The Antiquities Act, a short law from 1906, has resurfaced as a point of contention. Under the Antiquities Act, the President can designate national monuments, which sometimes span vast tracts of land, without Congressional approval. At first blush, this grant of authority seems inconsistent with American democracy and uncharacteristic of a country that values the input of its citizenry through its political processes. This very criticism has also been levied against judicial review and Supreme Court constitutional lawmaking. Much like Supreme Court decisions that influence future interpretations of the law of the land and the rights of the citizens for generations to come, the President’s power to preserve the land itself is significant because it influences the future physical shape of the American landscape and the history that the country will remember and enjoy for generations to come. But, if theorists can rationally argue that the constitutional lawmaking by nine unelected Justices is democratically legitimate, then surely this power, too, can be democratically legitimate. Indeed, the President—unlike those nine Justices—is the only official whose election involves nationwide participation. Both the Supreme Court’s form of constitutional lawmaking and the President’s exercise of power under the Act reflect a longstanding tradition of dispute in this country, and this tradition is very much a bedrock principle of American democracy. By reexamining the President’s power under the Act through a tradition of dispute framework and analogizing to constitutional lawmaking theories developed by Robert Post and Reva Siegel and Robert Cover, this Note argues that the President’s power under the Antiquities Act is indeed democratic and, in fact, perpetuates American democracy on two levels: (1) through furthering of the country’s longstanding tradition of dispute and (2) through Congress’s and the President’s response to that tradition.
INTRODUCTION

In recent years, America’s political and legal landscapes have reached several major landmarks. The political landscape further evolved with the country’s first election of an African-American as President in 2008, his reelection in 2012, and the nomination of a woman to be a major party’s Presidential nominee for the first time in history in 2016. In the legal landscape, the Supreme Court issued a landmark decision granting same-sex couples the right to marry. These political and legal changes reflect major changes in the American landscape—America’s national monuments, national parks, and other forms of public lands such as federal wildlife refuges. During the centennial of the National Park Service in

2016, President Obama committed to changing the American landscape in ways that “protect places that are diverse, culturally and historically significant, and that reflect the story of all Americans” by using his power under the Antiquities Act (the “Act”) to designate national monuments without congressional approval. However, some believe that granting the President the power to determine what best “reflect[s] the story of all Americans” clashes with democratic principles. Indeed, President Trump has viewed the use of this presidential power by other presidents as a “massive federal land grab” and has stated that “[it is] time to end these abuses and return control to the people . . . .” In that spirit of returning the land to the people, President Trump announced that he will review—and perhaps even shrink or eliminate—national monuments designated within the last twenty years, including Bears Ears National Monument, a 1.35-million-acre monument designated by President Obama that has “become the most prominent symbol of controversy surrounding the [Act].”

At first glance, it seems that such a grant of authority to one person—the President—is inconsistent with the commitments of a representative democracy. After all, the Act grants the President substantial influence in developing the American landscape, which is something shared by and affects all Americans. The same criticism has been made against judicial review and Supreme Court constitutional lawmaking, a practice that allows nine unelected Justices to develop much of the country’s constitutional law. Just as Supreme Court decisions influence future interpretations of the law of the land and the rights of the citizens for generations to come, the President’s power to preserve the land itself

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· 16 U.S.C. §§ 431–433 (1906) (current version at 54 U.S.C. § 3203 (2012)). The current version merely replaced “parcel” with “tract” in Section C, and “further” was omitted from Section D. Id. Additionally, since 1906, there has been one amendment to the Act to limit the President’s power regarding designations in Wyoming. Id.

· Tatiana Schlossberg, What is the Antiquities Act and Why Does President Trump Want to Change It?, N.Y. TIMES, Apr. 27, 2017, at A15.


· See U.S. CONST. pmbl.

influences the history and future physical shape of the American landscape. In fact, “no other law has had such a wide-ranging influence on the preservation of our nation’s cultural and natural heritage.”

Over one hundred years after President Theodore Roosevelt signed the Act into law, the Act continues to attract national attention. In June 2016, President Obama designated the Stonewall Inn in Greenwich Village, New York, as the country’s first national monument to LGBT rights. The designation sparked a heated controversy with some who called the designation a “monument to sin.” Similarly, in Utah, environmentalists and Native American tribes successfully urged President Obama to designate 1.35 million acres known as Bears Ears as a national monument, despite significant local opposition because of Bears Ears’ potential for oil and gas drilling. President Trump and his Secretary of the Interior, Ryan Zinke, have specifically mentioned Bears Ears as one of the monuments to reconsider, which has done little to quell the controversy over how these lands should be used and more to “thrust southeast Utah back to the front line in the battle over how much control Washington should have over Western lands.” Within the controversy—both around the Stonewall Inn and Bears Ears, as just two examples—opponents of the designations claim that the President’s power conflicts with the structure of American democracy because neither Congress nor its constituents can contribute to the decision of which places to include in the American landscape.

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2. See 54 U.S.C. § 3203 (2012) (indicating that the Antiquities Act was signed into law in 1906).
But, if theorists can rationally argue that the constitutional lawmaking by nine unelected Justices is democratically legitimate, then surely this power, too, can be democratically legitimate. Indeed, the President—unlike those nine Justices—is popularly elected. Both the Supreme Court’s form of constitutional lawmaking and the President’s exercise of power under the Act reflect a longstanding tradition of dispute in this country that is a bedrock principle of American democracy. It is out of this tradition that the country first gained its independence and continues to debate the most pressing national concerns. Such discourse and debate influences the outcomes of elections, laws that Congress passes, and even legal decisions from the Supreme Court. Through this tradition, the American landscape continues to evolve with the political and legal landscapes. When the President exercises his power to designate monuments under the Act, he preserves a place in the American landscape, as well as in the tradition of dispute that many national monument designations engender. By reexamining the President’s power under the Act through a tradition of dispute framework and referring to constitutional lawmaking theories developed by Robert Post and Reva Siegel and Robert Cover, this Note argues that the President’s power under the Antiquities Act is indeed democratic and even perpetuates American democracy on two levels: first, by furthering the country’s longstanding tradition of dispute, and second, by encouraging congressional and executive responses to that tradition.

