

HOW MUCH LAND CAN BE INCLUDED IN A
NATIONAL MONUMENT?—ANALYZING THE
“SMALLEST AREA COMPATIBLE” REQUIREMENT IN
THE ANTIQUITIES ACT

BY
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The Antiquities Act allows the President to designate “objects of historic or scientific interest” as “national monuments,” so long as the reserve is confined to the “smallest area compatible with the proper care and management of the objects.” Presidents have used this power expansively, protecting massive tracts of federal land, often by claiming that very large things, such as the Grand Canyon, or even entire landscapes, are “objects” in the requisite sense. Much legal debate has focused on whether these interpretations of “object” are justified. There remains a different issue, however, that has received considerably less attention: what is the smallest area compatible with the proper care and management of the objects? Does the Act, for instance, only allow presidents to protect the object of interest and not much more, or does it allow presidents to protect a substantial amount of land beyond an object of interest? I draw from language in the Act and existing case law to develop a framework for answering these questions. At bottom, properly caring for objects of “historic or scientific interest” can involve protecting features of the landscape if those features contribute to the historic or scientific interest of the objects, or to their study. This supports larger protections than some have thought, but it also places limits on the size of a given monument. The result is a principled framework for determining how large national monuments can be. More broadly, the discussion illustrates the usefulness of a value-focused analysis of environmental laws.

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I.	INTRODUCTION.....	708
II.	THE ANTIQUITIES ACT: HISTORY AND CONTROVERSY	711
	A. <i>Historical Background</i>	711
	B. <i>Original Intent and Meaning</i>	714
	C. <i>The Progression to Protecting Larger Objects of Interest</i>	716
	D. <i>Litigation Regarding “Object[s] of Interest”</i>	718
	1. <i>Cameron v. United States (1920)</i>	718
	2. <i>Cappaert v. United States (1976)</i>	719
	3. <i>Alaska v. United States (2005)</i>	720
	4. <i>Anaconda Copper Company v. Andrus (1980)</i>	720
	5. <i>Wyoming v. Franke (1945)</i>	721
	6. <i>Massachusetts Lobstermen’s Association v. Ross (2018)</i>	722
	E. <i>An Overlooked Issue</i>	723
III.	A FRAMEWORK FOR ANSWERING THE QUESTION	726
	A. <i>The Cappaert and Alaska Rulings, Redux</i>	727
	B. <i>Studying Scientific Interest: Lessons from Geomorphology</i>	730
	C. <i>Studying Historical Interest: Lessons from NHPA and the</i> <i>National Register</i>	732
	D. <i>Language from the Antiquities Act</i>	733
	E. <i>The Resulting Framework</i>	734
IV.	EXAMPLES, OBJECTIONS, AND REFINEMENTS.....	736
	A. <i>Two Examples: Devils Tower and Grand Canyon</i>	736
	B. <i>How Much Must the Surrounding Landscape Contribute to an</i> <i>Object’s Interest?</i>	738
	C. <i>A New Argument for Expansive Monuments: Bears Ears ...</i>	740
V.	CONCLUSION: A VALUE-FOCUSED ANALYSIS OF ENVIRONMENTAL LAWS.....	743

I. INTRODUCTION

In 1906, the United States Congress passed the Antiquities Act (Antiquities Act or Act).¹ The legislation allows the President,

¹ American Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (originally codified as amended at 16 U.S.C. §§ 431–433, current version at 54 U.S.C. § 320301–320303, 18 U.S.C. § 1866(b)); American Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (2012). The American Antiquities Act was recodified in 2014 under title 54 of the United States Code after title 54 was created for the purpose of moving existing laws related to National Parks under one title. See An Act to Enact Title 54, Pub. L. No. 113-287 § 2, 128 Stat. 3094 (2014) (codified as amended at 54 U.S.C. §§ 100101–320301) (purpose of establishing title 54); see also Antiquities Act, Pub. L. No. 113-287 Ch. 3203, 128 Stat. 3259 (codified at 54 U.S.C. §§ 320301–320303) (recodifying the Antiquities Act); Antiquities Act, 54 U.S.C. §§ 320301–320303 (2018). Section 433 of the original act was recodified under title 18, 18 U.S.C. § 1866(b) (2018). References to the Antiquities Act will be provided to the current version, codified primarily at title 54, but some cases and materials discussed may refer to the earlier version of the act Antiquities Act, 16 U.S.C. §§ 431–433. Cf. 54 U.S.C. §§ 320301–320303 (2018).

unilaterally, to create “national monuments.”² Although its passage was spurred by concern over the protection of indigenous antiquities, the Act allows presidents to protect “other objects of historic or scientific interest.”³ Under this language, presidents have protected massive areas of the federal domain, often by claiming that very large geologic features, such as the Grand Canyon, biological entities such as species, or even entire landscapes, are objects of interest.⁴ The Act has, as a result, played a key role in shaping America’s system of public lands, having been used numerous times by presidents on both sides of the aisle to preserve millions of acres of federal land.⁵

However, and perhaps unsurprisingly, the Act has also been a source of controversy, with critics objecting that presidents have stretched the law beyond its original intent and meaning.⁶ In particular, one of the most common objections is that a given natural entity does not qualify as an “object of interest.”⁷ Much of the legal discussion has therefore centered around this issue. Courts, for their part, have routinely upheld expansive readings of the “object of interest” language, agreeing with presidents that large geologic entities, species, and ecosystems can all qualify.⁸ At most, only very extreme things, such as “climatological phenomen[a]” and

² 54 U.S.C. § 320301(a).

³ *Id.*; See Christine Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1332, 1333 (2001) (discussing the general difference between archeological ruins and indigenous antiquities).

⁴ See, e.g., Proclamation No. 794, 35 Stat. 2175 (1908) (regarding the Grand Canyon), reprinted in DEP’T OF INTERIOR, PROCLAMATIONS AND ORDERS RELATING TO THE NATIONAL PARK SERVICE UP TO 1945 204 (1947); Proclamation No. 6920, 3 C.F.R. § 64 (1997) (regarding, in part, biological entities of interest with Grand-Staircase Escalante National Monument); Proclamation No. 10606, 88 Fed. Reg. 55331, 55338 (Aug. 15, 2023) (finding the landscape of the Baaj Nwaavjo I’ah Kukveni National Monument of special interest).

⁵ Mark Squillace, *The Monumental Legacy of The Antiquities Act of 1906*, 37 GA. L. REV., 473, 474, 585 (2003) [hereinafter Squillace, *Monumental Legacy*]. For skepticism about the environmental benefit of monuments, see Ann E. Halden, Note, *The Grand Staircase-Escalante National Monument and the Antiquities Act*, 8 FORDHAM ENV’T L. REV. 713, 717, 722, 727 (1997).

⁶ The controversies over national monuments might unfairly overshadow the broad agreement they receive from members of the public, various industries, and congresspeople. Such overshadowing would be part of what John Leshy argues is a “myth” regarding public lands—that they are more controversial than they really are. See generally JOHN D. LESHY, 2018 WALLACE STEGNER LECTURE: DEBUNKING CREATION MYTHS ABOUT AMERICA’S PUBLIC LANDS (2018) (discussing national monuments’ role in unifying the country). However, because changes to the Antiquities Act can be brought by a single litigant, or a few politicians with enough political sway, it is these controversies that will be my focus here. For an example of the sort of criticism offered of the Act, see Orrin G. Hatch, Opinion, *It’s Time to Undo the Federal Land Grab of Bears Ears*, SALT LAKE TRIB. (April 26, 2017, 10:39 AM), <https://perma.cc/4ACH-Q6D7>.

⁷ E.g., *Cameron v. United States*, 252 U.S. 450, 455–56 (1920); *Cappaert v. United States*, 426 U.S. 128, 141–42 (1976); *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945); *Mass. Lobstermen’s Ass’n v. Ross*, 349 F. Supp. 3d 48, 68 (D.D.C. 2018), *aff’d*, 945 F. 3d 535 (D.C. Cir. 2019), *cert. denied sub nom. Mass. Lobstermen’s Ass’n v. Raimondo*, 141 S. Ct. 979 (Mem.) (2021).

⁸ See discussion, *infra* Section II.D.

prairies entirely devoid of objects of interest, have been thought to fall possibly outside the “object of interest” language.⁹ The legal discussion of what counts as an “object” under the Act has therefore yielded relatively clear precedent on this matter.

By contrast, there is a different issue that has received comparatively little attention. The Act requires that monuments be “confined to the smallest area compatible with the proper care and management of the objects to be protected.”¹⁰ This raises the question: what *is* required for the proper care and management of the objects in question? An answer is needed to determine fully the scope of the Antiquities Act and the amount of land that can be set aside for a given monument. For instance, does the proper care and management involve protecting just the object and nothing beyond it? Or can it involve protecting a substantial amount of land around the objects of interest, too? Carol Hardy Vincent and Pamela Baldwin noted in 2001 that “[d]efenders [of the Antiquities Act] . . . assert that preserving objects of interest may require withdrawal of sizeable tracts of surrounding land.”¹¹ However, they continue: “[T]he case law on this subject is not extensive, and it is uncertain what conclusion a court would reach in any particular case in the future.”¹² Chief Justice John Roberts recently penned a statement in which he drew attention to the same lacuna: “No court of appeals has addressed the questions raised above about how to interpret the Antiquities Act’s ‘smallest area compatible’ requirement.”¹³ Meanwhile, in Congress, proposals have been offered to make explicit the amount of land that can be set aside under the Act, with some proposals greatly reducing the size of monuments, and others inviting more expansive designations.¹⁴

In light of this, it is important to analyze how much land can justifiably be set aside for the protection of a given object. In what follows, I develop such an analysis. Drawing from language in the Antiquities Act, existing case law, and evidence from the sciences and the field of historic preservation, I argue that a president can, under some circumstances, include a considerable amount of land around objects of interest within a monument boundary. The details in any given case will be determined by what parts of the broader area contribute to the historic or scientific interest of the objects, or to studies thereof. Notably, the framework

⁹ *Franke*, 58 F. Supp. 890 at 895 (discussing a hypothetical monument on a “bare stretch of sage-brush prairie”); *Anaconda Copper Co. v. Andrus*, No. 79-161, 1980 U.S. Dist. LEXIS 17861, at *9 (D. Alaska July 1, 1980) (discussing a “climatological phenomenon”).

¹⁰ Antiquities Act, 54 U.S.C. § 320301 (2018).

¹¹ CAROL HARDY VINCENT & PAMELA BALDWIN, CONG. RSCH. SERV., RL30528, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT: RECENT DESIGNATIONS AND ISSUES 5 (2001).

¹² *Id.*

¹³ *Mass. Lobstermen’s Ass’n v. Raimondo*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

¹⁴ See, e.g., H.R. REP. NO. 115-1081, at 1–4 (2018) (proposing amendments to the Antiquities Act which would restrict the size of proposed monuments and outlining language and legislative history for the act). For discussion, see also VINCENT & BALDWIN *supra* note 11, at 2; Klein, *supra* note 3, at 1336; and Squillace, *Monumental Legacy supra* note 5, at 479.

developed below is neutral on what qualifies as an object of interest, so it applies both to objects that fit a narrow, originalist understanding of the Act, as well as to more expansive objects. One consequence of this is that it can provide a way to argue on some critics' own grounds for expansive protections. It also, however, imposes limits on the acreage needed for a given monument. At some point, features of the landscape will cease to contribute to the specified object's historic or scientific interest. Thus, by letting the values mentioned in the Act—historic and scientific interest¹⁵—determine the amount of land a president can protect for a given object, the framework offers a principled approach to determining the size of monuments. This helps respond to a concern, expressed by Chief Justice Roberts, that presidential power under the Act has been “transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain.”¹⁶

Finally, the following discussion also highlights the possibility, and the importance, of a value-focused analysis of environmental laws, more broadly. Many such laws state as their aim the protection or promotion of specific values. While there are many questions to explore about these laws—“what qualifies as an object of interest?” being one such question regarding the Antiquities Act—there are numerous questions to explore specifically at the intersection of law and Value Theory.¹⁷ What values lie at the heart of a given piece of legislation? What, as a matter of law, is required to protect or promote those values? And ought Congress revise the law to better respond to the values in question? The ensuing discussion illustrates that these questions, though sometimes neglected, are important, and it hopefully serves as a guide to other such explorations of environmental laws in the future.

II. THE ANTIQUITIES ACT: HISTORY AND CONTROVERSY

A. *Historical Background*

Let us begin with a brief overview of the Act. Section (2) is often seen as the heart of the legislation. As originally enacted, it read:

¹⁵ Antiquities Act, 16 U.S.C. § 431 (2012) (mentioning the values and objects to be protected under Act). This language is also reflected in the current version of the law. 54 U.S.C. § 320301 (2018).

¹⁶ *Mass. Lobstermen's Ass'n*, 141 S. Ct. at 981 (Roberts, C.J., statement respecting the denial of certiorari).

¹⁷ Value Theory, as meant here, is the philosophical field devoted to the study of foundational questions about value: What is it for something to be valuable? How does one assess something's value? And how do values differ from one another, both in terms of their nature, but also the attitudes, actions, and policies it makes sense to adopt in light of them? For a survey of the field of Value Theory, see Mark Schroeder, *Value Theory*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta & Uri Nodelman eds., rev. ed. 2021) (ebook), <https://perma.cc/WZ74-B2YW>.

