NEPA therefore requires the agencies to provide Congress with the information needed to assess the environmental impacts of altering the boundaries of the Bears Ears Monument as Proclamation 9681 and the draft Monument Management Plan now attempt.

Second, NEPA requires agencies to assess both connected and cumulative actions.<sup>8</sup> In particular, agencies must assess “the incremental impacts of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person

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<sup>1</sup> No part of these comments purports to present the views, if any, of New York University.

<sup>2</sup> BLM & USFS, *Bears Ears National Monument: Draft Monument Management Plans and Environmental Impact Statement 2-2* (2018).

<sup>3</sup> *Id.*

<sup>4</sup> 40 C.F.R. § 1502.14.

<sup>5</sup> *NRDC v. Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972).

<sup>6</sup> *Id.* at 835.

<sup>7</sup> Jayni Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 *Env’tl L.* 125 (2018).

<sup>8</sup> 40 C.F.R. § 1508.25.

undertakes such other actions.”<sup>9</sup> By failing to consider the environmental impacts of the proposed alteration of the monument’s boundaries, the agencies have failed to assess cumulative impacts in a meaningful way as required by NEPA. For example, in this draft EIS, the agencies vaguely acknowledge that “all alternatives would contribute cumulatively to global GHG emissions from other sources.”<sup>10</sup> Yet NEPA requires more than this vague and perfunctory truism. Proclamation 9681 both is a connected, prerequisite action for this draft Monument Management Plan and also directly sets the stage for the cumulative impacts of this draft Monument Management Plan. By altering the boundaries of the monument and opening more lands for oil and gas exploration and other development,<sup>11</sup> Proclamation 9681 generates greenhouse gas and other significant environmental impacts. The incremental impacts of this draft Monument Management Plan now must be assessed specifically in light of the environmental impacts of Proclamation 9681.

Respectfully submitted,

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Attached: Jayni Hein, *Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act*, 48 *Env’tl L.* 125 (2018).

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<sup>9</sup> 40 C.F.R. § 1508.7.

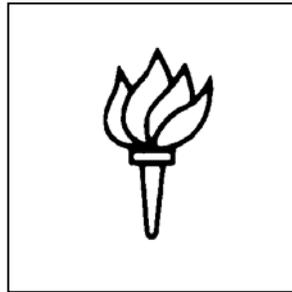
<sup>10</sup> DEIS at 3-107.

<sup>11</sup> Eric Lipton & Lisa Friedman, *Oil Was Central in Decisions to Shrink Bears Ears Monument, Emails Show*, N.Y. Times, Mar. 2, 2018.

# NEW YORK UNIVERSITY

## SCHOOL OF LAW

PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES  
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### Monumental Decisions: One-Way Levers Towards Preservation in the Antiquities Act and Outer Continental Shelf Lands Act

*Jayni Hein*

April 2018

# MONUMENTAL DECISIONS: ONE-WAY LEVERS TOWARDS PRESERVATION IN THE ANTIQUITIES ACT AND OUTER CONTINENTAL SHELF LANDS ACT

BY  
JAYNI FOLEY HEIN\*

*This Article seeks to answer a key question: Do the congressionally delegated powers of the President of the United States to withdraw offshore areas from mineral leasing and to designate national monuments imply that a president has the power to rescind or diminish such designations made by prior presidents? It answers in the negative, consistent with the enduring national narrative that public lands should be regulated according to principles of democratic decision making, especially where important public trust interests are at stake. The powers conferred to the President in the Antiquities Act of 1906 and section 12(a) of the Outer Continental Shelf Lands Act (OCSLA) operate in one direction only: towards preservation. Presidents do not have the authority to rescind or diminish national monument designations or to restore permanently withdrawn areas to offshore leasing. Congress retains this authority through its plenary power over public lands set forth in the Property Clause of the U.S. Constitution.*

*This Article fills a gap in the existing literature by identifying common threads running through OCSLA section 12(a), the Antiquities Act, and the common law public trust doctrine. Longstanding public trust doctrine jurisprudence reflects the principle that important public land decision making should be done by legislatures, through their deliberative and democratic process, or pursuant to explicit legislature authority. The doctrine provides important context for a history of public lands jurisprudence in which courts demand greater justification for actions diminishing public lands than for protecting those same lands. The one-way lever structure of the Antiquities Act and OCSLA section 12(a) are consistent with this historical framework,*

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*empowering the President to take unencumbered action to protect natural resources, but leaving the more “monumental” question of whether to remove such public land protections up to Congress, alone.*

*Furthermore, this Article argues that the public trust doctrine should serve as a background principle or canon of interpretation for public land statutes. Where, as here, a statute is silent as to whether the President can diminish public land protections, courts should presume that Congress retained such power exclusively for itself.*

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## I. INTRODUCTION

The Antiquities Act of 1906<sup>1</sup> is one of the most important conservation tools available to Presidents of the United States. Frequently invoked to preserve cultural, historical, scientifically valuable, and scenic areas on federal lands, sixteen presidents have designated 157 national monuments

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<sup>1</sup> Pub. L. No. 59-209, 34 Stat. 225 (codified as amended at 54 U.S.C. §§ 320301–320303 (Supp. II 2015)).

under Antiquities Act authority, totaling more than 800 million acres.<sup>2</sup> While President Bill Clinton was known for his prodigious use of Antiquities Act authority, President Barack Obama surpassed Clinton and well-known conservationist President Theodore Roosevelt by protecting more than 550 million acres of federal lands and waters pursuant to Antiquities Act authority.<sup>3</sup> President Obama also availed himself of a less-utilized federal statutory provision, section 12(a) of the Outer Continental Shelf Lands Act<sup>4</sup> (OCSLA), to withdraw several large areas of the Outer Continental Shelf from future mineral leasing, indefinitely.<sup>5</sup>

While President Obama's preservation agenda was largely applauded by environmentalists, it was criticized by some opponents as a "federal land grab."<sup>6</sup> Framing these actions as a "federal land grab" misstates the issue, as the land in question was owned by the federal government when it was designated as a national monument or withdrawn from mineral leasing.<sup>7</sup> From a law and policy perspective, the more interesting and pressing questions concern not the ownership of the land but the permissible bounds of executive power over this federal land. The durability of presidential preservation decisions—specifically, actions withdrawing offshore areas from future mineral leasing and designating certain federal lands as national monuments—has received limited attention in the courts and in academic literature, until now. President Obama's multiple, large-scale designations, which in some cases attracted robust state and local opposition,<sup>8</sup> and President Trump's unprecedented actions purporting to undo these designations, has drawn increased attention to this executive authority.

On April 26, 2017, President Trump signed an executive order directing the Secretary of the Department of the Interior, Ryan Zinke, to review

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<sup>2</sup> See Ani Kame'enui, *Monuments Protected Under the Antiquities Act*, NAT'L PARKS CONSERVATION ASS'N (Jan. 13, 2017), <https://perma.cc/9VC4-8LSQ>; *Archaeology Program*, NAT'L PARK SERV., <https://perma.cc/37UU-VQEE> (last updated May 8, 2017).

<sup>3</sup> See Juliet Eilperin & Brady Dennis, *With New Monuments in Nevada, Utah, Obama Adds to His Environmental Legacy*, WASH. POST (Dec. 28, 2016), <https://perma.cc/8FV2-KBRU>; Dana Varinsky, *Here's Every Piece of Land Obama Has Put Under Protection During His Presidency*, BUS. INSIDER (Jan. 16, 2017), <https://perma.cc/83SR-CVUW>.

<sup>4</sup> 43 U.S.C. §§ 1331–1356a (2012).

<sup>5</sup> Memorandum on Withdrawal of Certain Portions of the United States Arctic Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016) [hereinafter Arctic Offshore Drilling Rule]; Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf Offshore Alaska from Leasing Disposition, 2015 DAILY COMP. PRES. DOC. 1 (Jan. 27, 2015) [hereinafter Arctic Withdrawal Rule].

<sup>6</sup> Alessandra Potenza, *Trump Signs Executive Order That Threatens National Monuments*, VERGE (Apr. 26, 2017), <https://perma.cc/TZC2-B5GY> ("Trump said the executive order would end an abuse of power that's resulted in a 'massive federal land grab.'").

<sup>7</sup> National monuments may be reserved only upon the lands "owned or controlled by the Federal Government." Antiquities Act of 1906, 54 U.S.C. § 320301(a) (Supp. II 2015). And, the OCSLA applies to offshore lands and waters under federal jurisdiction, only. 43 U.S.C. §§ 1331, 1333(a) (2012).

<sup>8</sup> For instance, the Bears Ears National Monument designation was opposed by State of Utah elected officials and the congressional delegation. Coral Davenport, *Obama Designates Two New National Monuments, Protecting 1.65 Million Acres*, N.Y. TIMES (Dec. 28, 2016), <https://perma.cc/SSE6-XP3Y>.

national monuments designated by previous presidents under the Antiquities Act, and assess whether to rescind or reduce the boundaries of some of these national monuments.<sup>9</sup> In December 2017, President Trump issued two proclamations, downsizing Bears Ears National Monument by 85% and Grand Staircase-Escalante National Monument by nearly 50%.<sup>10</sup> Native American tribes and conservation groups sued, challenging these actions under the Antiquities Act, the U.S. Constitution, and the Administrative Procedure Act<sup>11</sup> (APA).<sup>12</sup> On April 28, 2017, President Trump issued a separate executive order, rescinding President Obama's offshore leasing withdrawals made pursuant to OCSLA section 12(a).<sup>13</sup> Environmental groups sued, challenging the legality of the offshore leasing executive order.<sup>14</sup>

The key question presented by both the OCSLA and Antiquities Act controversies is not whether these federal lands can ever be converted to other uses; but whether it would take an act of Congress to rescind or diminish these protective designations, as opposed to a mere flick of the President's pen. This question, with respect to both statutes, is a matter of first impression. No court has ever decided whether a president can rescind or diminish an existing national monument designation or reverse an offshore leasing withdrawal that was established "for a time period without specific expiration."<sup>15</sup>

This Article argues that both OCSLA section 12(a) and the Antiquities Act are structured such that protected offshore areas and national monuments endure across presidential administrations, and that Congress, alone, has the power to rescind or modify these designations. Existing scholarship cogently makes the case that based on its plain language and legislative history, the Antiquities Act grants a one-direction power to the President to designate national monuments, but not to rescind or diminish existing monuments.<sup>16</sup> This Article does not repeat the detailed and

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<sup>9</sup> Exec. Order No. 13,792, 82 Fed. Reg. 20,429, 20,429 (May 1, 2017) (signed April 26, 2017).

<sup>10</sup> See Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,087 (Dec. 8, 2017) (signed December 4, 2017); Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,096 (Dec. 8, 2017) (signed December 4, 2017); see also Nicholas Bryner et al., *President Trump's National Monument Rollback Is Illegal and Likely To Be Reversed in Court*, CONVERSATION (Dec. 4, 2017), <https://perma.cc/T73Q-SLKT>.

<sup>11</sup> 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

<sup>12</sup> Complaint for Declaratory & Injunctive Relief, Nat. Res. Def. Council v. Trump, No. 1:17-cv-02606 (D.D.C. filed Dec. 7, 2017); Complaint for Injunctive & Declaratory Relief, Hopi Tribe v. Trump, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017).

<sup>13</sup> Exec. Order No. 13,795, 82 Fed. Reg. 20,815, 20,815–16 (May 3, 2017) (signed April 28, 2017).

<sup>14</sup> Complaint for Declaratory & Injunctive Relief at 2, League of Conservation Voters v. Trump, No. 3:17-cv-00101-SLG (D. Alaska filed May 3, 2017) (alleging that President Trump's executive order violates the Constitution and is unlawful because the OCSLA provides presidents with the power to protect territory, only, and not to overturn those protections and increase development).

<sup>15</sup> Arctic Offshore Drilling Rule, *supra* note 5; see ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44687, ANTIQUITIES ACT: SCOPE OF AUTHORITY FOR MODIFICATION OF NATIONAL MONUMENTS 3 (2016), <https://perma.cc/6YKX-EGWC>.

<sup>16</sup> WYATT, *supra* note 15, at 4; see, e.g., Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55, 70–71 (2017) [hereinafter Squillace et al., *Presidents Lack Authority*]; see also ROBERT ROSENBAUM ET AL.,

persuasive analysis contained in other articles, but it builds upon this scholarship and examines the plain text and legislative history of a similar provision, OCSLA section 12(a). Furthermore, this Article illuminates how the restraints imposed on the executive branch by both OCSLA and the Antiquities Act—in the form of one-way levers to protect special places, but not to rescind those protections—are not novel. Rather, common law public trust doctrine jurisprudence developed with a distinction between the role of legislatures and non-legislative actors with respect to public land protections. As such, the longstanding public trust doctrine should serve as a background principle to frame the interpretation and understanding of OCSLA section 12(a) and the Antiquities Act.

First, the constitutional and statutory framework for OCSLA section 12(a) and the Antiquities Act strongly support the interpretation that Congress granted the President a one-way power to preserve public lands, but not to remove those protections. A limited role for the executive branch in public lands decision making is embedded in the Property Clause of the U.S. Constitution, which vests Congress with plenary authority over public lands.<sup>17</sup> While Congress explicitly delegated to the President the power to designate national monuments and to withdraw areas from offshore leasing in these two statutes, it did not explicitly delegate the power to lift these protections once in place, instead reserving the authority to undo such protections for itself. The plain text and legislative history of the Antiquities Act, as well as attorney general opinions interpreting the provision, support the interpretation that it confers a one-way power to the President.<sup>18</sup> This structure maintains the traditional separation of powers between Congress and the President with respect to public lands, vesting Congress, the most democratic of the three branches, with decision-making power over our widely shared public lands.

Second, interpreting OCSLA section 12(a) and the Antiquities Act to confer a one-direction power to the President is consistent with the enduring national narrative that public lands should be managed and regulated according to principles of democratic decision making, especially where important public trust interests are at stake. In several U.S. states, a long line of common law public trust jurisprudence elucidates the principle that government actions diminishing, impairing, or alienating public trust lands, such as the seabed, tidelands, and public parks,<sup>19</sup> should be made through a democratic, deliberative process, such as legislative action, or at least through explicitly delegated authority.<sup>20</sup> This is especially so when an

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ARNOLD & PORTER KAYE SCHOLER, THE PRESIDENT HAS NO POWER UNILATERALLY TO ABOLISH OR MATERIALLY CHANGE A NATIONAL MONUMENT DESIGNATION UNDER THE ANTIQUITIES ACT OF 1906, at 9 (2017), <https://perma.cc/662C-TXF7>.

<sup>17</sup> See U.S. CONST. art. IV § 3, cl. 2.

<sup>18</sup> See, e.g., Squillace et al., *Presidents Lack Authority*, *supra* note 16, at 56–59.

<sup>19</sup> Certain states, like New York, extend the public trust doctrine to public parks. See discussion *infra* Part IV.C.

