

EXECUTIVE POWER AND THE PUBLIC LANDS

HAROLD H. BRUFF*

The legal relationships of federal executive officers to the public lands are defined by a mixture of separation of powers principles, administrative law doctrines, and, of course, statutes and doctrines that are particular to the public lands field. This essay explores how separation of powers and administrative law concepts infuse our public land law. Both separation of powers law and administrative law are, or ought to be, influenced by the context in which they are applied. In fact, the relationship is reciprocal: the general doctrines affect the law of the context of their application, and vice versa. The discussion here develops one example of this relationship in operation.

INTRODUCTION: PUBLIC LAND LAW VIEWED FROM A DISTANCE

In the good old days (from a federal administrator's point of view), both Congress and the courts usually gave the Executive Branch broad discretion to manage our public lands. There were two primary reasons for this state of affairs. First, the function of managing a vast and diverse collection of federal lands has always seemed to call for flexible administration, for it demands attention to local needs and changing conditions as the manager balances priorities among many competing uses.¹ Second, federal lands policy has always encountered sharp political conflict.

* Charles Inglis Thomson Professor of Law, University of Colorado. This essay is an edited version of a speech I gave at the Rocky Mountain Mineral Law Foundation's Special Institute on Natural Resources and Environmental Administrative Law and Procedure on September 17, 2004. I thank the RMMLF for its cordiality.

1. In *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915), discussed *infra*, the Supreme Court noted that:

[T]he land is property of the United States and that the land laws are not of a legislative character in the highest sense of the term (Art. 4, § 3) "but savor somewhat of mere rules prescribed by an owner of property for its disposal."

These rules or laws for the disposal of public land are necessarily general in their nature. Emergencies may occur, or conditions may so change as to require that the agent in charge should, in the public interest, withhold the land from sale; and while no such express authority has been granted, there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. The power of the Executive, as agent in charge, to retain that property from sale need not necessarily be expressed in writing.

236 U.S. 459, 474 (1915), quoting *Butte City Water Co. v. Baker*, 196 U.S. 126, 126 (1905).

Wars that began over a century ago between western legislators and federal bureaucrats continue to this day, making it difficult to legislate crisp policy or any policy at all.² Lacking detailed statutory prescription, the Executive toils in the interstices, taking the yield that is practically available.

Earth Day (April 22, 1970) heralded the end of the good old days, as Congress began passing a number of statutes that somewhat restricted preexisting levels of executive discretion. Since it still was not easy either to draft good instructions for the land managers or to enact any meaningful legislation, many of these statutes took the form of requirements for land use planning.³ As the Supreme Court has remarked, a land use plan is a "statement of priorities."⁴ This means that the planning function is inherently discretionary for the Executive, and that the courts are not inclined to control it closely. Perhaps, then, the good old days are not entirely gone.

In this essay I argue that when the influences of separation of powers law and administrative law are added to our public land law as I have just described it, a somewhat surprising pattern of executive discretion emerges. Where the influence of separation of powers concepts is greatest, at the top and the bottom of the government's organization chart, executive discretion is at its maximum. In the middle of the organization chart, where the influence of administrative law concepts is greatest, executive discretion is at its minimum. In other words, Presidents and field employees of the Bureau of Land Management may be able to have some fun, but Secretaries of the Interior may not. To support this thesis, I first review a basic separation of powers precedent that arose in the public lands context, one that has proved liberating for Presidents in other con-

2. John Wesley Powell, for example, spent years battling western senators in his attempts to craft a unique land policy for the West. The senators won. See WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* (1962); see also DONALD WORSTER, *A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL* (2001).

3. Among planning statutes for the lands, I count the Federal Lands Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701–1784; The National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614; the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–ee; and the Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271–1287. The more generally applicable National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347, also imposes planning requisites for the lands. Contrast these statutes with the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543, a famously tough set of substantive restrictions, and probably the statute that most limits the discretion of federal lands managers.

4. See *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373, 2383 (2004) ("Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them.").

texts as well. I then consider presidential designation of national monuments, a function characterized by broad discretion. Turning to basic administrative law, I summarize constraints that bind actions at the cabinet level of government. Finally, I review some ways that agency employees acting informally can exercise broad discretion that may have important effects.

I. SEPARATION OF POWERS ON THE PUBLIC LANDS

Much modern separation of powers analysis begins with Justice Robert Jackson's opinion in the *Steel Seizure* case, in which he noted, "Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress."⁵ Jackson provided a framework for analysis: presidential powers are greatest when they enjoy the express or implied authorization of Congress; least when they are opposed to congressional will; and in the absence of a clear grant or denial of authority, there is a "zone of twilight" in which uncertainty dwells.⁶ Jackson's famous framework must not be applied mechanically. Instead, I believe that all separation of powers analysis should be contextual. Therefore, we should consider the nature of the subject matter involved, the history of interbranch relations that it involves, and the presence or absence of individual rights as we search for answers to real problems.

