

WHAT IF THE GRAND CANYON HAD BECOME THE SECOND NATIONAL PARK?

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February 26, 2019, was the one hundredth anniversary of Grand Canyon National Park. The Congress that established the park reported that “[t]he Grand Canyon has long been recognized as one of the greatest scenic regions

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of the world.”¹ It is no wonder that the Grand Canyon became our fifteenth national park.²

But it could have been the second national park, thirty-seven years earlier.

In 1882, Senator Benjamin Harrison introduced a bill to make the Grand Canyon a national park.³ John Wesley Powell had led the first official expedition along the Colorado River through the Grand Canyon in the Territory of Arizona in 1869, three years before Yellowstone became the first national park in 1872.⁴ Harrison was in the second year of his only term in the Senate; he would be elected President in 1888. But Harrison’s bill to make

1. S. REP. NO. 65-321, at 3 (1918) (quoting the Hon. H.L. Myers); *see also* 65 CONG. REC. 4,479 (1924) (statement of Sen. Ashurst) (remarking that the Grand Canyon’s “templed depths, its towers and minarets, its glowing colors and vastness, are not matched anywhere”); *Id.* at 4,456 (statement of Rep. Hayden) (describing the Grand Canyon as “the most stupendous natural wonder in the world”); S. REP. NO. 65-321, at 2 (quoting letter from Franklin K. Lane, Sec’y of the Interior (Feb. 5, 1918), stating that “[i]t seems to be universally acknowledged that the Grand Canyon is the most stupendous natural phenomenon in the world”); JOHN ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* 230 (1961) (concluding that the “Grand Canyon is remarkable mainly as our most spectacular scenic wonder”); GEORGE WHARTON JAMES, *THE GRAND CANYON OF ARIZONA: HOW TO SEE IT* 1 (rev. ed. 1910) (proclaiming that “all men unite in affirming that the greatest of all wonders, ancient or modern, is the Grand Canyon of Arizona”); C.A. Higgins, *The Titan of Chasms*, in *TITAN OF CHASMS: THE GRAND CANYON OF ARIZONA* 3, 6, 10 (Santa Fe ed., 1903) (proclaiming that the Grand Canyon “is the soul of Michael Angelo and of Beethoven” and that “[t]he comparative insignificance of what are termed the great sights in other parts of the world”—such as Yosemite and Niagara Falls—“is now clearly revealed”); William Eleroy Curtis, *Our National Parks and Reservations*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Mar. 1910, at 15, 21 (describing the Grand Canyon as “in many respects the grandest natural spectacle in the world”); Charles F. Lummis, *The Greatest Thing in the World*, in *TITAN OF CHASMS*, *supra*, at 23, 24 (describing the Grand Canyon as “the greatest chasm in the world, and the most superb”); John Muir, *The Grand Cañon of the Colorado*, *CENTURY MAG.*, Nov. 1902, at 107, 110 (writing that “nowhere else are there illustrations so striking of the natural beauty of desolation and death” and that “[w]ildness so goodful, cosmic, primeval, bestows a new sense of earth’s beauty and size”).

2. The counting of national parks is a bit subjective because of the elimination of some early parks. *See* ISE, *supra* note 1, at 49, 139–40 (describing the former Mackinac and Sully’s Hill national parks). I list the Grand Canyon as fifteenth because fourteen other current national parks preceded it. *See* DVD: *The National Parks: America’s Best Idea* inside cover (PBS 2009) (on file with the author) (placing the Grand Canyon fifteenth in a list of “national parks by date of establishment”).

3. Andrew Glass, *Congress Passes Bill Establishing Grand Canyon National Park*, *Feb. 26, 1919*, *POLITICO* (Feb. 26, 2015, 12:01 AM), <https://www.politico.com/story/2015/02/this-day-in-politics-115497> [<https://perma.cc/L768-8Y3F>].

4. Rebecca Hein, *John Wesley Powell: Explorer, Thinker, Scientist and Bureaucrat*, *WYO. HIST.* (Dec. 26, 2018), <https://www.wyohistory.org/encyclopedia/john-wesley-powell-explorer-thinker-scientist-and-bureaucrat> [<https://perma.cc/2FTE-N28J>]; *Quick History of the National Park Service*, *NAT’L PARK SERV.*, <https://www.nps.gov/articles/quick-nps-history.htm> [<https://perma.cc/M253-E6WX>] (last updated May 14, 2018).

the Grand Canyon a national park failed, as did similar bills that he introduced in 1883 and 1886.⁵

Both Harrison's motivation and the reasons why Congress was unpersuaded are lost in the mists of history. The only remaining, tantalizing evidence of what happened is a letter written by Secretary of the Interior Henry Teller, unmentioned in all of the previous histories of the Grand Canyon, which argued that a national park was unnecessary to protect the stupendous scenery, especially given how such a park would interfere with private settlement.⁶ Teller's logic was a frontal attack on the solitary Yellowstone precedent. If his reasoning had been adopted, Yellowstone could have been the first *and only* national park.

Instead, the national park idea stagnated for several decades, but the area around the Grand Canyon began to change. Miners, ranchers, tourism entrepreneurs, and railroads arrived on the scene. Two individuals—Ralph Cameron and William Bass—settled near the Grand Canyon in the 1880s and soon dominated the opposition to a national park until 1919 and beyond.⁷ As the possibility of a national park languished, Congress and a series of Presidents employed other legal tools to protect the Grand Canyon from despoliation.

This essay considers the consequences of the failed effort to make the Grand Canyon a national park in the 1880s. It relies on previously untapped archival sources to flesh out the account of why it took so long for the Grand Canyon to become a national park and what happened during the interim. It reviews the scant historical record of why Benjamin Harrison (who became the nation's twenty-third President) so persistently sought to establish a national park, and why Henry Teller (who returned to the Senate to represent Colorado for another twenty-four years) believed such a park was unnecessary. The dispute between Harrison and Teller presaged conflicting views about whether scenic landscapes should be public or private property. The fact that Teller prevailed over Harrison in the 1880s had significant consequences for the Grand Canyon and for federal public land law generally. The Grand Canyon confronted proposals for mining, dams, and private tourist development in the decades between Harrison's first national park bills and

5. Glass, *supra* note 3.

6. See Beth Dodd, *Who Was Henry M. Teller?*, MOUNTAIN JACKPOT NEWS, <http://www.mountainjackpot.com/2012/11/30/who-was-henry-m-teller/> [<https://perma.cc/K5FZ-UDB3>] (last visited Apr. 7, 2019).

7. See *supra* Section I.B.1.

the eventual creation of a national park in 1919.⁸ Those projects failed to achieve enduring success, but they succeeded in delaying the establishment of a national park. The inability to secure national park status prompted conservation-minded Presidents to stretch existing legal authorities to protect the Grand Canyon. President Theodore Roosevelt's creation of the Grand Canyon National Monument in 1908 established a precedent that set the Antiquities Act on a far different course from what Congress had expected when it enacted the law two years before.⁹

The saga of making the Grand Canyon a national park teaches us three lessons as the park begins its second century. First, it shows the surprisingly modest role that park status played in protecting the land in some of the early national parks. On the one hand, alternative legal tools can be employed “to conserve the scenery [and the] natural and historic objects, and the wild life [therein] and to provide for the enjoyment of the [same] in such manner and by such means as will leave them unimpaired for the enjoyment of future generations,” as the National Park Service (NPS) is now charged.¹⁰ On the other hand, the Grand Canyon's experience shows how even a national park designation does not guarantee the protection of our most spectacular landscapes. The second lesson is that federal ownership and management of our most spectacular landscapes—now celebrated as “America's best idea”¹¹—was contested even after Yellowstone became the first national park in 1872. And third, the delay reminds us that presidential action in response to congressional inaction can be a dangerous course to follow. The use of the Antiquities Act to protect the Grand Canyon in 1908 suggests that not only

8. See MICHAEL F. ANDERSON, NAT'L PARK SERV., POLISHING THE JEWEL: AN ADMINISTRATIVE HISTORY OF GRAND CANYON NATIONAL PARK 4, 10 (2000), <https://www.nps.gov/grca/learn/historyculture/upload/chapter1.pdf> [<https://perma.cc/KQ6R-KY74>].

9. See Sanjay Ranchod, *The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act*, 25 HARV. ENVTL. L. REV. 535, 544 (2001); Richard West Sellars, *A Very Large Array: Early Federal Historic Preservation—The Antiquities Act, Mesa Verde, and the National Park Service Act*, 47 NAT. RESOURCES J. 267, 296 (2007).

10. 54 U.S.C. § 100101(a) (2018); see also 16 U.S.C. § 1 (repealed 2014).

11. See DAYTON DUNCAN & KEN BURNS, THE NATIONAL PARKS: AMERICA'S BEST IDEA, AN ILLUSTRATED HISTORY xxii (2009). Duncan and Burns borrowed the claim from Western author Wallace Stegner, who credited the phrase to the same Lord Bryce who was so dismissive of American scenery, see JAMES BRYCE, 2 THE AMERICAN COMMONWEALTH 685 (1891) (opining that “taking the country as a whole, and remembering that it is a continent, it is not more rich in picturesque beauty than the much smaller western half of Europe”), though no one is sure if Bryce actually coined the phrase. See Alan Maceachern, *Canada's Best Idea? The Canadian and American National Park Services in the 1910s*, in NATIONAL PARKS BEYOND THE NATION: GLOBAL PERSPECTIVES ON “AMERICA'S BEST IDEA” 51, 51 (Adrian Howkins, Jared Orsi & Mark Fiege eds., 2016).

do bad cases make bad law in the courts, but the same phenomenon occurs in the executive branch as well.

I. THE THIRTY-SEVEN YEAR WAIT

A. *The Missed Opportunity to Establish a National Park*

The desert southwest was home for generations of Native American communities.¹² A small contingent of Spanish soldiers reached the Grand Canyon in 1540, but it remained largely unknown to European settlers and their descendants until after the Civil War and the construction of transcontinental railroads. John Wesley Powell's 1869 and 1872 raft trips on the Colorado River brought the Grand Canyon to national attention during the 1870s.¹³ Powell was engaged in a journey of scientific discovery, but he repeatedly raved about the scenery.¹⁴ So did Clarence Dutton, a geologist who accompanied him on the trip.¹⁵ Thomas Moran joined the 1872 journey, and his paintings of the Grand Canyon attracted large crowds when they were

12. See generally DON LAGO, GRAND CANYON: A HISTORY OF A NATURAL WONDER AND NATIONAL PARK 25–40 (2015) (describing the history of Native Americans living at the Grand Canyon).

13. See J.W. POWELL, EXPLORATION OF THE COLORADO RIVER OF THE WEST AND ITS TRIBUTARIES (1875). Even so, some members of Congress questioned the need for the federal government to subsidize Powell's trip. See CONG. GLOBE, 40th Cong., 2d Sess. 2563 (1868).

14. See POWELL, *supra* note 13, *passim*. Powell's career moved toward promoting irrigation and studying Indian culture. See HAL ROTHMAN, AMERICA'S NATIONAL MONUMENTS: THE POLITICS OF PRESERVATION 11 (1989) (describing Powell as "the preeminent power in federal science" at the end of the nineteenth century). Powell never suggested that the Grand Canyon should become a national park. Instead, he championed Arizona's petrified forest for national park status, a dream that was not realized until 1962. See *Petrified Forest: Fast Facts*, NAT'L PARK SERV., <https://www.nps.gov/pefo/planyourvisit/fast-facts.htm> [<https://perma.cc/KEY8-6AVJ>] (last updated May 19, 2018).

15. See CLARENCE E. DUTTON, THE PHYSICAL GEOLOGY OF THE GRAND CAÑON DISTRICT 49–50 (1882) ("The Grand Cañon of the Colorado is a great innovation in modern ideas of scenery, and in our conceptions of the grandeur, beauty, and power of nature. . . . Those who have long and carefully studied the Grand Cañon of the Colorado do not hesitate for a moment to pronounce it by far the most sublime of all earthly spectacles.").

displayed in New York City and Washington.¹⁶ Word of the canyon's magnificence quickly spread.¹⁷

In May 1882, Senator Harrison introduced a bill “[t]o set apart a certain tract of land lying on the Colorado . . . of the West, in the Territory of Arizona, as a public park.”¹⁸ After describing the boundaries of the park, the bill instructed the Secretary of the Interior “to make such rules and regulations as he may deem necessary or proper for the care and management” of the park, including “the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition.”¹⁹ The Secretary was further directed to “provide against the wanton destruction of the fish and game found within said park” and to remove all trespassers.²⁰ The bill authorized the Secretary to lease “small parcels of ground” necessary for “the erection of buildings for the accommodation of visitors.”²¹ Any revenue generated from such leases was to be used to build “roads and bridle-paths” in the park.²² The bill excluded lands that had already been settled.²³

We do not know what prompted Harrison to introduce his bill in the Senate. Harrison was a prolific writer and speaker throughout his lifetime, but his surviving writings and speeches never discuss the Grand Canyon, and they say little about his many other conservation actions. Nor did Harrison ever visit the Grand Canyon.²⁴ Perhaps he encountered John Wesley Powell, whose writings about his journey were widely read and who was serving as the director of the Bureau of Ethnology when Harrison arrived to begin his Senate term in 1881.²⁵ The two men might have crossed paths in the much smaller Washington of the 1880s, though their writings contain no indication

16. See THURMAN WILKINS, THOMAS MORAN: ARTIST OF THE MOUNTAINS 92 (1966) (describing the display of the painting); J. DONALD HUGHES, IN THE HOUSE OF STONE AND LIGHT: A HUMAN HISTORY OF THE GRAND CANYON 38 (1978) (observing that Moran's sketches and paintings “did more to make the Grand Canyon's beauty known to America than perhaps any other means”).

17. See generally STEPHEN J. PYNE, HOW THE CANYON BECAME GRAND (1998) (recounting the evolution of attitudes toward the Grand Canyon).

18. S. 1849, 47th Cong. (1882); 13 CONG. REC. 3741 (1882) (statement of Sen. Harrison).

19. S. 1849 § 2.

20. *Id.*

21. *Id.*

22. *Id.*

23. See *id.* (stating that “this act shall not apply to any lands actually settled upon and improved under and of the public-land laws of the United States prior to the date of the passage of this act”).

24. See LAGO, *supra* note 12, at 78 (stating that Harrison never visited the Grand Canyon).

25. Elizabeth C. Childs, *Time's Profile: John Wesley Powell, Art, and Geology at the Grand Canyon*, 10 AM. ART 6, 32 (1996).

that they did so. Or perhaps Harrison viewed Thomas Moran's painting after Congress paid an unprecedented \$10,000 to display it in the Capitol building.²⁶

Harrison's biographer records that "Harrison had come to the Senate in 1881 determined to protect his country's natural resources."²⁷ We also know that Harrison was a fan of the West, choosing to serve on the Senate's Territories Committee, where he advocated statehood for the Dakotas and other states.²⁸ He visited the first national park at Yellowstone.²⁹ Harrison's later service as President featured numerous actions at the vanguard of the nascent conservation movement, including the designation of the first forest reserves, the creation of three new national parks, the protection of Alaskan seals, and general expressions of concern about the overexploitation of the public domain.³⁰ Like many conservationists of his day, Harrison was an

26. See WILKINS, *supra* note 16, at 93 (explaining that Congress appropriated \$10,000 to buy the painting and then displayed it in the Senate lobby). The painting is now on display at the Smithsonian's American Art Museum in Washington. See *The Chasm of the Colorado*, Smithsonian Am. Art Museum, <https://americanart.si.edu/artwork/chasm-colorado-17814> [<https://perma.cc/QE7H-MF7M>] (last visited May 16, 2019).