<sup>20</sup> See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485–91 (1970) [hereinafter Sax, *The Public Trust Doctrine*].

action would open public trust lands to exploitation or development by private parties. The theory underlying this principle is that legislatures answer to a broader constituency than municipal actors and undertake a more deliberative, open process that guards against rash, ill-informed, or corrupt decisions with respect to public lands and resources.<sup>21</sup> OCSLA section 12(a) and the Antiquities Act, in effect, place an analogous procedural restraint on the President by reserving to Congress the authority to undo protected land status.

Beyond providing an illuminating analogy, the public trust doctrine should serve as a background principle or canon of statutory construction for public land statutes. As a canon of statutory interpretation, the public trust doctrine would function as a “clear statement” rule, requiring Congress to be explicit when granting a power to act contrary to public trust principles. Thus, in the absence of a “clear statement” by Congress providing a multi-directional power to the President to both designate and remove public land protections, courts should presume that Congress retained this power for itself.

This Article also serves, in part, to refute the arguments made by John Yoo and Todd Gaziano that the conventional relationship between the executive branch and Congress supports the argument that President Trump “has the right to reverse national monuments created by previous presidents without an act of Congress.”<sup>22</sup> In their view, presidents are free to volley national monument status back and forth, according to their opinion as to what qualifies as an object of “historic or scientific interest.”<sup>23</sup> But this argument overstates the amount of power delegated to the President in the Antiquities Act. Further, their arguments ignore relevant legislative history and the overarching purpose behind these two statutory provisions: to protect certain lands and resources for the benefit of current and future generations.

The structures of the Antiquities Act and OCSLA section 12(a) impose restraints upon the executive branch in accordance with the constitutional separation of powers and a long line of laws and judicial decisions recognizing a system of checks and balances for public land decision making.<sup>24</sup> These statutes reflect the wisdom of their drafters in delegating a one-way executive power to preserve public lands, leaving the more

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<sup>21</sup> See *id.* at 490–92; see also Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *ECOLGY L.Q.* 351, 355 (1998) [hereinafter Rose, *Joseph Sax*].

<sup>22</sup> Todd Gaziano & John Yoo, Opinion, *It's Magical Legal Thinking To Say Trump Can't Reverse Obama's National Monuments*, L.A. TIMES (July 6, 2017), <https://perma.cc/KS9T-GKGA> [hereinafter Gaziano & Yoo, *Magical Legal Thinking*]; see also JOHN YOO & TODD GAZIANO, AM. ENTER. INST., PRESIDENTIAL AUTHORITY TO REVOKE OR REDUCE NATIONAL MONUMENT DESIGNATIONS (2017), <https://perma.cc/NG4K-DK9Z> [hereinafter YOO & GAZIANO, PRESIDENTIAL AUTHORITY].

<sup>23</sup> YOO & GAZIANO, PRESIDENTIAL AUTHORITY, *supra* note 22, at 13–14; see Antiquities Act of 1906, 54 U.S.C. § 320301 (Supp. II 2015) (“The President may . . . declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments.”).

<sup>24</sup> See discussion *infra* Part III.

consequential decision of whether to lift such protections up to Congress, alone.

This Article proceeds as follows. Part II sets the stage by highlighting the national monument and OCSLA section 12(a) designations made by President Obama and some of his predecessors, and the more recent actions by the Trump Administration purporting to undo them. It shines a light on what is at stake both on the ground, in terms of protected lands, and from a legal perspective, in defining the bounds of delegated executive power over public lands.

Part III describes the constitutional and statutory framework for OCSLA section 12(a) and the Antiquities Act. In both provisions, Congress delegated specific powers to the executive branch. A careful reading of these statutory provisions reveals that Congress granted to the President a one-way power to preserve federal lands in both provisions, and reserved for itself the authority to rescind or modify these reservations once in place, pursuant to its plenary authority over public lands set forth in the Property Clause of the U.S. Constitution.

Part IV introduces the public trust doctrine, including its Roman and English common law origins. Common resources like the sea, tidelands, and submerged lands beneath navigable waters have been recognized as public trust resources for centuries.<sup>25</sup> The public trust doctrine also has a procedural component. In the United States, the doctrine has long been interpreted by several states to limit actions by non-legislative actors that threaten to diminish public trust resources, such as allowing non-public trust uses within public trust lands, or transferring public trust resources to private parties.<sup>26</sup> The public trust doctrine supports the interpretation of OCSLA section 12(a) and the Antiquities Act as conferring a one-way power to the President, consistent with the long-standing precept that public lands should be protected and managed according to principles of democratic decision making.

Part V argues that the public trust doctrine should serve as a canon of statutory interpretation to aid the interpretation of public land statutes, including the Antiquities Act and OCSLA section 12(a).<sup>27</sup> The doctrine can serve as an effective canon of statutory interpretation for public land statutes, particularly as a “clear statement” canon requiring Congress to be explicit if it intends to delegate authority to remove public land protections.<sup>28</sup> The doctrine would thus frame the inquiry with a presumption of conservation in the public interest. So applied, the canon would confirm that these two statutes confer a one-direction power to the President, consistent with their plain text, legislative history, and relevant Attorney General opinions.

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<sup>25</sup> Sax, *The Public Trust Doctrine*, *supra* note 20, at 524 n.158.

<sup>26</sup> *See id.* at 491–92, 494.

<sup>27</sup> *See* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 311–13 (1980) [hereinafter Wilkinson, *The Public Trust*]; *see also* William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 721–23 (2012).

<sup>28</sup> Araiza, *supra* note 27, at 721.

Part VI analyzes the common threads connecting the Antiquities Act, OCSLA, and the public trust doctrine. It concludes that the Antiquities Act and OCSLA section 12(a) reflect the wisdom of their drafters in conferring a one-way presidential power to preserve federal lands. While allowing unencumbered presidential actions to protect special places and natural resources, they reserve to Congress the more “monumental” power to modify or abolish national monuments and to return withdrawn lands to disposition by leasing.

## II. OF MONUMENTS AND MEN: PAST DESIGNATIONS AND PRESENT CONTROVERSY

President Obama and many of his predecessors invoked the Antiquities Act and OCSLA section 12(a) to designate national monuments and offshore protected areas, respectively, for environmental, historical, and cultural reasons.<sup>29</sup> The vast majority of these designations were intended to endure across presidential administrations, with the exception of certain time-limited offshore leasing moratoria areas, as evidenced in the proclamations announcing their creation.<sup>30</sup> No president has ever reversed a withdrawal of Outer Continental Shelf areas from oil and gas leasing, other than one with an express end date, prior to the Trump Administration. And no president has ever rescinded or reduced the boundaries of an existing national monument designated by a prior president subsequent to the passage of the Federal Land Policy and Management Act,<sup>31</sup> which made clear that such actions are reserved to Congress, alone.<sup>32</sup> In both respects, the Trump Administration’s actions removing protected public land status waded into legally untested waters.

### *A. The Outer Continental Shelf and OCSLA Section 12(a) Withdrawals*

The Outer Continental Shelf Lands Act (OCSLA) governs all activities on the Outer Continental Shelf, including mineral leasing. Section 12(a) of OCSLA has been used by six presidents spanning sixty-seven years, including to withdraw as much as several hundred million acres at a time.<sup>33</sup> Section 12(a) withdrawals can be time-limited, or, as President Obama and other presidents have used the provision, “for a time period without specific expiration.”<sup>34</sup> President Trump’s 2017 executive order rescinding President

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<sup>29</sup> See John Freemuth & Mackenzie Case, *What History Tells Us About Obama’s Antiquities Act Legacy*, LAW360 (Nov. 22, 2016), <https://perma.cc/KY8T-FT8N>.

<sup>30</sup> See, e.g., Proclamation No. 9558, 3 C.F.R. § 402 (2017); Proclamation No. 9234, 3 C.F.R. § 21 (2016) (“The management plan shall ensure that the monument fulfills the following purposes for the benefit of present and future generations . . .”).

<sup>31</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1787 (2012).

<sup>32</sup> See discussion *infra* Parts II.B and III.C.

<sup>33</sup> NAT. RES. DEF. COUNCIL & EARTHJUSTICE, BRIEFER ON PRESIDENTIAL WITHDRAWAL UNDER OCSLA SEC. 12(A), at i (2016), <https://perma.cc/2Z3X-F2H9>.

<sup>34</sup> E.g., Arctic Offshore Drilling Rule, *supra* note 5; Arctic Withdrawal Rule, *supra* note 5.

Obama's offshore reservations is an unprecedented action with the intended effect of opening these areas to oil and natural gas development.<sup>35</sup>

The Outer Continental Shelf of the United States is the submerged land, subsoil, and seabed lying within exclusive federal jurisdiction.<sup>36</sup> The United States asserts sovereignty over the Outer Continental Shelf within its 200-mile "exclusive economic zone."<sup>37</sup> Governance of offshore minerals and activities is split between states and the federal government. Generally, states have primary authority in the three-nautical-mile area extending from their coasts.<sup>38</sup> The federal government has exclusive jurisdiction over the remaining 197 nautical miles of the Outer Continental Shelf within its exclusive economic zone, an area almost one-tenth that of the continental United States.<sup>39</sup>

The Outer Continental Shelf contains abundant oil, natural gas, and other mineral resources. Federal offshore oil reserves represent about 11% of all oil reserves in the United States.<sup>40</sup> Developing and managing these fossil fuel reserves was a primary motivation behind the passage of OCSLA in 1953.<sup>41</sup>

In addition to providing valuable energy resources, oil and gas activities conducted on the Outer Continental Shelf have the potential to affect the sea floor, water, and coastal areas. One of the greatest risks of offshore oil and gas development is the risk of an oil spill, with its attendant effects on wildlife, fishing stocks, water quality, and coastal economies.<sup>42</sup> Aside from

<sup>35</sup> See generally Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017).

<sup>36</sup> *Outer Continental Shelf*, BUREAU OCEAN ENERGY MGMT., <https://perma.cc/8NXR-DTND> (last visited Jan. 27, 2018); see also OCSLA, 43 U.S.C. §§ 1331(a), 1333(a)(3) (2012).

<sup>37</sup> Proclamation No. 5030, 3 C.F.R. § 22 (1984), *reprinted as amended in* 16 U.S.C. § 1453 (2012).

<sup>38</sup> Three nautical miles is equivalent to 3.452 miles or 5.556 kilometers. Texas and the Gulf Coast of Florida have jurisdiction extending approximately nine nautical miles seaward from their coastlines. See *Outer Continental Shelf*, *supra* note 36.

<sup>39</sup> See Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to A New Frontier*, 6 STAN. L. REV. 23, 23 (1953); *Outer Continental Shelf*, *supra* note 36.

<sup>40</sup> MARC HUMPHRIES, CONG. RESEARCH SERV., R42432, U.S. CRUDE OIL AND NATURAL GAS PRODUCTION IN FEDERAL AND NONFEDERAL AREAS 2 (2016). "Taken together, U.S. federal oil reserves equal about 24% of all U.S. crude oil (and condensate) reserves, which are estimated at 39.9 billion barrels, according to the [United States Energy Information Administration]." *Id.*

[T]here are an estimated 5.3 billion barrels of proved oil reserves located on federal acreage onshore and . . . 4.3 billion barrels of proved reserves offshore.

....

U.S. dry gas proved reserves are estimated at about 388.8 trillion cubic feet (tcf) . . . , of which the federal share is about 22% (69 tcf onshore, 16 tcf offshore).

*Id.* at 2, 4.

<sup>41</sup> See Robin Kundis Craig, *Treating Offshore Submerged Lands as Public Lands: A Historical Perspective*, 34 PUB. LAND & RESOURCES L. REV. 51, 53 (2013).

<sup>42</sup> BUREAU OF OCEAN ENERGY MGMT., 2017-2022 OUTER CONTINENTAL SHELF OIL AND GAS LEASING PROPOSED FINAL PROGRAM 2-2 (2016), <https://perma.cc/RW8W-N5BT>; see also Arctic Offshore Drilling Rule, *supra* note 5 (citing as justification for the withdrawal "the unique logistical, operational, safety, and scientific challenges and risks of oil extraction and spill response in these Arctic waters").

the catastrophic risk of an oil spill, more common effects include discharge of oil, wastewater, and debris; air pollution, including greenhouse gas emissions; infrastructure impacts such as pipeline trenching on the seafloor; and increased vessel traffic to and from production and exploration sites—all of which can negatively affect aquatic wildlife and ecosystems.<sup>43</sup>

Congress was mindful of protecting the environmental resources of the Outer Continental Shelf when it passed OCSLA in 1953. OCSLA provides that the Secretary of the Interior can “at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein.”<sup>44</sup> In addition, Congress delegated separate authority to the President in OCSLA section 12(a), allowing him or her to “withdraw from disposition any of the unleased lands of the outer Continental Shelf.”<sup>45</sup>

From the beginning, presidents invoked section 12(a) in the name of environmental protection and conservation, and signaled that certain withdrawals were intended to be permanent. In 1960, President Eisenhower first used OCSLA section 12(a) to withdraw offshore areas to create the Key Largo Coral Reef Preserve, “for the purpose of preserving the scenic and scientific values of this area unimpaired for the benefit of future generations.”<sup>46</sup> In 1969, the Secretary of the Interior, presumably acting pursuant to authority delegated by the President, invoked OCSLA section 12(a) following the Santa Barbara oil spill to withdraw 21,000 acres of unleased offshore lands and designate them as an “Ecological Preserve.”<sup>47</sup>

Other presidents have withdrawn offshore areas from oil and gas leasing pursuant to OCSLA section 12(a), many of which covered large areas. In 1990, President George H.W. Bush removed a number of areas from potential leasing for a set time period,<sup>48</sup> and in 1998, President Clinton extended this order through 2012.<sup>49</sup> In addition, President Clinton withdrew all of the areas of the Outer Continental Shelf designated as marine sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972<sup>50</sup> from disposition by leasing for a time period without specific

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<sup>43</sup> See BUREAU OF OCEAN ENERGY MGMT., *supra* note 42, at S-9.

<sup>44</sup> OCSLA, 43 U.S.C. § 1334(a) (2012).

<sup>45</sup> *Id.* § 1341(a).

<sup>46</sup> Proclamation No. 3339, 3 C.F.R. § 20 (Supp. 1960) (signed March 19, 1960), *reprinted in* 54 U.S.C. § 320101 (Supp. II 2015).

<sup>47</sup> Establishment of Santa Barbara Channel Ecological Preserve, 34 Fed. Reg. 5655, 5655 (Mar. 26, 1969).

<sup>48</sup> Statement on Outer Continental Shelf Oil and Gas Development, 26 WEEKLY COMP. PRES. DOC. 1006 (June 26, 1990).

<sup>49</sup> Memorandum on Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition, 34 WEEKLY COMP. PRES. DOC. 1111 (June 12, 1998) [hereinafter Clinton’s Withdrawal].

<sup>50</sup> Pub. L. No. 92-532, 86 Stat. 1052 (codified as amended in scattered sections of 16 and 33 U.S.C.).

expiration.<sup>51</sup> In total, President Clinton's section 12(a) reservations covered 300 million acres.<sup>52</sup> President George W. Bush eliminated President Clinton's time-limited reservation, but left in place the designations that were not time-limited.<sup>53</sup> The legality of this action was never tested in court.