This Note proceeds in three parts before concluding. Part I provides an introduction to the Act and its history. Part II develops a framework to reveal how the President’s exercise of this power perpetuates American democracy by furthering the country’s longstanding tradition of dispute. Part III then considers how this power sustains American democracy through the President’s and Congress’s response to the tradition of dispute.

I. THE LAY OF THE LAND: BACKGROUND & HISTORY

Carved out of the nation’s 2.3 billion acres, the American landscape consists of over a hundred national monuments, some of which span millions of acres. By designating certain landscapes national

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monuments under the Act, presidents have the ability to develop the American landscape and the nation’s cultural, historical, and natural traditions and values without any congressional approval. This Act thus grants the President broad authority to determine, almost unilaterally, which aspects of the nation’s heritage are valuable and worthy of preservation. Section A briefly describes the Act as well as some other relevant federal laws before describing the Act’s history. In order to understand how the President’s power under the Act spurs controversy, it is helpful to understand how important land and land designations are to Americans. As such, Section B briefly discusses the cultural division among Americans about the meaning of land and the meaning they ascribe to the American landscape. After all, if the President were exercising power over something Americans found insignificant, then its democratic legitimacy would less likely be called into question in the first place.

A. THE ANTIQUITIES ACT, ITS HISTORY, & THE DIFFERENCE BETWEEN NATIONAL MONUMENTS & NATIONAL PARKS

1. The Antiquities Act—

Signed into law in 1906, the Act originally consisted of only four sections, totaling 417 words. This Note focuses on what was originally Section 2 of the Act, which grants the President power to designate national monuments without congressional approval. Under Section 2, the President may “in his discretion . . . 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 . . . .” These designations are to be “confined to the smallest area compatible with proper care and management of the objects to be protected . . . .” In about a hundred words, the Act grants the President broad authority to designate public lands as national monuments without congressional approval and subject only to the restriction that the land be confined to the smallest compatible area. Nonetheless, several national monuments have spanned thousands, and even millions, of acres.

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2. Id. at § 320301.
3. Id.
4. Id.
2. **A Brief History of the Antiquities Act**—

Although the Act was the first of its kind to preserve archaeological sites and the artifacts found on many public lands, President Theodore Roosevelt had greater ambitions than merely protecting assorted artifacts and archaeological sites. In fact, in an early exercise of power under the Act, President Roosevelt designated Devils Tower in Wyoming as a national monument, encompassing more than 1,000 acres. Later national monuments were much larger in size, spanning hundreds of thousands or millions of acres, such as Giant Sequoia and Grand Canyon-Parashant, respectively. But in 1906, Devils Tower was much larger than many congressmen imagined such designations would be. In fact, Congress originally discussed designations of 320 or 640 acres before finally adopting the more flexible language of “the smallest area compatible with the proper care and management of the objects to be protected.” The Devils Tower designation signaled both the beginning of President Roosevelt’s plan to use the Act as a vital piece of his conservation agenda and the beginning of executive use of the Act to shape the American landscape without congressional approval.

Since 1906, when the Act became law, all but three U.S. presidents have designated national monuments. Although heated controversy has often accompanied these designations, efforts to curb this presidential

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* RAY H. MATTISON, FIRST FIFTY YEARS: MONUMENT ESTABLISHED (1955), http://www.nps.gov/deto/learn/historyculture/first-fifty-years-monument-established.htm (describing that only 1,152.91 acres were set aside).
* “Confined to the smallest area compatible with the proper care and management of the objects to be protected” is flexible language, but previous discussions had imagined 320 or 640 acres before Congress was persuaded to adopt this flexible language. Lee, supra note 32, at 32. As such, millions of acres may not have been on the minds of many Congressmen. See Christine A. Klein, Preserving Monumental Landscapes under the Antiquities Act, 87 CORNELL L. REV. 1333, 1335 (2002) (“Following the 1943 designation of the 221,610-acre Jackson Hole National Monument in Wyoming, one congressman complained that Congress never intended that a national monument approach the size of a U.S. state.”).
* THE WILDERNESS SOCIETY, THE ANTIQUITIES ACT: PROTECTING AMERICA’S NATURAL & CULTURAL TREASURES 3 (2011) (describing that the only three presidents who did not use the Antiquities Act were Richard Nixon, Ronald Reagan, and George H.W. Bush).
power rarely succeed. Two exceptions—in Wyoming and Alaska—are discussed later as limits on this power and as Congress’s response to the tradition of dispute. Although President Trump is considering shrinking national monuments, he has not limited his power under the Act. Rather, it appears he has actually expanded it. Whether the Act empowers the President to revoke national monuments is beyond the scope of this Note, but President Trump’s position on trying to scale back certain national monuments and “return control to the people” highlights just how contentious this law and the designations made under it are. If the President could simply unilaterally revoke national monuments, then that, too, would add to the long-standing controversy around what should constitute the national landscape and, more importantly, the extent of this presidential power. This, despite changes to the overall federal land management scheme, the President’s power to decide which aspects of America’s cultural and natural heritage to preserve remains as relevant as ever.


Equally important to an understanding of the Act is the distinction between national monuments and national parks. National monuments include large tracts of land that extend beyond what the word “monument”

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There have been many attempts to amend or repeal the Antiquities Act but all have failed. See, e.g., National Monumental Designation Transparency and Accountability Act of 2015, S. 228, 114th Cong. (2015) (seeking to require Congressional approval for national monument designations and compliance with the National Environmental Policy Act of 1969); MAST Act, H.R. 330, 114th Cong. (2015) (seeking to require Congressional approval for national monument designations and compliance with the National Environmental Policy Act of 1969); Ensuring Public Involvement in the Creation of National Monuments Act, H.R. 1459, 113th Cong. (2014) (seeking to amend the Antiquities Act to require compliance with the National Environmental Policy Act of 1969 and limit the President to making one designation in a state without Congressional approval during a four-year term). Additionally, lawsuits challenging the President’s exercise of the power have often involved great deference to the President, and no designation has ever been deemed “unlawful.” See, e.g., Cameron v. United States, 252 U.S. 450, 455 (1920) (“The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation.”); Utah Ass’n of Counties v. Bush, 316 F. Supp. 2d 1172, 1193 (D. Utah 2004), appeal dismissed (“Plaintiffs feel this . . . effort at protecting the land was unlawful.”).