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

Upon recodification in 2018, Congress split Section 2 into three sentences but retained the core language.¹⁹ Thus, the Act holds that monuments are to be based around any of three things: 1) historic landmarks, 2) historic and prehistoric structures, or 3) other objects of historic or scientific interest. As the Act's name suggests, it was objects of the sort described by 1) and 2) that initially prompted Congress to pass the legislation.²⁰ During the second half of the 19th Century and first decade of the 20th Century, a number of ranchers, archeologists, and tourists explored the Southwest's indigenous sites, particularly in southern Utah and the Four Corners area.²¹ As they did so, they removed artifacts and human remains from those sites, placing them up for sale or collecting them in exhibits.²² This raised alarm among societies such as the American Association for the Advancement of Science and the Archaeological Institute of America, which saw the collection and sale of these artifacts as threatening scientific and archeological enterprises (even though some institutions benefited from the expeditions).²³ As a result, such groups asked Congress to provide an avenue through which the federal government could offer speedy protection to such sites.²⁴

Congress recognized the need to protect these "antiquities." One avenue could be through the national park designation, which Congress could, in theory, apply to areas of concern.²⁵ However, only Congress holds

¹⁸ Antiquities Act, 16 U.S.C. § 431 (2012). Section (2) can now be found in title 54 with slightly modified language, 54 U.S.C. § 320301(a)–(b) (2018).

¹⁹ 54 U.S.C. § 320301(a)–(b) (2018).

²⁰ Squillace, *Monumental Legacy*, *supra* note 5, at 477; David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RES. J. 279, 302 (1982).

²¹ ANDREW GULLIFORD, BEARS EARS: LANDSCAPE OF REFUGE AND RESISTANCE 166–167 (2022).

²² *Id.* at 155.

²³ ROBERT CLAUS, DIV. OF INTERIOR, REFERENCE SERVICE REPORT: INFORMATION ABOUT THE BACKGROUND OF THE ANTIQUITIES ACT OF 1906 2, 5 (1945).

²⁴ *Id.* at 2, 10. See also Ronald F. Lee, *The Origins of the Antiquities Act*, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION 15, 16 (David Harmon et al. eds., 2006) (expanding on the historical context compelling preservation societies to act).

²⁵ As Alfred Runte notes, there was some degree of resistance within Congress for even today's most popular national parks. See ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 43–56 (4th ed. 2010). Such members would be moved to protect parks only once their "worthlessness" for timber, mining, and ranching was demonstrated. *Id.*

this authority and designation involves a years-long, arduous process.²⁶ Faster protection could be ensured if, say, the President could single-handedly protect antiquities. At the same time, however, there was concern within Congress about granting the president *too* much power. In 1891, Congress had given presidents the authority to create “forest reserves,” which were the predecessor to today’s national forests.²⁷ Within fifteen years of that legislation, more than eighty-five million acres of public land had been designated by presidents as reserves, most of which were in western states.²⁸ This drew the ire of some senators, who viewed this as a sort of federal land grab insofar as it limited the amount of land that could enter into private hands or a state’s holdings.²⁹ Indeed, in 1907 Congress ended presidential creation of forest reserves in the Northwest, requiring an act of Congress to create them from that time on.³⁰

So, leading up to 1906 and the passage of the Antiquities Act, opposing forces were in play: some members of Congress felt a need for speedy protection of indigenous artifacts, something that presidential decree could provide, but there was also concern about granting the President too much power in setting aside federal lands from sale and use.³¹ The early legislative history of the Act displays this tension.

An early draft, written in 1900, would have granted the President the power to set aside more than the final Act allows.³² In particular, it would have allowed the President to protect “any natural formation of scientific or scenic value or interest, or natural wonder or curiosity on the public domain, together with such area of land surrounding or adjoining the same, as he may deem necessary for the proper preservation or suitable enjoyment of said reservation.”³³ The reference to “scenic value” would have expanded the scope of monuments beyond just historical and scientific interest, as would have the idea that presidents can protect “surrounding” land if deemed necessary for “the suitable enjoyment of

²⁶ In the 1901 Annual Report for the Commissioner of the General Land Office, it was noted:

“Owing to the want of some such general provision of law, each case, as it arises now, has to be made a matter for special legislation, and, in consequence, becomes subject to frequent delays and postponements, extending in some cases over years, which is a serious matter, since the need for promptness of action is frequently emergent”

ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICER TO THE SECRETARY OF THE INTERIOR FOR FISCAL YEAR ENDED JUNE 30, 1901, No. 8937-01-01, at 154 (1901).

²⁷ Forest Reserve Act, Ch. 561, § 24, 26 Stat. 1095, 1103 (1891).

²⁸ DAVID A. CLARY, *TIMBER AND THE FOREST SERVICE* 3 (1986).

²⁹ Klein, *supra* note 3, at 1385–86.

³⁰ The change applied to forests in Oregon, Washington, Idaho, Montana, Colorado, and Wyoming. GERALD W. WILLIAMS, *U.S. FOREST SERV., FS-650, THE USDA FOREST SERVICE—THE FIRST CENTURY* 25 (rev. ed. 2005).

³¹ Squillace, *Monumental Legacy*, *supra* note 5, at 477, 481–82 (2003).

³² CLAUS, *supra* note 23, at 2–3.

³³ *Id.* (quoting H.R. 8066, 56th Cong. § 7 (1900) (proposed bill offered by Representative Dolliver on February 5, 1900)). Notice the more expansive language: “scenic value,” “wonder or curiosity,” and “suitable enjoyment.” *Id.*; *cf.* Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (removing the more expansive language that was initially proposed).

said reservation.”³⁴ Meanwhile, other versions of the Antiquities Act would have limited presidential power far more than the actual Act does. Some, for instance, would have granted the President only the ability to establish national monuments of at most 320 or 640 acres in size.³⁵ The final Act strikes a balance between these versions.³⁶ It allows the President to protect a variety of different kinds of entities—landmarks and certain structures, as well as the seemingly-wider category “objects of historic or scientific interest”—but it leaves out mention of “scenic value,” and it permits the President to preserve only “the smallest area compatible with the proper care and management of the objects to be protected.”³⁷

B. Original Intent and Meaning

From the congressional record, it is clear that some members of Congress thought that the final language of the Act would not greatly expand the President’s authority and would only protect small objects with correspondingly small areas of land. In an oft-cited passage from the record, Representative John Lacey (R-Iowa), who brought the bill before the House, responded to worries about presidential power:

Mr. STEPHENS of Texas: How much land will be taken off the market in the Western States by the passage of the bill?

Mr. LACEY: Not very much. The bill provides that it shall be the smallest area necessary [sic] for the care and maintenance of the objects to be preserved.

Mr. STEPHENS of Texas: Would it be anything like the forest-reserve bill, by which seventy or eighty million acres of land in the United States have been tied up?

Mr. LACEY: Certainly not. The objective is entirely different. It is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest, whilst the other reserves the forests and the water courses.³⁸

³⁴ CLAUS, *supra* note 23, at 3–4.

³⁵ *Id.* at 5–6; *see also* VINCENT & BALDWIN, *supra* note 11, at 4–5 (noting that some proposed versions of the Act limited acreage); Klein, *supra* note 3, at 1342 (“An earlier bill passed by the Senate would have limited monument size to 640 acres.”); Squillace, *Monumental Legacy*, *supra* note 5, at 479, 481, 483 (discussing a proposed bill that would have authorized reservation of tracts of land of up to 320 acres).

³⁶ *See* HAL ROTHMAN, AMERICA’S NATIONAL MONUMENTS: THE POLITICS OF PRESERVATION 49 (1989) (describing the Antiquities Act as a fusion between disparate ideas).

³⁷ 54 U.S.C. § 320301 (2018).

³⁸ Squillace, *Monumental Legacy*, *supra* note 5, at 484 n.59 (citing 40 CONG. REC. 7,888 (1906)).

In speaking of “old objects of special interest” in the same breath as “Indian remains,” where the latter are localized structures and landmarks, it is reasonable to assume that Lacey thought that the “objects of special interest” would be localized entities as well.³⁹ Some writers, such as Christine Klein, have even suggested that “Congress intended simply to protect the nation’s *archaeological* treasures,” not natural objects.⁴⁰ Whether this is true remains uncertain—after all, earlier versions of the Act explicitly allowed for the protection of natural objects, and the version that got passed into law is seen as a compromise between the earlier versions.⁴¹ However, at most, Lacey intended for the Act to be used to protect relatively *small, localized* natural and archeological objects. Indeed, Lacey made explicit that monuments would not protect “forests and water courses”—two kinds of entities that are generally expansive in size.⁴²

The original meaning of the Act seems to match this intent.⁴³ The term “object” can be defined quite broadly to refer to anything one can think about or direct actions towards, as noted by both the Black’s Law Dictionary and dictionaries at the time of the Act’s passage.⁴⁴ However, such a reading does not fit with other elements of the Act. For instance, insofar as the Act only speaks of lands owned or controlled by the federal government, it follows that only material objects are to be protected, whereas the broader reading of “object” can refer to immaterial objects as well. So, it is more likely that someone at the time would have interpreted the Act’s use of “object” narrowly, perhaps referring just to small, localized objects, such as the structures and landmarks mentioned elsewhere in the legislation.⁴⁵ Lending support to this understanding is the claim that monuments are to be constrained in size. Thus, an originalist understanding of the Act arguably holds that presidents may

³⁹ *See id.*

⁴⁰ Klein, *supra* note 3, at 1334 (emphasis added).

⁴¹ *See* Squillace, *Monumental Legacy*, *supra* note 5, sec. II (outlining the history of the formulation of the Antiquities Act).

⁴² 40 CONG. REC. 7,888 (1906).

⁴³ In contemporary legal theory, originalists distinguish “original intent” from “original meaning.” The former is what the authors intended, while the latter is the meaning “a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.” RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 94–95 (updated ed. 2013).

⁴⁴ The former defines “object” as “[a] person or thing to which thought, feeling, or action is directed.” *Object*, BLACK’S LAW DICTIONARY (10th ed. 2014). It then defines “thing”: “1. The subject matter of a right, whether it is a material object or not; any subject matter of ownership within the sphere of proprietary or valuable rights.” *Thing*, BLACK’S LAW DICTIONARY (10th ed. 2014). A version of Webster’s from 1908 defines object as “anything placed before the mind or senses; motive; end; aim.” WEBSTER’S NEW ILLUSTRATED DICTIONARY OF THE ENGLISH LANGUAGE (Frank E. Wright ed., 1908).

⁴⁵ *See* Getches, *supra* note 20, at 301–02.

only protect relatively small objects with correspondingly small areas of land.⁴⁶

C. The Progression to Protecting Larger Objects of Interest

Initially, presidents adhered to this original intent and meaning. The first monument—Devils Tower in Wyoming, designated by President Theodore Roosevelt in 1906—was originally only 1,152.91 acres in size and protected the eponymous tower, which is a relatively isolated feature on the landscape.⁴⁷ El Morro in New Mexico, also designated by Roosevelt in 1906, was a mere 160 acres and protected a prominent sandstone feature with a pueblo situated on top.⁴⁸ Similarly, Montezuma Castle in Arizona, 161 acres in size, protected a cliff dwelling.⁴⁹ This trend, however, did not last long. Even within the same year, Roosevelt began protecting progressively larger areas. He created Petrified Forest National Monument, which stood at over 60,000 acres,⁵⁰ and within two more years, he was protecting over 800,000 acres as Grand Canyon National Monument.⁵¹ Presidents have continued to use the Act expansively. To list a few recent examples: President Bill Clinton designated nearly 1.7 million acres as the Grand Staircase-Escalante National Monument,⁵² President George W. Bush did the same for nearly 61 million acres as the underwater Marianas Trench Marine National Monument,⁵³ and President Barack Obama designated the more than 1.3 million acres Bears Ears National Monument, which was recently redesignated by President Joe Biden.⁵⁴

In many cases, presidents justify large monuments by citing the presence of very large objects of interest.⁵⁵ Sometimes it is a large geologic

⁴⁶ Others reach a similar conclusion. *See id.* at 302; VINCENT & BALDWIN, *supra* note 11, at 5.

⁴⁷ Proclamation No. 658, 34 Stat. 3236 (1906), *reprinted in* DEP'T OF INTERIOR, *supra* note 4, at 171, 172.

⁴⁸ Proclamation No. 695, 34 Stat. 3264 (1906), *reprinted in* DEP'T OF INTERIOR, *supra* note 4, at 177, 178.

⁴⁹ Proclamation No. 696, 34 Stat. 3265 (1906), *reprinted in* DEP'T OF INTERIOR, *supra* note 4, at 235, 236.

⁵⁰ *See* Proclamation No. 697, 34 Stat. 3266 (1906), *reprinted in* DEP'T OF INTERIOR, *supra* note 4, at 268.

⁵¹ Proclamation No. 794, 35 Stat. 2175 (1908) *reprinted in* DEP'T OF INTERIOR, *supra* note 4, at 28; *see also* Frank Norris, *The Antiquities Act and the Acreage Debate*, 23 THE GEORGE WRIGHT FORUM, no. 3, 2006, at 6, 9–10 (discussing controversy around the Grand Canyon's designation and how the Grand Canyon National Monument was later redesignated a national park). Here and elsewhere, I refer to national monuments under their initial title, even if they were later redesignated.