On January 27, 2015, President Obama, acting pursuant to the authority vested in him by Congress through OCSLA section 12(a), withdrew areas in the Arctic's Beaufort and Chukchi Seas from oil and gas leasing "for a time period without specific expiration."<sup>54</sup> On December 20, 2016, President Obama withdrew additional areas of the U.S. Arctic Ocean and Atlantic Ocean from future oil and gas "leasing for a time period without specific expiration."<sup>55</sup> In total, President Obama's Arctic reservations protected an additional 115 million offshore acres from oil and gas leasing.<sup>56</sup> In his proclamations announcing these actions, President Obama cited the importance of these areas to "subsistence use by Alaska Natives as well as for marine mammals, other wildlife, and wildlife habitat."<sup>57</sup> He also stated his intention "to ensure that the unique resources of these areas remain available for future generations."<sup>58</sup> In the Atlantic, President Obama withdrew thirty-one offshore canyons and canyon complexes comprising 3.8 million acres.<sup>59</sup> The President noted "the critical importance of canyons along the edge of the Atlantic continental shelf for marine mammals, deep water corals, other wildlife, and wildlife habitat," and the need "to ensure that the unique resources associated with these canyons remain available for future generations."<sup>60</sup>

While environmental preservation is not the only permissible motive for withdrawal under section 12(a), every exercise of the clause to date has been for a preservation-related purpose.<sup>61</sup> OCSLA section 12(a) prohibits oil and gas leasing in withdrawn areas. As a practical matter, withdrawing offshore areas from mineral leasing through OCSLA section 12(a) helps to protect marine wildlife and habitat, and provide long-term opportunities for

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<sup>51</sup> President Clinton's withdrawals added the language: "Each of these withdrawals is subject to revocation by the President in the interest of national security." Clinton's Withdrawal, *supra* note 49.

<sup>52</sup> NAT. RES. DEF. COUNCIL & EARTHJUSTICE, *supra* note 33, at i.

<sup>53</sup> Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 WEEKLY COMP. PRES. DOC. 986 (July 14, 2008).

<sup>54</sup> Arctic Withdrawal Rule, *supra* note 5.

<sup>55</sup> Arctic Offshore Drilling Rule, *supra* note 5.

<sup>56</sup> Press Release, U.S. Dep't of the Interior, Secretary Jewell Applauds President's Withdrawal of Atlantic and Arctic Ocean Areas from Future Oil and Gas Leasing (Dec. 20, 2016), <https://perma.cc/QQ5B-E2VN>.

<sup>57</sup> See Arctic Offshore Drilling Rule, *supra* note 5.

<sup>58</sup> *Id.*

<sup>59</sup> U.S. DEP'T OF THE INTERIOR, FACT SHEET: UNIQUE ATLANTIC CANYONS PROTECTED FROM OIL AND GAS ACTIVITY, <https://perma.cc/6NJG-GZ3D> (last visited Jan. 27, 2018).

<sup>60</sup> Memorandum on Withdrawal of Certain Areas off the Atlantic Coast on the Outer Continental Shelf from Mineral Leasing, 2016 DAILY COMP. PRES. DOC. 1 (Dec. 20, 2016).

<sup>61</sup> See generally NAT. RES. DEF. COUNCIL & EARTHJUSTICE, *supra* note 33.

research, recreation, and exploration.<sup>62</sup> The risk of catastrophic oil spills in withdrawn areas is greatly reduced. And while the precise effects depend on the global energy market, withholding large offshore areas from fossil fuel leasing and development has the potential to reduce aggregate greenhouse gas emissions.<sup>63</sup>

On April 28, 2017, President Trump issued an executive order rescinding President Obama's withdrawals made pursuant to OCSLA section 12(a).<sup>64</sup> No president has ever rescinded a section 12(a) withdrawal made for "a time period without specific expiration." The executive order was challenged in court by environmental groups, as beyond the President's authority.<sup>65</sup> In January 2018, the Department of the Interior released a new draft program for offshore drilling on the Outer Continental Shelf, to replace the program prepared during the Obama Administration.<sup>66</sup> The Trump Administration's draft program proposes to make over 90% of federal offshore lands available for future exploration and development, and to hold the largest number of lease sales in U.S. history.<sup>67</sup> This is an enormous expansion—the current program offers roughly 6% of available offshore acreage for lease—and it contemplates leasing in areas previously withdrawn by President Obama pursuant to his section 12(a) authority.<sup>68</sup> Governors and members of Congress from several coastal states, on both sides of the aisle, have voiced their opposition to the proposal, as coastal states dependent on tourism and fishing face serious risks from offshore oil spills.<sup>69</sup>

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<sup>62</sup> BUREAU OF OCEAN ENERGY MGMT., *supra* note 42, at xi ("The greatest concern related to oil and gas development . . . is that of an accidental oil spill.").

<sup>63</sup> See, e.g., Peter Erickson, *Final Obama Administration Analysis Shows Expanding Oil Supply Increases CO<sub>2</sub>*, STOCKHOLM ENV'T INST. (Jan. 30, 2017), <https://perma.cc/A3NH-3KBN>.

<sup>64</sup> See generally Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017).

<sup>65</sup> See generally Complaint for Declaratory & Injunctive Relief, League of Conservation Voters v. Trump, No. 3:17-cv-00101-SLG (D. Alaska filed May 3, 2017).

<sup>66</sup> Preparation of a new five-year leasing program also requires compliance with the National Environmental Policy Act of 1969 (NEPA). 43 U.S.C. § 1344(b)(3) (2012). The existing program, prepared by the Obama Administration, does not contain any scheduled lease sales in the Atlantic and only one lease sale in a small area of the Arctic that has a history of offshore oil production. BUREAU OF OCEAN ENERGY MGMT., *supra* note 42, at S-7, 4-11 & tbl.4-3.

<sup>67</sup> Press Release, U.S. Dep't of the Interior, Secretary Zinke Announces Plan for Unleashing America's Offshore Oil and Gas Potential (Jan. 4, 2018), <https://perma.cc/JC3C-W6LV>.

<sup>68</sup> Lisa Friedman, *Trump Moves to Open Nearly All Offshore Waters to Drilling*, N.Y. TIMES (Jan. 4, 2018), <https://perma.cc/34BF-22U4> ("The Obama administration blocked drilling on about 94 percent of the outer continental shelf, the submerged offshore area between state coastal waters and the deep ocean. Mr. Zinke charged that those restrictions had cost the United States billions of dollars in lost revenue and said the new proposal would make about 90 percent of those waters available for leasing.").

<sup>69</sup> See *id.*; Michael Livermore & Jayni Hein, Opinion, *The Keys to Our Coastal Kingdom*, U.S. NEWS & WORLD REP. (Jan. 10, 2018), <https://perma.cc/2MUM-6HQH>.

*B. National Monument Designations Pursuant to the Antiquities Act*

The Antiquities Act of 1906 authorizes the President to identify “objects of historic or scientific interest” and reserve federal lands necessary to protect such objects as national monuments.<sup>70</sup> With limited exceptions, each president since the passage of the Antiquities Act has exercised his authority to designate national monuments.<sup>71</sup> The Antiquities Act offers a broader menu of protections for designated lands than OCSLA section 12(a), which is limited to prohibiting oil and gas leasing.

When presidents designate national monuments, they typically proclaim the existence of the monument and establish restrictions on activities within the monument area. Directives in national monument proclamations instruct land managing agencies (typically, the Bureau of Land Management, the National Park Service, or the Forest Service) to implement certain use restrictions and exercise their expertise to develop a management strategy for the monument.<sup>72</sup> The basic management goal for designated national monuments is protection and preservation.<sup>73</sup> Many national monument designations prohibit new coal mining, hard rock mining, and oil and natural gas production, as well as other activities like commercial fishing or the use of off-road vehicles.<sup>74</sup> As such, national monument status generally confers a broader set of public land protections than OCSLA section 12(a), which is limited to prohibiting mineral leasing.<sup>75</sup>

National monuments protect important ecological, scenic, and historical values for present and future generations. They also serve to preserve ecological areas valuable for scientific study and recreation. At the same time, many national monument designations have been controversial.<sup>76</sup> Critics of national monument designations have argued that “locking up” large areas of federal lands from development deprives nearby communities of revenue from prohibited activities like grazing, drilling, commercial

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<sup>70</sup> Antiquities Act of 1906, 54 U.S.C. § 320301(a) (Supp. II 2015).

<sup>71</sup> See Kame’enui, *supra* note 2 (listing the national monuments designated during each president’s administration).

<sup>72</sup> See *id.*

<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., Proclamation No. 9558, 3 C.F.R. § 402 (2017) (prohibiting mining and mineral leasing in Bears Ears National Monument); Proclamation No. 9478, 3 C.F.R. § 231 (2017) (prohibiting commercial fishing, drilling, and mining in the Papahānaumokuākea Marine National Monument); Proclamation No. 7397, 3 C.F.R. § 22 (2002) (prohibiting mining, mineral leasing, and off-road vehicles in Sonoran Desert National Monument, while allowing some grazing to continue if BLM determines that grazing is compatible with the “paramount purpose” of protecting the monument).

<sup>75</sup> OCSLA, 43 U.S.C. § 1341(a) (2012).

<sup>76</sup> For instance, President Clinton’s 1996 designation of the Grand Staircase-Escalante National Monument, consisting of 1.7 million acres in southern Utah, prompted vocal local opposition. See, e.g., Associated Press, *Fightin’ Words: National Monuments*, NBC NEWS (Feb. 23, 2010), <https://perma.cc/M76A-5UWW> (“The last time they did that in Grand Staircase, they locked out a lot of ranchers, they locked out a whole bunch of clean coal.”).

fishing, and mining.<sup>77</sup> Supporters of monuments point to their environmental, social, and economic benefits.<sup>78</sup>

While the Antiquities Act describes “objects of historic or scientific interest,” the Act has been interpreted and applied for more than a century to allow the protection of very large areas, such as the Grand Canyon.<sup>79</sup> Courts, including the United States Supreme Court, have consistently upheld the use of the Antiquities Act to protect large landscapes under the Act.<sup>80</sup>

President Obama continued the longstanding presidential practice of designating large land areas as national monuments under the Antiquities Act. One of President Obama’s largest terrestrial monument designations was Bears Ears National Monument in southeastern Utah, encompassing approximately 1.35 million acres.<sup>81</sup> The President’s 2016 Proclamation withdrew these federal lands from all forms of sale and disposition, as well as mineral and geothermal leasing.<sup>82</sup> The Proclamation cited the area’s “cultural, prehistoric, and historic legacy,” and its “diverse array of natural and scientific resources,” such that monument status would ensure “that the prehistoric, historic, and scientific values of this area remain for the benefit of all Americans.”<sup>83</sup>

President Obama also designated new marine monuments in the Atlantic and Pacific Oceans, placing these areas off limits to commercial fishing, drilling, and mining. The Northeast Canyons and Seamounts Marine National Monument covers 4,913 square miles located 150 miles southeast of Cape Cod—an area nearly the size of the state of Connecticut—and includes three underwater canyons deeper than the Grand Canyon and four underwater mountains home to rare and endangered species.<sup>84</sup> In his Proclamation, President Obama framed the monument designation as a response to growing threats to the ocean ecosystem.<sup>85</sup> He noted that these

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<sup>77</sup> See, e.g., Todd Gaziano & John Yoo, *Trump Can Reverse Obama’s Last-Minute Land Grab*, WALL STREET J. (Dec. 30, 2016), <https://perma.cc/9HB4-MXNH>.

<sup>78</sup> See, e.g., HEADWATERS ECON., UPDATED SUMMARY: THE ECONOMIC IMPORTANCE OF NATIONAL MONUMENTS TO COMMUNITIES 1 (2017), <https://perma.cc/6YQJ-T8ZG> (“[L]ocal economies surrounding all 17 of the national monuments studied expanded following the creation of the new national monuments.”); Paul Lorah & Rob Southwick, *Environmental Protection, Population Change, and Economic Development in the Rural Western United States*, 24 POPULATION & ENV’T 255, 258–59 (2003) (“[T]he presence of natural amenities—pristine mountains, clean air, wildlife, and scenic vistas—stimulates employment, income growth and economic diversification by attracting tourists . . . .”); Ray Rasker et al., *The Effect of Protected Federal Lands on Economic Prosperity in the Non-Metropolitan West*, 43 J. REGIONAL ANALYSIS & POL’Y 110, 111 (2013).

<sup>79</sup> Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 483, 490 (2003) [hereinafter Squillace, *The Monumental Legacy*].

<sup>80</sup> See *Cameron v. United States*, 252 U.S. 450, 455–56 (1920) (upholding the designation of the Grand Canyon as a national monument); *Tulare County v. Bush*, 306 F.3d 1138, 1140–41 (D.C. Cir. 2002) (discussing Giant Sequoia National Monument).

<sup>81</sup> See generally Proclamation No. 9558, 3 C.F.R. § 402 (2017).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Michael P. Norton, *Monument Designation for Seabed off Cape Cod Under Review by Trump Administration*, MARBLEHEAD REP. (Apr. 27, 2017), <https://perma.cc/7DS7-Y8W2>.

<sup>85</sup> Proclamation No. 9496, 3 C.F.R. § 262 (2017).

“unique ecological resources” have long been the subject of scientific interest, and that “[t]hese habitats are extremely sensitive to disturbance from extractive activities.”<sup>86</sup>

President Obama also expanded the existing Papahānaumokuākea Marine National Monument in the Pacific Ocean, originally created by President George W. Bush in 2006,<sup>87</sup> to more than 582,000 square miles, making it the largest marine protected area in the world.<sup>88</sup> The expansion prohibits commercial fishing and mineral extraction within the monument.<sup>89</sup> The Proclamation did not modify the existing marine monument designated by President George W. Bush, but designated additional, adjacent areas which “contain[] objects of historic and scientific interest” to be part of the Papahānaumokuākea Marine National Monument Expansion.<sup>90</sup>

Until now, no president has attempted to rescind a monument designation made by his predecessor. Executive Order 13792 directed the Secretary of the Interior to review all national monuments designated or expanded after January 1, 1996, that either include more than 100,000 acres of public lands or for which the Secretary determines inadequate “public outreach and coordination with relevant stakeholders” occurred.<sup>91</sup> Following this Executive Order, on May 11, 2017, the Department of the Interior announced that it was accepting public comments on twenty-seven monuments that it intended to review, including the Grand Staircase-Escalante National Monument and Bears Ears National Monument.<sup>92</sup> The public comment period was open for just sixty days, yet the Interior Department received nearly 3 million comments which were “overwhelmingly in favor of maintaining existing monuments.”<sup>93</sup> Secretary of

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<sup>86</sup> *Id.*

<sup>87</sup> See Proclamation No. 8031, 3 C.F.R. § 67 (2007).

<sup>88</sup> Frances Kai-Hwa Wang, *Obama To Expand Papahānaumokuākea Marine National Monument in Hawaii*, NBC NEWS (Aug. 26, 2016), <https://perma.cc/4PQR-A7BP>.