Eilperin & Fears, supra note 7.

Id.

For some further discussion of whether the Act also includes the power to revoke national monuments, see, e.g., Olivia B. Waxman, Could a President Get Rid of a National Monument? Here’s Why the Answer’s Complicated, Time (Aug. 24, 2017), http://time.com/4912638/donald-trump-national-monument-history/.


might call to mind. Under the Act, national monuments under the Act preserve scientifically or historically interesting lands. Although both national monuments and national parks may span thousands or millions of acres and although both are often under the management of the National Park Service, only Congress—under Article I of the Constitution—has the authority to create national parks. The Organic Act of 1916, otherwise referred to as the National Park Service Organic Act, which established the National Park Service, provides that the purpose of the National Park Service is conservation and that national parks ensure that future generations will also be able to enjoy these parts of the American landscape. In contrast, the Antiquities Act focuses on preservation and conservation for “historic or scientific reasons.” Despite some overlap of motivating ideologies, the national parks were explicitly intended to encourage Americans’ continued enjoyment of natural scenery, but national monuments were intended to prevent pillaging and the destruction of scientifically or historically interesting lands. Although both national parks and national monuments constitute the American landscape and are typically managed by the National Park Service, national monuments designated under the Antiquities Act are not subject to congressional approval. This distinction is why presidential action under the Antiquities Act often spurs significant controversy and, in turn, perpetuates American democracy, as discussed in Part II.

B. A BRIEF HISTORY OF THE CULTURAL DIVISION OVER THE MEANING OF LAND

A discussion of the meaning of land and the meaning Americans ascribe to the American landscape is important to understanding the deep cultural commitment to how land is used and what the American landscape symbolizes. That cultural commitment is effectively the root of the controversy that the President’s use of the Act engenders.

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* See Monument, Oxford English Dictionary (2d ed. 1989) defining “monument” as “a statue, building, or other structure erected to commemorate a famous or notable person or event.”
* See, e.g., supra note 20 and accompanying text.
* Id.; U.S. CONST., Art. I. This authority also grants Congress the power to create national monuments, but this Note focuses on national monuments designated by the President under the Antiquities Act.
* Lee, supra note 32, at 29-32.
1. Cultural Divisions about the Meaning of Land—

Laws like the Antiquities Act and the Organic Act of 1916 underscore the value the country places on its land, even if there remains significant disagreement over how to use the land. A survey of popular culture and historical references lends support to broad notions of the idea that land is important to Americans, though it means different things to different people. But the roots of land’s cultural significance run deeper than Woody Guthrie’s pithy statement that “this land is your land, this land is my land” and “this land was made for you and me.”

The varying meanings of land to different people is exemplified by a recent controversy over what to do with 187,757 acres of land in Oregon—return it to local ranchers or maintain it as the Malheur Wildlife Refuge created by President Theodore Roosevelt, The controversy over this tract ultimately turned into a culture war between conservative and liberal ideologies. As Professor Jedediah Purdy explained, those 187,757 acres—and how they should be used and who should control them—mean radically different things to the ranchers occupying the land, the federal government, and environmentalists. For the ranchers as well as libertarians and some conservatives, this land speaks to the pressing need for a smaller role for the federal government in Oregon, where individuals bearing their own guns are the law. For liberals, the land represents shared public land intended for many public uses (as well as an opportunity to mock the brazen actions and ideologies of ranchers and libertarians). For environmentalists, the Malheur Wildlife Refuge was just that—a wildlife refuge for native birds. Ultimately, different meanings of land provide a basis for broader beliefs about how American society should be ordered and governed.

But the standoff Oregon is not the only example of divisions in the meaning of land. For some, the meaning of land returns to America’s Judeo-Christian heritage, and the role of land in the Judeo-Christian narrative. For example, in leading the Israelites across the Jordan River,

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* See, e.g., Woody Guthrie, *This Land is Your Land* (1945); Margaret Mitchell, *Gone with the Wind* 33 (1936) (“Land is the only thing in the world that amounts to anything . . . . ‘Tis the only thing worth working for, worth fighting for—worth dying for.”).

* Id.

* Id.

* Id.

* Id.


* Id.

* Id.

* Id.

* Id.
Joshua explains that God has given the Israelites not only a place of rest but also the land itself. As such, land may be a place of respite, and for others, land may take on a Romantic meaning as something to enjoy and appreciate. But both of these meanings often run up against other meanings of land, such as economic meanings, that create an especially tense cultural divide.

2. Cultural Divisions over the Meaning of the American Landscape—

The divisions among Americans about the meaning of land influence the different meanings Americans ascribe to the American landscape and what should be included within its contours. Just as Americans can agree that having a constitution is a useful tool for ordering and governing society, they also agree that having some type of national landscape is an important tool for honoring and preserving the best aspects of the nation. But within that terrain, many disagree over what should be included and how those decisions should be made. To some, the American landscape is nearly synonymous with the National Park Service and having a place to enjoy nature—from picnics to hikes to appreciating the scenic beauty. But for others, the American landscape is primarily a way to steward the lands themselves and to protect the wildlife that depend on them. Still others perceive the American landscape as a tool to develop tourism and promote economic growth. Depending upon what citizens think the purpose of the American landscape should be, certain designations can anger certain populations, particularly when those designations clash with their vision of the American landscape and how that landscape ought to develop in a democracy. For example, in the 1940s when President Franklin Delano Roosevelt sought to expand Grand Teton National Park with the Jackson Hole National Monument, local citizens felt that the Jackson Hole acreage was better left to cattle grazing. The locals were not repudiating all of Grand Teton National Park or even the idea of an American landscape.

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* Joshua 1:13.
* Id.
* Id.
* See Cameron v. United States, 252 U.S. 450, 456 (1920) (noting that the Grand Canyon draws "thousands of visitors"). One of the reasons the United States government litigated the case against Cameron was to protect tourism, which Cameron’s mining activities would impede. Cameron, 252 U.S. 450 at 454–56.
* *U.S. at War: Gun Play*, TIME, May 17, 1943, at 21.
Instead, they merely argued that the Jackson Hole acreage did not need to be included in the American landscape as a national monument. Rather, the locals wanted the land left public and open for economic use, if a national monument designation meant the loss of economic benefits from cattle grazing. This issue was particularly divisive and later led to a formal amendment to the Act discussed in Part III.