Although Congress possesses explicit constitutional power to legislate for the public lands,⁷ Presidents have roamed quite freely throughout the zone of twilight, and the courts have proved willing to uphold these executive adventures. Presidents exercise their authority over the lands by issuing executive orders or proclamations. These law-making or law-applying decisions always invoke every source of constitutional or statutory power that anyone might detect.⁸ A venerable Supreme Court deci-

5. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

6. In this twilight zone, Justice Jackson said, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* at 637.

7. The Constitution provides, "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" U.S. CONST. art IV, § 3, cl. 2.

8. See generally Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1 (1982). Executive orders can be defined simply as directives to the bureaucracy; proclamations differ only in that they are usually addressed to the world at large. Either can be used to announce decisions that are law-making in the sense that they establish a binding general policy, or law-applying in that they determine how a general policy governs a particular set of facts. See generally KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER (2001); William Neighbors, *Presidential*

sion shows how all three branches often interrelate in the public lands context.

In *United States v. Midwest Oil Co.*,⁹ the Supreme Court upheld a bold executive action. Congress had, without any explicit qualification, opened public lands containing petroleum to occupation and purchase by private citizens. Early in the twentieth century, as oil became important as a fuel, an oil rush took place on the lands at such a rate that the government would have soon found itself buying its own oil back to fuel the Navy. President Taft issued an order, "Temporary Petroleum Withdrawal No. 5," withdrawing from private claims large tracts of public land in California and Wyoming "[i]n aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain . . ."¹⁰ Months later, the Midwest Oil Company entered some of the covered lands, extracted a quantity of oil, and filed for a certificate of ownership. The government sued to recover the land and the value of the oil.

In an opinion by Justice Lamar, the Court upheld the President's order. As it often does in cases involving presidential power, the government advanced more than one constitutional claim. The narrower argument was that the Commander-in-Chief had an obligation to assure an economical supply of fuel for the Navy by preserving existing public rights in oil. In the context of the case, this claim had merit. More broadly, the government mixed constitutional and statutory arguments by asserting that "the President, charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution (art. 2, § 1), and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties."¹¹ This reference to the "vesting clause" was typical of traditional arguments that the President enjoys broad, "inherent" constitutional powers.¹² The oil company, also invoking a traditional argument, rejoined that the withdrawal order was an invalid presidential attempt to suspend the operation of a statute, in violation of the Executive's duty to ensure the faithful execution of the laws.¹³

Legislation by Executive Order, 37 U. COLO. L. REV. 105 (1964). Executive orders are collected in 3 C.F.R.; see also NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, FEDERAL REGISTER, at http://www.archives.gov/federal_register/executive_orders/executive_orders.html.

9. 236 U.S. 459 (1915).

10. *Id.* at 467.

11. *Id.* at 468.

12. These arguments were first advanced by Hamilton, and first refuted by Madison. They have changed little from that day. See PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 17–18 (2d ed. 2005).

13. The President's duty expressed in U.S. CONST. art. II, § 3 to "take care that the laws be faithfully executed" has always been understood to forbid the suspension of statutes, an

The Supreme Court did not endorse any of the competing constitutional arguments, perhaps because they all carried unknown implications for the future. Instead, the Court chose a relatively narrow, statutory ground of decision that stayed close to the context of the case. The Court, after reviewing the administrative history of the statute, described "the legal consequences flowing from a long continued practice to make orders like the one here involved."¹⁴ The Court emphasized that there had been hundreds of withdrawal orders dating back to our early history and involving very diverse objectives that included Indian and military reservations and even bird reserves. The absence of any special statutory authority for these orders did not trouble the Court.

The reasons for the Court's attitude appear to be: the nation's proprietary interest in the lands,¹⁵ the absence of any private injury, and the presence of congressional power to disaffirm any reservation. The Court thought, however, that Congress had never exercised that power; it had always acquiesced in presidential action. The Court itself had upheld the reservation power after the Civil War.¹⁶ Executive advisers had continuously and consistently asserted the power. The Court concluded, in language much-quoted since, "that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands."¹⁷ Thus, the Court left the boundary between the Executive's constitutional and statutory powers unclear, wisely saving difficult questions about ultimate power for another day.

Midwest Oil, as the case establishing the Court's "acquiescence doctrine," has been cited approvingly ever since.¹⁸ Debate continues about

English constitutional abuse that was well known to the Framers. See, e.g., *The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 43 Op. Att'y Gen. 275 (1980).