⁵² Proclamation No. 6920, 3 C.F.R. § 64 (1997).

⁵³ Proclamation No. 8335, 3 C.F.R. § 1 (2010).

⁵⁴ Proclamation No. 9558, 3 C.F.R. §§ 402, 407 (2017).

⁵⁵ They also sometimes justify the large area by citing a plethora of smaller objects on the landscape. Indeed, whereas early monument proclamations offered no more than a sentence or two by way of justification, nowadays they tend to be multi-page documents

feature that is selected. President Roosevelt, for instance, held that the Grand Canyon itself was an object of interest,⁵⁶ and President Bush echoed the idea when he singled out part of the Marianas Trench, spanning 940 nautical miles within the United States Exclusive Economic Zone, as such an object.⁵⁷ Meanwhile, other monuments have been created partly on the grounds of protecting species, which are large entities in the sense of being spatially extended over a geographic area.⁵⁸ Some politicians and scholars have also suggested that entire landscapes, themselves, can be objects of interest. Bruce Babbitt, Secretary of the Interior under President Clinton, is a proponent of the idea. He thinks that the Antiquities Act should be used to protect “Landscape Monuments” and “anthropological ecosystems,” saying that it “isn’t about a ruin here or there . . . it’s about a whole, interwoven landscape . . . it’s about communities that were living in and on this land . . . and drawing their living and their inspiration and their spirituality from a landscape.”⁵⁹ This idea has appeared quite recently in many of President Biden’s proclamations. When re-designating Bears Ears, he described the landscape as a “cultural landscape” and a “living breathing landscape,” suggesting that it, itself, is an object worthy of protection.⁶⁰ And even more recently, he referred to landscapes within the Baaj Nwaavjo I’tah Kukveni National Monument as “themselves objects of historic and scientific interest.”⁶¹

However, even though presidents on both sides of the political aisle have designated expansive monuments, they have faced, and continue to face, considerable pushback. Recently, for instance, there was much debate over Bears Ears and Grand Staircase-Escalante National Monuments. Senator Orrin Hatch (R-Utah) criticized the Obama administration’s designation of Bears Ears, stating that President Obama violated “both the spirit, and arguably, the letter of the law,” when he “locked away an astonishing 1.35 million acres.”⁶² Senator Hatch raised the issue with President Trump who promised to “fix this disaster.”⁶³ The Trump administration then used the Antiquities Act to reduce drastically the size of Bears Ears and Grand Staircase-Escalante,

enumerating all sorts of significant objects. For an example, see President Obama’s proclamation creating Bears Ears, Proclamation No. 3 C.F.R. § 402 (2017).

⁵⁶ Proclamation No. 794, 35 Stat. 2175 (1908) *reprinted in* Dep’t of Interior, Proclamations and Orders Relating to the National Park Service Up to 1945, at 204 (1947).

⁵⁷ Proclamation No. 8335, 3 C.F.R. § 1 (2010). President Bush also cited the presence of many smaller geologic features, species, and ecosystems. *Id.*

⁵⁸ For instance, the Obama administration’s Bears Ears designation singled out the Ka-china daisy, as well as other species. Proclamation No. 9558, 3 C.F.R. § 402 (2017).

⁵⁹ Bruce Babbitt, From Grand Staircase to Grand Canyon Parashant: Is There a Monumental Future for the BLM?, University of Denver College of Law Carver Lecture (Feb. 17, 2000), *transcribed in* 3 U. DENV. WATER L. REV. 223, 224 227 (2000) (internal quotation marks omitted). This speech was quoted in Klein, *supra* note 3, at 1394.

⁶⁰ Proclamation No. 10285, 86 Fed. Reg. 57321, 57321–22 (Oct. 8, 2021).

⁶¹ Proclamation No. 10606, 88 Fed. Reg. 55331, 55338 (Aug. 15, 2023).

⁶² Hatch, *supra* note 6.

⁶³ *Id.*

claiming that vast areas of the original designations were not based around objects of historic or scientific interest, and that other parts were not confined to the smallest area compatible with the objects of interest found there.⁶⁴

D. Litigation Regarding “Object[s] of Interest”

The criticisms expressed by Senator Hatch and President Trump are not new. They echo objections that have been raised numerous times in the history of the Act.⁶⁵ In particular, much of the discussion in courts has centered around what qualifies as an “object of interest.”

1. Cameron v. United States (1920)

The first case brought before the courts takes up this issue regarding Grand Canyon National Monument. In 1920, the United States enjoined Ralph Cameron and others from occupying and using a stretch of land for mining purposes within the monument.⁶⁶ Cameron continued to assert exclusive right over the area, prompting the United States to bring suit.⁶⁷ In court, Cameron objected “that there was no authority for [the monument’s] creation” because the canyon was not an object of interest.⁶⁸ The Court disagreed. It held:

The Grand Canyon, as stated in [the President’s] proclamation, “is an object of unusual scientific interest.” It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.⁶⁹

In issuing this ruling, it is notable that the *Cameron* Court provided its own evidence that the canyon qualifies as an object of interest.⁷⁰ It did

⁶⁴ Proclamation No. 9681, 3 C.F.R. §§ 188, 189 (2018); Proclamation No. 9682, 3 C.F.R. § 196 (2018).

⁶⁵ For a slice of the academic discussion of these issues, see RONALD LEE, NAT’L PARK SERV., THE ANTIQUITIES ACT OF 1906 55–56, 98 (1970), <https://perma.cc/S9UH-9TLX>; Norris, *supra* note 51, at 10–15; James R. Rasband, *Antiquities Act Monuments: The Elgin Marbles of Our Public Lands?*, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION, *supra* note 24, at 137, 144–45; Rothman, *supra* note 36, at 54, 71; Mark Squillace, *The Antiquities Act and The Exercise of Presidential Power: The Clinton Monuments*, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION, *supra* note 24, at 106, 123–124 [hereinafter Squillace, *Presidential Power*]. See also generally Squillace, *Monumental Legacy*, *supra* note 5 (discussing the history of the Antiquities Act, including past and ongoing controversies).

⁶⁶ See *Cameron*, 252 U.S. 450, 454–55 (1920) (describing the factual background).

⁶⁷ *Id.* at 458.

⁶⁸ *Id.* at 455.

⁶⁹ *Id.* at 455–56.

⁷⁰ *Id.*

not merely repeat Roosevelt's rationale for the monument but found facts of its own for why the canyon merits protection under the Act.⁷¹ As a result, it provides strong precedent for expansive interpretations of "object of interest." Klein, for instance, takes the ruling to have "legitimized over a decade of executive practice protecting large landscapes."⁷² It lends particularly strong support for thinking that a president can use the Act to protect large *geologic* entities.

2. *Cappaert v. United States* (1976)

The second case to reach the Supreme Court—*Cappaert v. United States*⁷³—expanded the "object of interest" language further. The case centered around the protection of Devil's Hole, a pool of water in a detached unit of what was then Death Valley National Monument.⁷⁴ President Truman protected the waterhole for a number of scientific reasons, one of which was that it contained a rare species of pupfish, found in the wild only at this location.⁷⁵ If the water in the pool dropped to a certain point, algae production would decrease, threatening the species' existence.⁷⁶ Nearby, the Cappaert family drilled wells on their ranch and pumped groundwater, reducing the water in Devil's Hole.⁷⁷ In 1971, the United States sought an injunction that would limit the Cappaerts' pumping.⁷⁸ The Cappaerts objected, arguing, among other things, that the Act "did not give the President authority to reserve a pool" and that therefore the inclusion of it within a monument was unlawful.⁷⁹ Instead of preserving such things as a pool, the Cappaerts argued that the "President may reserve federal lands only to protect archeologic sites."⁸⁰ The Court, however, ruled against the Cappaerts. It held that "[t]he pool in Devil's Hole and its rare inhabitants are 'objects of historic and scientific interest.'"⁸¹ In reaching this conclusion, the Court cited, and did not take issue with, the earlier ruling from *Cameron*. Geologic entities, such as the pool, remained eligible for protection under the Act. Going further, however, the *Cappaert* ruling also said that a *species* can be an "object" of interest.⁸² It thereby expanded the scope of the Act beyond the ruling in *Cameron*.

⁷¹ *Id.*

⁷² Klein, *supra* note 3, at 1348; *see also* Squillace, *supra* note 5, at 486 n.70, 492 (noting that the Court declined to address the Antiquity Act's directive that monuments be "the smallest area compatible with" object preservation goals).

⁷³ 426 U.S. 128 (1976).

⁷⁴ *Id.* at 131.

⁷⁵ *Id.* at 131–32, 134.

⁷⁶ *Id.* at 133–34.

⁷⁷ *Id.* at 128, 133.

⁷⁸ *Id.* at 135.

⁷⁹ *Id.* at 141.

⁸⁰ *Id.* at 141–42.

⁸¹ *Id.* at 142.

⁸² *Id.*

3. *Alaska v. United States (2005)*

A yet further expansion comes from a more recent case in which Alaska and the federal government disputed title to submerged lands in Glacier Bay.⁸³ The United States can retain title to submerged lands that would otherwise be entitled to a future state if the lands were set aside, before statehood, “as part of a federal reservation ‘such as a wildlife refuge.’”⁸⁴ Thus, the Court considered whether the lands under Glacier Bay were “intended” to be part of Glacier Bay National Monument when President Calvin Coolidge created the monument, and therefore whether the federal government retained title to them.⁸⁵ As part of determining this, the Court considered what the aims of the monument were and whether the submerged lands furthered those aims.⁸⁶ The Special Master appointed in the case identified three such aims: the “scientific study of the majestic tidewater glaciers,” the study and preservation of “the remnants of ‘interglacial forests,’” and the “safeguarding of the flora and fauna that thrive in Glacier Bay’s complex and interdependent ecosystem.”⁸⁷ He then judged that exclusion of the submerged lands from the monument would have undermined these aims.⁸⁸ The Court did not take issue with this conclusion or with the idea that the proclamation aimed partly to protect forests and flora and fauna.⁸⁹ Important for the present discussion is that this lends support for seeing not just geologic entities and species as possible “objects of interest,” but also entire ecosystems, such as forests, as such objects. Indeed, more recent courts have taken the *Alaska* ruling to show precisely this.⁹⁰

4. *Anaconda Copper Company v. Andrus (1980)*

Other courts, meanwhile, have explored whether there are upper limits to what qualifies as an object of interest. In hearing a complaint from the Anaconda Copper Company about three monument designations in Alaska, the district court (in an unpublished opinion) agreed with the *Cameron* and *Cappaert* Courts that “matters of scientific interest which involve geologic formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act.”⁹¹ However, it noted that neither the *Cameron* nor *Cappaert* ruling

⁸³ *Alaska v. United States*, 545 U.S. 75 (2005).

⁸⁴ *Id.* at 100.

⁸⁵ *Id.* at 100–02.

⁸⁶ *Id.*

⁸⁷ *Id.* at 102 (quoting the Report of the Special Master).

⁸⁸ *Id.*

⁸⁹ *Id.* This case is discussed further below. See *infra* III.A.

⁹⁰ See *Mass. Lobstermen’s Ass’n*, 349 F. Supp. 3d 48, 68 (D.D.C. 2018) (citing *Alaska v. United States*, 545 U.S. at 103).

⁹¹ *Anaconda Copper Co.*, No. 79-161, 1980 U.S. Dist. LEXIS 17861, at *2, 7 (D. Alaska July 1, 1980). The monuments were Admiralty Island National Monument, Yukon Flats National Monument, and Gates of the Arctic National Monument. *Id.*

“fully” defined the parameters of such authority.⁹² In one telling passage, the court expressed skepticism that a “solar basin” and a “certain climatological phenomenon” are “objects of interest”—two features mentioned in one of the presidential proclamations being examined.⁹³ It upheld the related monument, but that is because it considered other things cited in the proclamation as qualifying objects.⁹⁴

5. *Wyoming v. Franke* (1945)

Another court has also explored possible limits on what qualifies as an object of interest. In *Wyoming v. Franke*,⁹⁵ the state of Wyoming challenged Franklin D. Roosevelt’s Jackson Hole National Monument. The state argued, among other things, that the monument did not actually contain any “historic landmark, historic or prehistoric structure, or objects of historic or scientific interest.”⁹⁶ The National Park Service responded by calling a number of scientists to testify that the area did indeed contain objects of interest, such as “glacial formation[s],” “mineral deposits,” and indigenous “plant life,” as well as “trails and historic spots” connected to the early fur trade.⁹⁷ The district court upheld the creation of the monument, finding the evidence produced by the Park Service sufficient for supporting the claim that the area contained objects of interest.⁹⁸ Indeed, the court went quite far in identifying the sorts of objects that can be protected under the Act, suggesting at most a very high upper limit on what qualifies. It said that nearly anything but a “bare stretch of sage-brush prairie” with “no substantial evidence that it contained objects of historic or scientific interest” could be upheld by courts.⁹⁹ However, it reached this conclusion largely because it saw the controversy over what qualifies as an object as lying primarily “between the Legislative and Executive Branches of the Government in which, under the evidence presented here, the Court cannot interfere.”¹⁰⁰ In

⁹² *Id.*; see also Getches, *supra* note 20, at 303 (“The one paragraph the [*Cameron*] court devoted to the issue did not deal with the question of congressional intent or the language which seems to limit the land area to be withheld, nor were these matters fully developed in the briefs of the parties.” (internal citations omitted)).