II. A BEDROCK PRINCIPLE OF AMERICAN DEMOCRACY: THE TRADITION OF DISPUTE

The development of constitutional law by the Supreme Court provides a window to understand how national monument designations under the Act perpetuate American democracy. Robert Cover’s theory of nomos and narrative and Robert Post and Reva Siegel’s theory of democratic constitutionalism are pertinent here. Controversy over how to use the land is not resolved with the Presidential Proclamation that designates the land as a national monument. Thus, nomos and narrative and democratic constitutionalism are apt because they: (1) account for moments where a legal decision on an issue does not end the controversy surrounding the issue, and (2) address legal decisions in which democratic legitimacy is questioned. These theories remain particularly useful because the President makes the decision of which aspects of America’s cultural, historic, and natural heritage should be preserved without the approval of Congress or input from the American people. Similarly, Post and Siegel’s theory of democratic constitutionalism looks to an aspect of American government that seems inconsistent with American democracy and finds a way to legitimate the practice.

Section A begins by developing the analogy between constitutional lawmaking from the Supreme Court and national monument designations under the Antiquities Act. Section B applies Robert Cover’s theory of nomos and narrative and Robert Post and Reva Siegel’s theory of democratic constitutionalism to develop the tradition of dispute as a way of analyzing the President’s exercise of this power. Section C applies the tradition of dispute to President Clinton’s Grand Staircase-Escalante designation and President Obama’s recent Stonewall Inn designation to underscore how this power perpetuates American democracy.
A. THE ANALOGY: CONSTITUTIONAL LAWMAKING & NATIONAL MONUMENT DESIGNATIONS UNDER THE ANTIQUITIES ACT

Although American democracy is a bedrock principle of American identity, scholars have long debated whether the practice of constitutional lawmaking at the hands of the Supreme Court is indeed "democratic." Most of America’s constitutional law has been developed by the Supreme Court, comprised of nine unelected Justices, rather than the arguably more democratic Article V process of passing constitutional amendments. But as discussed in the next Section, by borrowing the scholarship that has legitimated constitutional lawmaking by the Supreme Court, this Presidential power, too, can be legitimated. It is worth noting that if the law made by nine unelected Justices can be considered democratically legitimate, then surely the landscape developed by the only official whose election warrants nationwide participation can also be deemed democratically legitimate.

B. THEORETICAL TOOLS: A TRADITION OF DISPUTE, NOMOS AND NARRATIVE & DEMOCRATIC CONSTITUTIONALISM

Law is not separate “from the narratives that locate it and give it meaning.” These narratives are inextricably linked to what Robert Cover refers to as a nomos or “normative universe.” As such, nomos captures values like liberty and dignity that create a national identity. On the other hand, debates over abortion, affirmative action, and same-sex marriage demonstrate that Americans imagine these values in differing ways. Attuned to these differences, Cover explains that the meaning of an authoritative text—for the U.S., its Constitution—is “always ‘essentially contested,’ in the degree to which this meaning is related to the diverse and divergent narrative traditions within the nation.” A contested narrative about the meaning of the Constitution is then consistent with the idea of heterogeneous visions for American society. At its very core, the American landscape’s nomos is one that captures the diversity of American views and values.

Robert Post and Reva Siegel’s theory of democratic constitutionalism extends the theory of nomos and narrative by bolstering

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* Id.
* Id. at 4, 28.
* Post & Siegel, supra note 17, at 378–79, 381.
* Cover, supra note 66, at 4, 17.
the idea that a contested narrative helps to explain what makes non-Article V constitutional lawmaking—landmark Supreme Court decisions—democratic and legitimate. Against the backdrop of cultural controversy surrounding abortion and Roe v. Wade; Post and Siegel explore how interpretive disagreement is normal and how “backlash”—a reaction counter to certain changes in society—contributes to social cohesion and legitimates the Constitution: “Backlash expresses the desire of a free people to influence the content of their Constitution . . . .” Rather than ending the debate about abortion, Roe turned abortion into “one of the nation’s most explosive political questions.” Although the late Justice Scalia in his Planned Parenthood of Southeastern Pa. v. Casey dissent argued that Roe “foreclos[ed] all democratic outlet[s] for the deep passions this issue arouses,” Post and Siegel observe that the decision encouraged Americans to engage in “[d]emocratic politics, [which] in turn, shapes the institution of judicial review.” A Supreme Court decision did not end the controversy over abortion or the ability for other viewpoints to be heard and honored. In fact, the ensuing controversy surrounding Roe in many ways led to Casey.

American history is rooted in “traditions of argument,” so disputes over the Constitution are consistent with national history and tradition. Under democratic constitutionalism, the Constitution, while “always ‘essentially contested,’” is unifying because the People continue to respect the Constitution as the law of the land, even when they disagree with its application.

1. A National Tradition of Dispute—

As an extension of Cover’s “contested narrative” conception, Post and Siegel’s democratic constitutionalism includes the idea that disagreement and cultural controversy are, in fact, normal and common

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* Id.
* Post & Siegel, supra note17, at 389.
* Id. at 374, 377, 389.
* Id. at 376.
* Id. at 398.
* Id. at 1002 (Scalia, J., dissenting).
* Post & Siegel, supra note 17, at 399.
* Id.
* Id.
* Id. at 404–05.
* Cover, supra note 66 at 17.
* Post & Siegel, supra note 17, at 376.
characteristics of democracy. As such, it makes sense that something as fundamental as land use should also be infused with disagreement. Just as people have deeply held convictions about the Constitution, so too do people hold convictions about the land. Broadly, the tradition of dispute should come as no surprise. After all, this nation was created out of rebellion and dispute with England. In fact, “it has been rightly observed that our constitutional system consists of ‘an historically extended tradition of argument’ whose ‘integrity and coherence . . . are to be found in, not apart from, controversy.’” Similarly, land disputes are also not new, dating as far back as 1607, when the European settlers arrived at Jamestown with a belief that land could be owned—in direct contrast to the Native Powhatans’ view that land was shared by everyone and not owned.