14. *Midwest Oil Co.*, 236 U.S. at 469.

15. See *supra* note 1 and accompanying text.

16. *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1867) ("[F]rom an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.")

17. *Midwest Oil Co.*, 236 U.S. at 474. Three Justices dissented, concluding that the withdrawal order was not supported by express or implied authority from Congress.

18. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Haig v. Agee*, 453 U.S. 280 (1981). Concurring in the *Steel Seizure* case, Justice Frankfurter said:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pur-

the application of *Midwest Oil* outside the public lands context;¹⁹ nevertheless, it remains firmly established for the lands.²⁰ The Court's conception of "the Executive, as agent in charge" of the lands, empowered to act as necessary to preserve them unless contravened by Congress, depends on the premise that the lands are initially infused with public not private rights, until Congress allows a conversion from public to private rights to occur, and it is actually perfected. Broader views of the appropriateness of presidential stewardship over public property of all kinds are probably present also.²¹ Nevertheless, in contrast to a holding that the President possesses constitutional executive power to reserve the lands, the statutory acquiescence that *Midwest Oil* announced is contingent. It is always subject to congressional retraction—which eventually occurred in the context litigated in *Midwest Oil* itself.²² Yet when one road closes another may remain open, as presidential actions in creating national monuments demonstrate.

II. MONUMENTS TO PRECEDENT: EXPANSION OF THE ANTIQUITIES ACT

Fittingly enough, aggressive presidential action to preserve the public lands is one of the legacies of Theodore Roosevelt ("TR").²³ TR and

sued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II. Such was the case of *United States v. Midwest Oil Co.*, 236 U.S. 459.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

19. In his discussion of competing views of executive power, Justice Jackson considered President Taft's basis for the withdrawal order to be inconsistent with Taft's generally cautious views on executive power. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 n.1 ("It even seems that President Taft cancels out Professor Taft. Compare his Temporary Petroleum Withdrawal No. 5 of September 27, 1909, *United States v. Midwest Oil Co.*, 236 U.S. 459, 467-68, with his appraisal of executive power in 'Our Chief Magistrate and His Powers 139-40.'").

20. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 44-47 (1993).

21. *Id.* at 11 ("I contend that the constitutional conception of a Chief Executive authorized to enforce the laws includes a general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm.").

22. When Congress rearranged certain withdrawal authorities in enacting FLPMA in 1976, it provided that "the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459) . . . [is] repealed." Federal Lands Policy Management Act. Pub. L. No. 94-579, Title VII, § 704(a), 90 Stat. 2743, 2792 (1976).

23. Presented with a bill sharply restricting his authority to make withdrawals, TR issued a number of "midnight proclamations" setting aside sixteen million acres of forest land, and then signed into law a rider to a Department of Agriculture appropriations bill that prevented

his successors have relied on authority granted by the Antiquities Act of 1906 to create national monuments.²⁴ This statute, which is now itself an antiquity, says that the President may designate certain parcels of land as national monuments "in his discretion." To the modern Supreme Court, this phrase may signal congressional intent that executive action be entirely unreviewable.²⁵ At the same time, the Act requires that the reserved parcels "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."²⁶ This provision suggests that the Act authorizes preservation of local attractions such as Indian burial mounds, rather than the vast tracts that Presidents have often designated as monuments. Early on, however, in *Cameron v. United States*²⁷ the Supreme Court upheld TR's invocation of the Act to designate the Grand Canyon as a National Monument. If the Canyon could qualify, what could fail? *Cameron's* broad endorsement of presidential authority may be questionable, but it is probably too late to seek its reconsideration. The Supreme Court ordinarily applies a strong policy of *stare decisis* to its statutory interpretations, leaving corrections to Congress.²⁸ In this case, Congress is certainly aware of the longstanding executive and judicial interpretation of the Act and has usually acquiesced in presidential designation of monuments.²⁹

creation of new western forest reserves. See NATHAN MILLER, *THEODORE ROOSEVELT: A LIFE* 469-72 (1992).

24. The Antiquities Act provides:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and pre-historic 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.

16 U.S.C. § 431 (1906); see generally Ronald F. Lee, *The Antiquities Act of 1906*, 42 J. OF THE SOUTHWEST 247 (2000); HAL ROTHMAN, *PRESERVING DIFFERENT PASTS: THE AMERICAN NATIONAL MONUMENTS* (1989).

25. See *Webster v. Doe*, 486 U.S. 592 (1988) (holding that the statutory phrase "in his discretion" rendered an action unreviewable under the Administrative Procedure Act).