⁹³ *Anaconda Copper Co.*, 1980 U.S. Dist. LEXIS 17861, at *9; see also Proclamation 4627, 3 C.F.R. §1474 (1978).

⁹⁴ *Anaconda Copper Co.*, 1980 U.S. Dist. LEXIS 17861, at *9–10.

⁹⁵ 58 F. Supp. 890 (D. Wyo. 1945).

⁹⁶ *Id.* at 895.

⁹⁷ *Id.*

⁹⁸ *Id.* at 895–96.

⁹⁹ *Id.* at 895.

¹⁰⁰ *Id.* at 896. Courts have reached a related conclusion in other cases. See *Alaska v. Carter*, 462 F. Supp. 1155, 1157–58 (D. Alaska 1978). In that case, courts considered whether a President’s actions under the Act are subject to environmental impact statement requirements under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370h (2018). *Alaska v. Carter*, 462 F. Supp. at 1158. The court ruled that “the President is not subject to the impact statement requirement of NEPA when exercising his power to

deference to presidential authority backed by Congress, the court used only a loose standard of review: rather than evaluate the matter according to the preponderance of evidence rule, the court considered whether the President's action was "arbitrary" or "capricious."¹⁰¹ Regarding Jackson Hole National Monument, the court held that it was neither.¹⁰²

The court expressed sympathy, however, for Wyoming's complaint, saying that "[u]ndoubtedly great hardship and a substantial amount of injustice will be done to the State and her citizens if the Executive Department carries out its threatened program"¹⁰³ It suggested that "the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about."¹⁰⁴ Heeding the call, Congress amended the Antiquities Act to stipulate that presidents could no longer unilaterally designate new monuments in Wyoming.¹⁰⁵

6. *Massachusetts Lobstermen's Association v. Ross (2018)*

A more recent ruling, by contrast, saw a larger role for the judiciary in interpreting the objecthood language. Responding to a group of fishing associations who objected to the Northeast Canyons and Seamounts Marine National Monument created by President Obama, the District Court for the District of Columbia distinguished two kinds of objections one can raise to uses of the Act: the first "are those that can be judged on

proclaim national monuments under the Antiquities Act." *Id.* at 1160. In reaching this conclusion, it reasoned that "[n]o cases have been brought to the court's attention that hold that the President must file an environmental impact statement prior to acting under a specific delegation of Congressional authority" and that "the doctrine of separation of powers prevents this court from lightly inferring a Congressional intent to impose such a duty on the President" *Id.* It then ended its ruling by noting that "[t]he ultimate decision on public lands has been delegated to the Congress by Article I of the Constitution and the public interest lies in allowing the Congress to make the ultimate decision." *Id.* at 1165. The federal District Court of Utah offers a clear explanation of why deference is called for. In its ruling in *Utah Association of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004), it held that, "[w]hen the President is given such a broad grant of discretion as in the Antiquities Act, the courts have no authority to determine whether the President abused his discretion To do so would impermissibly replace the President's discretion with that of the judiciary." *Id.* at 1183–84.

¹⁰¹ *Franke*, 58 F. Supp. at 895–96; Klein, *supra* note 3, at 1349.

¹⁰² It held:

"In the proofs in this case we have evidence of experts and others as to what the area contains in regard to objects of historic and scientific interest and by that testimony this Court is bound although it may not agree that the testimony of the witnesses by the preponderance rule sufficiently supports the claim of the defendant."

Franke, 58 F. Supp. at 895–96.

¹⁰³ *Id.* at 896.

¹⁰⁴ *Id.*

¹⁰⁵ Klein, *supra* note 3, at 1351; see also Hal Rothman, *Showdown at Jackson Hole: A Monumental Backlash Against the Antiquities Act*, in THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION, *supra* note 24, at 81–92 (discussing the historical debate around Jackson Hole in Wyoming).

the face of the proclamation” and the second are those that require “some factual development.”¹⁰⁶ Of the former, the court held that “[j]udicial review of such claims resembles the sort of statutory interpretations with which courts are familiar” and therefore such review is possible.¹⁰⁷ It gave, as an example, the complaints heard in the *Cappaert* ruling about what qualifies as an “object of interest.”¹⁰⁸ In line with this, the court rejected the Plaintiffs’ assertion that the Northeast Canyons and Seamounts Marine National Monument “cannot be based on the ecosystems and natural resources because they are not ‘objects.’”¹⁰⁹ In doing so, it cited the precedent from the *Cameron* and *Cappaert* Courts, as well as the above-mentioned ruling in *Alaska*.¹¹⁰

Of the second kind of review, where some sort of factual development is required, the court gave a few examples, among them being complaints that a given object lacks “scientific or historical value” and complaints that a monument is not confined to “the smallest area compatible with the proper care and management of the objects to be protected.”¹¹¹ Review of such matters is not impossible, the court held, but it “stands on shakier ground.”¹¹² In particular, “review would be available only if the plaintiff were to offer plausible and detailed factual allegations that the President acted beyond the boundaries of authority that Congress set.”¹¹³ In the case at issue, the court found that the Plaintiffs had not provided sufficient evidence to support their complaint.¹¹⁴

E. An Overlooked Issue

To summarize: The Supreme Court has upheld expansive readings of what qualifies as an object of interest. The *Cameron* Court held that large geologic entities can qualify,¹¹⁵ the *Cappaert* Court ruled that species can,¹¹⁶ and the *Alaska* Court suggested that ecosystems can be “objects of interest.”¹¹⁷ Other courts have echoed these views, saying that only very extreme examples—“solar basins,”¹¹⁸ “climatological

¹⁰⁶ *Mass. Lobstermen’s Ass’n*, 349 F. Supp. 3d 48, 51, 54–55 (D.D.C. 2018).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 54.

¹⁰⁹ *Id.* at 68.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 55 (citing *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002)).

¹¹² *Id.*

¹¹³ *Id.* For further discussion of whether, or to what extent, disputes over the Act are justiciable, see the above discussion, *supra* note 100; Klein, *supra* note 3, at 1144–54 (Judicial Reticence); BENJAMIN HAYES, CONG. RSCH. SERV., R45718, THE ANTIQUITIES ACT: HISTORY, CURRENT LITIGATION, AND CONSIDERATIONS FOR THE 116TH CONGRESS 1–2 (2019) (describing the legislative history of the Antiquities Act after actions taken by President Trump).

¹¹⁴ *Mass. Lobstermen’s Ass’n*, 349 F. Supp. 3d at 55.

¹¹⁵ *Cameron*, 252 U.S. 450, 455–56 (1920).

¹¹⁶ *Cappaert*, 426 U.S. 128, 142 (1976).

¹¹⁷ *Alaska v. United States*, 545 U.S. 75, 102 (2005).

¹¹⁸ *Anaconda Copper Co.*, 1980 U.S. Dist. LEXIS 17861, at *9 (D. Alaska, June 26, 1980).

phenomen[a],”¹¹⁹ and “bare stretch[es] of sage-brush prairie” without any notable objects—might fall outside the scope of the Act.¹²⁰ Thus, the substantial amount of attention given to what counts as an “object of interest” has yielded relatively wide agreement in the courts about this matter. With just a few possible exceptions, expansive and large natural entities can qualify.

By contrast, however, there is a different question that has received considerably less attention, and which is just as relevant to determining the size of monuments. As noted earlier, the Act says that monuments “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”¹²¹ The question is: how much land *is* necessary for the proper care and management of the objects? Indeed, what does “proper care and management” mean in the first place? These questions run orthogonal to the issue of what qualifies as an object of interest because they arise for whatever ends up counting. And while they have not gone unnoticed, courts and legal scholars have yet to explore them fully. Recall Chief Justice John Roberts’ statement that “[n]o court of appeals has addressed the questions raised above about how to interpret the Antiquities Act’s ‘smallest area compatible’ requirement.”¹²² Moreover, echoing the opinion in *Mass. Lobstermen’s Ass’n*, Chief Justice Roberts noted that “petitioners have not suggested what this critical statutory phrase means or what standard might guide our review of the President’s actions in this area.”¹²³

Indeed, consideration of this issue is sometimes sidestepped and traded for the question about what qualifies as an object. *Mass. Lobstermen’s Ass’n* illustrates this evasion most clearly. The Plaintiffs provided factual evidence that President Obama set aside more land than was needed for the proper care and management of the objects, arguing that “[t]he monuments[] boundaries bear little relation to the canyons and seamounts”—“the monument’s canyon unit broadly sweeps in the entire area between the canyons, as well as [a] significant area closer to the shore than the canyons.”¹²⁴ The court replied:

The crux of the Lobstermen’s argument seems to be that the Monument reserves large areas of ocean beyond the objects the Proclamation designated for protection. The problem is that this position is based on the incorrect factual assumption that the only objects designated for protection are the canyons and the seamounts themselves. The Proclamation makes clear that the “objects of historic and scientific interest” include not just the

¹¹⁹ *Id.*

¹²⁰ *Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945).

¹²¹ 54 U.S.C. § 320301(b) (2018).

¹²² *Mass. Lobstermen’s Ass’n*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari) (citing 54 U.S.C. § 320301(b)).

¹²³ *Id.*

¹²⁴ *Mass. Lobstermen’s Ass’n*, 349 F. Supp. 3d 48, 67 (D.D.C. 2018) (quoting Proclamation No. 9496, 3 C.F.R. § 262 (2017)).

“canyons and seamounts” but also “the natural resources and ecosystems in and around them.”¹²⁵

In other words, while the Plaintiffs showed that a large amount of land was set aside beyond some of the objects of interest—the underwater canyons and seamounts—the court sidestepped the question of whether the broader landscape was needed to care properly for those canyons and seamounts. It was able to do this because the proclamation also said that the whole ecosystem is an object of interest.¹²⁶ This shifted attention back towards the much-discussed issue of what qualifies as an object: the Plaintiffs argued that “the boundaries cannot be based on the ecosystems and natural resources because they are not ‘objects,’” while the court noted the precedent showing otherwise.¹²⁷

So, it remains largely unexplored how much land might be involved in the “the proper care and management of the objects to be protected.”¹²⁸ Indeed, some might wonder whether courts can even wade into such matters. The court in *Franke* deferred on this very issue. The court posited that the deference it showed to what qualifies as an object “applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.”¹²⁹ However, as a matter of how Congress wrote the Act, there seems to be room for debate about this. Again, when originally enacted, the Act held that the President is “authorized, in his discretion, to declare . . . national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”¹³⁰ The clause “in his discretion” modified most directly, the verb “to declare.” It also presumably ranged over the verb “to reserve” because the President clearly had the authority to set aside land for the purposes of a monument. However, the “smallest area compatible” restriction seems *not* to have been up to presidential discretion. Rather, the Act seems to have been saying that the President has discretion to choose what to protect, and is allowed to set aside land for the protection, but that the resulting area must not be larger than is necessary for the aims of the Act, where this was a constraint placed *on* presidential discretion. This reading fits with the fact that Congress at the time worried about granting the President too much power.¹³¹

In recodifying the Act, Congress may have clarified matters further. It placed the restriction on monument size in a standalone sentence,

¹²⁵ *Id.* at 67–68.

¹²⁶ *Id.*

¹²⁷ *Id.* at 56 (collecting cases); *id.* at 68.

¹²⁸ 54 U.S.C. § 320301(b) (2018).

¹²⁹ *Franke*, 58 F. Supp. 890, 896 (D. Wyo. 1945).

¹³⁰ 16 U.S.C. § 431 (2012).

¹³¹ Compare Forest Reserve Act, Ch. 561, § 24, 26 Stat. 1095, 1103 (1891), with 40 CONG. REC. 7888 (1906) (discussing concern over reservations of land under the proposed Forest Reserve Act).

separating it from the sentence granting presidential discretion.¹³² It now reads:

- (a) Presidential Declaration.—The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.
- (b) Reservation of Land.—The President may reserve parcels of land as a part of the national monument. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.¹³³

The recodified language says that the “President’s discretion” applies to the declaration of national monuments. It does not insert those words when describing the restriction on monument size, suggesting that it is not up to presidential discretion whether the designated parcels are confined to the smallest area compatible.

Thus, courts may have a role in determining what is involved with the proper care and management of the objects. Again, the court in *Massachusetts Lobstermen’s Ass’n* held that judicial review on the matter stands on “shakier ground” but is not impossible.¹³⁴ Similarly, Chief Justice Roberts, in his recent statement, said that “how to measure the area necessary for [the objects’] proper care and management may warrant consideration.”¹³⁵ The issue can also, of course, arise for consideration within Congress, which has already shown a willingness to revise the Act. Indeed, there have been recent calls within Congress to amend the Act so that it would be used to protect no more than “640 acres.”¹³⁶ Thus, clarity on what all, beyond an object of interest, can justifiably be included within a monument would inform judicial decisions, in the event that future courts wade into the matter, and it would help legislators evaluate proposals that seek to modify or limit presidential authority under the Act.