<sup>89</sup> See Proclamation No. 9478, 3 C.F.R. § 231 (2017).

<sup>90</sup> *Id.* The President also stated that:

the Secretary of Commerce should consider initiating the process under the National Marine Sanctuaries Act to designate the Monument Expansion area and the Monument seaward of the Hawaiian Islands National Wildlife Refuge and Midway Atoll National Wildlife Refuge and Battle of Midway National Memorial as a National Marine Sanctuary to supplement and complement existing authorities.

*Id.* (citation omitted).

<sup>91</sup> Exec. Order No. 13,792, 82 Fed. Reg. 20,429, 20,429 (May 1, 2017).

<sup>92</sup> See *generally* Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment, 82 Fed. Reg. 22,016 (May 11, 2017).

<sup>93</sup> U.S. DEP'T OF THE INTERIOR, REPORT SUMMARY BY U.S. SECRETARY OF THE INTERIOR RYAN ZINKE (2017), <https://perma.cc/G8G6-NL28> [hereinafter ZINKE REPORT]; *Conservation Groups File Lawsuit After President Trump Illegally Axed Majestic Bears Ears National Monument*, EARTHJUSTICE (Dec. 7, 2017), <https://perma.cc/HJ38-NKAQ> (“Nearly three million Americans voiced their support for national monuments during Trump’s monument review, but he chose to ignore both the American people and the letter of the law to cater to the extractive industries who would gut our natural wonders,” said Heidi McIntosh, Managing Attorney in Earthjustice’s Rocky Mountain office.”).

the Interior Ryan Zinke released a two-page summary of his findings.<sup>94</sup> On September 17, 2017, the *Washington Post* published a leaked copy of Secretary Zinke's longer draft memorandum to President Trump, in which he recommended reducing the size of four national monuments and modifying the proclamations of several other monuments to allow a wider array of uses, including mining, hunting, commercial fishing, and grazing.<sup>95</sup>

On December 4, 2017, acting without congressional approval, President Trump issued a Proclamation reducing the size of Bears Ears National Monument in southern Utah by 85% and separating it into two units.<sup>96</sup> He also reduced the boundaries of Grand Staircase-Escalante National Monument by nearly 50%, claiming that its current boundaries were "greater than the smallest area compatible with the protection of the objects for which lands were reserved."<sup>97</sup> Conservation organizations and Native American tribes filed lawsuits challenging the legality of these actions.<sup>98</sup>

No court has ever ruled on the legality of presidential monument modifications. In the first decades of the Antiquities Act's existence, some presidents reduced the size of national monuments designated by their predecessors. Most of these actions were relatively minor, and none of these modifications were challenged in court.<sup>99</sup> Further, no president has reduced the size of a monument since President Kennedy modified the boundaries of the Bandelier National Monument in New Mexico in 1963.<sup>100</sup> All of these presidential modifications occurred before the passage of the Federal Land Policy and Management Act in 1976, which expressly reserved to Congress the power to rescind and modify national monuments created under the Antiquities Act.<sup>101</sup> In several instances, Congress has modified or abolished national monuments through legislation.<sup>102</sup>

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<sup>94</sup> ZINKE REPORT, *supra* note 93.

<sup>95</sup> See Juliet Eilperin, *Shrink at Least 4 National Monuments and Modify a Half-Dozen Others, Zinke Tells Trump*, WASH. POST (Sept. 17, 2017), <https://perma.cc/M84Q-4UPT>. See generally Memorandum from Ryan Zinke, Sec'y of the Interior, U.S. Dep't of the Interior, to President Donald J. Trump (Aug. 24, 2017), <https://perma.cc/EJ56-NRAC>.

<sup>96</sup> Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,087 (Dec. 8, 2017) (signed December 4, 2017); see Lee Davidson & Thomas Burr, *Trump Greeted by Cheers and Protests as He Visits Utah, Trims 2 Million Acres from Bears Ears and Grand Staircase-Escalante National Monuments*, SALT LAKE TRIB. (Dec. 4, 2017), <https://perma.cc/BX8J-W579>.

<sup>97</sup> Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,091 (Dec. 8, 2017) (signed December 4, 2017); see also Nicholas Bryner et al., *supra* note 10.

<sup>98</sup> Complaint for Declaratory & Injunctive Relief, Nat. Res. Def. Council v. Trump, No. 1:17-cv-02606 (D.D.C. filed Dec. 7, 2017); Complaint for Injunctive & Declaratory Relief, Hopi Tribe v. Trump, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017).

<sup>99</sup> See Squillace et al., *Presidents Lack Authority*, *supra* note 16, at 65.

<sup>100</sup> Proclamation No. 3539, 3 C.F.R. § 62 (Supp. 1963).

<sup>101</sup> Squillace et al., *Presidents Lack Authority*, *supra* note 16, at 65; see Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(j) (Supp. II 2015) ("The Secretary shall not . . . modify or revoke any withdrawal creating national monuments under chapter 3203 of [the Antiquities Act].").

<sup>102</sup> For example, Congress abolished the Wheeler National Monument in 1950, Act of Aug. 3, 1950, ch. 534, 64 Stat. 405; the Shoshone Cavern in 1954, Act of May 17, 1954, ch. 203, 68 Stat. 98; the Papago Saguaro in 1930, Act of Apr. 7, 1930, ch. 107, 46 Stat. 142; the Old Kasaan in 1955,

The on-the-ground impacts of removing national monument status or diminishing the size of a national monument would depend upon the particular monument's characteristics and the protections that would be lost. Leasing for coal mining, oil, and natural gas production could resume if an area reverted back to its previous status under a management plan that allowed such extractive uses.<sup>103</sup> For marine monuments, commercial fishing, mining, and oil and gas leasing could resume, unless prohibited by other federal laws. This Article next turns to the Property Clause of the U.S. Constitution, which vests Congress with plenary authority over federal lands, and to the text and legislative history of the two statutory provisions at issue: OCSLA section 12(a) and the Antiquities Act.

### III. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

This Part describes the relevant constitutional and statutory framework for OCSLA section 12(a) and the Antiquities Act. The Property Clause of the U.S. Constitution provides Congress with plenary power over federal lands. In OCSLA section 12(a) and the Antiquities Act, Congress delegated specific powers to the executive branch. A careful reading of these statutory provisions, as well as relevant history leading up to and subsequent to their passage, reveals that Congress granted to the President a one-way power to preserve federal lands in both provisions. Congress reserved its authority to rescind or modify these reservations once in place.

#### *A. The Property Clause: Congress as Caretaker of Public Lands*

The U.S. Constitution establishes a property system whereby Congress has plenary authority over public lands. The Property Clause of the Constitution provides that: "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>104</sup> As the U.S. Supreme Court has articulated, "[t]he power over the public land [is] thus entrusted to Congress . . . without limitations. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."<sup>105</sup>

A limited role for the executive branch in public lands decision making is embedded in the Property Clause of the U.S. Constitution. Congress may delegate its authority to the President or components of the executive branch so long as it sets out an "intelligible principle" to guide that exercise

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Act of July 26, 1955, ch. 387, 69 Stat. 380; the Fossil Cyad in 1956, Act of Aug. 1, 1956, ch. 847, 70 Stat. 898; and the Castle Pinckney in 1956, Act of Mar. 29, 1956, ch. 104, 70 Stat. 61.

<sup>103</sup> For example, land within the Bears Ears National Monument in Utah was open to new coal mining, oil and gas production, and uranium prospecting and mining under the management plan in place prior to the designation of Bears Ears as a national monument in 2016. See BUREAU OF LAND MGMT.: MONTICELLO FIELD OFFICE, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN 3 (2008).

<sup>104</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>105</sup> *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (internal quotations omitted).

of authority.<sup>106</sup> Requiring intelligible principles in statutory delegations ensures that “courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.”<sup>107</sup>

In our increasingly complex society, “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>108</sup> This is true with respect to management of federal lands and waters, which comprise approximately 640 million acres of land in the United States.<sup>109</sup> Through multiple statutes, Congress has delegated powers to numerous federal agencies, as well as the President, to manage public lands.<sup>110</sup> Congress frequently delegates broad authority to federal land management agencies such as the Bureau of Land Management (BLM), the Forest Service, the Fish and Wildlife Service, and the National Park Service to set rules and regulations to guide the administration, management, and development of federal lands.<sup>111</sup>

Over its long history, Congress has “withdrawn,” or exempted, some federal public lands from statutes that allow for resource extraction and development, and “reserved” them . . . for preservation and resource conservation. Congress has also, in several instances, delegated to the executive branch the authority to set aside lands for particular types of protection.<sup>112</sup>

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<sup>106</sup> *Accord* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

<sup>107</sup> *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring). Courts reviewing agency actions pursuant to delegated authority may also consider whether Congress intended to vest important economic and policy considerations with the agency, and if so, whether it made that intent clear. *See, e.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (reviewing a policy change by the Food and Drug Administration to regulate tobacco products and stating, “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”).

<sup>108</sup> *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

<sup>109</sup> CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2017) (“Four major federal land management agencies manage 610.1 million acres of this land, or about 95% of all federal land in the United States. These agencies are as follows: Bureau of Land Management (BLM), 248.3 million acres; Forest Service (FS), 192.9 million acres; Fish and Wildlife Service (FWS), 89.1 million acres; and National Park Service (NPS), 79.8 million acres. Most of these lands are in the West, including Alaska.”). BLM is also responsible for subsurface mineral resources in areas totaling 700 million acres. BUREAU OF LAND MGMT., MINING CLAIMS AND SITES ON FEDERAL LANDS, at i (2016), <https://perma.cc/CLK9-7947>. “Ownership and use of federal lands have stoked controversy[,] . . . including the extent to which the federal government should own land,” and how to balance the development and protection of natural resources on federal lands. VINCENT ET AL., *supra*, at 1.

<sup>110</sup> VINCENT ET AL., *supra* note 109, at 19.

<sup>111</sup> *Id.* at 19–20.

<sup>112</sup> Squillace et al., *Presidents Lack Authority*, *supra* note 16, at 57 (footnote omitted) (citing Wilderness Act, 16 U.S.C. § 1133(d)(3) (2012)); *see also* Wild and Scenic Rivers Act, 16 U.S.C. § 1280(b).

The Antiquities Act and OCSLA section 12(a) are two such delegations, made to the President directly.<sup>113</sup>

Both OCSLA section 12(a) and the Antiquities Act contain intelligible principles guiding the exercise of executive branch authority. However, the authority conveyed by Congress to the President in these provisions is limited. As described below, Congress delegated to the President the power to preserve public lands, but it did not delegate the power to lift such protections.<sup>114</sup> The one-way levers of the Antiquities Act and OCSLA section 12(a) allow the executive branch to protect special objects and places by effectively pressing “pause,” and reserve to Congress the ability to alter or remove these protections. This conclusion is bolstered by an examination of the plain text of the statutes, their legislative history, relevant attorney general opinions, and additional public land statutes passed before and after these Acts, which shows that Congress was clear in other laws when it sought to delegate “multidirectional” powers to the executive branch.

*B. OCSLA Section 12(a): Plain Text, Legislative History, and  
Contemporaneous Statutes*

Congress enacted OCSLA in 1953 in order to establish an orderly framework for governing the exploration and development of fossil fuels on the Outer Continental Shelf.<sup>115</sup> In addition to promoting oil and gas development, Congress was mindful of protecting other values on the Outer Continental Shelf, including conservation. OCSLA provides that the Secretary of the Interior can “at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of natural resources of the Outer Continental Shelf, and the protection of correlative rights therein.”<sup>116</sup>

In addition, Congress delegated separate authority to the President in OCSLA section 12(a). The plain language of OCSLA section 12(a) should be the starting point for analyzing its meaning, as in any exercise of statutory interpretation.<sup>117</sup> As the Supreme Court has stated, “There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”<sup>118</sup>

OCSLA section 12(a) is titled “Reservations,” and states, in full: “The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”<sup>119</sup> A

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<sup>113</sup> See *id.* at 56–57; see also discussion *infra* Part III.B.

<sup>114</sup> See discussion *infra* Part III.B.

<sup>115</sup> See OCSLA, 43 U.S.C. § 1332 (2012). See *infra* Part IV for more information on the history of OCSLA and the public trust doctrine.

<sup>116</sup> 43 U.S.C. § 1334(a).

<sup>117</sup> See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458 (1892) (interpreting a statute by looking at the plain language first).

<sup>118</sup> *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940).

<sup>119</sup> Ch. 345, § 12, 67 Stat. 462, 469 (codified at 43 U.S.C. § 1341(a)).

plain reading of this provision shows that Congress granted to the President the power to withdraw offshore lands from disposition through leasing. Absent in this text is any mention of the power to reverse withdrawals of Outer Continental Shelf lands and return them to leasing. Section 12(a) is titled, simply, “Reservations.” Like the provision itself, this title does not indicate any more expansive powers, such as the power to restore withdrawn lands to leasing or to modify previous withdrawals.

Offshore lands withdrawn by the President using section 12(a) are not necessarily insulated from disposition by leasing permanently because Congress retains authority over those lands. Congress has plenary authority over public lands as set forth in the Property Clause of the U.S. Constitution, and can pass legislation restoring some or all of the lands withdrawn by the President to disposition by leasing.<sup>120</sup> But the plain text of section 12(a) does not convey this authority to the President.

The legislative history of section 12(a) supports the interpretation that it was intended as a one-way lever to remove lands from disposition through mineral leasing. While there is not a great deal of legislative history addressing section 12(a), in particular, the 1953 Senate Report accompanying the bill that ultimately became OCSLA discusses “the authority of the President to withdraw certain areas of the seabed of the Continental Shelf from leasing,” but not the authority to rescind any such withdrawals.<sup>121</sup>

The Senate Report also makes clear that Congress intended section 12(a) to be invoked by the President for a variety of reasons, presumably including conservation. In the Committee Amendments, section 12(a) was retitled from “National Emergency Reservations” to simply “Reservations,” and a clause at the end of it that would have tied the President’s authority to reserve land to “the interest of national security” was removed.<sup>122</sup> The explanation provided for this change reads: “The committee believes that the authority of the President to withdraw certain areas of the seabed of the Continental Shelf from leasing should *not be limited to security requirements*.”<sup>123</sup> An Assistant Attorney General likewise recommended that this limitation be deleted:

[Section 12(a)] provides that the President may withdraw and reserve unleased areas for Federal use in the interest of national security. This provision is unnecessary, since leasing is not mandatory in any case; and it *is undesirable, in that it may imply that it constitutes the only permissible reason for refusing*

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<sup>120</sup> See, e.g., Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (“Congress [can] exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands . . .”).

<sup>121</sup> S. REP. NO. 83-411, at 26 (1953); see also Kevin O. Leske, “Un-Shelfing” Lands Under the Outer Continental Shelf Lands Act (OCSLA): Can a Prior Executive Withdrawal Under Section 12(a) Be Trumped by a Subsequent President?, 26 N.Y.U. ENVTL. L.J. 1, 27–31 (2017) (describing the legislative history of section 12(a)).

<sup>122</sup> S. REP. NO. 83-411, at 22, 26.

<sup>123</sup> *Id.* at 26 (emphasis added).