27. HENRY J. SIEVERS, BENJAMIN HARRISON: HOOSIER STATESMAN 242 (1959).

28. See *id.* at 242 ("During his work on the Committee on Territories, Harrison became increasingly aware of the need to preserve the natural beauties of the country."); Charles Latham, Jr., Benjamin Harrison in the Senate, 1881–1887, at 107 (Apr. 12, 1939) (unpublished senior thesis, Princeton University Dep't of History) (stating that "[t]he type of legislation in which Senator Harrison took the most active interest was that having to do with territories"); see also ANNE CHIEKO MOORE, BENJAMIN HARRISON: CENTENNIAL PRESIDENT 63 (Hester Anne Hale ed., 2009).

29. The most extensive account of one of his visits to Yellowstone appears in *Serenade to the Senator: Helena's Honors to the Distinguished Hoosier, Hon. Benj. Harrison*, HELENA WKLY. HERALD, Sept. 1, 1881, at 4; see also ROBERT E. HARTLEY, SAVING YELLOWSTONE: THE PRESIDENT ARTHUR EXPEDITION OF 1883, at 41 (2007) (noting that Harrison signed Yellowstone's hotel register in 1881); LAGO, *supra* note 12, at 78 (recounting that Harrison visited Yellowstone in 1881 with the artist Albert Bierstadt, and that he returned to Yellowstone in 1885); Latham, *supra* note 28, at 107 (reporting that "[d]uring the early part of his [Senate] term he made a considerable trip through the West, visiting many of the territories and parks, including Yellowstone"). On a later western journey, Harrison left the party as it traveled to Yellowstone and instead visited his son in Montana. See SIEVERS, *supra* note 27, at 201.

30. See MOORE, *supra* note 28, at 124; WILLIAM ELSEY CONNELLEY, THE LIFE OF PRESTON B. PLUMB 1837–1891, at 362 (1913) (describing the 1891 law authorizing the President to establish forest reserves as "the beginning of the conservation movement in America"); LEW WALLACE & MURAT HALSTEAD, LIFE AND PUBLIC SERVICES OF HON. BENJAMIN HARRISON 425–27 (1892) (describing the creation of Sequoia, General Grand, and Yosemite National Parks); LEW WALLACE, LIFE OF GEN. BEN HARRISON 310 (1888) (quoting Harrison's presidential ratification speech in Indianapolis on June 7, 1884 stating that "[t]here was a time in our history when we thought our public domain was inexhaustible").

outdoorsman who took numerous hunting and fishing trips.³¹ But again, while we know that Harrison was deeply interested in the West and in conservation, we do not know why. Harrison's own grandson admitted that he did not know why Harrison had become such a conservationist.³²

Harrison's Christian faith offers another possible explanation for his desire to make the Grand Canyon a national park. Harrison was a devout Presbyterian at a time when Reformed Protestants dominated the American conservation movement.³³ Harrison was thought to be destined for a career in the ministry, and his Christian faith directed his life even after he turned instead to law.³⁴ The conservation movement during the period which Harrison served in public life was itself dominated by figures who shared his Reformed Protestant beliefs, including John Muir and a series of Presidents and Secretaries of the Interior.³⁵ But Harrison never articulated any connection between his faith and his passion for conservation.

Whatever Harrison's motivation, his bill was assigned to the Senate Committee on Public Lands. Kansas Senator Preston Plumb chaired that committee, and he passed along Harrison's bill for the advice of the Department of the Interior.³⁶ There, Noah McFarland, the Commissioner of

31. See HANNAH LITWILLER, *THE STORY OF THE GRAND CANYON'S ESTABLISHMENT 100 YEARS LATER* 66 (2018) (observing that "[a]s a child in his native Ohio, he hunted, fished, and camped"); WALLACE, *supra* note 30, at 51–52.

32. See Interview by Julie A. Russell with Horace M. Albright, in *Grand Canyon Nat'l Park* (Apr. 7, 1981) [hereinafter Interview with Horace Albright] (explaining that Park Service Director Horace Albright once asked Benjamin Harrison's grandson William why Benjamin Harrison had been such a good conservationist, and William replied that he "didn't have any idea").

33. *Id.* at 267. See generally MARK R. STOLL, *INHERIT THE HOLY MOUNTAIN: RELIGION AND THE RISE OF AMERICAN ENVIRONMENTALISM* 151–52 (2015) ("[T]he historical trajectory of American environmentalism is regarded as a sort of para-religious movement or an expression of Reformed Protestant belief and culture.").

34. See generally Ted C. Hinckley, *Sheldon Jackson and Benjamin Harrison: Presbyterians and the Administration of Alaska*, 54 PAC. NW. Q. 66 (1963); William C. Ringenberg, *Benjamin Harrison: The Religious Thought and Practice of a Presbyterian President*, 64 AM. PRESBYTERIANS 175 (1986).

35. See MARK R. STOLL, *INHERIT THE HOLY MOUNTAIN: RELIGION AND THE RISE OF AMERICAN ENVIRONMENTALISM* 151 (2015) ("The administrations of four Presbyterian presidents—Benjamin Harrison, Grover Cleveland, Theodore Roosevelt, and Woodrow Wilson, with the support of three Presbyterian Secretaries of the Interior John W. Noble, Hoke Smith, and Franklin Lane—dramatically advanced the causes of conservation and parks."); see also *Wonders of the West: Talmage Talks of His Trans-Continental Journey*, GREENFIELD REPUBLICAN (Ind.), Sept. 27, 1889, at 7 (reporting on a Presbyterian minister's sermon about his travels to Yellowstone and Yosemite and concluding that "the world had a new and divinely inspired revelation, the Old Testament written on papyrus, the New Testament written on parchment, and now this last Testament written on the rocks").

36. See 13 CONG. REC. S4,284 (daily ed. May 29, 1882).

the General Land Office (GLO), was the first to review the bill.³⁷ He liked it. In a letter to Secretary of the Interior Henry Teller dated May 24, 1882, McFarland advised that “[t]he objects to be attained by the bill . . . appear to me to be worthy the consideration of Congress.”³⁸ He explained that “[t]he provisions of the bill are the same as those contained in the” statute establishing Yellowstone National Park in 1872.³⁹ His one suggestion was that the boundaries of the park be defined by reference to “some point well known by natural objects” rather than by “certain parallels of latitude and meridians of longitude,” given the difficulty and expense in establishing the latter in such a remote area.⁴⁰ McFarland offered text to accomplish his suggestions, including the boundaries and the exception for land that was already settled.

Secretary Teller was less impressed. Teller represented Colorado in the Senate from statehood in 1876 until 1909, interrupted only by a stint as Secretary of the Interior during President Chester Arthur’s administration.⁴¹ Teller was famously hostile to the evolving conservation movement. “We could not have settled Colorado if we had this new-fangled notion of conservation,” Teller once complained. “It is the theory that the people don’t know enough to take care of their resources.”⁴²

37. McFarland had served as a state senator first in Ohio and then in Kansas. *See* CHARLES LANMAN, BIOGRAPHICAL ANNALS OF THE CIVIL GOVERNMENT OF THE UNITED STATES 332 (2d ed. 1887); *Noah C. McFarland*, WIKIPEDIA, https://en.wikipedia.org/wiki/Noah_C._McFarland [<https://perma.cc/FDZ3-VLNJ>] (last updated Sept. 24, 2018).

38. Letter from Noah G. McFarland, Comm’r, Gen. Land Office, to Honorable Henry M. Teller, Sec’y of the Interior at 5 (May 24, 1882) [hereinafter McFarland Letter] (the editors have been unable to locate this document, which Prof. Nagle appears to have found in an archived source).

39. *Id.* at 4–5.

40. *Id.*

41. DUANE A. SMITH, HENRY M. TELLER: COLORADO’S GRAND OLD MAN 92, 117, 165, 231 (2002). Teller had become the Secretary of the Interior just one month before he reviewed Harrison’s bill, appointed by the newly elevated President Arthur in the aftermath of the assassination of President James Garfield. Teller replaced Samuel Kirkwood, a former senator from Iowa and Garfield appointee whose brief stint as Secretary of the Interior failed to offer any indication of his views toward conservation issues, pro or con. *See* DAN ELBERT CLERK, SAMUEL JORDAN KIRKWOOD 363 (1917) (allowing that Kirkwood’s tenure “was not marked by any notable constructive activity” and that he “lacked the genius for administration of the type required in the Department of the Interior”). Twenty years later, another presidential assassination produced profound effects on the future of the Grand Canyon, when Theodore Roosevelt succeeded William McKinley as president.

42. SMITH, *supra* note 41, at 236. “During his years as secretary of the interior, Teller worked hard for his region and with some successes; however, Congress ignored many of his recommendations. His concerns about Yellowstone National Park and fraudulent public lands transactions were well-taken. . . . When President Arthur pushed for preservation of forests on the

On May 26, 1882, Teller wrote a letter to Senator Plumb responding to his request for comments on the bill. Teller shared a copy of McFarland's letter, too. But Teller then wrote:

Aside from the suggestions of the Commissioner, it is questionable whether the withdrawal of so large a tract of the public lands from sale and settlement is advisable at the present time.

*The natural scenery along the Colorado River of the West, within the boundaries of the proposed reservation, does not require the creation of a public park to preserve it. Believing that its full benefits can be enjoyed by the public without interfering with the rights of settlement, or entailing upon the United States the expense of the same and improvement of the proposed reservation, I am of the opinion that this Bill ought not to become a law.*⁴³

After Secretary Teller expressed his opposition, the Senate Public Lands Committee nonetheless reported a version of the bill that contained McFarland's suggested revisions.⁴⁴ And that is all we know about it. The Senate failed to approve Harrison's bill in 1882. The similar bills he introduced in 1883 and 1886 met the same fate.⁴⁵

The modest attention that Harrison's bills received was generally positive or indifferent.⁴⁶ In January 1886, a local Flagstaff newspaper opined that

public domain, Teller responded with a cautiously hostile western attitude toward such an idea." *Id.* at 125; see also 42 CONG. REC. 4165 (1908) (statement of Sen. Teller) ("I would rather see people living on land than to see timber on it, no matter how beautiful it is or how fine. We have destroyed some timber in Colorado, but we have added to the sum happiness by so doing.").

43. Letter from Henry M. Teller, Sec'y of the Interior, to Preston Plumb, Senator 2-3 (May 26, 1882) [hereinafter Teller Letter] (emphasis added) (on file with Prof. Bruce Huber).

44. See ISE, *supra* note 1, at 231 (noting that Senator Harrison's "first bill was reported from committee but got no further attention").

45. See S. 863, 49th Cong., (Jan. 5, 1886); S. 541, 48th Cong., (Dec. 10, 1883); 17 CONG. REC. S402 (daily ed. Jan. 5, 1886); 15 CONG. REC. S53 (daily ed. Dec. 10, 1883); see also ISE, *supra* note 1, at 231; Latham, *supra* note 28, at 116 (noting that Harrison's later two bills were "not even reported back" from committee).

46. Several sources reported on the 1882 bill without taking a position on it. See *Public Reservation in Arizona*, SALT LAKE WKLY. TRIB., May 13, 1882, at 2 ("Senator Harris [sic] introduced a bill to set apart a tract of land in Arizona about sixty miles square, as a public place to be reserved under the supervision of the Secretary of the Interior, like the Yellowstone National Park, yesterday."); WKLY. ARIZ. MINER (Prescott), May 26, 1882, at 1 (same); Tombstone article (same); *Washington Notes*, CIN. DAILY GAZETTE, Mar. 14, 1882, at 1 (reporting, as the seventh item from Washington following news that "President Arthur's son is in the city" and "[t]he Chinese Minister expects to visit Spain this spring," that "[a] bill was introduced yesterday to make the Grand Canyon of Colorado a government park"). A year later, a Tucson newspaper reported that

[i]t is said there will be an effort made at the next session of Congress to set aside a large tract of ground in the northern part of the Territory, embracing

“[t]he National Park of the Grand Canon of the Colorado sounds well” and “will be the Mecca of tourists from all the world over.”⁴⁷ The newspaper was more expansive a few weeks later:

The *Globe Democrat* takes the right view of the question and gives good reasons why Congress should pass the bill recently introduced by Senator Harrison, to set aside a tract of land on the southern side of the Grand Canon of the Colorado, between the Little Colorado and Cataract canon, as a National Park. Here, will be found the “necessary scenery and other features”—including a faultless climate—to make the finest park in [the] world. From its natural terraces can be viewed the huge canon, whose opposite walls are eighteen miles away, with the Colorado [R]iver flowing nearly two miles below the surface of the surrounding country. All authorities concede that the grandeur of the scenery at this point is unequaled by any other spot where the footsteps of men have yet trod. It should be made national property before advancing civilization has appropriated it.⁴⁸

A year later, that newspaper admonished that “Senator Harrison’s bill for making a national park of the lands on the southern border of the Grand Canon of the Colorado should be pushed through Congress.”⁴⁹

Historians have speculated about why Congress declined to advance Harrison’s bills. One common assertion is that local opposition in Arizona blocked the proposal.⁵⁰ That is doubtful. No one else coveted the Grand Canyon when Harrison introduced his proposed national park legislation. The area was unsettled. The miners who opposed reserving the land for a national park did not arrive there until after Harrison introduced his legislation. Or perhaps it was the idiosyncratic beliefs of Henry Teller, who serendipitously

the Grand Canyon of the Colorado, as a national park. It might be well enough to reserve the ground for some such purpose, but it strikes us that ‘national park’ would not be a very appropriate name for it. National ‘bowels of the earth’ would suit better.

ARIZ. WKLY. CITIZEN (Tucson), Aug. 18, 1883, at 1.

47. ARIZ. CHAMPION (Flagstaff), Jan. 23, 1886, at 2.

48. ARIZ. CHAMPION (Flagstaff), Feb. 6, 1886, at 2.

49. ARIZ. CHAMPION (Flagstaff), Jan. 8, 1887, at 2.

50. See DUNCAN & BURNS, *supra* note 11, at 182 (claiming that Harrison’s bills “failed in Congress because of fierce opposition from local ranchers, miners, and settlers who did not want the federal government imposing restrictions on what they could and could not do”); Robert W. Righter, *National Monuments to National Parks: The Use of the Antiquities Act of 1906*, 20 W. HIST. Q. 281, 285 (1989) (“[M]ining interests wanted no barriers to mineral exploration of the canyon.”); LAGO, *supra* note 12, at 78 (contending that Harrison’s 1882 bill “was defeated by the protests of miners, loggers, and ranchers”). None of them offer any evidence for their assertions.

served as Secretary of the Interior at the moment when Harrison served in the Senate, that doomed a new national park. Most likely, Harrison's bills failed because of too little support, not too much opposition. The Grand Canyon remained unknown to much of the country, and the national park idea was only a decade old. Benjamin Harrison was simply ahead of his time.⁵¹

B. *The Privatization of the Grand Canyon*

The area around the Grand Canyon was nearly empty when Harrison sought to make it a national park.⁵² The failure of Harrison's attempts to create a Grand Canyon National Park opened the door for those who sought to do other things there. The three primary activities included mining, irrigation and water development, and tourism facilitated by private entrepreneurs. Those activities, in turn, encouraged the development of railroads to the sights and the mines. The sudden value of the Grand Canyon complicated the efforts to protect it, as the first national parks were created from lands that were judged to be worthless for anything besides enjoying their scenic beauty.⁵³

1. Mining

Arizonans boasted that it was "the oldest mining territory in the United States."⁵⁴ That excitement extended to the area around the Grand Canyon

51. See LAGO, *supra* note 12, at 79 (concluding that "Benjamin Harrison was a conservationist too soon, before there was much of a constituency to support his efforts"); LITWILLER, *supra* note 31, at 64 (agreeing that Harrison "was a conservationist much too soon"); see also Interview with Horace Albright, *supra* note 32 (opinion of the second director of the NPS that Benjamin Harrison "never had any rating as a conservationist, but he should have had. Somebody should write him up someday as one of the early conservationists. I don't suppose we know enough about him.").

52. See LAGO, *supra* note 12, at 61 ("The first white person to settle permanently on the canyon rim was John Hance, in 1883"); Douglas H. Strong, *Ralph H. Cameron and the Grand Canyon (Part 1)*, 20 ARIZ. & WEST 41, 42 (1978) ("[I]n 1883, the Grand Canyon remained largely unknown, even to people living in northern Arizona."); Nell Murbarger, *Trail-Blazer of Grand Canyon*, DESERT MAG., Oct. 1958, at 5-6 (recounting that in 1883 there was just one settler on the east end of the Grand Canyon and one settler on the west end).