III. A FRAMEWORK FOR ANSWERING THE QUESTION

So, to determine what all can be included in a given national monument, we need an analysis of what is involved with the “proper care and management” of objects of historic or scientific interest. On an intuitive level, such care and management would presumably involve protecting the objects from physical damage, and this idea does find

¹³² 54 U.S.C. § 320301(b) (2018).

¹³³ *Id.*

¹³⁴ *Mass. Lobstermen’s Ass’n*, 349 F. Supp. 3d at 55.

¹³⁵ *Mass. Lobstermen’s Ass’n*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

¹³⁶ H.R. REP. NO. 115-1081, at 5 (2018).

expression in the Act. Section 1 prohibits a wide range of actions, including the injury and destruction of an object of interest (at least without a special permit).¹³⁷ However, while intuitive, there remains more to explore about even this, as well as other dimensions of “proper care and management.”

A. The Cappaert and Alaska Rulings, Redux

Return to the ruling in *Cappaert*. Recall that the Cappaerts’ use of wells on their ranch lowered the water table to a point that impacted Devil’s Hole, endangering the rare pupfish living there.¹³⁸ The Supreme Court upheld an injunction on the Cappaerts’ use of groundwater, holding that “[s]ince a pool is a body of water, the protection contemplated is meaningful only if the water remains.”¹³⁹ Thus, consonant with the above, the *Cappaert* ruling calls for protecting the physical existence of the objects of interest—the pool and the pupfish. However, the ruling adds an important detail: it did not require the pool to be preserved in the exact same state that it was in prior to the designation. Rather, the Court held that “[t]he pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific interest.”¹⁴⁰ In particular, “the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool.”¹⁴¹ Thus, while protecting the material qualities of an object of interest is typically required to care properly for it, the *Cappaert* ruling established a limit on the degree of protection required. A monument designation only requires protecting the object of interest to the extent necessary for the aims of the proclamation, where one such aim is the protection of its scientific or historic interest.

At the same time, however, the *Cappaert* ruling also strengthens the Act in a different sense. For, at issue in that case was whether the proclamation could license the protection of groundwater *outside* of Devil’s Hole and the monument boundary.¹⁴² The Cappaerts pushed on this point; they argued that the government’s actions required protecting thousands of square miles of groundwater and that this violated the requirement that monuments be confined to the smallest area consistent with the protection of the objects.¹⁴³ The Court disagreed. It held that the government was justified in limiting the use of groundwater because doing so was, again, necessary to fulfill the aims of the proclamation.¹⁴⁴

¹³⁷ 16 U.S.C. § 433 (2012); 18 § 1866(b) (2018).

¹³⁸ *Cappaert*, 426 U.S. 128, 133–35 (1976).

¹³⁹ *Id.* at 140.

¹⁴⁰ *Id.* at 141.

¹⁴¹ *Id.*

¹⁴² *Id.* at 133.

¹⁴³ Brief for Petitioners at *64, *66–67, *Cappaert*, 426 U.S. 128 (No. 74-1107), 1975 WL 173691. Petitioners’ brief was cited in HAYES, *supra* note 113, at 12 n.129.

¹⁴⁴ *Cappaert*, 426 U.S. at 139–40, 147.

Indeed, the court allowed the government to restrict the Cappaerts' use of wells on *private* land, citing the federal reserved water rights doctrine: "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."¹⁴⁵ While this doctrine centers around the private use of water, however, the *Cappaert* ruling holds broader significance. For, if the government is justified in restricting the private use of water for the purposes of a monument, then presumably the President would be justified in restricting various uses of *federally-owned* areas for such purposes too.¹⁴⁶ That is, when the question is whether federal lands or waters can be included in a given monument, the concern expressed by the government in the *Cappaert* case—that part of the surrounding landscape was necessary for the aims of the monument¹⁴⁷—can be operative on its own, without reference to the federal reserved water rights doctrine. The *Cappaert* ruling thereby supports the idea that the proper care and management of an object of interest can license the protection of federal land beyond the object, if, and to the extent that, the surrounding area furthers the monument's aims. Moreover, it identifies one such aim: the preservation of the object's scientific or historic interest.¹⁴⁸

If we turn back to the *Alaska* ruling, we then see other ways that the surrounding landscape can contribute to the aims of a monument.¹⁴⁹ As part of the ruling, the Court considered whether the waters and submerged lands of Glacier Bay contributed to the study of how glaciers on the nearby land changed over time, the study of which was one of the aims of the protection.¹⁵⁰ The Special Master concluded that the waters and submerged lands did so contribute, and that excluding such features of the landscape from the monument would "compromise scientific study of the behavior of Glacier Bay's tidewater glaciers."¹⁵¹ The two reasons for the Special Master's conclusion are notable: First, the Special Master agreed with the federal government that "[w]ithout title to submerged lands in front of the tidewater glaciers, the United States . . . could not authorize studies involving long-term mooring of vessels."¹⁵² So, the area surrounding an object of interest can be important for satisfying the aims of a proclamation by providing access to the object of interest. Second, "researchers . . . have studied the effects of glaciers on submerged

¹⁴⁵ *Id.* at 138.

¹⁴⁶ *Id.* at 138 ("Reservation of water rights is empowered by . . . the Property Clause, which permits federal regulation of federal lands." (citations omitted)).

¹⁴⁷ *Id.* at 135.

¹⁴⁸ *Id.* at 141.

¹⁴⁹ *Alaska v. United States*, 545 U.S. 75, 102 (2005).

¹⁵⁰ *Id.* at 98; Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title at 246, *Alaska v. United States*, 545 U.S. 75 (No. 128), 2004 WL 5809425 [hereinafter Report of the Special Master].

¹⁵¹ Report of the Special Master, *supra* note 150, at 247.

¹⁵² *Id.*

areas.”¹⁵³ In particular, “[t]he great depth below sea level, the form of the submerged topography, and the departures from normal slopes, etc., are all explained satisfactorily by glacial erosion,” and therefore provide evidence of the existence and character of that phenomenon.¹⁵⁴ Thus, the surrounding area can hold information about the object of interest and in that way also be important for facilitating its study. The Court concurred with the Special Master and held that the submerged lands contributed to the aims of the monument.¹⁵⁵

Taken together, the *Cappaert* and *Alaska* rulings provide a catalogue of different ways that the area around an object of interest can contribute to a proclamation’s aims. The broader area can: 1) help preserve the object up to a point required for it to retain its scientific or historic interest;¹⁵⁶ 2) provide access for scientists studying an object of interest;¹⁵⁷ and 3) provide information that is pertinent to scientific or historic understanding of the object.¹⁵⁸ Moreover, from the *Cappaert* ruling, we have the idea that federal land that contributes to the aims of a monument can merit protection under the Act.¹⁵⁹ Thus, the rulings

¹⁵³ *Id.* at 248.

¹⁵⁴ *Id.* at 248 n.70.

¹⁵⁵ *Alaska v. United States*, 545 U.S. 75, 102 (2005).

¹⁵⁶ *See, e.g., id.* at 98, 102 (describing the importance of the glacially-impacted lands to scientific study); *Cappaert*, 426 U.S. at 141 (stating that there must be enough groundwater for Devils Hole to retain its scientific interest).

¹⁵⁷ *See, e.g., Alaska*, 545 U.S. at 98 (“[I]n the areas of glacial recession the submerged floor of the bay is contoured or sculptured in ways that can be studied to learn more of glacial movement and geologic formations.”).

¹⁵⁸ *See, e.g., id.* at 102 (describing the subjects of scientific study to include unique interglacial forest and the flora and fauna of Glacial Bay’s complex ecosystem); *Cappaert*, 426 U.S. 128, 142 (1976) (describing the biology within the pool in Devil’s hole as “rare”).

¹⁵⁹ Does every proclamation necessarily have the same aims? I believe they all have the first of the above-mentioned aims—protecting the scientific and historic interest. After all, the whole reason to protect a given object of interest in a monument is its interest. If a proclamation did not protect the scientific or historic interest of the objects it singles out, then it would undermine its own justification: once the objects came to lack historic or scientific interest due to mismanagement, they would no longer qualify for protection under the Act. The second and third aims mentioned in the main text, which facilitate the study of scientific or historic interest, may also be a universal aim of all proclamations under the Act, though it is perhaps more debatable. The Act was spurred by requests from scientific communities seeking to allow for the continued study of antiquities. CLAUS, *supra* note 23, at 2. So, at least in terms of its history, the study of the objects was of key importance. Additionally, Section 3 of the Act prioritizes scientific and historical study when it allows permits to be granted for the examination, excavation, or gathering of objects if done “for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects.” 54 U.S.C. § 320302(b)(1) (2018) (emphasis added). However, given that the emphasis on increasing such knowledge only applies explicitly to permits for the removal of objects, it is technically a jump to infer that this is an aim of all monuments. Nonetheless, it seems a rather uncontroversial jump to make. Another question deserves consideration: are there aims beyond the three mentioned in the main text that proclamations can have? For instance, can proclamations aim to promote the *appreciation* of objects’ historic and scientific interest? One might think that the answer is obviously yes, but recall that the Act removed language that

suggest when and why parts of the broader landscape can be included in a given monument.

To provide more detail about this, I turn now to the views of scientists and historical preservationists. In *Franke*, the district court held that evidence from scientists was sufficient for showing that the area contained objects of interest.¹⁶⁰ If expert views can help defend the existence of such objects, then presumably their views can also help determine what parts of the landscape contribute to the significance and study of those objects.

B. Studying Scientific Interest: Lessons from Geomorphology

As noted earlier, many of the objects singled out in proclamations are geologic features, such as the Grand Canyon, Jewel Cave, and Devils Tower. When it comes to such objects, some of the central questions that scientists explore are questions of geomorphology, or how the given geologic object formed and changed over time.¹⁶¹ It is not fully known, for instance, how Devils Tower developed and its formation remains a topic of discussion.¹⁶²

Geologists have developed theories describing, in abstract terms, what needs to be studied in order to understand the geomorphology of an entity. Dirk H. de Boer explains: “In principle, the form and functioning of any geomorphic system [e.g. Devils Tower] is the end product of the interaction of processes operating at all scale levels, from the smallest to the largest.”¹⁶³ However, “there exist both upper and lower limits for scales relevant to explaining system behaviour [i.e. the development of a geologic feature].”¹⁶⁴ At some point, low-level changes—events happening at a very small scale relative to the size of the geologic feature—“fluctuate too rapidly to affect the level of interest”; likewise, large-scale features become “part of the constant background” relative to the level of interest.¹⁶⁵ So, for example, facts about plate tectonics may be largely irrelevant to explaining the development of Devils Tower, as could the particular location of a single rock eroded from the feature.

However, de Boer says that there remains a range of scales that are relevant to the study and explanation of a given geomorphic system.¹⁶⁶

would have allowed presidents to protect “such area of land surrounding or adjoining the same, as he may deem necessary for . . . the suitable enjoyment of said reservation.” CLAUD, *supra* note 23, at 2–3 (quoting H.R. 8066, 56th Cong. § 7 (1900) (proposed bill offered by Representative Dolliver on February 5, 1900)). So, I leave discussion of this question for elsewhere.

¹⁶⁰ *Franke*, 58 F. Supp. 890, 895–96 (D. Wyo. 1945).

¹⁶¹ ALISTAIR F. PITY, THE NATURE OF GEOMORPHOLOGY 1–2, 21 (1982).

¹⁶² See *infra* text accompanying notes 160–72.

¹⁶³ Dirk H. de Boer, *Hierarchies and Spatial Scale in Process Geomorphology: A Review*, 4 GEOMORPHOLOGY 303, 304 (1992).

¹⁶⁴ *Id.* at 315.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 303–04.

Importantly, some of those scales are smaller than, and some larger than, the geologic feature itself.¹⁶⁷ This idea is echoed by others: in his *Introduction to Geomorphology*, Alistair Pitty introduces past attempts to classify geomorphic features.¹⁶⁸ In one chart, he conveys Jean Tricart's mapping of geomorphic features of a certain size to mechanisms relevant to that feature's development. According to Pitty, landforms, such as "ridges, terraces, cirques, moraines, [and] debris," were thought by Tricart to be influenced significantly by "mesoclimate."¹⁶⁹ The latter is described in precise terms by others. Thomas Warner, for instance, notes that the mesoclimate is taken to pertain roughly "to areas between 2 and 2000 km."¹⁷⁰ David Thomas provides, as an example of mesoscale features, "the mountain/valley winds generated over complex terrain."¹⁷¹ So, this means that, if a particular ridge is deemed to be an object of geomorphic interest, scientists may need to study the nearby mountains and valleys to understand how the particular ridge developed.

Returning to the example of Devils Tower, theorists discussing its origins typically agree that the tower's formation is linked to the Little Missouri Buttes, which lie a few miles northwest of the tower, and to the Belle Fourche River, which runs directly south of the tower.¹⁷² In one theory, the tower and the buttes were part of the same laccolith and the river eroded out "the connecting mass," thereby separating Devils Tower and making it the looming feature it is today.¹⁷³ In another view, the Tower and other "intrusive bodies" of the Black Hills are volcanic plugs—volcanic features formed when magma hardens in an active volcano.¹⁷⁴ Although these theories disagree in their details, theorists agree that specific features of the surrounding area are relevant to a geomorphological study of Devils Tower. Charles Robinson makes the point explicitly in a Geologic Survey Bulletin when he notes that "[m]uch more detailed geologic work will have to be done in the surrounding area before the mode of origin of Devils Tower may be proved conclusively."¹⁷⁵ This serves as an example of how certain features of the broader area can contribute to the study of a given object's geologic interest.