The shape of these disputes as they relate to national monuments often includes congressional bills to curtail the President’s power under the Antiquities Act or—at the extreme—repeal the Antiquities Act. Incidentally, these bills never pass, and only two occasions have seen successful restraints on the President’s power under the Antiquities Act. Similarly, litigation often addresses the controversy by bringing differing views before the Court, but the Court has always deferred to the President’s decision. These methods of addressing and illustrating the controversies over national monument designations—that spring from a national tradition of dispute—further reveal controversies between the President and Congress and between the President and the citizens who comprise Congress’s constituents.

2. Developing the Tradition of Dispute—

The Constitution both unifies and divides the American people because people agree on its authority for the U.S. legal system but disagree over its meaning; but by contrast, land may not unify and divide the public in the same way. In fact, land may be chiefly divisive, with the only unity created by the reality that Americans have to share a single continent. But Cover’s and Post and Siegel’s theories remain applicable and uniquely

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* Id. at 374.
* Id.
* See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).
* Post & Siegel, supra note 17, at 427.
* Supra note 35 and accompanying text.
* Id.
positioned to build a model for unearthing the tradition of dispute that explains how the Act is not an undemocratic exercise of power defying the typical checks and balances of the three branches, but rather is consistent with American democracy. The concept of public lands has different meanings and reasons of importance to different people. For example, when President Clinton designated the Grand Staircase-Escalante National Monument (“the Grand Staircase”) in Utah, the land represented recreational opportunities for hikers, a place for cattle grazing for local ranchers, and a place for economic growth for coal companies. Using the Grand Staircase land for coal development would have largely limited the environmental and recreational enjoyment of the land, just as a narrow reading of the Fourteenth Amendment would preclude a right to abortion. Sometimes, as with the Constitution, these meanings of public lands are incompatible with one another.

Unlike the Constitution, land can be carved up and parceled out more easily, but doing so does not make the controversy disappear. For example, local cattle ranchers are still angry over federal regulations even decades after President Clinton designated the Grand Staircase, and Utah remains frustrated by the significant federal ownership of its lands. In response, the Utah legislature passed the Public Lands Transfer Act, requesting that the federal government return some of the federal lands to the state, but the federal government has largely ignored this legislation. Cover and Post and Siegel’s arguments are especially instructive here: just as a Supreme Court decision to allow women the right to have an abortion did not end the controversy around reproductive rights, a Presidential decision to designate thousands or millions of acres to preserve a landscape does not resolve the dispute over how the land should be used.

Cover’s theory and Post and Siegel’s theory reveal the tradition of dispute that shapes conflict over land and, in turn, explain the laws that engage with and directly relate to the land, such as the Antiquities Act. As Cover argues, law designates significance to things; by allowing

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- Id.
- Cover, supra note 66 at 8.
presidents to designate lands as national monuments, the Antiquities Act is a law that gives certain lands special significance. Under both Cover’s and Post and Siegel’s conceptions, ongoing argument has a role to play in legitimizing legal decisions by keeping multiple interests engaged in the debate. From these theories, this Note argues that the exercise of power under the Act and the accompanying controversy follows a long tradition of dispute. Constitutional lawmaking evolves in response to disagreements with various mechanisms in place to protect the minority, and the meaning of the law evolves over time as well. Changes to the national landscape, such as national monuments, are often permanent. The national landscape evolves less by way of an ongoing dialogue and more by way of direct responses to certain interest groups at the expense of other views.

C. A POWER CONSISTENT WITH AMERICAN DEMOCRACY


The Utah Travel Industry describes the Grand Staircase-Escalante National Monument (“the Grand Staircase”) as a “Delaware-sized museum of sedimentary erosion that walks you down through a 200-million-year-old staircase of animals (that’s us!), minerals, and vegetables . . . .” Surrounding this vast “museum of sedimentary erosion” is a controversy over dueling narrative traditions—two stories for what this land means and how it should be used.

President Clinton’s designation of the Grand Staircase as a national monument in 1996 was motivated by a previously lackluster environmental record. But Clinton’s Grand Staircase designation represents more than one president’s attempt to win re-election. It responded to the conservation and preservation story at the expense of excluding many Utahans’ interests. The designation thus represents a decision to subordinate the economic story to a conservationist narrative in one particular change to the American landscape.

The frequent neglect of conservation at the time may explain why the economic interests, specifically coal development, gave way to conservation regarding the Grand Staircase. Clinton had done very little with conservation during his first term, and the two presidents preceding

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Id.


Id.

Squillace, supra note 115, at 107–08.
him had not designated any national monuments. Although Clinton’s designation emphasized conservation, it was not the end of the controversy, much as Roe was hardly the end of the abortion debate. The tradition of dispute provides a useful lens for understanding the controversy surrounding the Grand Staircase: decades after the designation, cattle ranchers are still vocal about their anger over the designation.

Additionally, Utah is dissatisfied with the amount of federal land within the state. It has thus engaged in political processes to pass the Transfer of Public Lands Act to compel the federal government to return some of the federal lands to the state. Although the federal government has ignored this law, there have been efforts to engage the local communities more with future land designations, and the petition for another national monument in Utah (Bears Ears) is another opportunity for this type of controversy to shape the American landscape.

Bears Ears—twin buttes and sandstone walls—is an area beloved by Native Americans, hikers, campers, and hunters alike, each of which have their unique objectives and interests. Native Americans alongside many environmentalists pushed President Obama to designate over a million acres under the Antiquities Act to protect the land from mining and drilling. Concurrently, local ranchers, politicians, and even some local Native Americans opposed the designation because the mining and drilling would bring new jobs to Utah, which already suffers from high unemployment. Similarly, Clinton’s designation of the Grand Staircase incited a visceral response from some groups that has still not completely subsided. Indeed, President Trump has further fueled this controversy by ordering the review of national monuments designated since 1996, the same year that Clinton designated the Grand Staircase. Thus, with many ideas about how to use the land and many angry personalities, designations may be viewed as a win for some, such as Native Americans and environmentalists in the case of Bears Ears, or as an unwelcome land grab by the federal government for many locals or even the current

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1. Id.
2. Id.
6. Id.
7. Id.
8. Id.
With President Trump’s announcement aimed at shrinking Bears Ears, the controversy continues and will likely culminate in litigation.\(^\text{117}\)