53. See ISE, *supra* note 1, at 230-34.

54. Report of the Governor of Arizona, 1885 SECRETARY INTERIOR ANN. REP. vol. II, at 893; see also Reclamation of Arid Lands by Irrigation, and Admission of Wyoming, Arizona, and Idaho: Hearings Before the H. Comm. on Territories, 50th Cong. 49 (1889) (statement of Delegate M.A. Smith) (testifying that "Arizona is beyond question the richest mineral country in America").

even though most of the territory's mining activity occurred further south.⁵⁵ Native Americans had already mined salt, clay, and copper there for generations.⁵⁶ As the settlers arrived, the first mining claims were recorded in the 1860s, and soon prospectors sought copper, lead, and asbestos.⁵⁷ Mining on such public lands was facilitated by the General Mining Law of 1872, which encouraged private individuals to stake and develop minerals by awarding them a patented land right when they did so.⁵⁸

Countless individuals seized the opportunity and staked claims near the Grand Canyon in the 1880s and 1890s.⁵⁹ Two miners achieved particular fame even though their mining efforts paled in comparison to their cultivation of tourism. William Bass moved to the area from Indiana in 1883 at the age of thirty-four, hoping to reverse his declining health.⁶⁰ His mining claims produced little, but he built a hotel and over fifty miles of trails for visitors to enjoy the Grand Canyon.⁶¹ Like Bass, Ralph Cameron arrived in the Arizona Territory in 1883, moving from Maine to Flagstaff.⁶² Cameron began as a miner, partnering with Pete Berry, whose Last Chance Mine yielded the purest copper in the area from an adit located a precipitous half-mile hike down the canyon at Grandview Point.⁶³ Cameron's interests soon extended to tourism and politics. He built a hotel at the top of Bright Angel Trail and worked diligently to develop trails that visitors could traverse into the canyon.

55. See COCONINO SUN (Flagstaff), Mar. 1, 1891 (reporting that the area around the Grand Canyon will be "a great mining region").

56. GEORGE H. BILLINGSLEY, EARLE E. SPAMER & DOVE MENKES, *QUEST FOR THE PILLAR OF GOLD: THE MINES & MINERS OF THE GRAND CANYON* 1 (1997).

57. See *id.* at 1, 21.

58. See Michael F. Anderson, *Canyon History: Mining*, ARIZ. STATE UNIV., <http://grcahistory.org/history/logging-mining-and-ranching/mining/> [<https://perma.cc/XN2V-G3JY>] (last visited Mar. 31, 2019).

59. See AL RICHMOND, *THE STORY OF GRAND CANYON RAILWAY: COWBOYS, MINERS, PRESIDENTS & KINGS* 3, 6 (2017) ("No less than thirty-one mining companies were incorporated in Coconino County between the years 1891 . . . and 1904. The number of individual separate mining claims is astronomical."); Debra Sutphen, "*Too Hard a Nut to Crack*": *Peter D. Berry and the Battle for Free Enterprise at the Grand Canyon, 1890–1914*, 32 J. ARIZ. HIST. 153, 156 (1991) ("The period [beginning around 1890] saw a veritable rush of prospectors to the remote region, all looking for gold, silver, copper, and anything else of natural value.").

60. See Hughes, *supra* note 16, at 50; see also BILLINGSLEY, SPAMER & MENKES, *supra* note 56, at 56 (noting Bass's arrival and describing him as "one of the pivotal pioneers of Grand Canyon history"); LAGO, *supra* note 12, at 62.

61. See BILLINGSLEY, SPAMER & MENKES, *supra* note 56, at 59.

62. See Strong, *supra* note 52, at 43.

63. See Sutphen, *supra* note 59, at 156–57, 159; see also *Miners*, NAT'L PARK SERV.: GRAND CANYON, <https://www.nps.gov/grca/learn/historyculture/miners.htm> [<https://perma.cc/DX8V-DJYG>] (last updated Feb. 12, 2018).

Cameron became the county sheriff in 1891, and his political career peaked when he was elected one of Arizona's U.S. Senators in 1920.⁶⁴

Both Bass and Cameron quickly realized that the Grand Canyon's potential as a tourist attraction was far greater than its future for mining.⁶⁵ Mining persisted, but none of the claims ever amounted to much.⁶⁶ It was only later in the twentieth century that mining became profitable, thanks to a newfound demand for uranium.⁶⁷

2. Water

Other visitors looked at the Grand Canyon and focused on the water that ran through it.⁶⁸ That became John Wesley Powell's preoccupation as he sought to encourage the settlement of southwestern lands. Water was needed for mining, ranching, tourism, and any other development plans. Numerous schemes sought to dam the Colorado River and divert its water to satisfy those needs, including several plans developed by Ralph Cameron, but none came

64. See Duncan & Burns, *supra* note 11, at 188 ("Cameron's ambitions—and opinion of himself—were as grand as the canyon he planned to exploit."); Blaine P. Lamb, "A Many Checkered Toga": Arizona Senator Ralph H. Cameron, 1921–1927, 19 ARIZ. & WEST 47, 48, 52 (1977).

65. See W.W. BASS, A FEW PLAIN TRUTHS PLAINLY STATED FOR GRAND CANYON VISITORS (1910), <http://archive.library.nau.edu/cdm/ref/collection/p16748coll2/id/74> [<https://perma.cc/8LU9-78DA>] (pamphlet, published in New York City, advertising that "I am a resident of the Canyon for over thirty years and have made the tourist business my specialty"); BILLINGSLEY, SPAMER & MENKES, *supra* note 56, at 56 ("By the spring of 1884, Bass was convinced that Grand Canyon had great potential as a tourist attraction."); HUGHES, *supra* note 16, at 50 (writing that Bass soon "forgot all about the gold and felt everyone should see the Grand Canyon"). Even so, a railroad official told Bass in 1885 that "[n]one would go that far only to see a hole in the ground." See *id.*

66. See BILLINGSLEY, SPAMER & MENKES, *supra* note 56, at 21 ("The Grand Canyon mines were virtually unknown or considered to be inconsequential to the mining community prior to the discovery of uranium, except when their involvement in political and judicial conflicts brought them into the general public's eye."); *id.* at 57 (noting that "in the long run, Bass's mines were not very profitable"); HUGHES, *supra* note 16, at 47 ("Hundreds of claims were located in the Grand Canyon," but "[f]ew prospectors were successful."); RICHMOND, *supra* note 59, at 17 (contending that most of the mines "were not worth the time and effort to record them, and many were out-and-out investment scams").

67. See Nat'l Mining Ass'n v. Zinke, 877 F.3d 845, 853–54 (9th Cir. 2017) (summarizing the history of uranium mining at the Grand Canyon).

68. 61 CONG. REC. 5,020 (1921) (statement of Sen. Ashurst) (stating that the Colorado Basin's "forests will be utilized, its mineral wealth will be sought, its dazzling scenic beauties will be unfolded; but its greatest development, however, must come from its water resources, upon which the development of its other resources must largely depend").

to fruition until the Hoover Dam opened in the 1930s, downstream of the Grand Canyon, followed by the upstream Glen Canyon Dam in the 1960s.

3. Tourism

“God put it there . . . to see,” Arizona’s territorial delegate once proclaimed about the Grand Canyon.⁶⁹ The first tourists began arriving at the Grand Canyon in the 1880s, not long after John Wesley Powell’s celebrated journey down the Colorado River through the canyon. Many of the early settlers arrived in the area planning to engage in mining or grazing and then quickly realized that the sight of the Grand Canyon was both stupendous and potentially lucrative. Initially, the canyon’s inaccessibility prevented all but the most intrepid from visiting, but the arrival of railroads and the construction of tourist facilities attracted more and more visitors.

We do not know whether Benjamin Harrison read John Wesley Powell’s account of his expedition, but we know that Ralph Cameron did.⁷⁰ Cameron visited the Grand Canyon for the first time in 1883, just a year after Senator Harrison’s first failed national park bill.⁷¹ Cameron began a forty-year effort to attract tourists to the Grand Canyon and to profit from their arrival.⁷² He cleared trails, constructed facilities along the South Rim, and sought to monopolize the viewpoints he had cultivated.⁷³ He charged tourists one dollar to ride down the Bright Angel Trail, and he sought to ensure that his facilities were the only ones nearby.⁷⁴ His efforts yielded longstanding legal and political battles that he fought as one of Arizona’s early United States senators and by litigating his claims all the way to the Supreme Court.⁷⁵ Quite simply, Ralph Cameron took credit for making the Grand Canyon accessible.⁷⁶

69. 62 CONG. REC. 4,949 (1922) (statement of Rep. Hayden) (quoting Mark Smith).

70. See Lamb, *supra* note 64, at 48 (observing that “Cameron became interested in the Southwest through reading John Wesley Powell’s account of his famed 1869 expedition down the Colorado River.”).

71. 65 CONG. REC. 3,060 (1924) (statement of Sen. Cameron) (“I made it possible for the greatest scenic wonder in the world to be visited for the first time. But for my energy the scenic wonders of the Grand Canyon would have been unknown until many years later.”).

72. See Strong, *supra* note 52, at 41.

73. See HORACE M. ALBRIGHT & MARIAN ALBRIGHT SCHENCK, *CREATING THE NATIONAL PARK SERVICE: THE MISSING YEARS* 264–66 (1999).

74. See HUGHES, *supra* note 16, at 67–68; *see also id.* at 68 (noting that Cameron’s claims consisted of 13,000 acres surrounding the railroad land “and were in a position to control the tourist trade”).

75. *Id.*

76. See 65 CONG. REC., *supra* note 71.

4. Railroads

Railroads were needed to bring people to the Grand Canyon. That proved to be challenging. A plan hatched in 1889 to build a railroad inside and along the entire length of the Grand Canyon in order to both facilitate mining and encourage tourism failed to overcome the engineering and financial obstacles.⁷⁷ The better capitalized Santa Fe began its transcontinental service in 1884, and it reached Flagstaff in 1892. A stagecoach line then transported visitors the remaining miles north to the Grand Canyon. Meanwhile, the Santa Fe and Grand Canyon Railroad Company had built a short line to enable mining near the Grand Canyon. Once that mine failed, the Santa Fe acquired the defunct company's tracks, built an additional fifteen miles of track terminating near Bright Angel Trail at the South Rim, and commenced service in September 1901.⁷⁸

Railroads needed to obtain congressional approval to cross the forest reserve established in 1893. In 1896, the House Public Lands Committee reported a bill authorizing the Flagstaff and Canyon Railroad Company to build a railway through the Grand Canyon Forest Reserve "so that travelers may be able in comfort to visit this wonderful region."⁷⁹ Two years later, the same committee reported another bill, introduced by Arizona's territorial delegate Marcus Smith, to allow the Santa Fe and Grand Canyon Railroad Company to cross the forest reserve "for the purpose of reaching the recently developed copper fields in that region."⁸⁰ The Arizona territorial legislature added its voice to support a railroad for tourists, too.⁸¹

77. See LAGO, *supra* note 12, at 57–59.

78. See *id.* at 73 (noting that the first train arrived at the Grand Canyon three days after Theodore Roosevelt assumed the presidency, and that "[b]oth events were necessary for the canyon to become a national park"); see also Gordon Chappell, *Railroad at the Rim: The Origin and Growth of Grand Canyon Village*, 17 J. ARIZ. HIST. 89 (1976).

79. H.R. REP. NO. 54-1212, at 1 (1896).

80. H.R. REP. NO. 55-1149, at 1 (1898). The committee explained that "[t]he mineral resources of the district are however of great richness, but at this time inaccessible and unprofitable, owing to the absence of means of transportation." *Id.*; see also S. REP. NO. 55-990, at 1 (1890) (report of the Senate Committee on Public Lands adopting the House committee's report "as the report of the Senate").

81. The territorial legislature provided tax breaks to any company building a railroad in Arizona. See RICHMOND, *supra* note 59, at 3, 6. It did so upon finding a compelling need to facilitate travel there. See Act of Mar. 21, 1889, 1889 Ariz. Sess. Laws 27 ("WHEREAS, There is contained within the borders of this Territory one of nature's most wonderful and stupendous productions, far excelling in magnificence and grandeur even the world renowned Falls of Niagara; and WHEREAS, It is almost impossible to visit this marvelous exhibition of the handiwork of the great Creator, owing to the long distance the same is situated from the line of any railroad and the rough and rugged roads that have to be traveled in reaching the same; and

But railroads could be unsightly, especially when travelling along the rim of the Grand Canyon. The location of various proposed lines prompted efforts to block them to preserve the scenic views. Yet even John Muir was relieved to see how insignificant the railroads were in the overall landscape. Upon seeing the trains, he “was glad to discover that in the presence of such stupendous scenery they were nothing. The locomotives and trains are mere beetles and caterpillars, and the noise they make is as little disturbing as the hooting of an owl in the lonely woods.”⁸²

C. *The Desperate Attempts to Protect the Grand Canyon*

The champions of conserving the Grand Canyon resorted to increasingly desperate attempts to protect it from these other uses. Over a period of twenty years, the Grand Canyon became a national forest, a game preserve, and a national monument. In other words, the Grand Canyon was protected because of its forests, its wildlife, and its scientific value. But everyone agreed that the highest value of the Grand Canyon was its natural beauty, so efforts to make the Grand Canyon a national park persisted all the while. Relying on these other laws designed to protect other values constituted the proverbial square peg in a round hole. The result was that the Grand Canyon was protected until support for a national park prevailed. In the process, however, those other laws were bent in ways that had long-term consequences of their own.

1. A Forest Reserve

Benjamin Harrison was more successful than his proposed bills had been. He was elected president in 1888 and served a single term sandwiched between the two terms of Grover Cleveland. As president, Harrison encouraged Congress to enact and then signed the Forest Reserve Act in March 1891.⁸³ Armed with that power, he designated much of the area around

WHEREAS, The citizens of our own Territory, savants, tourists and travelers are desirous of visiting that remarkable locality, the Grand Canyon of the Colorado.”).

82. JOHN MUIR, *STEEP TRAILS* 348 (1918).

83. CONNELLEY, *supra* note 30, at 362 (1913) (“[T]his bill was the beginning of the conservation movement in America”); Robert Underwood Johnson, Letter to the Editor, *N.Y. TIMES*, Mar. 25, 1912, at 10 (letter crediting Noble with the Act). The history of the provision authorizing the President to establish forest reserves remains unknown. See HAROLD K. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* 26 (1991) (“Much of the original documentation has been lost for what is now called the Forest Reserve Act of 1891. It is unfortunate that one of the most important legislative action sin the history of conservation is so obscure.”).

the Grand Canyon as a forest reserve shortly before he left office in March 1893.⁸⁴ The result of that proclamation was to forbid “entry or settlement” of the lands so that they could be “set apart as a public reservation.”⁸⁵

Harrison’s action implemented the recommendation of John Wesley Powell, who in his capacity as the Director of the United States Geological Survey had described the proposed reservation one month earlier:

The region selected for reservation embraces the most important scenic features of the Grand Canyon of the Colorado, the most stupendous chasm known on the globe, the picturesque features of which are elsewhere unequalled. In addition to the scenic features of the Grand Canyon itself, the plateaus on the north and south, embraced in the recommended reservation, are covered with great forests, which will thus be protected from spoliation.⁸⁶

Harrison’s forest reserve proclamation received a mixed reaction. Ralph Cameron later recalled that “[t]he forest reserve was managed and maintained under the forest regulations and everyone was getting along very well.”⁸⁷ But other local residents protested that the Grand Canyon was “strictly mineral country” and barren of trees.⁸⁸ Their territorial delegate to Congress agreed that the erstwhile forest reserve contained “a great amount of ordinary desert country with no forest upon it at all.”⁸⁹ Others hoped that the new forest reserve would become a national park.⁹⁰

Soon the President’s power to designate such forest reserves engendered widespread controversy when Grover Cleveland, Harrison’s successor, employed it to proclaim thirteen reserves in western states.⁹¹ Congress

84. Benjamin Harrison, *Proclamation No. 349 (Feb. 20, 1893)*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/proclamation-349-setting-apart-public-reservation-certain-lands-the-territory-arizona> [<https://perma.cc/P9EZ-JFRS>] (last visited June 2, 2019). Altogether, Harrison “created fifteen reserves containing over 13 million acres,” “mostly to protect water supplies.” STEEN, *supra* note 83, at 28.