¹⁶⁷ *Id.* at 304.

¹⁶⁸ PITY, *supra* note 161, at 2.

¹⁶⁹ *Id.* at 12.

¹⁷⁰ THOMAS WARNER, DESERT METEOROLOGY 8–9 (2004). He notes disagreement about the details, with some taking mesoclimate to pertain to areas slightly smaller, such as 1km–1000km. *Id.*

¹⁷¹ THE DICTIONARY OF PHYSICAL GEOGRAPHY 338–39 (David S. G. Thomas et al. eds., 4th ed. 2016).

¹⁷² CHARLES S. ROBINSON, U.S. DEP'T OF THE INTERIOR, GEOLOGIC SURV. BULL. 1021-1 GEOLOGY OF DEVILS TOWER NATIONAL MONUMENT WYOMING 259, at 301 (1956).

¹⁷³ WILLIAM L. EFFINGER, U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., A REPORT ON THE GEOLOGY OF DEVILS TOWER NATIONAL MONUMENT 10–11 (1934) (citing T. A. Jaggars's, *Laccoliths of the Black Hills*, in DEP'T OF THE INTERIOR, 21ST ANN. REP. U.S. GEOLOGIC SURVEY (1901)).

¹⁷⁴ See EFFINGER, *supra* note 173, at 10 (describing views discussing the "volcanic plug").

¹⁷⁵ ROBINSON, *supra* note 172.

C. Studying Historical Interest: Lessons from NHPA and the National Register

A related point holds regarding historical interest. For instance, consider the National Historic Preservation Act (NHPA).¹⁷⁶ Passed in 1966, the legislation was a response to public interest in historic preservation spurred partly by the loss of historic buildings from urban renewal.¹⁷⁷ The legislation requires federal agencies to consider the impact that each of their “undertakings” will have on historic properties.¹⁷⁸ It defines “historic property” as any prehistoric or historic “district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”¹⁷⁹ The National Register then states that a property must have “integrity” for it to be listed, and it notes that integrity of “location” and “setting” are components of an object’s overall integrity.¹⁸⁰ A property has locational integrity if it remains in the location “where the historic property was constructed or the place where the historic event occurred.”¹⁸¹ Similarly, integrity of setting is a matter of “*how*, not just where, the property is situated and its relationship to surrounding features and open space,” and the National Register notes that “topographic features” and “vegetation” can be key parts of the setting.¹⁸² NHPA regulations then provide examples of “adverse effects” to historic properties, stating that the “introduction of visual, atmospheric or audible elements” can “diminish the integrity of the property’s significant historic features.”¹⁸³

Court rulings pertaining to NHPA reflect these ideas. In 1985, the District Court for the Central District of California heard a case, *Colorado River Indian Tribes v. Marsh*,¹⁸⁴ in which Plaintiffs argued, among other things, that the Army Corps of Engineers issued a permit for the placement of riprap along the Colorado River without considering how this changed the setting of nearby historic properties.¹⁸⁵ The court agreed. It held that the Army Corps of Engineers erred in only considering the impact within the permit area and not the broader area.¹⁸⁶ The court said that agencies must consider how an undertaking might lead to the

¹⁷⁶ National Historic Preservation Act, 54 U.S.C. § 300101–307108 (2018).

¹⁷⁷ Jess R. Phelps, *The National Historic Preservation Act at Fifty: Surveying the Forest Service Experience*, 47 ENV’T L. 471, 478 (2017).

¹⁷⁸ 54 U.S.C. § 306108 (2018).

¹⁷⁹ *Id.*

¹⁸⁰ It says: “To retain historic integrity a property will always possess several, and usually most, of the aspects,” where these include integrity of location, design, setting, materials, workmanship, feeling, and association. U.S. DEP’T OF THE INTERIOR, NAT’L PARK SERV., NATIONAL REGISTER BULLETIN: HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 44 (rev. ed. 1997).

¹⁸¹ *Id.*

¹⁸² *Id.* at 45.

¹⁸³ Assessment of Adverse Effects, 36 C.F.R. § 800.5 (July 6, 2004).

¹⁸⁴ 605 F. Supp. 1425 (C.D. Cal. 1985).

¹⁸⁵ *Id.* at 1432.

¹⁸⁶ *Id.* at 1438.

“alteration of [a historical] property’s surrounding environment.”¹⁸⁷ A similar view was reached by the District Court of New Mexico in *El Rancho La Comunidad v. United States*. As cultural resource specialist Thomas King describes the case,¹⁸⁸ plaintiffs sued the Rural Electrification Administration for failing to consider the *auditory* impact a substation would have on land adjacent to where El Rancho residents performed the traditional Matachines Dance.¹⁸⁹ King relays, further, that the El Rancho community argued that the substation “would intrude on their performance of the dance, adversely affecting the integrity of the site.”¹⁹⁰ The District Court of New Mexico ruled in favor of the Plaintiffs.¹⁹¹

Now, NHPA differs in key ways from the Antiquities Act. For one, NHPA does not require protecting objects of historic interest. It only requires federal agencies *to consider* the impact an undertaking will have on historic properties.¹⁹² However, anything that federal agencies must consider in order to meet this requirement would presumably be a candidate for something that merits protection *if* one sought to preserve the property’s historic significance. Thus, NHPA and the National Register can serve as guides to figuring out what all might justifiably be protected under the Antiquities Act as a means to protecting an object’s historic interest. In particular, we get the idea that the location and setting of an object can sometimes merit protection.¹⁹³ As King puts it, “[c]hanging the setting of a property can have adverse effects [on the property]—again without necessarily touching the property itself.”¹⁹⁴

D. Language from the Antiquities Act

Interestingly, this idea about the importance of setting, and the broader conclusion—that areas beyond an object of interest can play a key role in its proper care and management—both gain support from language in the Act. Section 2 of the legislation has rightly received much of the focus in scholarly discussions of the legislation,¹⁹⁵ but Section 1

¹⁸⁷ *Id.* at 1435 (emphasis added).

¹⁸⁸ THOMAS KING, CULTURAL RESOURCE LAWS AND PRACTICE 124 (4th ed. 2013). While the docket for this case is available, the full text of the district court’s ruling in the case is unrecoverable. *El Rancho La Comunidad*, No. 90-113 (D.N.M. May 21, 1991).

¹⁸⁹ KING, *supra* note 188, at 124.

¹⁹⁰ *Id.*; ADINA KANEFIELD, ADVISORY COUNS. ON HIST. PRES., FEDERAL HISTORIC PRESERVATION CASE LAW, 1966–1996: THIRTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 153–154 (1996).

¹⁹¹ *El Rancho La Comunidad*, No. 90-113 (D.N.M. May 21, 1991).

¹⁹² 54 U.S.C. § 306108 (2018).

¹⁹³ KING, *supra* note 188, at 89.

¹⁹⁴ *Id.* at 156. He adds: “If you’re going to move a property away from its historical location, that’s an adverse effect, even if you’re moving it for protective reasons.” *Id.* at 155.

¹⁹⁵ See, e.g., CAROL HARDY VINCENT, CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 6 (2023) (discussing section 2 of the Act); Brent J. Hartman, *Extending the Scope of the Antiquities Act*, 32 PUB. LAND & RES. L. REV. 153, 153 (2011)

provides key insights. It assesses a penalty to “a person that appropriates, excavates, injures, or destroys any historic or prehistoric ruin or monument or any other object of antiquity” without a permit.¹⁹⁶ Two of these prohibitions—against appropriating and excavating the object—prevent people from exposing, removing, and carrying away the objects of interest. Indeed, Section 3 goes even further, requiring a permit for “gathering” objects of interest.¹⁹⁷ Together, these prohibitions call for protecting the objects in a particular way: namely, leaving them *in place*. This suggests that the location of the objects, and not just their material integrity, matters.

The Departments of the Interior, Agriculture, and War made this even clearer shortly after passage of the Act, when they jointly established rules and regulations for the management of monuments. Section 2 of those rules stated: “No permit for the removal of any ancient monument or structure which can be permanently preserved under the control of the United States *in situ*, and remain an object of interest, shall be granted.”¹⁹⁸ The rules and regulations hold a preference for preserving the objects of interest *in situ*, or in their original context and setting, making clearer that the context and setting are important.¹⁹⁹ This is relevant for the issue at hand because, if the setting and context are so important, then there is reason to believe that they, too, can merit protection. Were the surrounding area *not* protected and instead radically altered, the object of interest would not be protected *in situ*, even if it had been left physically in place during the process and spared alteration to its intrinsic qualities.

E. The Resulting Framework

Taken together, the foregoing fills out the picture of what can be involved with the proper care and management of objects of interest. Language from the Act suggests that the setting of an object of interest matters, given that the Act effectively requires the protection of objects *in situ*.²⁰⁰ The *Cappaert* and *Alaska* rulings make clear why the setting matters, and they set a precedent for protecting the surrounding area as part of the “proper care and management” of the objects. In particular, the *Cappaert* ruling shows that a feature of the surrounding landscape

(discussing section 2 of the Act); Robert Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & MARY ENV'T L. & POL'Y REV. 159, 161–62 (2004).

¹⁹⁶ 18 U.S.C. 1866 (2018); *see also* 54 U.S.C. § 320302 (2018) (permits). In recodifying the section, the text was changed slightly. The original version assessed a penalty for “any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument or any other object of antiquity” without a special permit. 16 U.S.C. § 433 (2012).

¹⁹⁷ 54 U.S.C. § 320302.

¹⁹⁸ Uniform Rules and Regulations, 34 Stat. L. 225 (June 8, 1906); *see* LEE, *supra* note 24, at 32, for discussion of this language.

¹⁹⁹ Uniform Rules and Regulations, 34 Stat. L. 225, (June 8, 1906).

²⁰⁰ *Id.*

can be protected if it is necessary for preserving the object's scientific or historic interest.²⁰¹ The *Alaska* ruling shows that the area can merit protection if it is important for advancing scientific study of the object, either by providing access to the object, or by being a source of information about it.²⁰² The expert views on geomorphology and NHPA then provide detail about how the broader landscape can, in general, contribute to an object's historic or scientific interest and, relatedly, to the study of such interest.²⁰³

The result is a value-centered framework for thinking about the size of monuments. It places the two values mentioned in the Act—historic and scientific interest—in the driver's seat, so to speak, and has them determine how much of the landscape can be set aside. At some point, part of the broader landscape will not contribute to a given object's interest or to studies of it. In such a case, the framework suggests that those parts of the broader landscape should not be included in a monument devoted to protecting the given object. The value-focused approach thereby places limits on what all can be included in a monument. However, the framework can also justify the protection of large areas of land beyond the select objects. Indeed, it is worth recognizing that the foregoing, in principle, can conflict with the legislative history of the Act calling for monuments to be small in size. Senator Lacey, as we saw earlier, is on the record saying that “not very much” land will be “taken off the market.”²⁰⁴ “The objective is entirely different,” he claimed, from the “forest-reserve bill” by which “forests and water courses” were set aside.²⁰⁵ By contrast, the foregoing framework—as will soon become clearer—can justify quite large monuments, providing protection for “forests and water courses.”

Importantly, there is good reason to depart from Senator Lacey's statement in the way suggested by the above framework.²⁰⁶ The primary aim of the Antiquities Act is to facilitate the proper care and management of objects with historic and scientific interest. After all, the objects, structures, and landmarks meriting protection under the Act do so *because* of their scientific or historical interest. Thus, these two values should drive decisions about the size of monuments, given that their care and management are the ultimate aims of the Act. Indeed, the Act itself makes this clear: when it mandates that monuments be “confined to the smallest area compatible with the proper care and management of the

²⁰¹ *Cappaert*, 426 U.S. 128, 142 (1976).

²⁰² *Alaska v. United States*, 545 U.S. 75, 102 (2005).

²⁰³ See also *supra* notes 160–72 and accompanying text.

²⁰⁴ 40 CONG. REC. 7,888 (1906).

²⁰⁵ *Id.*

²⁰⁶ Other scholars depart from Senator Lacey's statement, but for different reasons, such as the case law that allows very large objects to be protected under the Act, the fact that Congress has not revised the Act to limit the size of monuments, and the fact that Congress took out language that would have capped monuments at, say, 640 acres. See Squillace, *Monumental Legacy*, *supra* note 5, at 483, 486; Klein, *supra* note 3, at 1336–37, 1341–42, 1348, 1355.

objects to be protected,” it says that the constraint—being confined to the smallest area—must be compatible with the goal—the “proper care and management” of the objects, not vice versa.²⁰⁷ It does not say, in other words, that the proper care and management must be kept compatible with, and limited by, a desire for small monument boundaries.

Put differently, congresspeople at the time, including Senator Lacey, may have misunderstood what the two values—historic and scientific interest—call for by way of protection and study. They seem to have thought that such proper care and management could be done with a small area of land that includes the objects and not much more. But as we have learned, they were wrong about this. We should not interpret the Act to conform to such a misunderstanding. Instead, we should interpret the Act so that it conforms with the underlying and primary aim they themselves had: the proper care and management of the objects. This is why there is good reason to adopt the framework provided here, even if it yields implications that conflict with Senator Lacey’s statement.