Presidential preservation of Bears Ears represents another development in the Grand Staircase controversy, much like Casey furthered the abortion controversy.\(^\text{118}\) This new development further demonstrates how the Act sustains the ideals of American democracy by fostering a tradition of dispute that includes states and local citizens. Here, U.S. Senator Orrin Hatch (R-UT) began voicing the concerns of his constituents by sending a letter to President Obama opposing his use of the Antiquities Act in Utah.\(^\text{119}\) Senator Hatch’s letter urged President Obama to allow for “public participation in land-use decisions”\(^\text{120}\) rather than making unilateral decisions.\(^\text{121}\) The letter was also signed by his colleague Senator Mike Lee, and the U.S. Congressmen representing Utah in the House of Representatives.\(^\text{122}\)

Disparate regional identities or competing interests about how to use the land are not automatically reconciled after national monument designations. Just as Post and Siegel explain that a final decision from the Supreme Court does not end the controversy but rather spurs backlash—as they point out with Roe v. Wade—\(^\text{123}\) a final decision to preserve the land in Utah instead of putting it to economic use (such as coal development) did not end the controversy.\(^\text{124}\) The presidential proclamation designating the area as a national monument did not make these disputes disappear, even if it did make the Grand Staircase an official national monument. But this persisting controversy has its benefits. The controversy surrounding the Grand Staircase prompted a dialogue that led Clinton and subsequent presidents to involve local communities more when making future designations.\(^\text{125}\) Similarly, dialogue continues to shape the current controversy over Bears Ears and the variety of national monuments

\(^{117}\) See Schlossberg, supra note 6.
\(^{118}\) See Eilperin & Fears, supra note 7 (discussing how the Navajo Nation’s attorney general has prepared its legal claim).
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{125}\) Instead, this led to the Utah Transfer of Public Lands Act in 2012. See Healy & Johnson, supra note 100, at A1. See also Jim, supra note 97.
designated since 1996. Bears Ears is an example of how a national monument designation did not change the fact that many Utahans “do not support the use of the Antiquities Act within [their] community . . . .” President Obama’s designation did not end the debate, and it is unlikely that a reversal of any national monument would end the debate about this exercise of presidential power. Likewise, other uses of the land would not remove federal interests in protecting the Native American heritage tied to the land and ensuring that the American people can enjoy the many trails and recreational opportunities the land provides. But this controversy carries significant value by furthering the tradition of dispute, without which American democracy is weakened. Ensuring the continuation of this tradition is crucial for both the American landscape and the context of constitutional law; the American landscape is a shared space that requires careful attention if it is to remain “the story of all Americans.” In this case, the dispute ensures that people continue to care about the land and engage in political processes to ensure that the American landscape is at least responsive to the competing interests that encapsulate the country’s diversity. In doing so, the American landscape reflects the paradigm that America is built on “traditions of argument.” Reflecting this tradition in the American landscape is as important as the physical land itself. When President Clinton designated the Grand Staircase, he not only preserved an important geological structure—he also preserved an ongoing controversy about how best to use Western lands. President Obama was confronted with the same controversy regarding Bears Ears.

2. Stonewall Inn—

The Stonewall Inn designation marked the first national monument to LGBT rights in this country, coming roughly one year after the Obergefell decision, granting same-sex couples the right to marry. Much as President Theodore Roosevelt had greater plans for the Act than simply preventing the pillaging of Native American artifacts, President Obama used the Act to

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" See, e.g., Friedman, et al., supra note 116.
" Utah Delegation sends letter to President Opposing Use of Antiquities Act in Utah, supra note 120.
" In fact, President Trump is trying to shrink the Bears Ears. See, e.g., Eilperin & Fears, supra note 7.
" Office of the Press Secretary, supra note 3.
" Post & Siegel, supra note 87 at 376, 405.
create a more “inclusive” American landscape.\textsuperscript{133} Indeed, President Obama used his power to create national monuments to honor Harriet Tubman and women’s equality.\textsuperscript{134} This effort to create a more “inclusive” American landscape reflects the country’s broad diversity and changes the American landscape in much the same way that Brown, Roe, and Obergefell changed the legal landscape.

From the Stonewall Inn designation, the Act may most clearly be recognized as consistent with American democracy because the controversy tracks the dispute around Obergefell in many ways. The ideological disagreement over LGBT rights manifests itself at the constitutional level and at the American landscape level. In both cases, opponents return to the method by which the law or the landscape changed that simply do not involve congressional or popular input. Moreover, in both cases, significant backlash was provoked, but that backlash is a useful and important aspect of American democracy in that it encourages a national dialogue. Additionally, some have argued that constitutional lawmaking by the Supreme Court is instrumental in protecting the rights of minorities. Executive action to honor the rights of minorities in the American landscape—to ensure that the American landscape indeed reflects the country’s diversity—serves an analogous purpose. In this way, the threat of tyranny of the majority is avoided not only in the legal system but also in the history and heritage that the country honors and preserves.

Just as many people were angry with Justice Kennedy’s decisions in Lawrence, Windsor, and Obergefell because those opinions changed the law of the land based on the Justices’ decision in support of LGBT rights by 5 to 4, people were angry with President Obama’s designation of the Stonewall Inn on the grounds that the commitment of one man—the President—to LGBT rights had now changed an aspect of the American landscape. Many would say that this commitment is not reflective of the “story of all Americans,”\textsuperscript{136} but rather liberals’ political agenda.\textsuperscript{137} Chief Justice Roberts argued in dissent that Kennedy’s Obergefell opinion had nothing to do with the Constitution.\textsuperscript{138} Some would say that President Obama’s Stonewall Inn designation has nothing to do with America’s

\textsuperscript{133} Simone Leiro, President Obama Designates Stonewall National Monument, https://www.whitehouse.gov/blog/2016/06/24/president-obama-designates-stonewall-national-monument.
\textsuperscript{136} Office of the Press Secretary, supra note 3.
\textsuperscript{137} Zauzmer, supra note 14.
It is this backlash that sustains the tradition of dispute, thus perpetuating the American ideals of diversity of opinion. On multiple levels—the law of the land and the land itself—the country can engage in both abstract and concrete debates over LGBT rights, a particularly pressing issue in the 21st century. Despite the debate, Obama’s designation of Stonewall Inn does reflect the “story of all Americans,” even those who do not support LGBT rights, because it draws out the quintessentially American tradition of dispute.