26. The Antiquities Act, *supra* note 24.

27. 252 U.S. 450 (1920); see also *Cappaert v. United States*, 426 U.S. 128 (1976) (broadly interpreting executive power by holding that formation of a National Monument could include an intent to reserve unappropriated water for the maintenance of the monument).

28. See generally, e.g., Lawrence C. Marshall, "Let Congress Do It: The Case for an Absolute Rule of Statutory *Stare Decisis*," 88 MICH. L. REV. 177 (1989).

29. See generally GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 353-60 (5th ed. 2002); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982). When Congress enacted FLPMA in 1976, it revised executive authority over the lands, but left the Antiquities Act untouched. Recent examples of its acquiescence in use of the Act are Colorado's two newest national parks, Black Canyon of the Gunnison (Pub. L. No. 106-76, 113 Stat. 1126 (1999)) and

Two examples will suffice to illustrate the modern scope of presidential monument-building. Court challenges to each of these actions were rebuffed by lower federal courts that had imbibed the spirit of *Midwest Oil* and *Cameron*. In 1978, President Carter reserved about fifty-six million acres of land in Alaska from development by creating or enlarging national monuments. The President acted following Congress's failure to pass various legislative proposals on the disposition of these largely wilderness lands. Carter's order maintained the status quo on the lands; Congress eventually legislated their fate.³⁰ Meanwhile, the Anaconda Copper Company and the state of Alaska challenged the creation of the monuments on the ground that the President exceeded his authority under the Antiquities Act. A federal district court declared the President's designation valid and stated that Presidents had consistently interpreted the statutory terms "historic or scientific interest" broadly, that the Supreme Court had approved that practice, and that Congress, aware of the executive practice, had acquiesced in it.³¹

President Clinton, building on this precedent, invoked the Act in 1996 to establish the 1.7 million acre Grand Staircase-Escalante National Monument in Utah.³² Clinton then proclaimed nineteen new and three expanded monuments before he left office.³³ Once again lower federal courts upheld the presidential actions.³⁴ The courts accepted recitals in the proclamations connecting the affected land to the Act's purposes and would not probe the assertions for abuse of discretion. Hence, although the courts did not treat these presidential actions as completely unreviewable, they stopped one step short of that conclusion. All that they required was that the President's lawyers who drafted the proclamations

Great Sand Dunes (Pub. L. No. 106-530, 114 Stat. 2527 (2000)), both of which were promoted from National Monuments by Congress. On the other hand, Congress signaled its displeasure with designation of the Jackson Hole National Monument, now Grand Teton National Park, by removing the State of Wyoming from the ambit of the Antiquities Act. 16 U.S.C. § 431(a) (1906).

30. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980); see COGGINS ET AL., *supra* note 29, at 355 ("The Act rescinded the Carter withdrawals but included almost all the affected lands within various preservation systems.").

31. *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980); *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978).

32. Establishment of the Grand Staircase-Escalante National Monument, Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996) [hereinafter Proclamation].

33. See generally John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287 (2001); James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483 (1999).

34. See *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), *cert. denied*, 540 U.S. 812 (2003); *accord Tulare County v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002), *cert. denied*, 124 S.Ct. 63 (2003); *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004), *appeal docketed*, No. 04-4132 (10th Cir. June 14, 2004).

take care to tie factual recitals to the terms of the statute.³⁵ This judicial reticence to examine the basis of presidential actions in ways that would be routine for actions of subordinate administrators stems from the Supreme Court's refusal to subject the President to the Administrative Procedure Act, with its familiar forms of review.³⁶

These actions by Presidents Carter and Clinton illustrate a characteristic form of presidential activity. Presidents issue executive orders to implement their personal policies in the "zone of twilight" where clear congressional approval or disapproval is absent. Then, once a President has succeeded in issuing such orders in a particular context, his successors feel emboldened to follow the precedent and even to expand it.³⁷ They assume that judicial review will be restrained, even if it is not always as permissive as in the national monuments cases.³⁸ Eventually, actions that once were bold and questionable seem routine. Thus, the growth of the Antiquities Act from its modest textual base to its expansive modern meaning is not unique. As we have seen with both *Midwest Oil* and the Antiquities Act cases, statutes that are administered by Presi-

35. For an eloquent example of such a proclamation, see Proclamation, *supra* note 32.

36. See *Dalton v. Specter*, 511 U.S. 462 (1994); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); see generally Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997).

37. For a discussion of two prominent examples—orders promoting civil rights in government-related activities and orders seeking economic stabilization—see Joel Fleishman & Arthur Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1 (1976).