IV. EXAMPLES, OBJECTIONS, AND REFINEMENTS

With the framework now sketched, I want to consider how it applies to particular cases and to shed further light on the justifiable limits of monument designations. In considering a few examples, I will be able to explore details of the framework and some remaining issues.

A. Two Examples: Devils Tower and Grand Canyon

As mentioned at the outset, the line of reasoning offered above can apply to whatever the President deems an “object of interest.” It can apply to small objects in keeping with the original intent and meaning of the Act, and it can also scale up and apply to more expansive objects. As an example of the former, consider again Devils Tower. It adheres quite closely to the originalist idea that the Act would be used to protect relatively small objects. The foregoing argument, however, provides a reason for a larger monument designation around Devils Tower than President Roosevelt created. Roosevelt protected the tower because it is “such an extraordinary example of the effect of erosion in the higher mountains,” or in other words, for its geomorphic properties.²⁰⁸ The Little Missouri Buttes and the Belle Fourche played a significant role in the tower’s history, and they hold key information about the tower’s development.²⁰⁹ They thereby contribute to Devils Tower’s scientific interest. Again, as Charles Robinson notes, geologists will need to study

²⁰⁷ 54 U.S.C. § 320301(b) (2018).

²⁰⁸ Proclamation No. 658, 34 Stat. 3236 (1906).

²⁰⁹ EFFINGER, *supra* note 173, at 3, 10–11.

these surrounding features in order to explore the geomorphology of Devils Tower.²¹⁰

Interestingly, a policymaker had attempted to protect these features prior to Roosevelt's proclamation. In 1892, Senator Francis Warren of Wyoming wanted to protect the Little Missouri Buttes along with Devils Tower.²¹¹ Initially, all of these features were included in a temporary forest reserve totaling roughly sixty square miles, but this was reduced over time and Warren's attempt to have the area designated as a national park failed.²¹² As a result, today the Buttes are on private land and access to them can be closed off at the whim of the land owners, jeopardizing their future study, and, to that extent, the study of Devils Tower.²¹³ Indeed, this is remarkably similar to one of the issues discussed in *Alaska*. The State of Alaska argued that "the United States could study and protect the ancient forest remnants even if it did not have title to the submerged lands."²¹⁴ The Special Council disagreed (with the Court concurring), showing that federal ownership of lands is relevant for assuring the sort of access and scientific study that is part of a proclamation's aims.²¹⁵ Thus, for similar reasons, President Roosevelt could have included the Little Missouri Buttes in Devils Tower National Monument and thereby better facilitated scientific study of the tower.

A similar conclusion follows regarding the Belle Fourche. In 1952, the Bureau of Reclamation dammed the river upstream of Devils Tower.²¹⁶ Jeanne Rogers, with the National Park Service, noted that the dam greatly reduced the erosive capacities of the Belle Fourche River and altered the geology within the monument.²¹⁷ Thus, similar to how the groundwater outside of Devil's Hole protected the scientifically interesting features of the pool, and merited protection as a result, the Belle Fourche, left undammed, would have better protected the geologic features of the tower.

The same issue arose on a much larger scale with Grand Canyon National Monument. As noted earlier, President Roosevelt protected 800,000 acres as part of the monument.²¹⁸ In his proclamation, he justified the protection by noting that the canyon "is an object of unusual scientific interest, being the greatest eroded canyon within the United

²¹⁰ ROBINSON, *supra* note 172, at 301.

²¹¹ Ray H. Mattison, *Early Conservationists, Devils Tower*, NAT'L PARK SERV. (2022) <https://perma.cc/63SH-YDAG>.

²¹² *Id.*

²¹³ U.S. Dep't of the Interior, State of Wyoming Land Status Map, BUREAU OF LAND MGMT. (2020), <https://perma.cc/56AW-VUQA>.

²¹⁴ Report of the Special Master, *supra* note 150, at 252; *Alaska v. United States*, 545 U.S. 75, 102 (2005).

²¹⁵ Report of the Special Master, *supra* note 150, at 247.

²¹⁶ JEANNE ROGERS, *STANDING WITNESS: DEVILS TOWER NATIONAL MONUMENT, A HISTORY* 13 (2007).

²¹⁷ *Id.* at 13–14, 146.

²¹⁸ Proclamation No. 794, 35 Stat. 2175–76 (1908).

States.”²¹⁹ By the above argument, however, there may have been sufficient reason to make the designation even larger. The monument only protected part of the Colorado River and not enough to prevent the Glen Canyon Dam from being constructed.²²⁰ Amy Draut has detailed some of the changes brought by the dam: “Since closure of the dam in 1963, the hydrology, sediment supply, and ecosystem downstream in Marble and Grand Canyon have changed substantially.”²²¹ In particular, the dam has greatly reduced sediment within the canyon, reducing, in turn, the size and number of sandbars in the river corridor.²²² Moreover, she notes, “[t]he effects of dam operations are not limited only to the river itself, but even influence landforms, sediment, and biological communities above the river’s high water line.”²²³ In arid climates, sediment in the river corridor influences windblown sedimentation at higher reaches.²²⁴ So, the canyon’s geological character has changed from when the dam was built. Had the monument designation protected further upstream portions of the Colorado River, the Grand Canyon’s geology would have been better safeguarded. And, interestingly, Congress protected some of the upstream portions of the river corridor in the decades following President Roosevelt’s initial proclamation.²²⁵ There was even discussion of protecting Glen Canyon prior to the dam’s installation.²²⁶

B. How Much Must the Surrounding Landscape Contribute to an Object’s Interest?

At this point, however, a key issue arises—even if an area of the broader landscape contributes to an object’s historic or scientific interest, one might wonder whether it contributes enough to justify protection. The Glen Canyon Dam changed the geology of the Grand Canyon, but perhaps it did not change it enough to inhibit study of, say, how the canyon developed. This raises a further issue: the extent to which part of the

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Amy Draut, *Influence of Dam Operations on Geomorphology and Sediment in the Colorado River Corridor, Grand Canyon National Park, Arizona*, VIGNETTES: KEY CONCEPTS IN GEOMORPHOLOGY, <https://perma.cc/BAQ8-XVWP> (last visited Sept. 18, 2023).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* For further information on impacts of windborne sedimentation, see U.S. GEOLOGICAL SURV., USGS CIRCULAR 1282, *THE STATE OF THE COLORADO RIVER ECOSYSTEM IN GRAND CANYON: A REPORT OF THE GRAND CANYON MONITORING AND RESEARCH CENTER 1991–2004*, 184–88 (Steven P. Gloss et al. eds., 2005).

²²⁵ See, e.g., Proclamation No. 3889, 3 C.F.R. 26 (1969) (establishing Marble Canyon National Monument, Arizona); Grand Canyon National Park Enlargement Act, Pub. L. No. 93-620, 88 Stat. 2089 (1975).

²²⁶ Harold Ickes, Secretary of the Interior, proposed Escalante National Monument, which would have included Glen Canyon and surrounding land. The monument never came to fruition. W. L. Rusho, *Bumpy Road for Glen Canyon Dam* in *THE BUREAU OF RECLAMATION: HISTORY ESSAYS FROM THE CENTENNIAL SYMPOSIUM VOL. II*, 523, 524 (2008).

landscape contributes to an object's interest seems to depend on the particular scientific or historic investigation one wishes to carry out with respect to the object. Perhaps the Glen Canyon Dam did not undermine certain geomorphic studies of the Grand Canyon, such as how the canyon as a whole developed, but did jeopardize other geologic studies, such as how sandbars form in the river corridor. So, when the President protects an object for, say, its geologic interest, does this license the protection of every part of the surrounding landscape that is at all relevant to any geologic investigation of the object? Depending on the answer, one might worry that the value-focused analysis of the Act will license absurdly strong protections.

There are a few things to say by way of response, but these questions are among those where the existing case law is too thin to settle fully. Nonetheless, return once more to the *Cappaert* ruling. President Truman, in his proclamation, singled out many features that made Devil's Hole scientifically interesting: it "is a unique subsurface remnant of the prehistoric chain of lakes," it is "in distinctly striated limestone" that is "unusual among caverns," it is "an integral part of the hydrographic history of the Death Valley region," and it contains "a peculiar race of desert fish."²²⁷ What this shows is that the pupfish only contributed to part of Devil's Hole's scientific interest. Thus, when the *Cappaert* ruling held that enough groundwater had to be preserved in order to ensure the continued survival of the fish, it was holding that a feature of the landscape had to be protected because it contributed to only part of the object's interest.²²⁸ Similarly, the Special Master in *Alaska* only cited two studies done on the submerged waters in Glacier Bay that shed light on glacial behavior.²²⁹ From this, he concluded that the submerged waters were important for satisfying the aims of the monument.²³⁰ The rulings make clear, then, that the landscape can contribute to the aims of a monument sufficiently, even if they only contribute to *part* of the object's interest or only offer *some* information about it.

Arguably, this could have justified the inclusion of upstream portions of the Colorado River in the original Grand Canyon monument boundary. After all, the dam "influenced landforms"²³¹ that partly make up the canyon. Moreover, it is the eroded quality of the canyon that Roosevelt singled out in his proclamation.²³² So, to protect the canyon's geologic interest—including the landforms that are part of the canyon—more of the river corridor might have merited protection. Granted, this raises again the charge that the framework yields overly-strong conclusions. President Roosevelt's protection of Grand Canyon was already contentious, at least insofar as it sparked the first challenge to the Act in

²²⁷ Proclamation No. 2961, 3 C.F.R. § 19, 20 (1952).

²²⁸ *Cappaert*, 426 U.S. 128, 141, 147 (1976).

²²⁹ Report of the Special Master, *supra* note 150, at 88–89.

²³⁰ *Alaska v. United States*, 545 U.S. 75, 101–02 (2005).

²³¹ Draut, *supra* note 221.

²³² Proclamation No. 794, 35 Stat. 2175–76 (1908).

the courts.²³³ Protecting significantly more of the Colorado River may have been unrealistic at best, and destructive to the Antiquities Act at worst, leading to its repeal or its significant alteration.

However—and quite important for understanding the argument provided here—one should not confuse an all-things-considered judgment of the merits of a monument designation with a judgment as to whether the designation satisfies the requirements of the Act and is thus lawful. The argument provided here only seeks to show something about the latter: namely, that presidents can justifiably protect features of the broader landscape under the Act when those features contribute to the object's historic or scientific interest, or to the study of them. It is an entirely different calculus to determine whether, all things considered, a president ought to exercise their authority under the Act. The foregoing line of thought, in other words, provides insight into whether a given monument is lawful, not whether it is wise or politically prudent.²³⁴ If a great length of the Colorado River contributes to the Grand Canyon's geology, such that damming it would change some of the canyon's geologic features, then those parts of the river could very well have been lawfully included in Grand Canyon National Monument. Nonetheless, the political blowback might have been too great, or there might have been too significant a downside in other considerations, to support President Roosevelt exercising his lawful right under the Act.

Finally, it is worth remembering that, even though the framework broadens the scope of what can be included in a monument boundary, it still places limits on the size of monuments. For instance, the value-focused approach might not authorize the protection of the sixty square miles for Devils Tower that was initially included in the forest reserve. If it is the geomorphic interest of Devils Tower that the President is protecting, then acreage beyond what is needed to protect the Little Missouri Buttes and the Belle Fourche could well be unnecessary. The largest monument boundary for the protection of Devils Tower and its scientific interest might include just a slightly larger area around Devils Tower (so that it included the Little Missouri Buttes) and a thin corridor following the river upstream. Thus, even though the framework can support large monument boundaries, it is not a blank check for monuments of just any size. It serves as an outside constraint on presidential powers under the Act, limiting what the Executive branch can set aside for the protection of designated objects.

C. A New Argument for Expansive Monuments: Bears Ears

With all this said, consider one final example, which illustrates how the framework can provide a way to argue on certain critics' own grounds

²³³ *Cameron*, 252 U.S. 450, 454–55 (1920).

²³⁴ Mark Squillace details the sort of all-things-considered calculus used by Bruce Babbitt in plotting President Clinton's approach to national monuments. See Squillace, *Presidential Power*, *supra* note 65, at 7, 111, and 114.

for more expansive monuments. To do so, turn back to the recent debate over Bears Ears National Monument. Senator Hatch (R-Utah) argued that President Obama violated “both the spirit, and arguably, the letter of the law” when he “locked away an astonishing 1.35 million acres” for Bears Ears National Monument.²³⁵ After asking President Trump to “fix this disaster,” the Trump administration took action.²³⁶ President Trump used the Antiquities Act to de-designate many areas of President Obama’s Bears Ears monument, replacing it with two, much smaller monuments—Shash Jáa and Indian Creek.²³⁷ The Trump administration provided a number of reasons: some of the objects protected by Obama were “not unique,” were “not of significant scientific or historic interest,” were “not under threat of damage or destruction,” or were already protected by other laws.²³⁸ As a result, the Trump administration held that “the important objects of scientific or historic interest can instead be protected by a smaller and more appropriate reservation of 2 areas.”²³⁹ In particular, President Trump protected objects such as “cliff dwellings,” “rock art,” “kivas,” “pit houses, storage pits, lithic scatters, campsites, rock shelters, pictographs, and baskets.”²⁴⁰ Meanwhile, the San Juan River and the Valley of the Gods were excluded from the smaller monuments, as were “species such as the bighorn sheep, the Kachina daisy, the Utah night lizard,” and others.²⁴¹

There are many objections one might offer to President Trump’s action. One might take issue with some of the purported facts, such as whether a given object is free of any threat. One might also question whether some of the supposedly de-qualifying considerations are relevant for determining the merits of a monument, such as the lack of uniqueness or the fact that other federal laws protect the objects. The Act, at the very least, does not explicitly state that a President can only protect unique, hitherto unprotected, or threatened objects. Another objection, pressed by others, is that the Act cannot be used to *de*-designate a monument—rather, presidents can only use it to *create* monuments.²⁴²

Beyond these arguments, however, a further objection is now possible. One could have granted the Trump administration nearly everything it said and argue that a more expansive monument was still warranted. To do so, one would look at the objects President Trump sought to protect in Shash Jáa and Indian Creek and see whether caring properly for them provided sufficient reason for including other parts of

²³⁵ Hatch, *supra* note 6.