III. MAPPING THE CONTROVERSY: PERPETUATING AMERICAN DEMOCRACY WITHIN THE BRANCHES OF THE U.S. GOVERNMENT

The tradition of dispute underlies the democratic legitimacy of the President’s exercise of this power. But there is more to the story. This power is not only consistent with American democracy but actually perpetuates American democracy. When considered against the other avenues for developing the American landscape—namely congressional designations—the Act and its controversies are part of a broader structure that furthers American democracy’s tradition of dispute. This Part analyzes the President’s power under the Act by considering instances where the tradition of dispute has spurred political processes central to American democracy. The Act’s power to channel the tradition of dispute such that the backlash and dialogue around certain designations prompt congressional action effectively furthers American democracy. Section A discusses how the Act furthers American democracy by discussing two instances when the President’s exercise of power under the Act prompted a congressional response to curb that power. Specifically, this Section discusses the reaction to President Franklin Delano Roosevelt’s Jackson Hole National Monument and President Jimmy Carter’s Alaska national monuments and the subsequent congressional action to limit the use of the Act in Wyoming and Alaska. Section B discusses how the Act furthers American democracy by providing an example of how the President’s exercise of this power accomplished what Congress could not. Specifically, President Obama’s exercise of his power under the Act to designate the Underground Railroad National Monument and honor Harriet Tubman prompted Congress to designate two national parks in her honor, after years of citing budgetary constraints as reasons for not creating a national park.

See, e.g., Zauzmer, supra note 14.
Office of the Press Secretary, supra note 3.
A. **WHEN BACKLASH EFFECTIVELY REINS IN THE POWER**

Congressional approval is implicit in many national monument designations because attempts to repeal it or amend the federal land management scheme to limit Presidential power have failed. Additionally, Congress later re-designates many national monuments as part of the National Parks. But unlike the President who is elected to serve all Americans, individual representatives and senators are elected to represent their respective states and districts within the United States. As a result, they respond to the contested narrative with their constituents’ views about which lands belong in the national landscape. Although Congress has the power to create national parks, many of those parks are effectively vetoed by Western senators who sit on the public land management committees. Many lands in the western part of the United States are already public, and local citizens either want to have the lands returned to the states or to limit the restrictions regulating land use. Western senators voice these concerns so that the American landscape is responsive to these interests that want to limit both the federal regulations on the land and which lands are part of the national landscape. In two cases, the backlash created by national monument designations spurred congressional action to rein in the President’s power in very tangible ways.

1. **Jackson Hole, Wyoming**

In 1943, President Franklin Delano Roosevelt (“FDR”) spurred one of the first major controversies involving the Antiquities Act. FDR envisioned a wildlife reserve in Jackson Hole, Wyoming that would be an addition to Grand Teton National Park. Congress refused to expand Grand Teton National Park, but FDR had an alternative to create his wildlife reserve. Despite failing to convince Congress to expand Grand Teton National Park, FDR authorized this wildlife reserve in Jackson Hole,

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4. Id.
6. Id.
7. Id.
Wyoming by exercising his power under the Antiquities Act. In response, Congress attempted to remove the new national monument by passing a bill, but FDR simply vetoed the bill. This dispute continued for seven years. Many local ranchers were upset because of new restrictions on cattle grazing. In 1950, Congress and President Truman struck a compromise—Congress would expand Grand Teton National Park to include most of the Jackson Hole Monument, but the President could not make any other national monument designations in Wyoming without congressional approval. Even this compromise did not end the dispute. Local ranchers remained angry because while their future interests might be better served by the requirement of congressional approval for future monuments, the Jackson Hole National Monument was permanent. In maintaining the dispute, however, the President and Congress preserve an active dialogue about the concerns of American citizens—whether those concerns center on economic uses of land or ideological differences as is the case with recent designations such as the Stonewall Inn.

2. **Alaska**—

In 1978, President Carter sought to preserve 56 million acres in Alaska after Congress refused to pass a bill to protect those Alaskan lands. Local Alaskans opposed the bill, and Congress refused to work with President Carter to protect the land. Just as FDR had done, President Carter turned to the Antiquities Act when Congress turned its back on the President. Despite Congress’s refusal to support the preservation of the land, Carter designated all 56 million acres as several national monuments under the Antiquities Act. Two years later, in 1980, the President and Congress reached a compromise with the passage of the Alaska National Interest Lands Conservation Act on the condition that no future national monument designations in excess of 5,000 acres could be made in Alaska without congressional approval. Carter’s designation upset many local

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Id.

Rothman, *supra* note 145 at 90.

Id.


Id.

Andrus & Freemuth, *supra* note 152, at 93.

Alaskans and drew huge protests from those who felt that the designation reeked of dictatorship; some went as far as burning Carter in effigy at a protest.\(^\text{157}\) The controversy around Carter’s Alaska monuments implicated both the local interests for how the land should be used as well as who should get to make a land use determination in the first place. Notably, since Carter, no other president has attempted to create a national monument in Alaska.\(^\text{158}\) Alaskans refused to allow the national landscape to be solely at the mercy of presidential preservation, and Congress took up Alaskans’ concerns to ensure that the national landscape was responsive to their vision for the land.

Under the Antiquities Act, the President makes a decision without approval from Congress, so Americans’ ability to ensure congressional accountability—through elections—is missing from these decisions. Perhaps, if a President makes too many disagreeable national monument designations, then the People may not re-elect him for a second term. If he makes too few designations, then he might similarly lose re-election, as Clinton feared in the run-up to his second election.\(^\text{159}\) This requires presidents to balance the quantity and types of the designations that they make. In the case of President Carter, his Alaska designations involved a substantial amount of land for which Alaskans had other intentions. The dispute that these designations fueled provide a useful example of how Congress can step in and respond to the American tradition of dispute to ensure that the national landscape is responsive to the diversity of American ideas about land use, particularly in the future.