*to lease*. It should be omitted, or at least the final phrase, “for the use of the United States in the interest of national security,” should be deleted.<sup>124</sup>

The inaugural use of section 12(a) was President Eisenhower’s action withdrawing offshore lands from leasing to create a marine sanctuary; from the beginning, the provision was understood as allowing broad withdrawal purposes, including for preservation.<sup>125</sup>

The absence of any explicitly delegated power to rescind OCSLA section 12(a) withdrawals should be contrasted with the “two-way” power delegated to the Secretary of Commerce in the National Marine Sanctuaries Act,<sup>126</sup> passed shortly after OCSLA, in 1972.<sup>127</sup> That Act provides for the creation of national marine protected areas, and sets forth “[p]rocedures for designation and implementation” of protected marine areas that the Secretary must follow.<sup>128</sup> In describing the “terms of designation” for new marine sanctuaries, the Act provides that: “The terms of designation may be modified *only by the same procedures by which the original designation is made*.”<sup>129</sup> The terms of designation (and de-designation) of marine sanctuaries include public notice of the proposal, preparation and publication of a draft environmental impact statement and draft management plan, and at least one public hearing in the coastal area or areas that will be most affected by the proposed designation.<sup>130</sup>

The language of the National Marine Sanctuaries Act illustrates that when Congress sought to convey a multidirectional power to the executive branch, it did so explicitly and set forth specific procedures to guide both designations and de-designations. Yet even when Congress amended OCSLA in 1978, it maintained section 12(a) in its original form: without any express delegation of authority to undo prior offshore leasing withdrawals.<sup>131</sup>

In short, the plain text and limited legislative history of section 12(a) support the interpretation that Congress delegated authority to the President to withdraw areas from offshore leasing, leaving it up to the legislative branch whether to later lease some of these public lands. In this manner, Congress retains its authority as ultimate caretaker of public lands and serves as a check on potentially overzealous reservations by the executive branch.

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<sup>124</sup> *Id.* at 39 (emphasis added). Section 12(a) was originally titled section 10(a). *See id.*

<sup>125</sup> *See* Proclamation No. 3339, 3 C.F.R. § 20 (Supp. 1960) (signed March 19, 1960), *reprinted in* 54 U.S.C. § 320101 (Supp. II 2015).

<sup>126</sup> 16 U.S.C. §§ 1431–1445c (2012).

<sup>127</sup> Pub L. No. 92-532, 86 Stat. 1061 (1972).

<sup>128</sup> 16 U.S.C. § 1434.

<sup>129</sup> *Id.* § 1434(a)(4) (emphasis added).

<sup>130</sup> *See id.* § 1434(a).

<sup>131</sup> *See* Outer Continental Shelf Lands Act Amendments of 1978: Statement on Signing S. 9 into Law, 1978 PUB. PAPERS 1530, 1531 (Sept. 18, 1978).

*C. The Antiquities Act: Plain Text, Legislative History, and  
Contemporaneous Statutes*

The Antiquities Act of 1906 is one of the nation's earliest laws providing for presidential discretion to reserve public lands for protection. Section 2 of the Antiquities Act grants the President the authority to withdraw public lands for the protection of objects of historic or scientific interest. It states:

the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected.<sup>132</sup>

The plain language is clear that when it passed the Antiquities Act, Congress delegated to the President the power to reserve federal lands in order to create national monuments. Congress did not delegate the authority to abolish or diminish monuments.

In delegating the authority to create monuments, one of the drafters' aims was to empower the President to act quickly to prevent the destruction of unique and valuable objects and resources situated within the federal government's expansive land holdings.<sup>133</sup> Scientists at the turn of the 19th century were concerned about the destruction and confiscation of unattended ruins and artifacts on federal lands.<sup>134</sup> Consistent with these concerns, some early bills leading up to the Antiquities Act's passage sought to punish vandals who disturbed ruins on public property.<sup>135</sup>

As explored more thoroughly in other scholarship, statutes passed just before and after the Antiquities Act reveal that Congress knew how to delegate the authority to modify federal land withdrawals, but chose not to do so in the Antiquities Act.<sup>136</sup> The Pickett Act of 1910<sup>137</sup> and the Forest Service Organic Act of 1897<sup>138</sup> each contain language authorizing presidential

<sup>132</sup> Antiquities Act of 1906, 34 Stat. 225 (1906). The language of the Antiquities Act was edited and re-codified in 2014 at 54 U.S.C. §§ 320301(a)–(b) with the stated intent of “conform[ing] to the understood policy, intent, and purpose of Congress in the original enactments.” Act of Dec. 19, 2014, Pub. L. No. 113-287, § 2, 128 Stat. 3094, 3094; *see* 54 U.S.C. § 320301(a)–(b) (Supp. II 2015).

<sup>133</sup> *See* HAL ROTHMAN, *AMERICA'S NATIONAL MONUMENTS: THE POLITICS OF PRESERVATION* 47–48 (1989).

<sup>134</sup> *See id.* at 6–8.

<sup>135</sup> *See, e.g., id.* at 44 (“The Lodge-Rodenberg bill also made collecting artifacts in the public domain a misdemeanor. . . . [Critics] stressed that this failed to differentiate between archeology and vandalism and made all excavators liable to prosecution . . .”).

<sup>136</sup> *See* Squillace et al., *Presidents Lack Authority*, *supra* note 16, at 57–58.

<sup>137</sup> Act of June 25, 1910, ch. 421, 36 Stat. 847 (repealed 1976).

<sup>138</sup> Act of June 4, 1897, ch. 2, 30 Stat. 11, 34 (codified as amended at 16 U.S.C. §§ 473–482, 551 (2012)).

modification of certain withdrawals of federal lands.<sup>139</sup> The contrast between the more expansive authority expressly delegated in these contemporaneous statutes—to reserve land, and then subsequently, to modify or abolish such reservations—and the lesser authority delegated in the Antiquities Act supports the interpretation that Congress intended to give the President the power to create monuments, alone.<sup>140</sup>

Moreover, when Congress passed the Federal Land Policy and Management Act in 1976, it clarified that national monuments can be revoked or modified by an act of Congress, only.<sup>141</sup> The House Committee explained that the law “would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act.”<sup>142</sup> No president, until President Trump’s 2017 actions, has reduced the size of a national monument subsequent to the passage of the Federal Land Policy and Management Act.<sup>143</sup>

Finally, the executive branch has long acknowledged the limits to the President’s authority over established national monuments. In 1938, Attorney General Cummings concluded that the Antiquities Act “does not authorize [the President] to abolish [national monuments] after they have been established.”<sup>144</sup> The opinion explained that “the reservation made by the President under the discretion vested in him by the statute *was in effect a reservation by the Congress itself*,” and that, except where Congress expressly provided, “the President thereafter was without power to revoke or rescind the reservation.”<sup>145</sup> In 1924, the Solicitor General concluded that the President lacked the authority to reduce the size of a national monument.<sup>146</sup> And as recently as 2004, the Solicitor General represented to the Supreme Court that “Congress intended that national monuments would be permanent; they can be abolished only by [an] Act of Congress.”<sup>147</sup>

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<sup>139</sup> See 16 U.S.C. § 473; Act of June 25, 1910 § 1.

<sup>140</sup> See Letter from 121 Law Professors to Ryan Zinke, Sec’y, Dep’t of the Interior, & Wilbur Ross, Sec’y, Dep’t of Commerce (July 6, 2017), <https://perma.cc/6HDY-RWN8>.

<sup>141</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(j) (2012).

<sup>142</sup> H.R. REP. NO. 94-1163, at 9 (1976); see also Squillace et al., *Presidents Lack Authority*, *supra* note 16, at 60–61 (“An examination of [the Federal Land Policy and Management Act of 1976]’s legislative history removes any doubt that section 204(j) was intended to reserve to Congress the exclusive authority to modify or revoke national monuments.”).

<sup>143</sup> The last presidential national monument reduction, before President Trump’s two 2017 reductions, was President Kennedy’s modification of the Bandelier National Monument in 1963. See Proclamation No. 3539, 3 C.F.R. § 62 (Supp. 1963).

<sup>144</sup> Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att’y Gen. 185, 185 (1938).

<sup>145</sup> *Id.* at 187 (emphasis added).

<sup>146</sup> “Relying on a 1921 Attorney General opinion involving ‘public land reserved for lighthouse purposes,’ the Solicitor concluded that the President was not authorized to restore lands to the public domain that had been previously set aside as part of a national monument.” Squillace et al., *Presidents Lack Authority*, *supra* note 16, at 66; see also Squillace, *The Monumental Legacy*, *supra* note 79, at 559–60.

<sup>147</sup> Reply Brief for the United States in Response to Exceptions of the State of Alaska at 32 n.20, *Alaska v. United States*, 545 U.S. 75 (2005) (No. 128). This brief was filed by Acting Solicitor General Paul Clement during the Presidency of George W. Bush. *Id.* at 50.

In short, one-way levers to create national monuments and to reserve offshore lands reflect a congressional desire to allow relatively unencumbered executive branch action to protect special places, while preserving the legislative branch's prerogative over federal land management as established in the Property Clause. The one-way levers of the Antiquities Act and OCSLA section 12(a) thus maintain the traditional separation of powers between Congress and the President, which vests Congress with plenary authority over public lands.

While the statutes' plain text, legislative history, and relevant Attorney General opinions support the view that Congress conferred a one-way lever to preserve, courts interpreting these provisions should also consider the particular context of government stewardship of public lands, which can inform their understanding of the provisions.<sup>148</sup> In the spirit of this broader inquiry, this Article next examines a "procedural" rationale for the structure of these statutes, with roots in the common law public trust doctrine.

#### IV. THE PUBLIC TRUST DOCTRINE: PROTECTING PUBLIC LANDS THROUGH DEMOCRATIC DECISION MAKING

The common law public trust doctrine provides important context for a history of public lands jurisprudence in which courts demand greater justification for actions allowing development or diminishment of public lands than for protecting or withdrawing those same lands. This Part describes the Roman, English, and U.S. common law origins of the public trust doctrine, as well as how it has evolved in the United States to serve as a bedrock public lands doctrine that prioritizes democratic decision making where important public trust interests are at stake.

The public trust doctrine, broadly stated, provides that the government holds certain lands and waterways in trust for public benefit and public use. The public trust doctrine has long been held to apply to lands beneath navigable waters and tidelands, finding that such lands are "inherently the property of the public at large."<sup>149</sup> Much like national monuments, the public trust doctrine has been imbued with an almost mythic quality.<sup>150</sup> Both national monuments and the public trust doctrine fit neatly within the long-standing national narrative that certain natural and cultural treasures are common to all and worthy of lasting protection. The California Supreme

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<sup>148</sup> See, e.g., Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 454 (1989) ("[T]he interpretation of a text requires courts to refer to background norms in interpreting terms.").

<sup>149</sup> Rose, *Joseph Sax*, *supra* note 21, at 351.

<sup>150</sup> See Araiza, *supra* note 27, at 695 & n.4 (citing Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 701 (1986) (noting the public trust doctrine's "mystical and romantic appeal")); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 730 (1986) [hereinafter Rose, *The Comedy of the Commons*] ("A particularly striking aspect of this historical pattern is the resonance that public trust doctrine has in our law, despite frailties in its original authority.").

Court articulated the government responsibility over public trust resources in *National Audubon Society v. Superior Court*<sup>151</sup>:

[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.<sup>152</sup>

While it is primarily a doctrine of state common law, and subject to a fair amount of controversy about the extent of its reach and application,<sup>153</sup> the public trust doctrine has been recognized by the U.S. Supreme Court for well over a century.<sup>154</sup>

From a substantive standpoint, the doctrine declares certain natural resources to be property of the public at large, and certain uses to be “public trust uses,” including navigation, fishing, commerce, and recreation.<sup>155</sup> From a procedural standpoint, the doctrine imposes constraints on certain actors with respect to public trust lands and uses. Specifically, in many states, the public trust doctrine has evolved to constrain non-legislative actors from alienating or modifying public trust lands without explicit legislative authority.<sup>156</sup> This procedural aspect of the public trust doctrine likely serves a few aims. First, it vests decisions concerning commonly held public trust property with a broadly accountable democratic body, as opposed to lone actors or narrow interest groups.<sup>157</sup> Second, it ensures that when a legislative body intends to allow alienation or diminishment of public trust resources, the legislature states so explicitly.<sup>158</sup> This Article will return to these two aims in Part V, which describes how the public trust doctrine should serve as a background principle, or canon of interpretation, framing our

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<sup>151</sup> 658 P.2d 709 (Cal. 1983).

<sup>152</sup> *Id.* at 724.

<sup>153</sup> For an overview of the debate surrounding the doctrine, see Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989) [hereinafter Wilkinson, *Headwaters of the Public Trust*] (explaining that the doctrine focuses on water-based property, valuable for both economic and conservation reasons, and that the doctrine's application can cause a quick “collision between two treasured sets of expectancy interests,” private property owners and the general public); see also Rose, *The Comedy of the Commons*, *supra* note 150, at 713–14 (describing how modern courts have expanded the public trust doctrine to apply to a new public trust use, recreation, and geographically, to the “area from the tidelands to the dry sand areas landward of the high-tide mark”). *But see id.* at 722 (“[T]he recent judicial expansions of public access, like the academic literature, often simply refer us back to traditional doctrines.”).

<sup>154</sup> See *Ill. Central R.R. v. Illinois (Illinois Central)*, 146 U.S. 387, 436–37 (1892).

<sup>155</sup> See Wilkinson, *Headwaters of the Public Trust*, *supra* note 153, at 465; see also Rose, *The Comedy of the Commons*, *supra* note 150, at 728 n.69 (“The main additional contenders are now recreation and environmental preservation.”).

<sup>156</sup> See Sax, *The Public Trust Doctrine*, *supra* note 20, at 563.

<sup>157</sup> *Id.* at 558.

<sup>158</sup> See *id.* at 502 (“[The court] will view with skepticism any dispositions of trust lands and will not allow them unless it is perfectly clear that the dispositions have been fully considered by the legislature.”).

understanding of public land preservation statutes including the Antiquities Act and OCSLA section 12(a).

*A. The Public Trust Doctrine in Roman and English Common Law*

A full recitation of the Roman law origins of the public trust doctrine is beyond the scope of this Article and well covered in other works.<sup>159</sup> Nonetheless, an overview of key developments in Roman and English common law is instructive in introducing the natural resources traditionally protected by the doctrine and the corresponding restraints that the doctrine imposed upon the monarch and other government actors.