²³⁶ *Id.*

²³⁷ Proclamation No. 9681, 3 C.F.R. § 188, 190 (2018). Biden has since reinstated the Obama designation. Proclamation No. 10285, 86 Fed. Reg. 57321, 57321–22 (Oct. 15, 2021).

²³⁸ Proclamation No. 9681, 3 C.F.R. § 188, 189 (2018).

²³⁹ *Id.* at 190.

²⁴⁰ *Id.* at 188, 190.

²⁴¹ *Id.* at 192.

²⁴² Nicholas Bryner et al., *President Trump’s National Monument Rollback is Illegal and Likely to be Reversed in Court*, THE CONVERSATION (Dec. 4, 2017, 11:08 PM), <https://perma.cc/9ARJ-ME6Q>.

the landscape within the monument, particularly areas de-designated by the Trump administration. Members of the Hopi Tribe, the Ute Indian Tribe of the Uintah and Ouray Reservation, the Navajo Nation, the Zuni Tribe, and the Ute Mountain Ute Tribe, as well as historic preservation experts and anthropologists, should be asked to weigh in on this.²⁴³ But for illustrative purposes, consider: President Trump's proclamation says that the "Shash Jáa area contains the heart of the national monument: the iconic twin buttes known as the Bears Ears that tower 2,000 feet above the surrounding landscape and are considered sacred to the Native American tribes."²⁴⁴ Excluded from Shash Jáa, however, were areas directly to the north and west of the Bears Ears buttes—areas which had been included in President Obama's designation.²⁴⁵ Significantly, these areas include Deer Flat, Elk Ridge, and Fry Canyon, which have among the highest potential for uranium development of areas within the original monument.²⁴⁶

Would the development of uranium mines, and associated infrastructure, on those sites negatively impact the historical significance of the nearby Bears Ears buttes? Once again, NHPA serves as a helpful guide. NHPA regulations state that the "introduction of visual, atmospheric or audible elements" can adversely affect historical properties.²⁴⁷ Additionally, adverse effects may be "cumulative."²⁴⁸ In *Colorado River Indian Tribes*, for instance, the court noted that increased off-road traffic would likely arise from the proposed development and that such traffic could threaten the setting of the nearby historic sites.²⁴⁹ So, for similar reasons, it is possible that development of the mining sites near the Bears Ears buttes would increase industrial traffic in the area and negatively impact the setting and historical significance of the buttes. It is also possible that development of the mining sites might impact the visual, auditory, or atmospheric qualities of the buttes more directly.

²⁴³ See *id.*; Proclamation No. 9558, 3 C.F.R. §§ 402, 407 (2017) (listing the 5 tribes as having ties to the area).

²⁴⁴ Proclamation No. 9681, 3 C.F.R. § 190 (2018).

²⁴⁵ For discussion and maps, see Laris Karklis, et al., *Areas Cut Out of Utah Monuments are Rich in Oil, Coal, Uranium*, WASH. POST (Dec. 7, 2019), perma.cc/JTD7-8AD3; see also U.S. Dep't of the Interior, *Bears Ears National Monument: Indian Creek and Shash Jáa Units Map*, BUREAU OF LAND MGMT. (2018), <https://perma.cc/LBM3-4UQW> (includes location of the Bears Ears buttes relative to the rest of the Shash Jáa area).

²⁴⁶ See Karklis et al., *supra* note 245 (discussing the location of uranium deposits and nearby mines); *Very Little Energy Potential within Bears Ears National Monument*, UTAH DEP'T OF NAT. RES. (Dec. 4, 2017), <https://perma.cc/VSB9-KA9B> (the Department of Natural Resources for Utah found that Bears Ears contained "moderate to low" development potential for uranium. The highest producing areas, though, are "White Canyon, Elk Ridge, Deer Flat, Indian Creek, and Fry Canyon."). Despite the relatively low development potential, there were reports of a uranium company lobbying the Trump administration for a smaller monument to keep open the possibility of future mining in the area. See Juliet Eilperin, *Uranium Firm Urged Trump Officials to Shrink Bears Ears National Monument*, WASH. POST (Dec. 8, 2017), <https://perma.cc/CWJ5-J8LL>.

²⁴⁷ Assessment of Adverse Effects, 36 C.F.R. § 800.5 (July 6, 2004).

²⁴⁸ *Id.*

²⁴⁹ *Colo. River Indian Tribes*, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985).

Further facts would be needed to assess the likelihood of such possibilities, but the point is this: considerations relevant to an evaluation under NHPA provide details about how, exactly, mining operations might threaten the historic significance of the buttes. So, if the aim of a presidential proclamation is to protect the historic interest of the Bears Ears buttes—as was the case for President Trump’s—then protection of areas to the north and west of the buttes may also be called for.

More generally, if a president seeks to protect an object for its historic or scientific interest, there can be a reason, according to their own aims, to protect more of the surrounding area than they might recognize. Indeed, even on a narrow, originalist understanding of “object of interest,” the proper care and management of such objects can call for protecting the landscape beyond it. The President might decide that a large protection is not politically prudent or all-things-considered best, but such a protection can be lawful.

V. CONCLUSION: A VALUE-FOCUSED ANALYSIS OF ENVIRONMENTAL LAWS

Taken all together, the framework provided here fills a void within the existing legal discussion. It provides an analysis of the sort of facts that are relevant to the determination of a monument’s size—in particular, facts related to determining what the “smallest area compatible with the proper care and management” of objects of interest is.²⁵⁰ Such facts are ones that critics of a given designation could question, and that defenders of the designation could muster. In light of this, we have seen how a president can lawfully protect features of the broader landscape under the Act, provided that those features contribute to a designated object’s historic or scientific interest, or facilitates the study thereof. Depending on details of the case, this can license expansive national monuments. At the same time, however, the approach identifies limits for a justifiable monument. Regarding any given object deemed to be of historic or scientific interest, there will be a limit on what contributes to that object’s interest and therefore a limit on what a president can include in a monument dedicated to its protection. The framework thereby helps respond to the worry, expressed recently by Chief Justice Roberts, that presidential power under the Act “has been transformed into a power without any discernible limit to set aside vast and amorphous expanses of terrain.”²⁵¹

Beyond informing possible future litigation, the foregoing also proves significant for the other two branches of the government. It tells against, for instance, any revision of the Antiquities Act that would stipulate a pre-set limit on the size of monuments (e.g., 640 acres).²⁵² Such a revision

²⁵⁰ Antiquities Act, 54 U.S.C. § 320301 (2018).

²⁵¹ *Mass. Lobstermen’s Ass’n*, 141 S. Ct. 979, 981 (2021) (Roberts, C.J., statement respecting the denial of certiorari).

²⁵² See, e.g., H.R. REP. NO. 115-1085, at 1–2 (2018) (proposed bill limiting monument size).

would be, in a sense, self-undermining. The resulting legislation would aim to facilitate the proper care and management of objects of interest, but it would prohibit the sort of land protection needed for precisely that aim in certain cases. The foregoing also suggests that the Executive branch could consider expert views on what contributes to the objects' historic and scientific interest, as well as to their study, and to specify such details in future presidential proclamations. Doing so could help avoid possible litigation over the resulting monuments by making clear *why* areas beyond the objects were set aside. In these ways, my hope is that the foregoing provides a framework that members of the judiciary, litigants, legislators, and individuals involved with the drafting of proclamations under the Antiquities Act can use to evaluate and defend their choices.

There is also a further upshot to draw: the possibility and importance of a value-focused analysis of environmental laws, more generally. One of the striking things about many such laws is that they focus on protecting rather specific values. This is true particularly for public land laws. The Antiquities Act, as we have seen, speaks explicitly of "historic and scientific interest." The Wilderness Act²⁵³ aims to protect the "primeval character" of certain places and to offer "outstanding opportunities for solitude or a primitive and unconfined recreation."²⁵⁴ It also notes the presence of "ecological, geological, or other features of scientific, educational, scenic, or historical value" on the lands protected.²⁵⁵ The Eastern Wilderness Act²⁵⁶ adds to these the value of "physical and mental challenge."²⁵⁷ Meanwhile, national parks in general are said to be for "the benefit and enjoyment of the people" and protected as "pleasuring-grounds," while national recreation areas focus on providing more "general recreation."²⁵⁸ Other environmental laws, beyond the ones defining land designations, often focus on specific values too. The Endangered Species Act,²⁵⁹ for instance, refers to the "esthetic, ecological, educational, historical, recreational, and scientific value" of the species protected,²⁶⁰ and the Clean Air Act seeks to promote "public health and welfare."²⁶¹

A value-focused analysis explores what is required to respond adequately to these values, and it evaluates how such laws ought to be structured and interpreted as a result. Underlying this is a philosophical

²⁵³ The Wilderness Act, 16 U.S.C. §§ 1131–1136, 1131(c) (2018).

²⁵⁴ *Id.*

²⁵⁵ *Id.* § 1131(c)(4).

²⁵⁶ Pub. L. No. 93-622, 88 Stat. 2096 (1975).

²⁵⁷ *Id.* § 2(b) (1975).

²⁵⁸ For a representative example regarding national parks, see The Yellowstone National Park Protection Act, 17 Stat. 32, § 1 (1872). Regarding national conservation areas, see An Act to Provide an adequate basis for administration of the Lake Mead National Recreation Area, Arizona and Nevada, and for other purposes, 16 U.S.C. § 460n-3(b)(1) (2018).

²⁵⁹ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2018).

²⁶⁰ *Id.* § 1531(a)(3).

²⁶¹ Clean Air Act, 42 U.S.C. § 7401(a)(2) (2018).

view. Within the field of Value Theory, writers have noted that different values call for different responses.²⁶² As a result, different policies may be apt for different values. Aesthetic and historical values, for instance, can call for different forms of preservation.²⁶³ Other values, such as ecological or educational, may call for yet other forms of protection. A value-focused analysis of environmental laws takes seriously such details.

The first step is to determine the core values underlying a given law. As we have seen, such laws often refer explicitly to values, but work remains to figure out whether there are other values underlying the legislation that Congress left implicit. Doing so requires a close reading of the rules and regulations, sections on prohibited uses, and historical facts about the legislation. For instance, though national parks often seek explicitly to protect an area as a “pleasuring ground”—a rather general and ambiguous aim—the legislative history is widely taken to show that national parks focus on protecting *aesthetic* values and aim to offer opportunities for aesthetic pleasure and wonderment.²⁶⁴ Similarly, while I have focused on the two values stated explicitly in the Antiquities Act, there is a question of whether monuments can also be created to protect beautiful or aesthetically notable objects.²⁶⁵

Once the core value(s) of a law are clarified, the second step is to explore what all is required to protect or promote those values. Again, insofar as values prescribe specific responses, they can call for different forms of protection. Such facts can provide philosophical reason for structuring a given law in a particular way. This might, in some cases, call for revisions to a law if its current form inadequately protects the values it targets. In other cases, it can point towards a legal argument for interpreting the legislation in a certain way. This was the case in the above discussion. Language from the Antiquities Act and relevant court precedent provided insight into what, already in terms of the law, is part of the proper care and management of the objects of historic and scientific interest.

Thus, the foregoing shows how a value-focused analysis can advance our understanding of environmental laws. What is surprising is that such analyses are not more common than they are, given the explicit reference to values mentioned in these laws, and given that such laws often take as their primary aim the protection or promotion of particular values. The

²⁶² ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS, 10–11 (1993); see also Wlodek Rabinowicz & Toni Rønnow-Rasmussen, *The Strike of the Demon: On Fitting Proportions and Value*, 114 ETHICS 391, 391 (2004).

²⁶³ Levi Tenen, *Aesthetic and Historical Value: Their Difference and Why It Matters*, 29 ENV'T VALUES, 519, 520, 533 (2020).

²⁶⁴ See RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY 32 (1997) (noting that supporters of the act depicted national parks as “scenic places”).

²⁶⁵ See Levi Tenen, *The Genre View of Public Lands: The Case of National Monuments*, 81 J. AESTHETICS & ART CRITICISM, 9 (2023) (discussing whether aesthetic considerations can serve as legitimate bases for a monument, and how the Act fares when evaluated on aesthetic aims).

discussion here, then, serves as an example of how one can explore these issues—issues that, while sometimes neglected, center around the fundamental purposes of the laws in question.