**B. THE NEED FOR EXECUTIVE ACTION**

1. **A National Figure & A National Landscape—**

The nationwide election of the President highlights the uniqueness of the President’s ability to respond to the tradition of the dispute. Although many disagree over who the President should be in any election, the President is elected to represent the whole country, through a democratic process. The President thus maintains a level of accountability by virtue of his position to represent the nation, and is uniquely equipped to add to the American landscape in his role to play within the broader tradition of dispute. A surface-level analysis would conclude that, beyond the accountability to the People regarding a second election, the President’s decisions regarding national monument designations do not ostensibly


\(^{158}\) Raffensperger, *supra* note 148.

\(^{159}\) Squillace, *supra* note 96, at 109.
hinge on democratic values. This charge that it is an undemocratic exercise of power is levied by many critics against the Antiquities Act. Probing national monument designations further reveals that this criticism is weak, as considered by other scholars. These scholars, though, cite the implicit democratic processes at work such as the continued existence of the Antiquities Act, despite changes to the federal land management scheme, and the fact that many national monuments are later re-designated as national parks by Congress. The weakness of these arguments derives from their heavy reliance on implicit processes, neglecting how the exercise of power is consistent with American democracy in a broad sense, and failing to mention that the Act in fact aligns with and perpetuates American democracy.

As the President considers designations to develop the American landscape, the Antiquities Act should be his premier vehicle for action. Certain circumstances may require executive action to add to the American landscape, such as budgetary constraints or gridlock. These circumstances are particularly common regarding additions to the American landscape in the West; many Western senators sit on the public lands committee and veto national park designations. In such situations, it is up to the President to take executive action to ensure that the country has a meaningful American landscape when Congress fails to act.

President Obama’s Underground Railroad National Monument is an instructive example of the tangible benefits of the exercise of executive power. In 2013, amidst the publicity of the Sesquicentennial of the Civil War, Obama designated over 11,000 acres of Maryland’s Eastern Shore to honor Harriet Tubman with the Underground Railroad National Monument. Across much of this land, Tubman brought seventy slaves to freedom. This national monument honors Tubman’s role in history by creating space in the American landscape for previously untold stories to be recognized and shared. Presidents can designate lands under the Antiquities

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But see Albert C. Lin, Clinton’s National Monuments: A Democrat’s Undemocratic Acts?, 29 ECOLOGY L.Q. 707, 708 (2002). This article, however, does not consider the exercise of power against a broader tradition of dispute or its role in the general scheme of American democracy and legal theory.

Id.


Id.
Act for historic reasons, and the American landscape develops from both a desire to engage in conservation and a desire to honor and preserve certain histories.

For years, Congress had debated creating a national park to honor Tubman, citing a lack of funding as a primary reason not to complete the project. Obama’s designation spurred the approval of a national park honoring Tubman—and the creation of an additional park in New York—and thus removed unnecessary hurdles. Even when both Congress and the President agree on which history to honor, Congress is sometimes subject to a variety of internal constraints that prevent it from accomplishing the preservation on its own. In those instances, it is important that the President has the power to go ahead and preserve the history without Congress’s approval. The ability of the executive to make certain decisions without congressional approval is an integral aspect of American government that ensures a balance of power between the Executive and the Legislature. That this monument was celebrated and even cited by some members of Congress speaks to the importance of the president’s power under the Antiquities Act.

After devoting much of her life to helping slaves escape to freedom, Tubman’s commitment was finally honored on a national level by the country’s first African American president. This follows a tradition that grants the President the power to develop the American landscape, including the history that is preserved within that landscape. It is fitting that our nation’s first African American president incorporated Harriet Tubman and the Underground Railroad into the national landscape.

IV. CONCLUSION

With the 100th anniversary of the National Park Service, many people celebrated our American landscape, but at the same time, many

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See John Bodnar, *Remaking America: Public Memory, Commemoration, and Patriotism in the Twentieth Century* 169–70, 180–82 (1992) (discussing the National Park Service’s selection of historic sites based on “national significance” as well as “preservation of landscape treasures” with a focus on patriotism and “contribut[ing] to the dominant celebration of nation building”).


contested the President’s power to develop that landscape, claiming that the
exercise of power is undemocratic and inconsistent with American ideals. Indeed, the current President is voicing similar concerns about the Act, although there is an argument to be made that unilaterally shrinking or revoking designations could be equally undemocratic. Analyzing this power and the controversies it engenders from the perspective of a tradition of dispute, reveals that the power and its exercise are highly consistent with American democracy. If the law that is representative of the nation—the Constitution—was developed out of controversy, then it makes sense that the landscape that is representative of the nation, too, would also develop out of controversy. The way in which the President and Congress respond to this tradition further preserves American democracy throughout the political branches.

More than lines on a map, the American landscape tells a story that reflects a shared tradition of dispute. This tradition is a bedrock principle that manifests itself not only in constitutional lawmaking but also, as this Note points out, in the development of the American landscape. The Antiquities Act enables the physical observation of this tradition, beyond just at the abstract level of what the law is or becomes. This power solidifies a rich tradition of dispute.

Just as President Theodore Roosevelt had greater ambitions for the Act than protecting Native American artifacts from pillaging, President Obama strived to use the Act to create a more inclusive American landscape and to continue President Roosevelt’s tradition of conservation. The American landscape continues to develop such that it includes not only important natural and geological structures but also important testaments to the evolution of American history—from Harriet Tubman to women’s suffrage to LGBT rights.

These controversies over national monuments designated under the Antiquities Act reflect similar ideological controversies that are capturing the attention of the media on issues such as race, gender, and LGBT rights. Although it is tempting to say that the Act is undemocratic, deeper analysis reveals that this Act actually bolsters American democracy by fueling the tradition of dispute and thus continuing important dialogue around major issues. Post and Siegel observe that “[c]onstitutional law embodies a nomos, and fidelity to that nomos demands engagement that is both legal and political.” Similarly, the American landscape “embodies a nomos” that requires the very same legal and political engagement if the country is to remain faithful to that nomos. This nomos incorporates the diversity of

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“See Schlossberg, supra note 6.
“Leiro, supra note 133.
“Post & Siegel, supra note 17, at 433.
“Id.
American values and the heterogeneity of its citizens. Remaining faithful to that nomos ensures that generations to come will find their own place within the tradition of dispute and that the American landscape will truly “reflect the story of all Americans.”

Office of the Press Secretary, supra note 3.