85. Harrison, *supra* note 84.

86. Letter from J.W. Powell, Dir., U.S. Geological Survey, to Sec’y of the Interior, at 1 (Feb. 14, 1893) (on file with Prof. Bruce Huber).

87. 62 CONG. REC. 2951 (1922) (statement of Sen. Cameron).

88. See Righter, *supra* note 50, at 285–86 & n.14 (1989) (citing Petition from Citizens of the County of Coconino, Territory of Arizona, Protesting the Establishment of Grand Canyon Forest Reserve (on file with the National Archives and Records Administration)).

89. 31 CONG. REC. 4,278–79 (1898) (statement of Del. Smith).

90. Elia Ruhamah Scidmore, Letter, *Our New National Forest Reserves*, 41 CENTURY MAG., at 792, 793 (1893); see also *id.* at 795 (citing the Grand Canyon as one “of the most important reserves” and observing that “[t]he first thought of those who favored this reservation was the protection of the marvelous scenery of the region”).

91. See STEEN, *supra* note 83, at 30–37; Jamie Lewis, *February 22, 1897: Cleveland Celebrates Washington by Foreshadowing Roosevelt*, PEELING BACK BARK (Feb. 22, 2009),

repealed the law in 1908, but not until President Theodore Roosevelt used it to create a batch of new reserves of his own.⁹² Also, the repeal of the law empowering the President to create new forest reserves left existing reserves such as the Grand Canyon intact.

2. A Game Preserve

President Theodore Roosevelt took the next step. Roosevelt created what is regarded as the first national wildlife refuge at Pelican Island in Florida in 1903.⁹³ The birds on the island were being slaughtered for their feathers, which Roosevelt sought to prevent. Accordingly—or at least according to a persistent legend—Roosevelt asked his advisers whether anything prohibited him from designating such a refuge, and when they answered “[n]o,” he said “I So Declare It.”⁹⁴ Roosevelt’s presumption was that the president could take any action that was not affirmatively prohibited, rather than asking whether he possessed a specific grant of legal authority.

Congress soon regained control. In 1906, Senator Reed Smoot of Utah introduced legislation empowering the President to establish a game preserve at the Grand Canyon.⁹⁵ According to the Senate committee’s report, “the sentiment is unanimously in favor of this action, in that it will protect from hunters some suitable portion of that region, to be used as a refuge and breeding ground for game animals, which are being reduced in number by reason of having no such protection and whose existence it is beneficial to maintain.”⁹⁶ Congress passed the bill, Roosevelt signed it, and then he proclaimed a game preserve in 1906.⁹⁷ The preserve was needed to prevent the disappearance of wildlife and to block mining claims.⁹⁸ The wildlife, in

<https://fhsarchives.wordpress.com/2009/02/22/february-22-1897-cleveland-celebrates-washington-by-foreshadowing-roosevelt/> [<https://perma.cc/UP9S-9YFE>].

92. See DOUGLAS BRINKLEY, *THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* 777–78 (2009).

93. *Pelican Island: History*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/refuge/pelican_island/about/history.html [<https://perma.cc/T43B-D3Z5>] (last visited June 4, 2019).

94. BRINKLEY, *supra* note 92, at 13–14 (describing Roosevelt’s action); see Exec. Order No. 1014, 2 PRESIDENTIAL EXECUTIVE ORDERS 812 (1909) (enlarging Pelican Island Reservation “created by Executive Order of March 13, 1903”).

95. See Righter, *supra* note 50, at 284.

96. S. REP. NO. 15-1586, at 1 (1906).

97. Righter, *supra* note 50, at 286.

98. See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 54 (1992); ROTHMAN, *supra* note 14, at 66 (“Roosevelt’s establishment of a game preserve in early 1906 prohibited the future filing of mining claims.”); *Game Preserve*,

turn, added to the experience of the tourists who visited to see “one of the scenic wonders of the world.”⁹⁹

The game preserve tightened access to the Grand Canyon.¹⁰⁰ That is not to say that the wildlife experienced the benefit in the manner that we would expect today. The first warden of the game preserve was credited with shooting 532 mountain lions during twelve years along the North Rim.¹⁰¹

3. A National Monument

The scenic enjoyment of the Grand Canyon remained vulnerable. By 1908, the most immediate threat was Ralph Cameron’s plan to construct a trolley line close to the South Rim.¹⁰² So President Roosevelt turned to another statute enacted for another purpose just a couple of years before.

In 1906, with no recorded opposition, Congress passed and President Roosevelt signed into law “an act for the preservation of American antiquities.”¹⁰³ The Act emerged from the tension between three distinct agendas: newly organized social scientists wanting specific protection, federal officials who wanted the power to establish new national parks, and western members of Congress who opposed granting such power to federal officials.¹⁰⁴ On the House floor, westerners received a final assurance from Representative Lacey, who sponsored the bill in the House, that the bill’s limited scope was meant to apply to historic Indian sites-- to smaller areas than those that had been previously reserved under the soon-to-be repealed Forest Reserve Act. Additionally, the bill provided for “small reservations” rather than “entirely different” national parks. Lacey’s response to Stephens “satisfied westerners,”¹⁰⁵ and the House and the Senate each passed the bill without a recorded vote.¹⁰⁶ Roosevelt signed the law without comment; there

COCONINO SUN, July 10, 1908, at 1 (noting the presence of deer, wild turkeys, and antelope and the threat posed to them by making the area “more and more accessible to hunters”).

99. *Game Preserve*, *supra* note 98, at 1.

100. See BILLINGSLEY, SPAMER & MENKES, *supra* note 56, at 4 (stating that “[a] U.S. Attorney opinion also closed the preserve to all private entry” once it became a game preserve).

101. See HUGHES, *supra* note 16, at 77.

102. See Francis P. McManamon, *The Antiquities Act and How Theodore Roosevelt Shaped It*, 31 GEORGE WRIGHT F. 324, 339 (2014) (“Cameron’s plan to build a trolley line along the south rim was the proximate cause of Roosevelt’s national monument proclamation.”).

103. Antiquities Act of 1906, Pub. L. No. 59-209, 34 Stat. 225 (codified at 54 U.S.C. §§ 320301–03 (2018)).

104. McManamon, *supra* note 102, at 327–29.

105. ROTHMAN, *supra* note 14, at 47.

106. See *id.* Apparently, Senator Teller had expressed his opposition to any bill that failed to contain a 640 acre limit, but he did not vote against the bill. See ISE, *supra* note 1, at 152–53.

is no evidence that he was personally involved in the lengthy congressional process that resulted in the Act.¹⁰⁷

As enacted, the Antiquities Act authorized the President,

in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, 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.¹⁰⁸

Roosevelt soon employed the law with his typical vigor to establish national monuments to protect small ruins and scientific features that prompted Congress to pass the law.¹⁰⁹

Then Roosevelt proclaimed the Grand Canyon a national monument on January 11, 1908.¹¹⁰ The Forest Service began considering such a proclamation at least two months before.¹¹¹ The impetus appears to have come from the American Civic Association, whose November 1907 meeting included a call for the Grand Canyon to be held “as a great national

107. See McManamon, *supra* note 102, at 335 (“Theodore Roosevelt was not engaged in the details of legislative crafting of the Antiquities Act between 1900 and 1906; however, his overall executive and legislative philosophy supported those working on the law.”). Reflecting on his conservation achievements in his 1913 autobiography, Roosevelt devoted just one sentence to his use of the Antiquities Act, while writing at length about his establishment of new forest reserves even as Congress had moved to abolish that presidential authority. Compare THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 460 (1913) (listing “the passage of the National Monuments Act of June 8, 1906, under which a number of objects of scientific interest have been preserved for all time” as just one “step to preserve from destruction beautiful and wild creatures whose existence was threatened by greed and wantonness”), with *id.* at 428–61 (describing establishment of reserves in chapter titled “The Natural Resources of the Nation”).

108. 16 U.S.C. § 431 (repealed 2014).

109. See, e.g., RAY H. MATTISON, DEVILS TOWER NATIONAL MONUMENT: A HISTORY 9 (1971).

110. Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908).

111. See Memorandum, Nov. 5, 1907 (referring to the extract of a memorandum prepared on November 5, 1907, “for use of Secretary by Commissioner of General Land Office: ‘The Forest Service now has under consideration the creation of a national Monument out of the Grand Canyon of the Colorado’) (the editors have been unable to locate this document, which Prof. Nagle appears to have found in an archived source). Another cryptic, unsigned memorandum instructs, “Take up with Mr. Pinchot the question of the proposed Grand Canyon National Monument Reserve,” including which lands should be omitted to account for the railway right-of-way and the hotel on the South Rim near the Bright Angel Trail. Memorandum, Nov. 7, 1907 (the editors have been unable to locate this document, which Prof. Nagle appears to have found in an archived source).

monument.”¹¹² Roosevelt obliged. His proclamation described the Grand Canyon as “an object of unusual scientific interest, being the greatest eroded canyon” in the country.¹¹³ The proclamation warned “all unauthorized persons not to appropriate, injure or destroy any feature of this National Monument or to locate or settle upon any of the lands” it reserved.¹¹⁴ It also stated that the national monument and the national forest status “shall both be effective,” with the national monument as “the dominant reservation.”¹¹⁵ The monument covered more than 800,000 acres.¹¹⁶

Nothing in Roosevelt’s official correspondence or speeches, his voluminous writings, or in any archival sources indicates that he grappled with the legality of his controversial interpretation of the Antiquities Act to create the kind of de facto national park that westerners in Congress opposed and that they were promised would not happen. But he did not act with disregard for the law. On January 11, 1908, Secretary of the Interior James Rudolph Garfield advised President Roosevelt that

[a]fter careful examination of the conditions set forth, and the law, I am of the opinion that the creation of this Monument not only falls within the purview of the [Antiquities Act], but that the establishment of the Monument will be in the interests of the people of the United States.¹¹⁷

112. See Telegram from Am. Civic Ass’n to Theodore Roosevelt, President, U.S. (Nov. 21, 1907) (on file with Prof. Bruce Huber) (“Learning with gratification of the proposition of the Federal forest service to hold as a great national monument the Grand Canyon of the Colorado, believing it the duty of the United States to keep inviolate and free from desecration this stupendous work of nature . . . the American Civic Association, in Convention assembled, respectfully urges you to use to the utmost power of the Federal Government support of such action as will forever insure the continuance in awe-inspiring grandeur of the Grand Canyon and its surroundings.”); see also *Save Grand Canyon*, N.Y. TRIBUNE, Nov. 21, 1907 (reporting on the American Civic Association’s meeting); J. Horace McFarland, President, Am. Civic Ass’n, Address at National Park Conference (Jan. 3, 1917), reprinted in PROCEEDINGS OF THE NATIONAL PARKS CONFERENCE 104 (Dep’t of the Interior ed., 1917) (“It was rather early in Mr. Roosevelt’s administration that I received a letter one day from a good woman who wanted to know if something could not be done to prevent the building of a trolley line around the rim of the Grand Canyon of the Colorado. I thought something could. So did Mr. Pinchot. So did Mr. Roosevelt. And the Grand Canyon immediately thereafter was, by Executive order, declared a national monument. The trolley line is not yet there.”).

113. Proclamation No. 794, 35 Stat. 2175 (Jan. 11, 1908).

114. *Id.*

115. *Id.*

116. *Theodore Roosevelt Makes Grand Canyon a National Monument*, HIST., <https://www.history.com/this-day-in-history/theodore-roosevelt-makes-grand-canyon-a-national-monument> [<https://perma.cc/FP5T-UGTQ>] (last visited Apr. 1, 2019).

117. Letter from James Rudolph Garfield, Sec’y of the Interior, to Theodore Roosevelt, President of the U.S., at 1–2 (Jan. 11, 1909). The only evidence that Roosevelt’s subordinates

Roosevelt's proclamation received scant attention in the East, but it was more widely reported in the West. Many of the stories simply quoted from the text of Roosevelt's proclamation.¹¹⁸ One frequently published story reported that the monument "assures the area of exclusion from all kinds of entry and means that the government will have power to prevent marring of the scenic beauty by unsightly exploitation of any kind."¹¹⁹ *Grand Canyon Cannot Be Marred*, trumpeted another headline.¹²⁰ Yet the news stories demonstrated confusion about the nature of a natural monument. One report asserted that "[i]t has long been realized that it was highly desirable to have [the Grand Canyon] set apart as a National Monument"—even though national monuments did not exist until two years before.¹²¹

The first expression of displeasure appeared on February 1, two weeks after the proclamation. The *Williams News* described how William Bass, "the Grand Canyon miner," was "very much displeased" with Roosevelt's action.¹²² The *News* wrote that "Mr. Bass has a just cause for displeasure. He has spent a lot of money developing his mine from a mere showing to what

grappled with those questions is buried in archival sources, not official published documents. Besides Garfield, the director of the United States Geological Survey advised that "legitimate mining and prospecting in the Grand Canyon should not be hampered in any way and no legitimate mining operations will seriously detract from the scientific or scenic interest of the region." See Letter from George Otis Smith, Dir., U.S. Geological Survey, to James Rudolph Garfield, Sec'y of the Interior, at 3 (Dec. 5, 1910) (quoting from his October 1907 recommendation to President Roosevelt). That recommendation "was ignored," an action that was "bitterly resented by certain parties desirous of developing both asbestos and copper within the area." *Id.* at 4.

118. See *Declares Grand Canyon a National Monument*, S.F. CALL, Jan. 16, 1908, at 8; *Grand Canyon as National Monument*, TOMBSTONE EPITAPH, Jan. 26, 1908; *Grand Canyon Now National Monument*, L.A. HERALD, Jan. 23, 1908, at 6; *The Enlarged Forests of This Territory*, ARIZ. REPUBLICAN, Jan. 22, 1908, at 7; *The Grand Canyon National Monument*, ARIZ. REPUBLICAN, Feb. 8, 1908, at 8; *Now a National Monument*, COCONINO SUN, Feb. 1, 1908, at 1.

119. See *Declares Grand Canyon a National Monument*, *supra* note 118, at 8; *Grand Canyon as National Monument*, *supra* note 118; *Grand Canyon Now National Monument*, *supra* note 118, at 6; *The Enlarged Forests of This Territory*, *supra* note 118, at 7; *Now a National Monument*, *supra* note 118, at 1.

120. *Grand Canyon Cannot Be Marred*, ALBUQUERQUE CITIZEN, Jan. 21, 1908, at 7.

121. *The Enlarged Forests of This Territory*, *supra* note 118, at 7.