The public trust doctrine originated under Roman law as the principle that a sovereign state holds public lands—particularly the seabed and lands affected by the tides—in trust for the benefit of the public. “This [doctrine] permitted the public to use the ocean and the seashore for any noninjurious purpose.”<sup>160</sup> Some public interests, such as navigation and fishing, were considered public uses protected from infringement by the sovereign and other actors.<sup>161</sup> In common areas like the sea, seashore, highways, and running water, “perpetual use was dedicated to the public.”<sup>162</sup>

The English monarch originally claimed a private interest in the land beneath the sea, including the power to grant this land to individuals, removing it from the public domain.<sup>163</sup> Around the time of the Magna Carta (1215), the law began to recognize additional public rights in the seabed and seashore.<sup>164</sup> Subsequently, the monarch held two interests in the seashore and tidal lands: the “jus privatum” and the “jus publicum.”<sup>165</sup>

The jus privatum was the proprietary interest in the seabed and seashore which the sovereign had previously possessed.<sup>166</sup> “This interest . . . was subordinate to the jus publicum, an interest which the [monarch] henceforth held in his capacity as representative of the people, for the

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<sup>159</sup> See, e.g., Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186 n.6 (1980) (citing JUSTINIAN, INSTITUTES, 2.1.1–6 (J.B. Moyle trans., Oxford Univ. Press rev. ed. 1911)); Sax, *The Public Trust Doctrine*, *supra* note 20, at 475–78; Heather J. Wilson, Comment, *The Public Trust Doctrine in Massachusetts Land Law*, 11 B.C. ENVTL. AFF. L. REV. 839, 840–43 (1984) [hereinafter Wilson, *Massachusetts*]; see also James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 12–19 (2007).

<sup>160</sup> Wilson, *Massachusetts*, *supra* note 159, at 840. “Roman writers discuss[ed] public activities which were permitted upon the seashore, such as ‘fishing, navigating and taking water.’” *Id.* at 843.

<sup>161</sup> *Id.*

<sup>162</sup> Sax, *The Public Trust Doctrine*, *supra* note 20, at 475 (quoting W.A. HUNTER, ROMAN LAW 311 (J. Ashton Cross trans., 4th ed. 1903)).

<sup>163</sup> *Id.*

<sup>164</sup> Wilson, *Massachusetts*, *supra* note 159, at 844 (citing R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM 43 n.(v) (2d ed. 1875)).

<sup>165</sup> *Id.* The “public right” to certain lands was called the “jus publicum” in Roman law. See Rose, *The Comedy of the Commons*, *supra* note 150, at 713.

<sup>166</sup> Wilson, *Massachusetts*, *supra* note 159, at 844.

protection of their common navigational and fishing rights.”<sup>167</sup> The jus publicum could be alienated only by an act of Parliament.<sup>168</sup> Thus, these public lands were to be spared from potential total elimination at the hands of the monarch.

As the U.S. Supreme Court explained in *Appleby v. City of New York*, in English common law:

[T]he powers of the king are limited, and he can not now deprive his subjects of these rights by granting the public navigable waters to individuals. But there can be no doubt of the right of parliament in England, or the legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. . . . Hence the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large; provided they do not interfere with vested rights which have been granted to individuals.<sup>169</sup>

Therefore, notwithstanding the restraints the public trust doctrine imposed upon the monarch, it arguably remained within the authority of Parliament to enlarge or diminish public trust rights for another legitimate public purpose.<sup>170</sup>

This structure has modern analogs in some U.S. states’ public trust doctrines that persist today, which place additional constraints on non-legislative actors with respect to public land management. OCSLA section 12(a) and the Antiquities Act, in reserving to the legislature the ability to remove protected land status once granted, parallel this structure and evince a “procedural” or “democratic” rationale for their one-way lever structure.

### *B. The Public Trust Doctrine in the United States*

The history of the public trust doctrines in many eastern U.S. states extends back to before statehood. When the original thirteen colonies were

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<sup>167</sup> *Id.*; see also *Shively v. Bowlby*, 152 U.S. 1, 57 (1894) (“At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation.”); *Arnold v. Mundy*, 6 N.J.L. 1, 71–72 (1821) (“[T]he wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. . . . This principle, with respect to rivers and arms of the sea, is clearly maintained in the case of the royal fishery upon the Banne . . . .”); STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO, AND HALL’S ESSAY ON THE RIGHTS OF THE CROWN IN THE SEA-SHORE 389 (WM. W. Gaunt & Sons, Inc. 1993) (1888) (“[F]or the jus privatum, that is acquired to the subject either by patent or prescription, must not prejudice the jus publicum.”).

<sup>168</sup> *Wilson, Massachusetts*, *supra* note 159, at 844; see also *Appleby v. City of New York*, 271 U.S. 364, 382 (1926); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410–12 (1842); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 83 (1851). *But see* *Wilkinson, Headwaters of the Public Trust*, *supra* note 153, at 431 n.31 (citing a conflicting view from R. CLARK, WATERS AND WATER RIGHTS 101 (1970)).

<sup>169</sup> *Appleby*, 271 U.S. at 382 (quoting Chancellor Walworth).

<sup>170</sup> See *id.*; *Sax, The Public Trust Doctrine*, *supra* note 20, at 476; see also *Arnold*, 6 N.J.L. at 50 (noting that the King of England never had the right in his sovereign capacity to grant away “the common property” in tidelands and navigable waterways, so neither did the colonies nor U.S. states).

settled, the Crown granted the title to and trusteeship of tidelands in the colonies to the companies chartered to settle those colonies.<sup>171</sup> A portion of the tidelands passed into private ownership, subject to the provision that the owners not interfere with “the rights of the public to have the benefit of the waters for navigation, fishing and fowling.”<sup>172</sup> After the American Revolution, the states became entitled to the land under their navigable waters, subject to the public trust.<sup>173</sup> The public trust doctrine passed to new states of the Union under the Equal Footing Doctrine.<sup>174</sup> The states thus continue to act as trustee of public trust resources and of the public’s rights to navigation, fishing, and other uses.<sup>175</sup>

The “lodestar” of the public trust doctrine is the U.S. Supreme Court’s 1892 decision in *Illinois Central Railroad v. Illinois*.<sup>176</sup> In *Illinois Central*, the Supreme Court issued an opinion that provided a legal basis for later state pronouncements and reaffirmations of their common law public trust doctrines.<sup>177</sup> Illinois had granted more than 1,000 acres underlying Lake Michigan to Illinois Central Railroad for harbor and commercial development.<sup>178</sup> A few years later, the state sued to invalidate its original grant.<sup>179</sup> The Supreme Court ruled in the state’s favor, holding that the original grant was voidable because navigable waterways, including those in inland navigable lakes and rivers, are held by the states “in trust for the people” so that “that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”<sup>180</sup> The Court found that while Illinois could convey small parcels of the seabed or shore that would not injure the public trust, granting almost the entire waterfront of Chicago would, in effect, abdicate the state’s legislative authority over navigation, and the public trust doctrine does not permit such an abdication.<sup>181</sup>

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<sup>171</sup> See, e.g., *Bos. Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 359 (Mass. 1979).

<sup>172</sup> *Crocker v. Champlin*, 89 N.E. 129, 130 (1909).

<sup>173</sup> See Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 6 (2007) [hereinafter Craig, *Eastern Public Trust*].

<sup>174</sup> *Id.* Under the Equal Footing Doctrine, each state succeeded on an equal footing with all others to the rights of sovereignty, jurisdiction, and eminent domain. See *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845); *Shively*, 152 U.S. 1, 26 (1893) (noting that states admitted into Union after adoption of the Constitution granted “the same rights as the original States in tide waters, and in the lands below the high water mark”). Prior to each state’s incorporation, its submerged lands were held in trust by the federal government. Once the titles to such lands were vested in a state, federal sovereignty over those lands was extinguished. See *Summa Corp. v. California ex rel. State Lands Comm’n*, 466 U.S. 198, 205 (1984).

<sup>175</sup> Sax, *The Public Trust Doctrine*, *supra* note 20, at 475–76.

<sup>176</sup> 146 U.S. 387 (1892); see Sax, *The Public Trust Doctrine*, *supra* note 20, at 489 (calling *Illinois Central* the “lodestar” of the public trust doctrine).

<sup>177</sup> Rose, *Joseph Sax*, *supra* note 21, at 351–52.

<sup>178</sup> Sax, *The Public Trust Doctrine*, *supra* note 20, at 489.

<sup>179</sup> *Id.*

<sup>180</sup> *Illinois Central*, 146 U.S. at 452.

<sup>181</sup> *Id.* at 452–53.

*C. The Public Trust Doctrine as a Theory of Public Land Management Best Effectuated by Legislatures*

In 1970, Professor Joseph Sax revived academic and judicial interest in the public trust doctrine through the publication of his seminal article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*.<sup>182</sup> Sax described the “special regulatory obligations over shorelands” that states possess, “which are inconsistent with large-scale private ownership.”<sup>183</sup> Sax found that the public trust doctrine should affect how courts consider actions by governments that could convey public trust resources to private parties. He identified the “central substantive thought in public trust litigation” as:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.<sup>184</sup>

Sax’s review of judicial public trust cases led to his conclusion that decisions potentially affecting public trust interests should “be made by a body with a constituency broad enough to be responsive to the whole range of significant potential users.”<sup>185</sup> And as a result, “court[s] should look skeptically at programs which infringe broad public uses in favor of narrower ones,”<sup>186</sup> such as reducing national monument boundaries to lease land to private developers for fossil fuel production.

Sax thus read the doctrine as a theory of public land management best carried out by state legislatures, and pointed to states like Massachusetts and New York which embraced this “procedural” application of the doctrine.<sup>187</sup> The theory underlying this principle is that legislatures answer to a broader constituency than municipal actors, and undertake a more deliberative and open process that guards against rash, ill-informed, or corrupt decisions with respect to public natural resources.<sup>188</sup> Sax was concerned about bad decisions being made by local governments or lone actors that may appear “rational from the atomistic perspective of the actor, but which, from the perspective of the larger community, is highly disadvantageous.”<sup>189</sup> As Professor Carol Rose noted, “Sax effectively treated the public trust as a common-law version of the then-novel ‘hard look’ doctrine for environmental impacts. . . . [T]he public trust doctrine required

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<sup>182</sup> See generally Sax, *The Public Trust Doctrine*, *supra* note 20.

<sup>183</sup> *Id.* at 489.

<sup>184</sup> *Id.* at 490.

<sup>185</sup> *Id.* at 560–61.

<sup>186</sup> *Id.* at 491.

<sup>187</sup> *Id.* at 483, 492; see also Wilkinson, *The Public Trust*, *supra* note 27, at 310 (discussing required legislative authorization for administrative agencies to use public resources to promote private gain).

<sup>188</sup> Sax, *The Public Trust Doctrine*, *supra* note 20, at 490–91, 534.

<sup>189</sup> *Id.* at 534.

the collection of adequate information, public participation in decisions, informed and accountable choices, and close scrutiny of private giveaways of environmental resources.”<sup>190</sup>

Furthermore, Rose has described how the public trust doctrine emerged as a way to protect certain common natural resources that were more socially valuable as common resources than as privately owned resources: public lakes and rivers allow commerce and confer myriad public benefits that would not be possible in a different property regime.<sup>191</sup> Thus, the doctrine serves to protect certain common property, held by disparate “owners,” or the “unorganized public.”<sup>192</sup> Given the political weakness of the unorganized public, the public trust doctrine protects broadly held social values that enhance public sociability, such as commerce on the waterways, and more recently, recreation in natural areas.<sup>193</sup>

Many states, through laws or common law jurisprudence, have ratified a “procedural” or “democratic” aspect of the public trust doctrine by requiring state legislatures to explicitly approve any potential alienation or modification of trust resources. For example, in Massachusetts, the land between the high and low water marks has traditionally been subject to the public trust.<sup>194</sup> Common law public trust doctrine jurisprudence in Massachusetts has settled on the principle that a change in the use of public trust lands, or their conveyance to private parties, is impermissible without a clear showing of legislative approval.<sup>195</sup> As a result, “state agencies, municipalities, and other governmental entities [must] obtain legislative authorization before altering existing uses of public trust lands,” and they are limited in their ability to directly regulate or to abrogate public trust lands.<sup>196</sup> Massachusetts courts have tolerated some legislative alienation of public lands, but have looked skeptically at claims that this authority can be delegated.<sup>197</sup>

In New York, the common law public trust doctrine has evolved to encompass not only navigable-in-fact waterways and tidelands, but the

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<sup>190</sup> Rose, *Joseph Sax*, *supra* note 21, at 355.

<sup>191</sup> Rose, *The Comedy of the Commons*, *supra* note 150, at 721, 723, 775–81.

<sup>192</sup> *Id.* at 721.

<sup>193</sup> *See id.* at 723, 779.

<sup>194</sup> *Bos. Waterfront Dev.*, 393 N.E.2d 356, 359–60 (Mass. 1979). The doctrine has evolved to allow public access to the ocean through the tidelands and shore land, as well as access to “great ponds,” which otherwise might be blocked by private land ownership. *Id.* at 367.

<sup>195</sup> *See, e.g., Trio Algarvio, Inc. v. Comm’r of the Dep’t of Env’tl. Prot.*, 795 N.E.2d 1148, 1151 (Mass. 2003); *Gould v. Greylock Reservation Comm’n*, 215 N.E.2d 114, 126 (Mass. 1966) (“In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority of power to permit use of public lands and of the Authority’s borrowed funds for what seems, in part at least, a commercial venture for private profit.”).

<sup>196</sup> Wilson, *Massachusetts*, *supra* note 159, at 841; *see Craig, Eastern Public Trust*, *supra* note 173, at 64–68 (giving an overview of Massachusetts’s public trust doctrine and its application).

<sup>197</sup> *See, e.g., Moot v. Dep’t of Env’tl. Prot.*, 861 N.E.2d 410, 420 (Mass. 2007) (holding that “[t]he rights of the public in Commonwealth tidelands . . . cannot be relinquished by departmental regulation”).

protection of inland public parkland.<sup>198</sup> While the precise origin of the evolution of the doctrine to parkland is unclear, New York public trust cases have long held that public parkland cannot be sold by cities or municipalities without state legislative authorization.<sup>199</sup> As early as 1871, in *Brooklyn Park Commissioners v. Armstrong*,<sup>200</sup> the court described the City of Brooklyn as a trustee holding park lands for the purpose of public park use.<sup>201</sup> The court held that the City could not sell or convey land held in trust for public use without legislative sanction.<sup>202</sup> As recently as 2001, the New York Court of Appeals reaffirmed the public trust doctrine and held that disruption of public access to a park was a non-park use requiring state legislative authorization.<sup>203</sup> Therefore, the public trust doctrine in New York operates as a procedural constraint on non-legislative actors who could otherwise impair public trust lands or uses.

In New York, “[g]reat ramifications flow from a determination that a proposed activity is a non-park use,” as the process of obtaining state legislative authorization for “parkland alienation” often takes more than a year and can attract robust opposition from local communities and their legislators.<sup>204</sup> New York generally passes fewer than twenty bills each year authorizing parkland alienation.<sup>205</sup> The state legislature regularly cites its “on-going effort to protect the public trust as it relates to the use of parklands,” and its policy of preserving open space.<sup>206</sup> Therefore, a “procedural” public trust doctrine has been integrated into the state legislative process, serving

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<sup>198</sup> See, e.g., Craig, *Eastern Public Trust*, *supra* note 173, at 85–86 (listing state public trust protections); *2002 Annual Report*, N.Y. ST. ASSEMBLY (Dec. 15, 2002), <https://perma.cc/FY8M-YLDX> (“Case law has been established which requires that any use of public parkland for non-parkland purposes must be authorized by the New York State Legislature.”).