38. In *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc), cert. denied, 443 U.S. 915 (1979), a case involving price controls, the court required a "nexus" between an authorizing statute and an executive order, which would exist if the President established a "reasonable relation" between them. The court then accepted affidavits containing economic predictions from the President's advisers as proof of the nexus. This was certainly a permissive standard of review, one not far removed from the fictional rationality test traditionally used for the lowest level of constitutional scrutiny of legislation. For a discussion of *Kahn*, see Kimberley A. Egerton, Note, *Presidential Power Over Federal Contracts Under the Federal Property and Administrative Services Act: The Close Nexus Test of AFL-CIO v. Kahn*, 1980 DUKE L.J. 205 (1980).

On the presumption of regularity courts attach to presidential initiatives embodied in executive orders, see *Am. Fed'n of Gov't Employees v. Reagan*, 870 F.2d 723 (D.C. Cir. 1989), which held that the Federal Service Labor-Management Relations Act did not require the President to incorporate written findings into an executive order implementing his statutory authority to exempt certain agencies from coverage. But see *In re Reyes*, 910 F.2d 611 (9th Cir. 1990) (invalidating executive order imposing restriction on geographical areas within which Philippine national who had served in U.S. military could serve and be eligible for naturalization pursuant to Immigration and Naturalization Act, which authorized no such restrictions).

It is always possible for a court to find that an executive order issued pursuant to one statute runs afoul of another statute. Compare *Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), with *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) (rejecting such an argument).

dents usually receive generous interpretation. In contrast, statutes that are administered by the President's subordinates may not be approached so charitably, as we shall next discover.

III. THE DOMAIN OF ADMINISTRATIVE LAW

Like Presidents, subordinate administrators act "by the stroke of a pen" in a myriad of ways. They might issue federal regulations after full notice and comment procedures. They might announce interpretations of statutes or regulations. They might make informal decisions that either allocate funds and commence federal projects or withhold the funds and terminate the projects. They might initiate or settle litigation over agency policies. All of these actions below the presidential level are the domain of administrative law, and are guided by the doctrines of that field and by the federal Administrative Procedure Act ("APA").³⁹

Whether administrative action that affects public lands is presidential or that of a subordinate administrator, it ordinarily reflects the political philosophy of the incumbent President. Elections bring changes that reverberate down through the levels of the federal bureaucracy. Like earthquakes, however, elections produce effects that diminish with distance from the epicenter. That is, Presidents must manage the Executive Branch to try to ensure that their remote subordinates actually follow the policies of the administration, and not their own personal preferences. Administrative law recognizes the validity of policy changes that flow from our national elections, but it controls the ways that these policy changes can occur, as we shall see.

The actions of most interest to us fall into two categories, rulemaking and "informal" action.⁴⁰ The APA provides minimum procedural prerequisites for rulemaking. To make a substantive rule that has the force of law, an agency must notify the public of its proposed rulemaking, afford an opportunity for written comment on the proposed rule, and accompany the rule it finally adopts with a statement of its basis and purpose.⁴¹ In practice, these simple requirements have developed into a rather elaborate and time-consuming process that tends to produce a massive public record of information, analysis, and opinion, and that culminates in a detailed explanation of the factual basis and policy ra-

39. 5 U.S.C. § 551 (1994); see generally Section of Administrative Law and Regulatory Practice of the American Bar Ass'n, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1 (2002) [hereinafter *Blackletter*].

40. In addition to rules, the "agency actions" that the APA subjects to judicial review are orders, licenses, sanctions, and relief. See 5 U.S.C. § 551(13) (1994); *Norton v. S. Utah Wilderness Alliance*, 124 S.Ct. 2373, 2378 (2004).

41. 5 U.S.C. § 553 (1994).

tionale for the final rule.⁴² For example, for the Department of the Interior to revise its grazing regulations requires a major effort, followed by judicial review.⁴³

Much law-applying in the public lands context is known as “informal” action, because the APA requires no special procedures for administrative actions other than rulemaking and formal adjudication.⁴⁴ For example, the Secretary of the Interior might enter into an agreement with Montana specifying methods to control the bison population of Yellowstone National Park,⁴⁵ or it might designate a desert canyon in California as open to unrestricted use by off-road vehicles.⁴⁶ Anticipating judicial review, agencies normally accompany announcements of these informal statutory decisions with explanations similar to those used for rulemaking.⁴⁷

The APA’s standard of judicial review for rulemaking and for informal agency actions is much the same, except for procedural issues relating to rulemaking. Courts examine agency actions for constitutionality, statutory authorization, procedural regularity, and substantive rationality.⁴⁸ On issues of statutory authority, the celebrated *Chevron* doctrine instructs courts to defer to an administrator’s statutory interpretation within the bounds of reason and ascertainable legislative intent.⁴⁹ This deference is based on the administrator’s presumed expertise and a related notion that Congress commits indeterminate legal issues (which are intermixed with policy concerns) to the agency and not to the courts. Thus, *Chevron* tries to cede the swampy border areas where law and policy intermingle to the agencies, leaving the courts the high ground of statutory clarity. In practice, though, the Supreme Court sometimes simply announces what a statute means, whether or not that is really clear.⁵⁰

42. In contrast, Presidents perform their rulemaking activities simply by issuing executive orders or proclamations, without any prior public procedure, and often without any accompanying explanation.