122. *That "National Monument"*, WILLIAMS NEWS, Feb. 1, 1908, at 1; see also BILLINGSLEY, SPAMER & MENKES, *supra* note 56, at 56 (describing Bass as "one of the pivotal pioneers of Grand Canyon history"). Bass was born in Indiana and moved to Arizona after his doctor advised that Bass had only a few months to live. The advice worked: Bass lived to be 84, dying in 1933. He began as a miner, but after he visited the Grand Canyon for the first time, he "forgot all about the gold and felt everyone should see the Grand Canyon." HUGHES, *supra* note 16, at 50; see also BILLINGSLEY, SPAMER & MENKES, *supra* note 56, at 59 ("During his thirty-five years at Grand Canyon, Bass constructed more than fifty miles of trails in the Canyon, including the first cross-canyon trail"); Murbarger, *supra* note 52, at 5–9 (recounting Bass's life as told by his son).

promises to be one of Arizona's greatest copper mines."¹²³ The paper continued by asserting that

[t]he peculiar part of the 'national monument' nonsense is, why should citizens of the United States be prohibited from taking the mineral wealth out of the canyon, for such trivial reasons as are set forth in the proclamation? If all the mineral wealth there is in the canyon should be taken out, the place would not be injured one particle, from the sight seer's point of view. The Canyon is a great sight, we admit, and should be seen by everyone who has the opportunity, but there is no logical excuse for penning up the millions in mineral wealth which undoubtedly exist there.¹²⁴

Soon Arizona's territorial delegate expressed his objection to the national monument. In a March 30 speech in the U.S. House of Representatives, Marcus Smith explained why he had introduced an amendment to the agricultural appropriation bill that would "relieve the situation at the Grand Canyon of Colorado and prevent the further doubling up of separate kinds of executive reservations on the same ground." Smith proceeded to cite a "glaring instance of the President's peculiar sense of the powers invested in him by the laws of the land." According to Smith, the "pure purpose" of the Antiquities Act was "preserving the prehistoric land marks of the country, the cliff dwellers, the Casa Grande ruins, and things of that sort erected by human hands, as the bill showed on its face." Instead, Roosevelt

takes a vast territory of country . . . and makes it so absolutely sacred that a man would be afraid to cut a switch from that land to encourage the speed of his horse." Smith insisted that the law "certainly could not be tortured into applying to a vast region of country simply because it was wonderful or interesting."¹²⁵

Delegate Smith's claim fits what we know about the enactment of the Antiquities Act. Still, Smith sought to deflect personal blame from Roosevelt, speculating that he was "probably advised thereto by somebody who must have known nothing about the construction of the statute."¹²⁶

123. *That "National Monument"*, *supra* note 122, at 1.

124. *Id.*; see also *Mining Claims Not Affected By Order: Flagstaff Man Protests Against Grand Canyon National Monument Proclamation*, *BISBEE DAILY REV.*, Feb. 12, 1908, at 3 (describing Bass's objections). The *Arizona Republican* disagreed, pointedly accusing the *Williams News* of failing to "carefully read" the proclamation before it published its claims. See *The Grand Canyon National Monument*, *supra* note 118, at 8.

125. 42 CONG. REC. app. 118 (1908) (statement of Del. Smith).

126. *Id.* There is no indication that Smith was aware of Secretary of the Interior Garfield's advice, discussed *supra* at note 118.

Besides questioning the national monument's legality, Smith dismissed concerns about the effect of the proposed railroad on the experience of visiting the canyon. To the contrary, the purpose of the railroad was "so that the greatest wonder of God's hand, except the universe itself, may be revealed to the astonished wonder of the beholder." Under Roosevelt's proclamation, by contrast, "the public must be shut off from the enjoyment of the most uplifting, awe-inspiring sight that ever spread itself before the human eye since God said 'Let there be light,' up to and including the time when the President said 'Thou shall not see.'"¹²⁷ And that was all unnecessary in Smith's view. When Representative Mondell interrupted by asking Smith if he thought "there is danger of that Grand Canyon washing away or being carried away unless it is protected in this manner?"¹²⁸ Smith thanked Mondell

for thus calling the attention of the House to the absurdity of this Presidential proclamation. . . . No; you can not carry it away, you can not destroy it, and a thousand men working a hundred years could not even deface it. It will not wash away . . . for a mighty river for a million years has been hurling its angry torrents against its rock-ribbed sides, and the canyon is still there. All that water can ever do will only increase the wonder of its depth.¹²⁹

Smith concluded with an attack on the increasing restrictions that the executive branch was imposing on western lands. "I believe," Smith proclaimed, "every State and Territory is of right entitled to utilize the resources within its boundaries."¹³⁰ He asserted that "[t]he public lands do not of right belong to the people of the whole United States."¹³¹ Rather, "they are or should be held by the Government in trust for the present and future residents of the State or Territory in which such lands lie."¹³² Smith decried "impudent special officers, whose business seems to be to give all the trouble possible to every settler on the public domain."¹³³ Finally, Smith observed

with a feeling of profound apprehension the rapid strides being taken toward centralization in our Government. The Executive is encroaching on the powers reserved by the Constitution to the other two coordinate branches. Everything now is being done by commissions and bureaus and special functionaries appointed by

127. *Id.*

128. *Id.* (statement of Rep. Mondell).

129. *Id.* at 119 (statement of Delegate Smith).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

the President. It is time to call a halt and take some observations of the road over which we have come and make some provident arrangements for a safer journey ahead of us.¹³⁴

Henry Ashurst voiced many of the same arguments. Ashurst was the district attorney of the Grand Canyon's Coconino County when he wrote a letter to William Bass in February 1908; four years later he was elected one of the new State of Arizona's first U.S. Senators. Ashurst and Bass were concerned about the effect of the national monument on mining near the Grand Canyon. "The attempt, on the part of President Roosevelt, to suspend the Mining Laws, within the National Monument is simply a usurpation of the powers of Congress," wrote Ashurst.¹³⁵

Congress returned to the topic of the Grand Canyon during a 1910 House committee hearing considering whether to allow the Grand Canyon Scenic Railroad Company to construct a rail line to provide better access for tourists.¹³⁶ The hearing betrayed a surprising ignorance of national parks, national monuments, and the status of the Grand Canyon. Delegate Smith repeated his charge that the national monument was established "utterly without warrant of law."¹³⁷ The committee chair, Wyoming's Representative Frank Mondell, agreed that no one serving in the Congress that passed the Antiquities Act "had any idea of including in a national monument an area larger than some of the States."¹³⁸ The assistant to the Secretary of the Interior

134. *Id.*

135. Letter from Henry F. Ashurst, Dist. Attorney of Coconino Cty., to W.W. Bass, (Feb. 18, 1908) (on file with Prof. Bruce Huber); *see also id.* at 2 ("[A]ny strained construction [of the Antiquities Act] which, in effect, would operate to suspend the Mining Laws of the United States, is an assumption of power by the Executive Branch of the Government that has never been delegated to it, either expressly or by implication."); *id.* at 3 ("Any person who, upon reading [the Antiquities Act] can find therein any power delegated to the President to suspend or annul the Mining Laws of the United States, within a National Monument, certainly possesses stronger eyes than I."); *id.* at 4–5 ("The President is treading on forbidden ground and is making laws instead of executing the laws which is at utter variance with the imperishable distinction of the legislative, judicial, and executive functions which support the genius of our Government.").

136. Granting Right of Way over Certain Sections of the Grand Canyon Monument Reserve, in Arizona, to the Grand Canyon Scenic Railroad: Hearing on H.R. 2258 Before the H. Comm. on the Pub. Lands of the H.R., 61st Cong. 3 (1910) [hereinafter Granting Right of Way].

137. *Id.* at 49 (quoting a February 25, 1910 letter from Del. Smith).

138. *Id.* at 19 (statement of Rep. Mondell); *see also id.* (statement of Rep. Herrick). Representative Herrick noted that the "act specifically states that no such area shall be reserved larger than is necessary for the purpose of preserving these antiquities; in other words, that small areas shall be reserved." *Id.* Representative Volstead agreed that

[t]his land ought to be set aside as a national park rather than having what seems to me the ridiculous proposition of withdrawing it under [the Antiquities Act], although I have no personal objection to it. It would be very much more proper to set it aside as a national park.

distinguished national parks and national monuments as follows: “National parks are authorized by special acts of Congress. They are supposed to be playgrounds of the people, where nature’s wonders are preserved in a natural state. The national monument act, as I understand it, was designed to protect American antiquities, such as the cliff dwellings.”¹³⁹

The hearing concluded with a colloquy about the legality of the national monument proclamation. Representative Herrick suggested that “if the matter were taken into the courts it would be held that [the national monument] does not exist,” because “the President has only authority from Congress to set aside an area as small as possible; and he has not done that.”¹⁴⁰ Representative Parsons countered, “You can not take it into the courts. You might impeach the President for creating it; but when he creates it, it legally exists.”¹⁴¹

Both were soon proved wrong. The legality of the monument was litigated, and the Supreme Court upheld it.¹⁴² The case reached the Court as part of Ralph Cameron’s effort to sustain the mining claims that he had staked near the South Rim of the Grand Canyon. The legal argument centered on whether Cameron had satisfied the 1872 General Mining Act’s requirements for acquiring a patented mining claim. In fact, Cameron did not address the status of the national monument until he filed his brief in the Supreme Court, which prompted the federal government to complain that the question was not timely raised.¹⁴³ Beyond the procedural posture, the arguments of both parties were strikingly brief. Cameron simply asserted that the Grand Canyon “is not a landmark, structure, or object of historic or scientific interest within the meaning of the act, but it is merely an enormous canyon.”¹⁴⁴ The absence of a valid national monument, Cameron argued, meant that he could continue to explore for minerals there.¹⁴⁵ The government’s response was equally pithy. “It is conceded,” the government wrote, that the Antiquities Act “authorizes the President to create monuments of objects of historic or scientific interest,” and “[i]t is likewise conceded that in the proclamation creating the Monument

Id. at 20 (statement of Rep. Volstead).

139. *Id.* at 38 (testimony of E.C. Finney, Assistant to the Sec’y of the Interior). Four years later, the new state of Arizona’s first representative admitted to his House colleagues that President Roosevelt had “stretched the law considerably when he created a national monument containing 800,000 acres in Arizona and 600,000 acres in the State of Washington, but he did it, and [those] great areas are now included in such monuments.” 51 CONG. REC. 13,818 (1914) (statement of Rep. Hayden).

140. Granting Right of Way, *supra* note 136, at 50 (statement of Rep. Herrick).

141. *Id.* (statement of Rep. Parsons).

142. *Cameron v. United States*, 252 U.S. 450, 464 (1920).

143. See Brief for Respondent at 23, *Cameron*, 252 U.S. 450 (No. 205).

144. Brief for Petitioner at 47, *Cameron*, 252 U.S. 450 (No. 205).

145. See *id.* at 48.

it was declared that the Grand Canyon of the Colorado River is an object of unusual scientific interest.”¹⁴⁶

The Court devoted most of its opinion to the mining law issues, too. Justice Van Devanter disposed of the Antiquities Act issue in one paragraph:

The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing “objects of historic or scientific interest.” The Grand Canyon, as stated in his 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.¹⁴⁷

The court omitted any discussion of the history and purposes of the Act or the provision confining national monuments to “the smallest area compatible with proper care and management of the objects to be protected.”¹⁴⁸ Nonetheless, the Court’s decision in *Cameron* has long been regarded as affirming the use of the Antiquities Act to create large national monuments that are de facto national parks protected for their scenic landscapes.¹⁴⁹

D. A National Park

The national park idea never disappeared after Senator Harrison’s unsuccessful bills of the 1880s. Surprisingly, there is no evidence that Harrison pursued the idea when he served as president from 1889 to 1993.

146. Brief for Respondent, *supra* note 144, at 23–24.

147. *Cameron*, 252 U.S. at 455–56.

148. 16 U.S.C. § 431 (repealed 2014).

149. *See, e.g.*, *Mass. Lobstermen’s Ass’n v. Ross*, 349 F. Supp. 3d 48, 51 (D.D.C. 2018) (holding that “just as President Roosevelt had the authority to establish the Grand Canyon National Monument in 1908, so President Obama could establish the Canyons and Seamounts Monument in 2016”); William J. Clinton, Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona, 32 WEEKLY COMP. PRES. DOCS. 1785, 1786 (Sept. 18, 1996) (stating that the Antiquities Act “gives the President the authority to protect Federal lands of extraordinary cultural, historic, and scientific value, and in 1908 that’s just what Theodore Roosevelt did when he protected the Grand Canyon”); RICHARD WEST SELLERS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY 14 (1997) (asserting that the Grand Canyon and Mount Olympus national monuments “established another significant precedent – that the Antiquities Act could be used to preserve very large tracts of public land, far larger than its supporters (or opponents) had envisioned”).

Also surprisingly, the next we hear of a possible national park appears in a short news story from November 1890, which reported the Flagstaff visit of William Bass, “a strong advocate of having the Grand Canyon set apart as a National Park,” who nonetheless assured that a park “is only to protect the wall of the Canyon and not to interfere to any extent with the mining, agriculture or grazing interest of the country.”¹⁵⁰ Even so, his planned meeting fizzled “owing to the inclemency of the weather,” so that “only a very few were out and no action was taken.”¹⁵¹

Bass would soon become an implacable foe of later national park proposals. In fact, the historical record presents something of a paradox. Numerous historians and writers have remarked on the widespread opposition that locals expressed toward a national park.¹⁵² But nearly all of the surviving expressions of opposition were penned by William Bass. Bass wrote letters to newspapers and politicians, gave speeches, and otherwise objected to national park proposals for nearly three decades from the 1890s until park’s establishment in 1919. “For God’s sake do all you can against it for it will shut up one of the most promising mineral districts in Arizona and bankrupt Coconino County,” wrote William Bass to his “friend,” territorial delegate Marcus Smith.¹⁵³ Smith forwarded Bass’s letter to the Commissioner of the General Land Office, agreeing “that there is no necessity for this park and it will seriously interfere with all development in that part of Arizona without doing the government a particle of good.”¹⁵⁴ In a 1910 speech to the American Mining Congress, Bass boasted of the Grand Canyon’s scenic grandeur, but he also emphasized the region’s mineral and timber resources, so he advised that “it would be wholly inadvisable to forever prohibit further

150. *A National Park*, ARIZ. WKLY. ENTERPRISE, Nov. 22, 1890 (citing FLAGSTAFF DEMOCRAT).

151. *Id.*

152. *See, e.g.*, HUGHES, *supra* note 16, at 65 (“Local feeling was divided on the question of Grand Canyon National Park. While the people of northern Arizona favored the publicity and the increased tourist business that might be expected, miners, stockmen and settlers to the area were quick to voice their opposition to anything that might threaten their interests.”).

153. Letter from W.W. Bass to Marcus Smith, Ariz. Territorial Delegate 1 (Mar. 14, 1898) (on file with Prof. Bruce Huber).

154. Letter from M.A. Smith, Ariz. Territorial Delegate, to Comm’r, Gen. Land Office (Mar. 31, 1898) (on file with Prof. Bruce Huber); *see also* Letter from W.W. Bass to Senator Marcus A. Smith (Sept. 29, 1918) (“One of our largest Cattle Companies here has already a standing application for the exclusive Grazing Permit on the entire south rim of the Canyon and already has several carloads of wire piled up read to fence fifty thousand acres right around where I am located” and advising that “thousands of acres of the best land for farming has been already included and if there is no effort made to stop this outrage our section will never be populated.”) (the editors have been unable to locate this document, which Prof. Nagle appears to have found in an archived source).

development” until the government investigated those resources more thoroughly.¹⁵⁵

There are a handful of other indications of the nature of the opposition to a national park. Ralph Cameron was the national park’s “greatest enemy,” according to NPS official Horace Albright.¹⁵⁶ The Forest Service objected to making a national park out of its prize forest reserve, though its opposition waned over time.¹⁵⁷ The editor of the Williams News added his voice to the opposition, insisting that the creation of a national park would result in “the depopulation of Northern Arizona, and especially if [it] excludes mining as that is the only hope left for this section of Arizona.”¹⁵⁸

And William Randolph Hearst opposed a national park. Horace Albright later recalled that Hearst

fought us in getting the park created. We found we were having an unknown enemy when the Park bill was going through, unknown enemy opposing it. I’ve forgotten how the opposition was expressed, but it was effective. . . . The reason was, he was afraid that the National Park Service would take Grandview and that Berry property away from him. . . . So we worked out a provision which is in the law.¹⁵⁹

In 1913, Hearst acquired 200 acres, including the land up nearly up to the famed Grandview Point, from local miner Peter Berry. Locals soon feared

155. Bass said that “[i]t is estimated that nearly four billion feet of lumber could be marketed without injury to the future supply of the region lying north of the Grand Canyon boundaries” and “[t]he entire region, both on the surface and in the canyon itself, contains mineral in liberal quantities,” including “[e]xtensive lodes and veins of copper ores” and asbestos fiber “pronounced by our geological survey to be superior to any ever discovered in the United States.” See *Bass Makes Good at Mining Congress*, WILLIAMS NEWS, Oct. 15, 1910, at 2. For additional examples of Bass’s objection to a national park, see *Says National Park Will Be Much Too Large*, COCONINO SUN, Apr. 7, 1916, at 1 (reporting on Bass’s criticism of a national park); Letter from W.W. Bass “To the Honorable The Senators and Congressmen of the United States” (Feb. 24, 1910) (listing the timber, water, mining, and other resources that would be lost if Congress passed a pending national park bill).