<sup>199</sup> Cyane Gresham, Note, *Improving Public Trust Protections of Municipal Parkland in New York*, 13 *FORDHAM ENVTL. L.J.* 259, 267–68 (2002).

<sup>200</sup> 45 N.Y. 234 (1871).

<sup>201</sup> *Id.* at 234–35 (“The title of the city, thus acquired, is impressed with a trust to hold the lands for the public use as a park, and it cannot, of itself, convey or dispose of them in contravention of the trust; but it is within the power of the legislature to relieve the city from such trust, and to authorize a sale, free therefrom.”).

<sup>202</sup> *Id.* at 248. In 1920, the court in *Williams v. Gallatin* reached a similar result. 128 N.E. 121, 122 (N.Y. 1920) (“A park is a pleasure ground set apart for recreation of the public. . . . It need not, and should not, be a mere field or open space, but no objects, however worthy, . . . which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred. . . .”).

<sup>203</sup> *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1053–55 (N.Y. 2001).

<sup>204</sup> Gresham, *supra* note 199, at 282–85.

<sup>205</sup> See *id.* at 285 (counting less than twenty bills each year from 1990–2000). For years 2014–2016, a review of New York State Assembly Local Government Committee annual reports shows that fewer than twenty parkland alienation bills were passed each year. See COMM. ON LOCAL GOV'TS, N.Y. STATE ASSEMBLY, 2016 ANNUAL REPORT 6–8 (2016), <https://perma.cc/TGT9-ARA7> [hereinafter 2016 ANNUAL REPORT]; COMM. ON LOCAL GOV'TS, N.Y. STATE ASSEMBLY, 2015 ANNUAL REPORT 10–12 (2015), <https://perma.cc/N8C4-BRSB>; COMM. ON LOCAL GOV'TS, N.Y. STATE ASSEMBLY, 2014 ANNUAL REPORT 11–13 (2014), <https://perma.cc/A5P2-GYDP>. In general, the state encourages substitution of equivalent land (based on acreage or market value) for discontinued parkland. See, e.g., 2016 ANNUAL REPORT, *supra*, at 6.

<sup>206</sup> *2002 Annual Report*, *supra* note 198. This language appears in several of the Committee's annual reports. See, e.g., 2016 ANNUAL REPORT, *supra* note 205, at 6.

as a check on potential impairment of public trust rights by municipal actors and others outside the legislature.

Other states have embraced a similar approach to public trust lands management.<sup>207</sup> For example the California Supreme Court has articulated: “Nothing short of a very explicit provision . . . would justify us in holding that the Legislature intended to permit the shore of the ocean, between high and low-water mark, to be converted into private ownership.”<sup>208</sup>

Notably, some courts and scholars have found that even legislatures cannot alienate certain public trust lands except in furtherance of a “trust” purpose.<sup>209</sup> Thus, notwithstanding the distinction between legislatures and other actors evident in the history of public trust doctrine jurisprudence, even legislatures can be limited by the doctrine, as the Illinois legislature was in *Illinois Central*, when they do not adequately protect public trust values.<sup>210</sup>

In short, the common law public trust doctrine has long been interpreted by several states to constrain actions that threaten to alienate or diminish public trust resources. State common law jurisprudence has evolved to judicially ratify constraints on non-legislative actors with respect to public trust land management, while also serving as a backstop against complete legislative abdication of public trust duties. In this manner, the public trust doctrine supplies a procedural and democratic rationale for the structure of the Antiquities Act and OCSLA section 12(a): in limiting presidential power to a one-way lever to conserve public resources,

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<sup>207</sup> For example, the Florida constitution has provided since 1970 that land under navigable waters

is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

FLA. CONST. art. X, § 11. Alabama has longstanding judicial restrictions on alienation by municipalities. *See* *Douglass v. City Council of Montgomery*, 24 So. 745, 746 (Ala. 1898) (holding that municipalities “cannot of course, dispose of property of a public nature, in violation of the trusts upon which it is held”). New Jersey allows the state legislature to convey public trust land only “in furtherance of the purposes of the doctrine.” *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

<sup>208</sup> *Kimball v. Macpherson*, 46 Cal. 103, 108 (1873).

<sup>209</sup> *See* Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 811–14 (1979) (criticizing Sax and arguing that the public may have property rights that restrain the legislature from alienating property except in furtherance of “trust” purposes); Rose, *The Comedy of the Commons*, *supra* note 150, at 721 n.39 (not making this claim directly, but citing, *inter alia*, Coquillette, *supra*); *see also* *City of Berkeley v. Superior Court*, 606 P.2d 362, 364–65, 369 (Cal. 1980); Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 52–54 (1976) (describing the origin and transformation of the public trust doctrine in the United States); Leonard R. Jaffee, *The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters: Neptune City v. Avon-by-the-Sea—A Case of Happy Atavism?*, 14 NAT. RESOURCES J. 309, 318, 334–35 (1974) (defending the claim that tidewater resources are property of New Jersey citizens, and therefore beyond legislative authority to alienate).

<sup>210</sup> *See Illinois Central*, 146 U.S. 387, 452–54 (1892).

presidents cannot diminish protected common property. The structure of OCSLA section 12(a) and the Antiquities Act are squarely in line with the public trust doctrine's restraints on impairment of public lands by non-legislative actors. The President's "atomistic" views about national monuments and other shared natural resources should not be the final say with respect to long-term public use and enjoyment of them. Too much of our common natural, historical, and cultural legacy is at stake, especially when removing protections would open these lands to private development.

The next Part explains how courts can use the public trust doctrine as an interpretive aid to understand the structure of the Antiquities Act and OCSLA section 12(a). As a canon of interpretation, the public trust doctrine would frame the analysis in favor of public trust values and preservation.

#### V. THE PUBLIC TRUST DOCTRINE AS A CANON OF STATUTORY INTERPRETATION FOR PUBLIC LAND STATUTES

Beyond proving an illuminating analogy, the public trust doctrine should serve as a background principle to inform our understanding and interpretation of public land statutes. As a background principle or canon of interpretation, the public trust doctrine would lack independent legal effect, but would act as an "interpretive aid" for other public lands laws or regulations.<sup>211</sup> In order to effectuate the democratic values on which the doctrine is based, the public trust doctrine should serve as a particular kind of interpretative rule—requiring a "clear statement" from the legislature before recognizing any right to impair or diminish public trust values. Thus situated, a public trust doctrine canon of interpretation would confirm that the Antiquities Act and OCSLA section 12(a) confer a one-way lever in the direction of preservation to the President.

Canons of statutory interpretation have long been used by courts to assist in interpreting statutes and regulations.<sup>212</sup> They have also been criticized for their ubiquity and diversity, which renders their usefulness as an interpretive aid to courts less clear.<sup>213</sup> Most famously, Karl Llewellyn noted that for nearly every canon in circulation, another canon can be found which states the opposite principle.<sup>214</sup> Despite these critiques, canons are frequently used and cited by courts, and a legal literature has developed with

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<sup>211</sup> See Araiza, *supra* note 27, at 697 (proposing use of the public trust doctrine as a canon rather than a hard rule); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 286–87 (1982); Wilkinson, *The Public Trust*, *supra* note 27, at 273–74, 276, 311–13.

<sup>212</sup> See Sunstein, *supra* note 148, at 453 ("To a large degree, interpretive principles—including the traditional 'canons'—serve the same function in public law. They too help judges to construe both statements and silences; they too should not be seen as the intrusion of controversial judgments into 'ordinary' interpretation." (footnote omitted)).

<sup>213</sup> See *id.* at 451–52.

<sup>214</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 395–96 (1950) (noting several juxtaposed canons); see also Araiza, *supra* note 27, at 703.

respect to a normative framework for analyzing canons of construction.<sup>215</sup> Professor William Eskridge has set forth normative evaluative principles for canons of statutory interpretation.<sup>216</sup> As Eskridge has observed, interpretive rules that cut across statutes can assist rule-of-law values like predictability and objectivity, democratic values, and widely held public values.<sup>217</sup>

In the early 1980s, public lands scholars Charles Wilkinson and David Getches argued that the public trust doctrine supports the principle that courts should demand greater justification for administrative decisions opening or allowing development on public lands than for protecting or withdrawing the same lands. Wilkinson urged that the doctrine be accepted as a means of construing the obligations of federal agencies under public land laws.<sup>218</sup> He suggested that “[i]f there are unresolved questions on the face of statutes, courts should assume that Congress intended to protect and preserve the public resources as a trustee would.”<sup>219</sup> Writing decades before the present controversy over national monuments and offshore leasing moratoria, Wilkinson noted that such a canon of construction could assist courts in determining the extent of protection afforded to wildlife, public recreation, aesthetic opportunities, stream flows, and more.<sup>220</sup> Judicial interpretation would point in the direction of protection and preservation if courts were to construe public lands and environmental statutes to effectuate Congress’s intent to act as trustee with the duty of preserving the public’s resources.<sup>221</sup>

Getches likewise described how the public trust doctrine could be used akin to a canon of construction:

The theory is that public lands are to be held and managed consistently with a trust implied from the high standards set for stewardship of federal lands in modern statutes. Thus, as gaps must be filled and vague statutes interpreted, the context is to be one of protection of the public interest in federal lands and resources.<sup>222</sup>

Writing more recently, Professor William Araiza proposed that the doctrine be used as an interpretive canon to assist in judicial interpretation of statutes and administrative regulations.<sup>223</sup> The doctrine as a canon of interpretation would be “parasitic” on the underlying statute or regulation,

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<sup>215</sup> See, e.g., William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 552, 576 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)).

<sup>216</sup> *Id.* at 576.

<sup>217</sup> *Id.* at 576–81; see also Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1980–81 (2017) (citing Eskridge and applying his normative framework to Supreme Court pronouncements).

<sup>218</sup> Wilkinson, *The Public Trust*, *supra* note 27, at 311–13.

<sup>219</sup> *Id.* at 312.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 312–13.

<sup>222</sup> Getches, *supra* note 211, at 334.

<sup>223</sup> Araiza, *supra* note 27, at 698.

meaning that it would not expand any right or confer any freestanding authority, but would assist in construing the underlying statute and favor the public trust value.<sup>224</sup> As Araiza writes: “The argument is that the principle underlying the public trust doctrine—that ‘social’ uses of natural resources generate benefits that merit protection—is so important that it warrants consideration when courts construe laws or review government actions that affect those uses.”<sup>225</sup> Other scholars have called for a broader “green canon of construction” that would extend beyond the narrow canon that I propose here.<sup>226</sup>

While a public trust canon could take various forms, one of the ways in which it could function is as a “clear statement” requirement.<sup>227</sup> In its strongest version, a clear statement requirement is a rule of narrow statutory construction that rejects interpretations that override “substantive values embodied in the rule, unless the statute explicitly so provides.”<sup>228</sup>

A clear statement canon of construction would require legislature to be specific when it wants to confer a certain power or reach a particular result.<sup>229</sup> It also ensures that adequate attention will be paid by courts to the interests that motivated the legislation at issue. The Supreme Court has used a clear statement canon of construction on numerous occasions before interpreting a statute to impose requirements that would otherwise break with overriding statutory purpose.<sup>230</sup> As Professor Cass Sunstein has

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<sup>224</sup> *Id.* at 718–19.

<sup>225</sup> Araiza, *supra* note 27, at 704 (footnote omitted).

<sup>226</sup> Professor Dan Farber has described how an existing federal law, the National Environmental Policy Act (NEPA), provides textual support for a “green canon of construction.” DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 125–27 (1999). NEPA section 102 provides that: “The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and *public laws* of the United States shall be *interpreted* and administered in accordance with the policies set forth in this chapter.” 42 U.S.C. § 4332 (emphasis added). Those policies are listed in NEPA section 101 and include, “fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations” and “preserv[ing] important historic, cultural, and natural aspects of our national heritage.” *Id.* § 4331(b). Farber argues that this language can be viewed as establishing a “green canon of construction” that judges should apply in interpreting ambiguous environmental and public land statutes. FARBER, *supra*.

<sup>227</sup> *See id.* at 721.

<sup>228</sup> William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 *IND. L.J.* 865, 880–81 (1993); *see also* Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 *U. PITT. L. REV.* 383, 385 (1991) (noting that Justice Scalia’s concurrence in *Taffin v. Levitt*, 493 U.S. 455, 469–473 (1990), argued that the presumption in favor of concurrent federal and state jurisdiction should only be considered rebutted if Congress explicitly provided for exclusive federal jurisdiction in the statutory text, or in other words, provided a clear statement).

<sup>229</sup> *See* Sunstein, *supra* note 148, at 457–58 (“Some principles designed to fulfill institutional goals require a ‘clear statement’ before courts will interpret a statute to disrupt time-honored or constitutionally grounded understandings about proper governmental arrangements. Clear-statement principles force Congress expressly to deliberate on an issue and unambiguously to set forth its will; they commonly appear in statutory interpretation as a subset of the category of interpretive norms.”).

<sup>230</sup> Clear statement rules are commonly applied in federalism cases. For example, in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Supreme Court stated that Congress may abrogate the states’ Eleventh Amendment immunity “only by making its intention

explained, a clear statement canon is similar to a principle in favor of narrowing agency discretion when there is any doubt as to statutory authority, as such a principle “works against regulatory pathologies produced by factional power or self-interested behavior of bureaucrats.”<sup>231</sup>

Treating the public trust doctrine as a “clear statement” canon of interpretation for public land preservation statutes makes sense, given how the doctrine has developed in some states to require, quite literally, a clear statement from legislatures before allowing the modification or impairment of public trust lands or trust uses.<sup>232</sup> This is more than mere word play; a public trust canon of construction that requires a clear statement from Congress before accepting an interpretation that would upset statutory purpose would serve to protect socially valuable common resources and the interests of disparate resource owners, like the unorganized public, which Rose identified as underpinning the public trust doctrine.<sup>233</sup> Moreover, a clear statement public trust canon would guard against the abuses or biases of lone actors, which Sax identified as a concern motivating the doctrine,<sup>234</sup> as well as factional or bureaucratic self-interest.<sup>235</sup>

Running a potential public trust doctrine canon of interpretation through Eskridge’s normative framework for evaluation, as a clear statement principle, the canon would promote objectivity, at least in part, as it would not substitute any interest groups’ views for another; it simply requires a clear statement before interpreting a statute to infringe on pre-existing public land protections. The canon would serve democratic values, as it would vest primary authority for public land decision making with the most democratic of the three branches, Congress, unless the statute explicitly indicated otherwise. Finally, the canon would protect widely shared public values, such as public land preservation. Indeed, the public trust doctrine is premised on the notion that certain lands and resources are common to all, and incompatible with private ownership and exploitation.

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unmistakably clear in the language of the statute.” *Id.* at 242. This canon of construction, the Court explained, was dictated by “[t]he fundamental nature of the interests implicated by the Eleventh Amendment.” *Id.*; see Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 16 (2004) (“The [Supreme] Court’s less flashy clear statement rules may be an even more important set of examples. Those rules enhance the political and procedural checks on federal lawmaking in a number of sensitive areas, including regulation of traditional state functions, abrogation of state sovereign immunity, imposition of conditions on federal funding, and preemption of state law.”); see also Solimine, *supra* note 228, at 401–02, nn.122–27.