43. See *Pub. Lands Council v. Babbitt*, 529 U.S. 728 (2000).

44. Formal adjudication is a trial-like process governed by the APA, defined in 5 U.S.C. § 554-57 (2000), and used when called for by a program statute.

45. *Intertribal Bison Coop. v. Babbitt*, 25 F. Supp. 2d 1135 (D. Mont. 1988), *aff’d*, 175 F.2d 1149 (9th Cir. 1999). In Boulder, Colorado, these animals would be buffaloes.

46. *Sierra Club v. Clark*, 756 F.2d 686 (9th Cir. 1985).

47. Presidents sometimes furnish contemporaneous explanations of their law-applying decisions, but there is no consistent practice.

48. 5 U.S.C. § 706(2)(A)–(D) (2000).

49. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see generally RICHARD J. PIERCE, JR., I ADMINISTRATIVE LAW TREATISE, 137–91 (4th ed. 2002).

50. E.g., *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865 (1999) (overturning an Interior Department interpretation of a statute governing lease royalties for coal bed methane gas); see generally Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE

Lower federal courts, in contrast, invariably cite and try to follow the *Chevron* formula.⁵¹

On issues of fact and policy, the APA requires courts to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion."⁵² The Supreme Court has parsed this terminology to require a "searching and careful" inquiry into the agency's judgments, although a reviewing court is not to "substitute its judgment for that of the agency."⁵³ The effort is to ensure that agency actions are "based on a consideration of the relevant factors" and do not demonstrate a "clear error of judgment."⁵⁴

Reviewing courts compare an agency's official explanation of a decision with the "administrative record" on which the agency based the decision. Absent particular indications of "bad faith or improper behavior," the court does not inquire further into the "actual" basis of decision.⁵⁵ If the explanation does not sufficiently justify the action on the basis of the administrative record, the usual remedy is a remand to the agency for further consideration.⁵⁶

In administrative law cases, courts also consider a series of threshold defenses before reaching the merits of the case. These include objections to the plaintiff's standing to sue, to the timing of the lawsuit, and to the reviewability of the subject matter.⁵⁷ These defenses all embody separation of powers concerns, because they reflect both Article III definitions of cases and controversies that the federal courts may consider and fundamental concepts about the policy domain of the Executive Branch.⁵⁸ In standing cases, plaintiffs must demonstrate (1) "injury in fact," (2) that the agency caused their injury and that it will be redressed by the injunction they seek, and (3) that they are arguably within the zone of interests that the statute governs.⁵⁹ In timing cases, the central issues are (1) the fitness of the issues for judicial consideration, (2) the hardship to the parties from withholding review, and (3) whether judicial intervention would "inappropriately interfere with further administrative action."⁶⁰ Analysis of reviewability of the subject matter begins with a

L.J. 969 (1992).

51. PIERCE, *supra* note 49, at § 3.6.

52. 5 U.S.C. § 706(2)(A) (2000).

53. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

54. *Id.*

55. *Id.* at 420.

56. *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

57. *Blackletter*, *supra* note 39, at 47-59.

58. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-78 (1992).

59. *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 872 (1990).

60. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998); *Abbott Labs. v. Gard-*

“basic presumption of review.”⁶¹ Nevertheless, some kinds of issues, such as an agency’s refusal to initiate enforcement action⁶² or its allocation of appropriations,⁶³ are “committed to agency discretion”⁶⁴ and hence, are unreviewable. Priority setting, for example the selection of enforcement activities or the allocation of funds from a general budget, is often prominent in unreviewable agency decisions, because the agency is usually considering a wide range of possible actions. Courts cannot comfortably review such global judgments.