156. Interview with Horace Albright, *supra* note 32.

157. See *id.* (recalling that the Forest Service “had opposed us to some extent earlier, but not much”).

158. Letter from George U. Young to Binger Herman, Comm’r, Gen. Land Office 1 (Jan. 13, 1898); see also *A Diabolical Scheme*, WILLIAMS NEWS, Jan. 1, 1897, at 1 (denouncing “the fiendish and diabolical scheme to set aside the Grand Canyon of the Colorado as a national park”).

159. Interview with Horace Albright, *supra* note 32.

that he would “build a palatial residence to entertain friends” there.¹⁶⁰ That never happened. Hearst seemingly just wanted to be left alone.¹⁶¹

The first push since Senator Harrison for a national park began in 1896, when Congress appropriated \$25,000 for the preparation of a report on a national forestry policy.¹⁶² A special forestry commission of the National Academy of Sciences (NAS) duly submitted such a report to the Secretary of the Interior in February 1897.¹⁶³ In addition to proposing steps for the management of existing forest reserves, the NAS recommended that the Grand Canyon and Mount Rainier reserves be transformed into new national parks. “Parts of two forest reserves contain features of supreme natural beauty,” the NAS explained, “and can best be preserved for the enjoyment and instruction of the world by creating them national parks and governing them under the rules and regulations which have proved successful in protecting the Yellowstone National Park.”¹⁶⁴ The NAS explained that the Grand Canyon and Mount Rainier

are each in its particular way unsurpassed in interest. Their natural wonders should be preserved without further defacement than is necessary to make them easily accessible to the people; and unless mining is prohibited in their immediate neighborhood, and unless they can be strictly guarded against fires, their scenic value will be seriously impaired.¹⁶⁵

The Commissioner of the GLO dispatched Edward Bender as a special agent to study whether the Grand Canyon should become a national park.¹⁶⁶ Bender concluded that the Grand Canyon “should certainly be made a

160. DON LAGO, *CANYON OF DREAMS: STORIES FROM GRAND CANYON HISTORY* 125 (2014) (quoting *Coconino Sun*, Jan. 23, 1914) (first letter capitalization in original headline).

161. *See id.* at 122–70 (recounting Hearst’s time at the Grand Canyon).

162. Sundry Civil Bill of July 11, 1896, 29 Stat. 432.

163. *See* REPORT OF THE NATIONAL ACADEMY OF SCIENCES FOR THE YEAR 1897, S. DOC. NO. 55-57, at 18 (1898); *THE CONSERVATION DIARIES OF GIFFORD PINCHOT* 68 (Harold K. Steen ed., 2001) (explaining that the Secretary of the Interior requested in January 1886 that the National Academy of Sciences establish a forestry commission “to examine the western public lands and made recommendations for areas to be set aside as forest reserves”). Gifford Pinchot served on that commission, just a few years before President Roosevelt tapped Pinchot to head the Forest Service. *See* *THE CONSERVATION DIARIES OF GIFFORD PINCHOT*, *supra*, at 68. The forestry commission traveled west during the summer of 1896, but there is no indication in Pinchot’s admittedly brief diaries that they visited the Grand Canyon. *See id.* at 72–75.

164. S. DOC. NO. 55-57, at 63.

165. *Id.*

166. *See* Letter from C.N. Bliss, Sec’y of the Interior, to Comm’r, Gen. Land Office (June 3, 1898) (on file with Prof. Bruce Huber) (describing the special agent’s report and his opinion that the Grand Canyon’s protection “can be most adequately secured by the creation of a National Park”).

National Park, with as much of the environment as would cover points of natural interest, as well as the Pine Forests, under such conditions as will permit the fullest development of its great mineral resources.”¹⁶⁷ That report convinced the Secretary of the Interior to support such national park legislation.¹⁶⁸ Similarly, the superintendent of the forest reserve expressed his “earnest and urgent recommendation” for the transformation of the reserve that he managed into a national park.¹⁶⁹ The local Flagstaff newspaper agreed. “There is probably no better located section in the United States for a national park,” the paper exhorted.¹⁷⁰ And John Muir lent his voice to the cause. The Grand Canyon “should be made into a national park,” he wrote, because of its “supreme grandeur and beauty.”¹⁷¹

167. Letter from Edward Bender, Special Agent, Gen. Land Office, to Comm’r, Gen. Land Office (Jan. 31, 1898) (on file with Prof. Bruce Huber) (lengthy, hand written report responding to the Commission’s October 1897 instructions to investigate the Grand Canyon). Bender elaborated:

It should be a gratification to the American People, that the law empowers the President of the United States, to set aside, for the use of the people forever, and to debar from vandalism, not only the surrounding forest, but to include in it, this unique, and most sublime, of Nature’s Masterpiece, as a National Park; with all the protective and improving features, usually incident to land set aside for this purpose. In the Grand Cañon, the United States possess the Supreme Natural Wonder of the World, as one day it will become the Mecca, towards which the steps of all, who love the Grand, the Beautiful, and Sublime, will sure be bent.

Id. See generally Jeff Ingram, *Ten Years: A Forest Reserve, the GLO, and E Bender’s Report*, CELEBRATING GRAND CANYON (Nov. 1, 2009), <https://gcfutures.blogspot.com/2009/11/forest-reserve-glo-and-edward-benders.html> [<https://perma.cc/FR59-2ASK>] (describing Bender’s report and the events preceding and following it).

168. See Ingram, *supra* note 167.

169. Letter from W.P. Hermann, Forest Supervisor of The Grand Canyon Forest Reserve, to Hon. Binger Hermann, Comm’r, Gen. Land Office 1 (Oct. 3, 1898) (on file with Prof. Bruce Huber). The supervisor listed nineteen reasons for his recommendation, beginning with the fact that the Grand Canyon “contains features of Supreme natural beauty and an immense scope of scenic wonder.” *Id.* at 2.

170. *National Park Wanted*, COCONINO SUN, Sept. 24, 1898. See also *National Parks Again*, COCONINO SUN, Oct. 29, 1898 (reporting that the Grand Canyon forest reserve superintendent had been instructed to visit the canyon “and report upon the advisability of converting that reservation, or that part of it adjacent to the canyon, into a national park”); COCONINO SUN, Sept. 30, 1899, at 7 (“An effort will be made during the next session of Congress to create two national parks in Arizona. The Grand Canyon of Arizona and the petrified forest near Holbrook, it is expected, will be set aside as national parks and improved as such.”).

171. John Muir, *The Wild Parks and Forest Reservations of the West*, 81 ATLANTIC MONTHLY 15, 27 (1898); see also JOHN MUIR, OUR NATIONAL PARKS (1903) (reprinting his 1898 article). Muir, as usual, described the Grand Canyon in especially vivid prose:

No matter how far you have wandered hitherto, or how many famous gorges and valleys you have seen, this one, the Grand Cañon of the Colorado, will

In 1900, the GLO requested a report on a proposed national park. The superintendent of the national forest reported favorably, though he believed “that the territory that might be embraced in a National Park should not be large because of the inaccessibility of most of the territory of this Reserve.”¹⁷²

When Theodore Roosevelt visited the Grand Canyon in 1903, he implored the people of Arizona (in now oft-quoted words) “to keep this great wonder of nature as it now is.”¹⁷³ But the immediate object of Roosevelt’s ire was built nonetheless, and it is now a national historic landmark.

I was delighted to learn of the wisdom of the Santa Fe Railroad in deciding not to build their hotel on the brink of the cañon. I hope

seem as novel to you, as unearthly in the color and grandeur and quantity of its architecture, as if you had found it after death, on some other star; so incomparably lovely and grand and supreme is it above all the other cañons in our fire-moulded, earthquake-shaken, rain-washed, wave-washed, river and glacier sculptured world. . . . Every architectural invention of man has been anticipated, and far more, in this grandest of God’s terrestrial cities.

Id. at 35–36.

172. Letter from J. B. Narna, Forest Supervisor, to Comm’r of the Gen. Land Office 1 (Oct. 10, 1900) (on file with Prof. Bruce Huber).

173. Theodore Roosevelt, Remarks at Grand Canyon, Arizona (May 6, 1903), *reprinted in Conservation Legacy*, THEODORE ROOSEVELT, <http://www.theodore-roosevelt.com/trenv.html> [<https://perma.cc/VXM9-6PRE>] (follow “National Forests” hyperlink; then follow “Grand Canyon; May 6, 1903, ‘. . . leave it as it is . . .’” hyperlink) (last visited June 2, 2019). Roosevelt’s full remarks are as follows:

In the Grand Canyon, Arizona has a natural wonder which, so far as I know, is in kind absolutely unparalleled throughout the rest of the world. I want to ask you to do one thing in connection with it in your own interest and in the interest of the country to keep this great wonder of nature as it now is. I was delighted to learn of the wisdom of the Santa Fe railroad people in deciding not to build their hotel on the brink of the canyon. I hope you will not have a building of any kind, not a summer cottage, a hotel, or anything else, to mar the wonderful grandeur, the sublimity, the great loneliness and beauty of the canyon. Leave it as it is. You can not improve on it. The ages have been at work on it, and man can only mar it. What you can do is to keep it for your children, your children’s children, and for all who come after you, as one of the great sights which every American if he can travel at all should see. We have gotten past the stage, my fellow-citizens, when we are to be pardoned if we treat any part of our country as something to be skinned for two or three years for the use of the present generation, whether it is the forest, the water, the scenery. Keep the forests in the same way. Preserve the forests by use; preserve them for the ranchman and the stockman, for the people of the Territory, for the people of the region round about. Preserve them for that use, but use them so that they will not be squandered, that they will not be wasted, so that they will be of benefit to the Arizona of 1953 as well as the Arizona of 1903.

Id.

you will not have a building of any kind, not a summer cottage, a hotel or anything else, to mar the wonderful grandeur, sublimity, the great loneliness and beauty of the cañon.¹⁷⁴

He spoke too soon. The Santa Fe build its hotel, and El Tovar is now recognized as one of the architectural gems of the national parks system.¹⁷⁵ On the other hand, the rest of the development along the South Rim of the Grand Canyon could be seen to vindicate Roosevelt's concern.

President Roosevelt returned from the Grand Canyon and asked Congress to make it a national park.¹⁷⁶ Congress declined. No bills to that effect were introduced in Congress during Roosevelt's presidency. William Bass attributed Roosevelt's decision to proclaim the Grand Canyon a national monument to the unwillingness of Congress to make it a national park.¹⁷⁷

Roosevelt's national monument proclamation in 1908 sparked a move to make the Grand Canyon a national park. The Secretary of the Interior soon advised that the Grand Canyon should be made a national park. A national

174. LAGO, *supra* note 12, at 82; *see also id.* (describing Roosevelt's visit and objections).

175. According to the Park Service:

El Tovar's significance lies in its eclectic architecture--a combination of the Swiss chalet and Norway villa as the promotional brochures boasted--and the way in which that transitional architecture bridged the gap between the staid Victorian resort architecture of the late nineteenth century and the rustic architecture later deemed appropriate for the great scenic and natural wonders of the United States. Interlocked with that significance is the building's importance as the Santa Fe Railway's key structure of its "destination resort" at Grand Canyon which dramatically increased tourism and in turn had an indirect bearing on the area's establishment as a national monument in 1908 and a national park 11 years later.

Laura Soullière Harrison, NAT'L PARK SERV., ARCHITECTURE IN THE PARKS: NATIONAL HISTORIC LANDMARK THEME STUDY 91 (1987).

176. *See* Theodore Roosevelt, State of the Union (Dec. 6, 1904), <http://www.let.rug.nl/usa/presidents/theodore-roosevelt/state-of-the-union-1904.php> [<https://perma.cc/6PJQ-RMWR>] ("The Canyon of the Colorado should be made a national park . . ."); Theodore Roosevelt, State of the Union (Dec. 5, 1905) <http://www.let.rug.nl/usa/presidents/theodore-roosevelt/state-of-the-union-1905.php> [<https://perma.cc/WQ3Y-GWB7>] ("In my judgment, the Grand Canyon of the Colorado should be made into a National park."); Theodore Roosevelt, *Wilderness Reserves* (pt. 2), in 10 FORESTRY & IRRIGATION 301, 308 (1904) (reporting on his recent visits to Yellowstone, Yosemite, and the Grand Canyon that "[i]t is hard to make comparisons among different kinds of scenery, all of them very grand and very beautiful; yet personally to me the Grand Cañon of the Colorado, strange and desolate, terrible, and awful in its sublimity, stands alone and unequalled. I very earnestly wish that Congress would make it a national park, and I am sure that such a course would meet the approbation of the people of Arizona.").

177. *See* W.W. Bass, *Protest Against Grand Canyon Reserve*, MOHAVE COUNTY MINER, Dec. 3, 1910, at 5.

monument, he reasoned, failed to authorize the concessions, travel, and conveniences “which its growing importance requires.”¹⁷⁸

The momentum continued after Roosevelt left office in 1909. In November 1910, the American Scenic and Historical Preservation Society asked President Taft to enlarge the Grand Canyon National Monument. The head of the United States Geological Survey wrote to his superior, Secretary of the Interior Ballinger, recommending instead that Congress create a national park, albeit one in which some mineral development would be allowed.¹⁷⁹ Ballinger in turn supported pending legislation to create a national park. A national monument and game preserve, he reasoned, “do not permit of any development and improvement for the benefit and enjoyment of the people of the United States such as could be accomplished if the Canyon were created a national park.”¹⁸⁰ Locally, support for a national park increased once Arizona became a state in 1912.¹⁸¹ By then, the Secretaries of the Interior and Agriculture, the Arizona State Legislature, and the Sierra Club were all pushing for a national park.¹⁸² In Congress, numerous bills were introduced to create a national park at the Grand Canyon, though sometimes with questionable names.¹⁸³ By 1915, the Secretary of the Interior’s annual report described the Grand Canyon “as the most important national park project pending at the present time,” adding that “[t]he public, generally, understand that the canyon is in a national park, and the volume of requests for

178. *National Parks and Reservations*, 1909 DEP’T INTERIOR REP. vol. 1, at 40, 41.

179. See Letter from George Smith, Dir., U.S. Geological Survey, to the Sec’y of the Interior (Dec. 5, 1910) (on file with Prof. Bruce Huber) (citing Mount Rainier Act § 5, 30 Stat. 993, 995 (1889) (providing “[t]hat the mineral-land laws of the United States are hereby extended to the land lying within” the national park)).

180. Letter from R.A. Ballinger, Sec’y, to Hon. William H. Taft 3, (Dec. 10, 1910) (on file with Prof. Bruce Huber).

181. See LOUISE M. HINCHCLIFFE, LEGISLATIVE HISTORY: GRAND CANYON NATIONAL PARK 10 (1976) (compiled for Superintendent Merle E. Stitt) (on file with Grand Canyon National Park) (“Locally, there began to be more interest in the park after the job of getting Arizona admitted as a State was accomplished in 1912. Flagstaff businessmen urged their Congressmen and Senators to work for a national park, despite accusations that their only interest was increased tourism and its benefits to them.”).