<sup>231</sup> Sunstein, *supra* note 148, at 458.

<sup>232</sup> See discussion *supra* Part IV. And even then, legislatures themselves may be unable to diminish or alienate public trust resources where doing so would be incompatible with protecting the public’s interest in the lands and waters remaining. See *Illinois Central*, 146 U.S. 387, 452–53 (1892) (explaining that State control over navigable waters is “title held in trust for the people of the State,” which requires legislators to act in the public’s interest when enacting laws that diminish or alienate public trust resources).

<sup>233</sup> See Rose, *The Comedy of the Commons*, *supra* note 150, at 721–23. Of course, there are other forms that a public trust canon could take; however, a clear statement requirement aligns with past judicial interpretations of the doctrine. See discussion *supra* Part IV.

<sup>234</sup> See Sax, *The Public Trust Doctrine*, *supra* note 20, at 531, 534.

<sup>235</sup> Sunstein, *supra* note 148, at 458.

As a canon, the doctrine would give appropriate weight to widely shared values, where doing so would be consistent with legislative text and purpose.

In short, a public trust doctrine canon of interpretation would serve to protect social and environmental values from infringement. Applied here, a public trust canon would confirm that the Antiquities Act and OCSLA section 12(a) confer a one-direction power to the President in the direction of preservation, consistent with the statutes' plain text, legislative history, and relevant legal opinions.

In the final Part, this Article describes how the public trust doctrine illuminates the wisdom of the structure established in OCSLA section 12(a) and the Antiquities Act.

#### VI. THE WISDOM OF ONE-WAY EXECUTIVE BRANCH LEVERS IN THE ANTIQUITIES ACT AND OCSLA SECTION 12(A)

Both the Antiquities Act and OCSLA section 12(a) provide one-way levers for the President to protect special places for the benefit of present and future generations. Congress did not give the President the power to undo or diminish these reservations of public land. The drafters of the Antiquities Act intended for the President to be able to act decisively to make conservation decisions through national monument designations.<sup>236</sup> And the drafters of OCSLA section 12(a) intended to confer a broad power to reserve resources of the Outer Continental Shelf, including for conservation purposes.<sup>237</sup> The legislative branch serves as a check on these executive branch powers by retaining the authority to revoke or modify national monument designations and offshore leasing withdrawals through legislative action.

Until now, no president has ever rescinded a permanent offshore leasing withdrawal made by a prior president pursuant to section 12(a) of OCSLA. And until now, no president has embarked upon a far-reaching review of national monuments designated by his predecessors and announced steep reductions in monument size, even in the face of overwhelming public support for maintaining monuments.<sup>238</sup>

The fact that such actions are unprecedented is unsurprising, because the President does not possess the power to rescind or diminish these protections. Congress retained these powers exclusively, pursuant to its plenary authority over public lands set forth in the Property Clause of the U.S. Constitution. This conclusion is bolstered by an examination of the plain text of the statutes, their legislative history, relevant attorney general opinions, as well as additional public land statutes passed before and after

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<sup>236</sup> S. REP. NO. 106-250, at 1 (2000); *see also supra* notes 133–135 and accompanying text.

<sup>237</sup> H.R. REP. NO. 83-1031, at 9 (1953); *see also supra* notes 121–125 and accompanying text.

<sup>238</sup> *See* discussion *supra* Parts II.B and III.C.

these Acts that show Congress was clear when it sought to delegate “multidirectional” powers to the executive branch.<sup>239</sup>

Moreover, understanding OCSLA section 12(a) and the Antiquities Act as one-way presidential levers to preserve is consistent with the public trust doctrine, which in some states imposes restrictions on alienation of public lands absent specific legislative approval.<sup>240</sup> The logic behind this principle is that legislatures answer to a broader constituency than municipal actors, and by virtue of their numerous rules of procedure and process, undertake a more deliberative, open process that helps to guard against rash or corrupt decisions with respect to public lands and natural resources.

By reserving to the legislative branch the power to reduce or abolish national monuments and offshore protected areas, the one-way levers of OCSLA and the Antiquities Act parallel this public trust doctrine jurisprudence. Congress, like state legislatures, is designed to operate through a sequential, democratic process that helps to guard against impulsive, misinformed, or unethical decisions with respect to public lands and resources. There is a significant risk to giving the President the power to rescind national monuments at will: the nation’s cultural, historical, and scenic legacy would rest upon the particular preferences or whims of one person, with their attendant biases and blind spots. Similarly, a concern about the biases of lone and local actors trumping the broader public interest animated and informed Professor Sax’s articulation of the public trust doctrine as best effectuated by state legislatures.<sup>241</sup> Crafting these provisions as one-way levers reflects considerable foresight in light of the recent, unprecedented actions of the Trump Administration that pits short-term local interests, such as fossil fuel production, against the broader long-term public interest in maintaining offshore protected areas and national monuments, as demonstrated through the millions of public comments opposed to shrinking any national monument boundaries.<sup>242</sup>

Congress is a deliberative body; protecting public lands through congressional action often entails multiple hearings with witnesses, several rounds of legislation drafting, and protracted negotiations. Such a deliberative process has benefits and may lead to worthwhile compromises,

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<sup>239</sup> See generally Squillace et al., *Presidents Lack Authority*, *supra* note 16 (using similar factors to demonstrate that “Congress intended to reserve for itself the power to revoke or modify national monument proclamations”).

<sup>240</sup> See discussion *infra* Part IV.C.

<sup>241</sup> For example, Sax described the controversy surrounding whether the Town of Emeryville could legally fill and develop parts of San Francisco Bay. Sax, *The Public Trust Doctrine*, *supra* note 20, at 532–34. This experience “suggest[ed] the need to adjust traditional decision-making mechanisms for [common] resources like the bay in light of the potential disjunction between the perceived benefit to the local entity and the total impact of such local choices on the community of users as a whole.” *Id.* at 534.

<sup>242</sup> See Exec. Order No. 13,792, 82 Fed. Reg. 20,429, 20,429 (May 1, 2017) (directing the Secretary of the Interior to review all monuments designated or expanded after January 1, 1996, for which the Secretary determines inadequate “public outreach and coordination with relevant stakeholders” occurred); Valerie Volcovici, *U.S. Interior Department Receives Over 2 Million Comments on Monument Review*, REUTERS, July 11, 2018, <https://perma.cc/PC3L-SV96>.

but it can also imperil the preservation of special places that require swift protection.<sup>243</sup> A president unrestrained by these processes can, by contrast, act quickly and decisively. Without such “bold executive actions,” many of the monuments, national parks, and marine reserves that we value today would not exist.<sup>244</sup>

But while speed and decisiveness in *protecting* public lands may be an asset, which helps explain why Congress delegated to the executive branch the authority to create monuments and offshore reserves in the first place, haste in *removing* such protections and opening these lands to development could threaten their very existence. Once protected status is removed, such federal lands typically default to their original management plans, which may allow for resource extraction, commercial fishing, and other uses previously found to imperil their security or longevity. Congress may not be able to act quickly enough to stop such executive branch actions to prevent the permanent degradation of former monuments and offshore reserves.

Therefore, the Antiquities Act and OCSLA section 12(a) are part of a lineage of public lands jurisprudence that requires the “monumental” decision of whether to rescind public land protections to be made by legislatures, or at least through explicitly delegated authority. This important context counters the argument made by Gaziano and Yoo that, “Almost every grant of power, by Constitution or statute, implicitly also includes the power of reversal.”<sup>245</sup> As Bruce Fein and W. Bruce DelValle have argued: “Exceptions to the Constitution’s entrustment of all legislative power to Congress should be narrowly construed to safeguard against executive tyranny.”<sup>246</sup> It would be unwise to read unrestrained executive branch power into statutes where none exists, especially where statutory purpose and intent is to preserve public objects and places for the benefit of present and future generations.

Gaziano and Yoo cite examples from different legal contexts to support their claim that “a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation.”<sup>247</sup> But different rules apply in different legal contexts, and in the public lands context, every grant of power does not include the power of reversal. For instance, Gaziano and Yoo cite the example of agency rulemaking authority, which is generally understood to allow an agency to repeal regulations, consistent with statutory authority.<sup>248</sup> But this example is distinct from the present issue in at least two important ways: first, the

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<sup>243</sup> See John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 304 (2001) (“Although the existence of an immediate threat is not a necessary precondition to protective action, where threats do exist, the executive is almost always able to act more quickly than the Congress.”).

<sup>244</sup> See *id.* at 301–02, 304 (describing the hurdles to protection through legislative action and stating that only a fraction of lands considered are ultimately protected).

<sup>245</sup> Gaziano & Yoo, *Magical Legal Thinking*, *supra* note 22.

<sup>246</sup> BRUCE FEIN & W. BRUCE DELVALLE, DISTORTING THE ANTIQUITIES ACT TO AGGRANDIZE EXECUTIVE POWER—NEW WINE IN OLD BOTTLES 4 (2017), <https://perma.cc/2SAU-XFGT>.

<sup>247</sup> YOO & GAZIANO, PRESIDENTIAL AUTHORITY, *supra* note 22, at 7.

<sup>248</sup> *Id.* at 7–8.

President is not an agency and is not subject to the APA and its procedural protocol that applies to agency actions issuing, repealing, and revising regulations, such as the “notice and comment” rulemaking process.<sup>249</sup> Here, by contrast, without such procedural constraints, a President could essentially delete national monuments by keystroke.<sup>250</sup>

Second, the agency rulemaking example and the others cited by Gaziano and Yoo are not congressionally delegated powers deriving from the Property Clause of the U.S. Constitution. For instance, they cite the power of higher courts to overrule lower courts’ judicial opinions, as well as executive branch powers deriving directly from the Constitution.<sup>251</sup> Each of these examples is distinct from the situation at hand; some of these examples deal with different branches of government or actors; others describe different sources of constitutional authority, like the Treaty Clause.<sup>252</sup> Here, by contrast, the Constitution gives Congress, not the President, the power to administer federal lands.<sup>253</sup> Congressional authority over public lands is “without limitations.”<sup>254</sup> The legislative branch delegated the power to designate national monuments and to withdraw offshore areas from leasing to the executive branch through specific laws, but it did not confer the ability to diminish or revoke those reservations. And as described in Part III, statutes passed contemporaneous to the Antiquities Act and OCSLA section 12(a) show that when Congress sought to delegate a multidirectional power with respect to public land protections, it did so explicitly.<sup>255</sup>

Finally, the particular context of protected federal lands is relevant to interpreting these provisions as one-way levers, as demonstrated by the longstanding public trust jurisprudence described in Part IV. As one more example of how public lands are distinct and have been treated as such for centuries, implied executive branch power to reserve and protect federal lands, but not to open such lands to development, existed for a century before Congress expressly revoked it in the Federal Land Policy and Management Act, passed in 1976.<sup>256</sup> In *United States v. Midwest Oil Co.*,<sup>257</sup> the Supreme Court explained the long history of executive branch “reservations” and congressional acquiescence to such reservations:

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<sup>249</sup> See *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding that the President is not an “agency” under the APA); see also APA, 5 U.S.C. §§ 551–559 (2012) (laying out extensive procedures for notice and comment rulemaking that apply to agencies).

<sup>250</sup> While the broad electorate would serve as one check on this authority, through the power to select another president later, for presidents in their final term, this check is less powerful.

<sup>251</sup> See YOO & GAZIANO, PRESIDENTIAL AUTHORITY, *supra* note 22, at 7–8.

<sup>252</sup> See U.S. CONST. art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

<sup>253</sup> See *id.*, art. IV, § 3, cl. 2.

<sup>254</sup> See *Alabama*, 347 U.S. 272, 273 (1954).

<sup>255</sup> See discussion *supra* Parts III.B–C.

<sup>256</sup> See Getches, *supra* note 211, at 313.

<sup>257</sup> 236 U.S. 459 (1915).

The Executive . . . withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public but did not interfere with any vested right of the citizen.<sup>258</sup>

The Court noted that “the withdrawal orders prevented the acquisition of any private interest in such land.”<sup>259</sup> Thus, implied executive branch authority to reserve public lands served to *prevent* private interests from controlling and exploiting public land. This implied authority to withdraw and protect public lands existed for so long, until expressly repealed by the Federal Land Policy and Management Act, because it fit neatly in line with the stewardship goals of the federal government and did not intrude upon the legislative branch’s ultimate prerogative over public lands.<sup>260</sup> As Getches explained: “To allow [private] uses without some delegation of authority from Congress arguably usurps the authority of the legislative branch under the Property Clause. To deny private uses, on the other hand, preserves congressional prerogatives and flexibility.”<sup>261</sup>

In short, the public trust doctrine illuminates the wisdom of the structure established in OCSLA section 12(a) and the Antiquities Act, and shows that it is not novel. The doctrine provides important context for a history of public lands jurisprudence in which courts demand greater justification for actions allowing development on public lands than for protecting the same lands. Indeed, the doctrine can be applied as a canon of interpretation that requires a “clear statement” by Congress before interpreting a statute to allow actions that could otherwise impair public lands and resources.

## VII. CONCLUSION

President Trump has already taken actions with respect to public lands that this Article argues no president has the authority to take. These actions include reversing presidential withdrawals of Outer Continental Shelf areas from oil and gas leasing and embarking on a far-reaching “review” of existing national monuments, culminating in sharp boundary reductions.<sup>262</sup> Moreover, the Trump Administration may attempt to take additional actions, likewise without legislative authority, that threaten the preservation of our nation’s protected lands.

Ultimately, the legality of these executive branch actions will be decided by the federal courts. In examining the extent of presidential power over protected public lands as set forth in the Antiquities Act and OCSLA section 12(a), courts should look first to the statutory text and constitutional

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<sup>258</sup> *Id.* at 475.

<sup>259</sup> *Id.* at 479.

<sup>260</sup> See *Getches*, *supra* note 211, at 287–88.

<sup>261</sup> *Id.* at 287.

<sup>262</sup> See discussion *supra* Part II.

framework, but also at the broader context of public land management, including the public trust doctrine.

The powers conferred to the President in the Antiquities Act and section 12(a) of OCSLA operate in one direction only: towards preservation. Presidents do not have the authority to rescind national monument designations or to restore previously withdrawn areas to offshore leasing; Congress retains this authority through its plenary power over public lands as articulated in the Property Clause.

The Antiquities Act and OCSLA section 12(a) reflect the wisdom of their drafters in conferring a one-way executive branch power to preserve federal lands. While allowing relatively unencumbered presidential actions to protect special places and natural resources, they reserve to Congress the more “monumental” power to modify or abolish national monuments and to return withdrawn offshore lands to disposition by fossil fuel leasing. This interpretation is consistent not only with statutory text, the relevant constitutional framework, and legislative history, but also with the enduring national narrative that public lands should be regulated according to principles of democratic decision making, especially where important public trust interests are at stake.