A recent case illustrates the tendency of the threshold defenses to converge. In *Norton v. Southern Utah Wilderness Alliance* (“SUWA”),⁶⁵ the Supreme Court considered a challenge to the Bureau of Land Management’s (“BLM”) stewardship of some Utah land under the Federal Land Policy and Management Act of 1976 (“FLPMA”).⁶⁶ The Secretary of the Interior identified these federal lands as “wilderness study areas” suitable for wilderness designation, whereupon they had to be managed “so as not to impair the[ir] suitability for preservation as wilderness.”⁶⁷ Environmental groups sued to force BLM to take more effective action to protect these lands from environmental damage caused by off-road vehicles. Over the years, usage of the study areas by these vehicles had increased sharply, and BLM had not succeeded in controlling it. The plaintiffs asked the courts to “compel agency action unlawfully withheld or unreasonably delayed”⁶⁸ under the APA. But they did not ask for specific remedial action, perhaps because they understood the discretionary and evolving nature of the agency’s responses to this problem. Instead, echoing the statute, they asked for an order to prevent further impairment.

A unanimous Supreme Court rejected the challenge. It held that the APA claim could succeed only where an agency has “failed to take a *discrete* agency action that it is *required to take*.”⁶⁹ These limitations, Justice Scalia said, were designed to preclude generalized attacks on federal programs and judicial direction of even discrete agency actions that were

ner, 387 U.S. 136, 149 (1967).

61. *Abbott Labs.*, 387 U.S. at 140–41. The Court went on to say that “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Id.* at 141.

62. *Heckler v. Chaney*, 470 U.S. 821 (1985).

63. *Lincoln v. Vigil*, 508 U.S. 182 (1993).

64. 5 U.S.C. § 701(a)(2) (2000).

65. 124 S. Ct. 2373 (2004).

66. 43 U.S.C. § 1701–1784 (2000).

67. *Id.* at § 1782.

68. 5 U.S.C. § 706(1) (2000).

69. *SUWA*, 124 S. Ct. at 2379 (emphasis in original).

not commanded by law.⁷⁰ Here, although the statute declared a mandatory goal, it left the question of means to the agency. The Court was concerned, as it so often is in standing and timing cases, with the potential that federal courts could become entangled in abstract disagreements over federal programs before any concrete dispute arose.

In *SUWA*, the plaintiffs tried to recast their claims to avoid dismissal under traditional threshold doctrines. Yet they invoked a provision of the APA that has not been treated as a broad grant of judicial review authority.⁷¹ The district court had correctly analogized the provision to an authorization to grant mandamus, which may be used to compel "ministerial" but not discretionary agency action.⁷² This limitation on court intervention reflects separation of powers boundaries to judicial review that trace directly back to *Marbury v. Madison*.⁷³ In addition, the plaintiffs' claims might well have failed under either of two traditional formulations of the threshold defenses. First, *SUWA* could have resulted in a holding of unreviewability, because any court order would have rearranged both agency funding allocations and decisions about levels of enforcement activity. Second, the Court could have easily held that no final agency action that was ripe for review had occurred. Hence *SUWA* breaks no new ground, although the opposite result in the Supreme Court would certainly have done so.

IV. CONSERVING ADMINISTRATIVE DISCRETION

Now let us weave together some of the strands of separation of powers and administrative law that are summarized above. Consider a maxim, the Law of Conservation of Administrative Discretion.⁷⁴ This Law holds that when administrative discretion is confined in one way, it

70. "[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." *SUWA*, 124 S. Ct. at 2380 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (emphasis in original)).

71. The usual function of § 706(1) is to enforce statutory deadlines for agency action. See RICHARD J. PIERCE, JR., II ADMINISTRATIVE LAW TREATISE § 12.3 (4th ed. 2002).

72. *S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33347722, at *2 (D. Utah Dec. 22, 2000).

73. 5 U.S. (1 Cranch) 137 (1803); see *Marbury and Its Legacy: A Symposium to Mark the 200th Anniversary of Marbury v. Madison*, 72 GEO. WASH. L. REV. 1 (2003); *Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003).

74. This Law was discovered by Professor Jerry Mashaw of the Yale Law School. Since its title is a bit Newtonian, it may not be too much to hope that Mashaw will be eligible for the Nobel Prize in Physics, and that my elaboration of it here might entitle me to a share in the Prize. See very generally Eric Cornell and Carl Wieman, the two most recent Nobel Laureates (Physics) at the University of Colorado.

will emerge somewhere else—and in at least an equal amount. The Law reflects basic human nature—the desire of a bureaucrat to perform his or her statutory mission with any means that might be available. It is often evident in public land law.