182. See ISE, *supra* note 1, at 232.

183. See 1911 DEP’T INTERIOR REP. vol. 1, at 721 (noting that H.R. 6331 was introduced on April 20, 1911 and that the Association of American Geographers and the Geological Society of America recommended the land be named Powell National Park); ISE, *supra* note 1, at 232 (noting that Rep. Hayes introduced a bill in 1911 to establish “Carnegie National Park” at the Grand Canyon, citing H.R. 6331, 62d Cong., (1911)); *Grand Canyon National Park: Bill Introduced in Senate To Make Grand Canyon National Park—Vast Area Will Be Closed Up*, COCONINO SUN, Feb. 4, 1910, at 1 (describing Senator Flint’s bill to set aside the Grand Canyon as a national park and noting that President Taft “is understood” to be “in entire accord with its provisions”).

information regarding it that the service receives in the course of a year is enormous.”¹⁸⁴

The breakthrough occurred after Congress created the National Park Service in 1916. There was only a dim recollection of Benjamin Harrison’s efforts during the 1880s.¹⁸⁵ Stephen Mather, the head of the new NPS, championed national park status for the Grand Canyon.¹⁸⁶ Soon Arizona Senator Henry Ashurst introduced a bill to make the Grand Canyon a national park.¹⁸⁷ The purpose of the park was the preservation of its scenery, enabling people to enjoy its natural beauty without interfering with it.¹⁸⁸ Secretary of the Interior Franklin Lane testified to Congress that “[i]t seems to be universally acknowledged that the Grand Canyon is the most stupendous natural phenomenon in the world,” and that while the national park idea had

184. 1916 SUPERINTENDENT NAT’L PARKS ANN. REP. 93. Other publications cultivated the perception that the Grand Canyon was already a national park. See EDWARD FRANK ALLEN, A GUIDE TO THE NATIONAL PARKS OF AMERICA 218 (1915) (“The Grand Canyon of Arizona is not a part of a national park, but of a government reservation. Its preeminence among the scenic wonders of America, however, makes it unnecessary to apologize for its inclusion in this book.”); ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS 97–99 (1954) (noting that that the *National Parks Portfolio* used to persuade Congress to establish the NPS in 1916 included a section “on the Grand Canyon, which as not a national park or even under the Interior Department”).

185. See 62 CONG. REC. 4,949 (1922) (statement of Rep. Hayden) (remarking that Harrison introduced “[t]he first bill” to create a Grand Canyon National Park on January 5, 1886); 61 CONG. REC. 5,019 (1921) (statement of Sen. Ashurst) (stating that “the first bill to make the Grand Canyon a national park was introduced by” President Harrison on January 5, 1886, but the bill “failed to become a law, and the project has been presented to the Congress from time to time since 1886”). To the contrary, Harrison’s 1886 bill was his third try at making the Grand Canyon a national park.

186. ROTHMAN, *supra* note 14, at 97.

187. S. Res. 390, 65th Cong. (1918) (enacted); Scott Craven, *Grand Canyon National Park Opened with A Shrug. Now It’s on Everyone’s Bucket List*, AZCENTRAL (Feb. 26, 2019, 5:28 PM), <https://www.azcentral.com/story/travel/arizona/grand-canyon/2019/02/15/grand-canyon-national-park-100th-anniversary-centennial/2766189002/> [https://perma.cc/587H-CXUS]. Ashurst was another colorful westerner. His eloquence earned him the nickname “Five-Syllable Henry.” He was also a self-proclaimed paragon of inconsistency. After having first decried President Franklin Roosevelt’s infamous Court packing plan and then championed it in the Senate, Ashurst responded to a constituent applauding his position by asking, “which stand?” Hedley Donovan, *The Difficulty of ‘Being Fair’ to Goldwater*, LIFE, Sept. 18, 1964, at 95.

188. See 57 CONG. REC. 1,769–770 (1919) (statement of Rep. Stafford); *id.* at 1770 (statement of Rep. Hayden) (observing that “the primary purposes of the park” are “not to impair its scenic beauty”); *Id.* at 773 (statement of Rep. Hayden) (encouraging the construction of a railroad “to make it possible for more people to look at the wonders and the glories of the Grand Canyon”).

been floated since the 1880s, “there has never been a valid objection advanced against it.”¹⁸⁹

Even so, miners objected to the end.¹⁹⁰ In September 1918, William Bass wrote to Marcus Smith, the territorial delegate who spoke out against the monument and who now served the new state of Arizona in the U.S. Senate. Bass advised that “it is bad judgment to pass this measure at this time as there is going to be some vigorous protests against it if it passes in its present form.” Bass described the opposition of local grazing interests, and then asked, “what on earth is the use of so much fine farming land being tied up within the park? A mile or two should be all that is necessary as a protection and in places it is from six to thirty miles from the south rim.”¹⁹¹

Congress approved the legislation in 1918 after sorting out the questions of access, and President Woodrow Wilson signed the law in February 1919 during a brief visit to Washington while he was otherwise occupied with negotiating the Treaty of Versailles in Paris.¹⁹² Within three years, the Grand Canyon was exalted as “the greatest of the national parks.”¹⁹³

II. WHAT MIGHT HAVE BEEN

The thirty-seven-year delay between Senator Benjamin Harrison’s initial national park proposal and the ultimate enactment of the park’s establishment act had several consequences. First, that delay solidified the shaky precedent that Yellowstone had begun for public ownership and federal government management of our most scenic landscapes. Second, and less conclusively, the contrast between national park status and other land conservation

189. H.R. REP. NO. 65-832, at 9 (1918) (citing letter from Franklin K. Lane, Sec’y of the Interior (Feb. 5, 1918)).

190. See HORACE M. ALBRIGHT & ROBERT CAHN, *THE BIRTH OF THE NATIONAL PARK SERVICE: THE FOUNDING YEARS, 1913–33*, at 83 (1985).

191. Letter from W.W. Bass to Hon. Marcus A. Smith 1, 2 (Sept. 29, 1919) (on file with Prof. Bruce Huber). Senator Smith forwarded Bass’s letter to Park Service Director Stephen Mather, who replied that

if Congress decides to make the Grand Canyon a national park Mr. Bass will be given every consideration by this Service. It is not our custom to harass those owning private lands within a park area as we recognize fully their rights just the same as if they were without the park.

Letter from Stephen T. Mather, Dir., to Senator Smith (Oct. 25, 1918) (on file with Prof. Bruce Huber).

192. *Today in History—February 26: The Grand Canyon*, LIB. CONGRESS, <http://web.archive.org/web/20190227082627/https://www.loc.gov/item/today-in-history/february-26/> (last visited June 2, 2019).

193. 62 CONG. REC. 4,949 (1922) (statement of Rep. Hayden).

designations was not nearly as striking as one may anticipate. Third, the desire to protect the Grand Canyon resulted in the stretching of the Antiquities Act far beyond what Congress intended when it had passed the law two years before.

A. *The Case for National Parks*

The national park designation placed tourism development at the Grand Canyon under the control of the federal government, not private entrepreneurs. The park rebuked Ralph Cameron, who had worked so hard to attract tourists to the Grand Canyon and to reap the financial rewards of doing so. The park also rebuked Henry Teller, who objected to Senator Harrison's 1882 national park bill in that the scenery of the Grand Canyon "does not require the creation of a public park to preserve it," and that the area's "full benefits can be enjoyed by the public without interfering with" private development.¹⁹⁴

Teller never relented in his philosophical objection to national parks.¹⁹⁵ Teller's objection to a national park at the Grand Canyon was anticipated by a California senator who opposed the Yellowstone bill because "[t]he geysers will remain, no matter where the ownership of the land may be, and . . . I cannot see how the natural curiosities can be interfered with if settlers are allowed to appropriate them."¹⁹⁶ A park supporter countered that a national park would "prevent squatters from taking possessing of the springs and destroying the beautiful decorations."¹⁹⁷

The more likely outcome during the 1880s was not that the Grand Canyon would become a national park; it was that Yellowstone would be stripped of its national park status. The idea that the federal government should be in the business of managing national parks remained controversial a decade after a

194. See John Copeland Nagle, Opinion, *What if the Grand Canyon Had Been Our Second National Park?*, L.A. TIMES (Feb. 28, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-nagle-grand-canyon-presidential-power-20190228-story.html> [<https://perma.cc/Y5LU-QCPV>].

195. See 38 CONG. REC. 4026 (1904) (statement of Sen. Teller) ("I wish to say that I am very much opposed to the establishment of Government parks. I do not believe it is a part of the province of the Government of the United States to be establishing parks."); 42 CONG. REC. 3378 (1908) (statement of Sen. Teller) (stating, in response to an Idaho senator who desired a national park, "I do not want any in Colorado").

196. H. DUANE HAMPTON, HOW THE U.S. CAVALRY SAVED OUR NATIONAL PARKS 28 (1971).

197. HAMPTON, *supra* note 196, at 29 (quoting F.V. Hayden, *The Hot Springs and Geysers of the Yellowstone and Firehole Rivers*, 3 AM. J. SCI. & ARTS 161, 176 (1872)).

divided Congress approved Yellowstone as the first national park in 1872.¹⁹⁸ The establishment of Yellowstone was unaccompanied by any funding, so the park remained at the mercy of settlers, poachers, and entrepreneurs.¹⁹⁹ Congress rejected repeated pleas to fund the park's management.²⁰⁰

The sporadic congressional debates culminated in an 1886 proposal to transfer Yellowstone to the War Department. Missouri Senator George Vest, the park's leading champion, asserted that "the ultimate intention" of those favoring military control "is to destroy the park."²⁰¹ He was right. Teller, now back in the Senate, favored the governmental abandonment of the park except for "the small points where these large geysers and other things are."²⁰² Senator Plumb agreed that most of the area should be returned to the public domain.²⁰³ Representative Reagan proposed repealing the law establishing Yellowstone as a national park.²⁰⁴ Representative Holman suggested giving Yellowstone to the territory of Wyoming, just as Congress had transferred Yosemite to the state of California and Mackinac Island to the state of Michigan (after a brief career as a national park).²⁰⁵

198. *See, e.g.*, 14 CONG. REC. 3488 (1883) (statement of Sen. Ingalls) ("I do not understand myself what the necessity is for the Government entering into the show business in the Yellowstone National Park.").

199. *See* HAMPTON, *supra* note 196 (observing that the park's managers "were provided with neither physical nor legal force to stop the endemic vandalism, poaching, and trespassing").

200. *See, e.g.*, LOUIS C. CRAMTON, EARLY HISTORY OF YELLOWSTONE NATIONAL PARK AND ITS RELATION TO NATIONAL PARK POLICIES 39 (1932) (citing H.R. DOC. No. 43-20 (1874) that describes letters from the Secretary of the Interior and the Superintendent of Yellowstone National Park requesting a \$100,000 appropriation); *see generally* CRAMTON, *supra*, at 37-52 (detailing the efforts to obtain congressional appropriations for Yellowstone).

201. 17 CONG. REC. 7841 (1886) (statement of Sen. Vest); *see also id.* (statement of Sen. Vest) (contending that the end of civilian administration would mean "virtually an end of the Yellowstone National Park"). Besides being known as the savior of Yellowstone and having served in the Confederate Congress, Vest is best known for the closing argument he gave in a criminal trial where he coined the phrase that "a dog is man's best friend." *See* George G. Vest, Eulogy of the Dog (Sept. 23, 1870), *in* ROBERT C. BYRD, THE SENATE, 1789-1989: CLASSIC SPEECHES, 1830-1993, at 441 (1994). For other accusations of the ultimate goal of Yellowstone's opponents, *see* 17 CONG. REC. 7843 (1886) (statement of Sen. Dawes) (observing that Yellowstone's opponents "thought that the park ought to be appropriated as part of the public domain of the nation" and "were sick of the setting apart of this region of country for any public purposes"); *id.* at 7845 (statement of Sen. Call) (arguing that "[t]o destroy it, to make it private property, would be to create a monopoly, and a most wicked monopoly, of that which ought to belong to all the people of the United States").

202. 17 CONG. REC. 7844 (1886) (statement of Sen. Teller); *see also id.* (statement of Sen. Teller) (acknowledging that turning the park over to the Army is "to practically destroy the park").

203. *See* 17 CONG. REC. 7845-46 (1886) (statement of Sen. Plumb).

204. *See* HAMPTON, *supra* note 197, at 78.

205. *See* ISE, *supra* note 1, at 49 (explaining how Congress "by some chance" set aside Mackinac Island National Park in 1875, but then turned it over to the State of Michigan in 1895).

Ultimately, Congress decided against abolishing the park and terminating its civilian employees. Senator Vest led the defense of the national park, joined by (among others) Senator Benjamin Harrison.²⁰⁶ But Congress also declined to fund those civilian employees managing the park. Soon thereafter, the Secretary of the Interior invoked an 1883 statute authorizing him to request the assistance of the military in protecting Yellowstone.²⁰⁷ Yellowstone remained under military control until the establishment of the Park Service in 1916.

All of that occurred while the Grand Canyon languished without national park status. Lacking national park protection, threats to the public ownership of the Grand Canyon persisted. A 1902 news report warned of the activities of private commercial interests and admonished the government to “save this property for the whole people.”²⁰⁸ The report quoted a railroad president who agreed “that it would be a national shame should any portion of the canyon or its accessories be allowed to get into private ownership. It belongs to the government now, and should be by it protected for the benefit of all the citizens.”²⁰⁹ Inspired by that report, an official with a New York City button manufacturer wrote to President Roosevelt beseeching him to “use your influence and power, to keep this magnificent piece of property in the hands of the government.”²¹⁰ But Arizonans were less convinced of the need for national parks even during Roosevelt’s administration.²¹¹

Some of the objections to a national park equated federal control with corporate monopolies or faceless bureaucrats. For them, Ralph Cameron was the little guy fighting against the powerful federal government and Santa Fe railroad as they attempted to monopolize tourist concessions at the Grand

206. See 14 CONG. REC. 3484 (1883) (statements of Sen. Harrison) (suggesting that the amount of land set aside for private hotel development be reduced from eighty acres to ten acres); CRAMTON, *supra* note 200, at 55 (listing Senator Harrison among “congressional friends of Yellowstone” and praising his support of the park during Senate debates); *Mr. Vest’s Victory*, 20 FOREST & STREAM 101, 101 (1883) (reporting that “[i]n his effort to save the Park, Senator Vest has received efficient aid from Mr. Harrison, of Indiana, a gentleman who last summer visited the Park, and was thus able to speak intelligently of its needs”).

207. See HAMPTON, *supra* note 196, at 79; Act of March 3, 1883, ch. 143, 22 Stat. 627 (authorizing the Secretary of the Interior to request that the Secretary of War “make the necessary details of troops to prevent trespassers or intruders from entering the park for the purpose of destroying the game or objects of curiosity therein, or for any other purpose prohibited by law, and to remove such persons from the park if found therein”).

208. *The Grand Canyon as a Park*, BROOKLYN DAILY EAGLE, Jan. 12, 1902, at 16.

209. *Id.* (quoting “Mr. Ripley, the president of the road”).

210. Letter from B.M. Snow to Hon. Theodore Roosevelt (Jan. 13, 1902) (on file with Prof. Bruce Huber).

211. See LAGO, *supra* note 12, at 85 (contending that “Arizona politicians and business leaders were still denouncing national parks as un-American” while Roosevelt was President).

Canyon. Henry Ashurst, who supported a national park as one of Arizona's first U.S. senators, nonetheless sided with Cameron in his battles against the railroad. "I have never been in sympathy with these tactics that have been resorted to by the [Santa Fe] railroad company at the Grand Canyon," he wrote, "and simply because I did not wish to see the railroad company monopolize everything and drive everybody else out, I took my stand with Cameron and his trail"²¹² The Santa Fe was sensitive to such criticism, supporting a national park but insisting that nothing would ever be done at the behest of "special interests."²¹³ Ashurst also expressed particular scorn for the "sixty-dollar-a-month departmental clerks" and other federal bureaucrats who viewed western development as inherently wrongful:

I think Roosevelt's faux pas he made at the Canyon when he advised us not to deface or fill up the canyon seems to have been taken seriously by a lot of bureaucrats, journals and sixty-dollar-a-month departmental clerks here. If you hear some of these fellows talk about conservation you would think that the settler is a man who is going abroad at night seeking what land he might devour, striking it off the face of the world leaving a state of chaos. You would also think, to hear them talk, that the citizens of the West, axe in hand, are chopping trees down ruthlessly and wantonly for the mere pleasure of it.²¹⁴

212. Letter from Senator Henry F. Ashurst to W.W. Bass at 1–2 (July 12, 1912) (on file with Prof. Bruce Huber); *see also id.* at 2 (declaring that "in a contest between the citizen and the grasping corporation it never takes me long to make up my mind on what side I should be fighting").