Consider the history of the implementation of the Antiquities Act. Presidents pursuing preservationist values have created monuments with little legal constraint. When Congress enacted FLPMA, however, it limited executive discretion in some ways. It repealed some previous withdrawal authorities and granted the Interior Department new withdrawal authority that was hedged by the usual administrative law constraints of public notice and required analysis and reports.⁷⁵ At the same time, though, it left the Antiquities Act untouched. It should not surprise anyone that Presidents continued to use their wide authority under the Antiquities Act rather than have their Interior secretaries run the FLPMA gauntlet to make withdrawals.⁷⁶

In contexts where action by the President's subordinates is normal, there is a hierarchy to the burdensomeness of administrative procedures. The Conservation Law says that relatively confining, time-consuming, and expensive procedures will yield to less formal ones whenever the administrator's goals, or most of them, can still be realized. Moreover, judicial review tends to focus on the more formal procedures. Informal agency behavior may well fall within the scope of the threshold defenses to any court consideration of the merits.

Among the procedures discussed here, so-called "informal" rulemaking is the most burdensome. It has become so difficult to promulgate a major new federal regulation that an entire literature has arisen decrying the "ossification" of federal rulemaking.⁷⁷ In addition, deregulatory actions encounter the same procedures and the same jeopardy to intense judicial review as actions initiating or extending regulation.⁷⁸ Agencies now commonly attempt to alter the meaning of their existing regulations by "interpreting" them or the underlying statute, thereby avoiding public procedures for amending rules but forfeiting the level of judicial deference they would enjoy for rules promulgated after notice and comment.⁷⁹

75. See Leshy, *supra* note 33, at 298.

76. See Rasband, *supra* note 33, at 499–504.

77. See, e.g., Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

78. See generally Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177.

79. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992). Regarding deference, see *United States v. Mead Corp.*, 533 U.S. 218 (2001) and

When an agency makes an official statutory decision, for example by approving mining exploration near protected grizzly bears, its action is likely to be both highly visible to every interested group and swiftly followed by judicial review.⁸⁰ On the other hand, and tracking the distinction between action and inaction that has deep roots in administrative law, agency inaction that allows private activity to continue is usually far less visible and is very difficult to challenge in court, as the *SUWA* plaintiffs learned to their dismay. Indeed, whenever an agency is not prepared to issue an official decision that is reviewable under the APA, the courts are unlikely to interfere. For example, the Secretary of the Interior is free to be irritatingly slow in issuing patents to mining companies.⁸¹ In short, persons dealing with the government and seeking its official action have no ready means to force it to conclude a possibly extended period of contemplation.

In the public lands field, the Conservation Law tends to shift decisions away from forms that are fully reviewed under administrative law principles and toward those that are reviewed more gently, or not at all. Thus, Presidents have gathered discretion into their own hands under the Antiquities Act, where it is safest from challenge. As *SUWA* confirms, an alternative locus of discretion is down toward the bottom of the organization chart. The behavior of lower-level federal employees may have important practical consequences yet may escape judicial review. For example, they delay issuing mining patents, or they decline to close roads where off-road vehicles roam.

Discretionary action with lasting effects can also evade prior public debate. For example, President Clinton was able to announce new monuments without having to discuss them with affected interests and communities.⁸² And a new monument is permanent if the record to date is any guide.⁸³ Nonetheless, official presidential action is always visible, and Presidents are certainly politically accountable for what they do, both to Congress and to the people. At the other end of the organization chart, government employees can take highly informal administrative actions without the public procedures typical of the APA. The effects can be permanent in any practical sense—if, for example, BLM employees

Christensen v. Harris County, 529 U.S. 576 (2000), both of which extend only the limited respect due to the "power to persuade" contained in agency interpretations that are issued by informal processes.

80. See *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982).

81. *Independence Mining Co. v. Babbitt*, 885 F. Supp. 1356 (D. Nev. 1995), *aff'd*, 105 F.3d 502 (9th Cir. 1997).

82. See generally Rasband, *supra* note 33.

83. Leshy, *supra* note 33, at 288.

allow excessive usage by off-road vehicles that destroys the wilderness potential of a study area.

CONCLUSION

Thus we have seen the limitations of administrative law and public land law in their efforts to confine administrative discretion. In part, as *Midwest Oil* demonstrated long ago, discretion persists in this field because managerial functions demand it and Congress appreciates that fact. In the context of designating national monuments, Congress has allowed Presidents to act quite freely, and reviewing courts, sensitive to separation of powers principles, have not confined presidential discretion. In contrast, departmental actions governed by the APA must follow prescribed procedures and survive searching judicial review. Yet when agencies engage in informal processes of policy formation, their subordinate employees may be able to exercise wide discretion without fear of court intervention.

We should not be surprised by this overall pattern, or even dismayed. Along the boundary between law and politics, there will always be room for both to operate—and for both administrators and private citizens to seek to shift the boundary one way or the other in response to the needs of the times.