213. *See National Parks*, ARIZ. REPUBLICAN, Mar. 18, 1916, at 4. Santa Fe Railroad President E.P. Ripley wrote that

[T]he canyon should be made a national park. We believe with you that the canyon is much more interesting than some of the other freaks of nature which have been created national parks, but I think there is no danger that the territory will be desecrated by advertisements for malt beverages or cheap watches for the reason that the rim of the canon is already a national ornament and as such is under government control—except a very small acreage which belongs to private individuals, including the railway terminus. There is no danger that anything the government may see fit to do in the direction of making this into a park will be opposed by any 'special interests.'

Id.

214. Letter from Senator Henry F. Ashurst to W.W. Bass at 2 (July 12, 1912) (the editors have been unable to locate this document, which Prof. Nagle appears to have found in an archived source).

William Bass suggested that part of the Grand Canyon should be made a state park in order to avoid the monopolistic tendencies of the federal government.²¹⁵

The national park idea won that debate. By 1932, former Representative and parks supporter Louis Cramton listed the policies established by the history of Yellowstone National Park that “are so universally concurred in that it does not occur to us now that they ever could have been questioned.”²¹⁶ First on the list was the propriety of the federal government managing land for the benefit of the people.²¹⁷ Yet government operation of tourism at the Grand Canyon and in other national parks has not been a panacea, as the repeated controversies regarding appropriate concessions attest. Moreover, the story of the Grand Canyon is also a reminder of the fate of places that have struggled to gain national park designation. Most recently, the Indiana Dunes became a national park more than a century after Stephen Mather had championed the idea, despite the transformation of the area from a remote beach to an industrialized landscape.²¹⁸

B. Parks and Protection

The second question is what would have been prevented if the Grand Canyon had become a national park earlier. Generally, national parks exclude the types of commercial uses that occur on other federal lands, such as mining, agriculture, and water projects.²¹⁹ The Grand Canyon confronted

215. See Letter from Representative Carl Hayden to W.W. Bass at 1 (July 8, 1914) (the editors have been unable to locate this document, which Prof. Nagle appears to have found in an archived source) (noting the receipt of a letter from Bass proposing “to have a certain portion of the Grand Canyon set aside as a state park”).

216. CRAMTON, *supra* note 200, at 1.

217. See *id.* (“That the Federal Government may, under proper circumstances, itself undertake the administration of a reservation of land ‘dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people.’”).

218. See Consolidated Appropriations Act, 2019, H.R. 648, 116th Cong. § 115 (2019) (redesignating the Indiana Dunes National Lakeshore as the Indiana Dunes National Park). The controversy is described in J. RONALD ENGEL, SACRED SANDS: THE STRUGGLE FOR COMMUNITY IN THE INDIANA DUNES (1983); KAY FRANKLIN & NORMA SCHAEFFER, DUEL FOR THE DUNES: LAND USE CONFLICT ON THE SHORES OF LAKE MICHIGAN (1983); STEPHEN T. MATHER, REPORT ON THE PROPOSED SAND DUNES NATIONAL PARK, INDIANA (1917); John Copeland Nagle, Viewpoint, *Indiana Dunes a Deserving Lakeshore, Not an Undeserving National Park*, S. BEND TRIB. (Feb. 2, 2019), https://www.southbendtribune.com/news/opinion/viewpoint/viewpoint-indiana-dunes-a-deserving-lakeshore-not-an-undeserving-national/article_f87eef32-c818-5b67-ae35-166b65ec9300.html [<https://perma.cc/HEF3-X7K9>].

219. See Robert B. Keiter, *The National Park System: Visions for Tomorrow*, 50 NAT. RESOURCES J. 71, 86–90 (2010); Robert B. Keiter, *Toward a National Conservation Network Act:*

such activities beginning in the 1880s. None of them, though, resulted in any significant harm to the natural beauty and scientific value of the Grand Canyon. The mines were modest; the water projects were delayed. Even without a national park, the area was largely preserved, thanks in part to the forest reserve, game preserve, and national monument designations that preceded the national park's establishment. The Forest Service recognized the uniqueness of the Grand Canyon and acted to protect it accordingly, first as a forest reserve and later as a national monument.²²⁰ These other designations enabled the Grand Canyon to resist the despoliation that many conservationists feared.

Historian Don Lago argues that it was geology, not the law, that protected the Grand Canyon from exploitation. As he explains, the discovery of "massive copper deposits" in southern Arizona in the 1880's triggered a parallel "frenzy [that] sent many prospectors into the Grand Canyon."²²¹ Had they found copper there, Lago contends, "the canyon would have been helpless." He paints a dismal picture of what would have ensued:

It would have become a chain of huge open-pit mines and been streaked with mining talus. The cliffs would have been carved and tunneled for railroad tracks and roads to twist down to the mines. The canyon would have been filled with the smoke and noise of trains hauling out ore. Copper smelters on the rim would have poured smoke into the air and into the canyon, shrouding the view. The rim would have held massive piles of processed ore—or perhaps the ore would have been dumped back into the canyon. Perhaps instead of being powered by coal, the smelters would have been powered by spiderwebs of wires coming up from the hydroelectric dams on the river, dams flooding dozens of miles of the canyon. The rim would have held smoke-dingy towns with shabby housing, rowdy bars, labor unrest, and company bullies.²²²

Transforming Landscape Conservation on the Public Lands into Law, 42 HARV. ENVTL. L. REV. 61, 65–66 (2018).

220. See Letter from H.B. Greeley, Acting Forester, to Stanley D. McGraw 2 (Mar. 18, 1915) (advising that "[t]he Secretary of Agriculture has expressed himself as being opposed to the commercialization of the Grand Canyon which he considers one of the greatest national wonders of the world. For this reason no action will be taken by the Department toward allowing any use of the Grand Canyon which will affect its scenic beauties so long as there appears to be as little need as at present for the development of the water power resources included in the Grand Canyon National Monument.") (the editors have been unable to locate this document, which Prof. Nagle appears to have found in an archived source).

221. LAGO, *supra* note 12, at 11.

222. *Id.*

The threat of commercial development did not end with the creation of the national park. National parks remained targeted. Railroads fought throughout the 1880s and 1890s for a right-of-way through Yellowstone.²²³ Later, during the same decade that Congress created the Park Service and established eight national parks (including the Grand Canyon), Congress and President Woodrow Wilson approved the damming of the scenic Hetch Hetchy valley within Yosemite National Park.

Ironically, some advocates supported a national park precisely because it was less restrictive than the national monument. As Arizona's lone member of Congress, Carl Hayden, wrote in 1917:

It was with the idea of improving the present conditions that I favored the passage of a National Park bill. The bill provides for mining under certain conditions. Nobody can now locate a mine within the Monument. The bill provides for water power development. Nobody can now locate a water power site within the Monument.²²⁴

Thus, the legislation establishing the Grand Canyon National Park specifically authorizes certain projects. It preserved existing mining claims and authorized future mining claims,²²⁵ and it allowed government reclamation projects and rights of way for irrigation “whenever consistent with the primary purposes of [the] park.”²²⁶ Another seemingly innocuous provision was inserted to ensure that no structures would block the view of the canyon from William Randolph Hearst's parcels along the South Rim.²²⁷ The park's congressional boosters insisted that such traditional commercial uses did not necessarily interfere with enjoyment of the Grand Canyon's scenic beauty.²²⁸ The primary purpose of the park was to promote tourism,

223. See HAMPTON, *supra* note 196, at 113-19.

224. Letter from Rep. Carl Hayden to W.W. Bass 1 (June 18, 1917) (on file with the author).

225. See An Act To Establish the Grand Canyon National Park in the State of Arizona, §§ 4, 6, Pub. L. No. 277, Stat. 1175, 1177-78 (1919).

226. *Id.* §§ 5, 7.

227. See ISE, *supra* note 1, at 234. Hearst acquired the property in 1913 from early prospector, and Ralph Cameron's partner, Pete Berry. See Sutphen, *supra* note 59, at 169.

228. See 53 CONG. REC. 10,364 (1916) (statement of Rep. Hayden) (asserting that grazing on “the adjacent range can in no way interfere with the scenic beauties of the canyon. I am also satisfied that the water power and mineral resources of the Grand Canyon can be made available for use without detracting from its grandeur in the slightest degree.”); 52 CONG. REC. 13,817 (1914) (statement of Rep. Hayden) (“The use of the water power in the Mount Olympus and Grand Canyon Monuments would not interfere with our enjoyment of any of the beauties of nature. That was the case in the Hetch Hetchy bill . . . This is a parallel case.”).

and if other commercial activities were compatible with increased visitation, then the Secretary of the Interior could allow them. That never happened.²²⁹

Instead, future battles over mining and water involved the land outside the national park's boundaries, beyond the control of the Park Service. Other laws have served to block the more controversial projects. Most recently, the Forest Service refused to grant permission to cross its land to access a proposed private development in the gateway town of Tusayan,²³⁰ and the Secretary of the Interior imposed a twenty-year moratorium on uranium mining.²³¹ New uses of the canyon unanticipated in 1919—especially recreational rafting trips and overflights—have generated new federal legislation and its attendant administrative and judicial decisions as the struggle over the proper use of a national park continues.²³²

C. *The Presidential Creation of De Facto National Parks*

The most enduring consequence of the thirty-seven-year effort to make the Grand Canyon a national park is the precedent that it set for presidential action. Congress has zealously guarded its power, explicitly stated in the Property Clause,²³³ to determine the appropriate management of federal public lands. Only Congress may create a national park. Once Congress experienced presidential forest reserve proclamations, it revoked the power that it had previously granted to the President to establish new forest

229. That is what NPS official Horace Albright expected. *See* Interview with Horace Albright, *supra* note 32 (“[The mining clause is] an innocuous thing because he doesn’t have to do it and never did do it. I don’t think there was any great demand to prospect in the park. You just don’t do it if you don’t have to. It didn’t tell you he had to do it. . . . That was a concession in order to ward off opposition. Probably, some organization of miners were opposing us. This is a perfectly harmless provision because the Secretary could always refuse to do it. [The reclamation provision is] just permissive and not demanding. It has no enforcement in it.”). Albright said the same thing about the reclamation provision: It was “just permissive.” *Id.*

230. *See* Letter from Heather Provencio, Forest Supervisor, Kaibab National Forest, to Craig Sanderson, Mayor, Town of Tusayan (Mar. 4, 2016) (explaining how the proposal failed to satisfy the regulatory criteria for the use of national forest land); STEPHEN NASH, GRAND CANYON FOR SALE: PUBLIC LANDS VERSUS PRIVATE INTERESTS IN THE ERA OF CLIMATE CHANGE 63–77 (2017) (describing the controversy) (the editors have been unable to locate this document, which Prof. Nagle appears to have found in an archived source).

231. *See* Nat’l Mining Ass’n v. Zinke, 877 F.3d 845 (9th Cir. 2017).

232. *See* River Runners for Wilderness v. Martin, 593 F.3d 1064, 1084 (9th Cir. 2010) (upholding the Park Service’s authorization of motorized rafts in the national park); Grand Canyon Air Tour Coal. v. F. A. A., 154 F.3d 455, 478 (D.C. Cir. 1998) (upholding the FAA’s regulation of noise from Grand Canyon overflights).

233. U.S. CONST. art. IV, § 3, cl. 2.

reserves.²³⁴ And Congress was careful to limit the President's power under the Antiquities Act to smaller sites known for the historic or scientific value.²³⁵

But Congress messed up. The text of the Antiquities Act sweeps far broader than the law's intent. Theodore Roosevelt was the first to exploit that contradiction when he named the Grand Canyon a national monument. His action provoked a bit of an outcry, but the reaction was muffled because . . . it was the Grand Canyon! Everyone agreed that the Grand Canyon deserved our highest protection; indeed, many thought it was already a national park. A bit of presidential stretching of the law could be tolerated in the service of such an obviously worthwhile objection. Even the Supreme Court said more about the marvels of the Grand Canyon than it did about the smaller area limitation and the historical purposes of the Antiquities Act.²³⁶

Then the Grand Canyon became a precedent. Presidents soon named other large, spectacular landscapes as national monuments that look like de facto national parks, citing Roosevelt's action with respect to the Grand Canyon.²³⁷ Just before leaving office, Roosevelt himself employed the Antiquities Act in that manner to create the Olympic National Monument at the behest of a local member of Congress from Washington's Olympic Peninsula who was frustrated that Congress had not approved his national park plan.²³⁸ Olympia was not the Grand Canyon, though, and the controversy over Roosevelt's action persisted. The Forest Service soon recommended that the President's use of the Antiquities Act to designate national monuments that function as de facto national parks should be viewed as a temporary, interim measure pending full congressional study of the area.²³⁹ With Olympia, Congress declined to establish a national park. Instead, President Wilson shrunk the

234. ROTHMAN, *supra* note 14, at 26.

235. McManamon, *supra* note 102, at 337.

236. *See* Cameron v. United States, 252 U.S. 450, 455–56 (1920) (noting that the Grand Canyon “is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors”).

237. *See* Ranchod, *supra* note 9, at 544; Sellars, *supra* note 9, at 296.

238. ISE, *supra* note 1, at 383; Clifford Edwin Roloff, *The Mount Olympus National Monument*, 25 WASH. HIST. Q. 214, 225 (1934) <https://journals.lib.washington.edu/index.php/WHQ/article/view/8828/7863> [<https://perma.cc/6QYL-P3YH>]; Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 492–93 (2003).

239. ISE, *supra* note 1, at 387–88.

national monument by two-thirds.²⁴⁰ It would be two more decades before Congress agreed to establish Olympic National Park.²⁴¹

Meanwhile, subsequent presidents proclaimed new national monuments that Congress then elevated into some of our most iconic national parks. That phenomenon reached its peak in 1978, when President Carter established multiple, vast national parks in Alaska that Congress largely codified in 1980.²⁴² Since then, presidents—especially Clinton and Obama—have proclaimed many more and much larger national monuments, typically citing the Grand Canyon as their precedent for doing so.²⁴³ Congress, however, has declined to elevate those new monuments to national park status. Now President Trump wants to shrink some of those monuments, and his power to do so is currently being litigated.

III. CONCLUSION

The Grand Canyon was the first of the great scenic spectacles of the United States to be seen by Europeans and the last to be made into a national park. Yellowstone, Yosemite, Glacier, the giant sequoias of California, Mount Rainier, Denali, and the volcanoes of Hawai'i were each visited later and turned into national parks sooner. Yellowstone National Park was forty-seven years old by the time the Grand Canyon was created. By that time, the national park idea had become firmly established as it endured the growing pains associated with such a novel concept.

The Grand Canyon path was more convoluted. Alone among our scenic wonders, it received protection as a forest reserve, a game preserve, and a national monument before it was awarded the status of a national park. The nearly four decades of struggle shaped the area, but they shaped the law even more.

All of that could have been avoided if more people had listened to Benjamin Harrison.

240. *Antiquities Act 1906-2006: Mount Olympus National Monument*, NAT'L PARK SERV., <https://www.nps.gov/archeology/sites/Antiquities/profileOlympic.htm> [https://perma.cc/2EC9-WYQ5] (last updated Mar. 16, 2019).

241. *Id.*

242. Squillace, *supra* note 238, at 502–04.

243. Jesse Knowlden, *The Presidential Authority To Reserve and Modify National Monuments Under the Antiquities Act*, 87 U. CIN. L. REV. 593, 602 (2018); see Squillace, *supra* note 238, at 507–08.