Public Land Bargains, Revolutionary Rhetoric, and Building Trust

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In 2019, the Supreme Court decided Sturgeon v. Frost *for the second time.* Sturgeon *arose because of a 1980 federal statute, the Alaska National Interest Lands Conservation Act, that limited the executive branch's jurisdiction over public land in Alaska to lands to which the federal government holds title. This is a major deviation from the default public land management regime, in which the federal government can regulate private activity on state or private land under the Property Clause of the Constitution to achieve public land objectives. Because this limitation only applies in Alaska, the Alaska National Interest Lands Conservation Act can be thought of as a public land "bargain" between one state and the federal government.*

This Note discusses public land "bargains," like the Alaska National Interest Lands Conservation Act, and proposes a framework for assessing future "bargains." To do this, it first presents a taxonomy of existing public land "bargains," focusing on the rhetorical context surrounding their passage. Second, it presents some of the arguments made by modern public land "bargain" advocates. Third, it argues that public land "bargains" can make it more challenging for the federal government to promote healthy ecological systems and achieve statutory goals. Fourth, it proposes a loose theoretical framework for assessing public land "bargains" in light of those costs. Finally, it argues that the costs of public land "bargains" might be avoidable if land management agencies instead work to build trust with public land communities.

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INTRODUCTION

The early public land policies of the U.S. federal government facilitated the swift and efficient extraction of natural resources, like minerals and timber, which fueled westward expansion and produced revenue for the federal government.[1] These policy priorities generated laws that made it easy to both acquire private land and to extract natural resources in the West.[2] Then, at the very end of the nineteenth century, the federal government began to change course.[3] The federal government began to recognize that natural resources were limited, so it shifted towards a model of "scientific utilitarianism[,]" which deployed scientific expertise to bring the "greatest good of the greatest number [of people] in the long run."[4] This model "presumes that resource management is a technical task and that our goals and objectives can be met through the application of experts' specialized tools."[5] Crucially, people implementing

1. Paul W. Gates, *Public Land Issues in the United States*, 2 W. HIST. Q. 363, 365 (1971) (stating "American land policy from independence to the end of the nineteenth century had four objectives inherited from the colonial period: to produce revenue for the government; to facilitate the settlement and growth of new communities; to reward veterans of wars; and to promote [development of public educational institutions]").

2. *See id.* at 368–69.

3. *Id.* at 373.

4. *Id.*; *see* Timothy P. Duane, *Community Participation in Ecosystem Management*, 24 ECOLOGY L.Q. 771, 772 (1997) (noting "[r]esource management agencies have nevertheless continued to emphasize commodity production to the detriment of emerging social and ecological values, which have been excluded from the traditional decisionmaking process"); Charles Wilkinson, *"Greatest Good of the Greatest Number in the Long Run" TR, Pinchot, and the Origins of Sustainability in America*, 26 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 69, 74 (2015).

5. Duane, *supra* note 4.

scientific utilitarianism began to reject early federal policies that streamlined the transfer of land from public ownership to private ownership.[6] As the federal government shifted towards retaining ownership of public land, it consolidated control over public land management in technical experts, many of whom worked in Washington, DC.[7]

Gifford Pinchot was an early architect of this emerging technocratic public land bureaucracy. Early in his career as the first head of the U.S. Forest Service, Pinchot "railed against the way that the [early] public land laws allowed the acquisition of valuable federal timber land and rampant timber theft . . . calling it a 'gigantic and lamentable massacre of trees.'"[8] Pinchot believed in harvesting resources, "but only conservatively."[9] To stanch the perceived massacre, Pinchot imposed "businesslike regulations, enforced with promptness, effectiveness, and common sense" that often limited extractive activity.[10] By the time many of these regulations went into effect in the early 1900s, the timber frontier had shifted from the East towards the Pacific.[11] Thus, these new regulations particularly affected people in western states. This created a rift between people in the eastern and western United States. People who lived near the nation's political core, in the East, felt the effects of new public land policies indirectly. But people in the western United States, who lived on the periphery[12] of the expanding nation, often experienced new public land policy as a direct limit on their ability to mine or log.[13]

These regulations and other limits on resource extraction sowed anger among people on the country's political periphery. Many westerners had built lives around extracting resources from the natural world. Small lumbermen "all over the west hated" Pinchot and the young Forest Service for limiting their ability to log.[14] They voiced their anger through revolutionary rhetoric. For

6. *See* Gates, *supra* note 1, at 373.
7. *See id.*
8. *Id.*
9. *Id.* at 72.
10. *Id.*
11. *Id.*
12. Throughout this Note, I refer to a rough distinction between people living in the country's political "core" and people living on the country's political "periphery." This is loosely based on a dichotomy developed by Wendell Berry in an essay about modern political relationships in the United States. As he puts it, "a national or a state government is a center solemnly entrusted with responsibility for peripheral places." Berry writes as "part of an effort of the periphery to be heard by the center." This Note is my attempt to engage in cooperative communication between the core and periphery. *See* Wendell Berry, *Local Knowledge in the Age of Information, in* THE WAY OF IGNORANCE 113, 119 (2005) (providing "[w]e need to consider the possibility that even our remnant . . . population [on the periphery] possesses knowledge and experience that is indispensable [to effective public land management] in a rapidly urbanizing world. The center may need to pay attention to the periphery and accept its influence simply in order to survive.").
13. *See infra* Subparts I.B and I.C (discussing the impacts of public land policy on people in the West).
14. ROBERT KELLEY, BATTLING THE INLAND SEA: FLOODS, PUBLIC POLICY, AND THE SACRAMENTO VALLEY 328 (1989).

example, in Alaska, people "burn[ed] Pinchot in an effigy" and staged a reenactment of the Boston Tea Party for preventing settlers from mining and logging.[15]

Motivated by their frustration, many people in western communities near public lands began advocating for a new type of legislation: the public land bargain. Public land bargains are legislative acts limiting the executive branch's authority over federal land within a given state. Both Wyoming and Alaska secured public land bargains in the twentieth century, so in Alaska and Wyoming, the federal executive branch cannot take certain public land-related actions that it can take in any other state.[16] Wyoming's public land bargain prohibits the president from unilaterally creating national monuments.[17] Alaska's public land bargain does this as well, but it goes further by limiting the executive branch's regulatory jurisdiction over rivers in Alaska, even those passing through federal land.[18]

Out of frustration with the continued concentration of regulatory authority over public land in Washington, DC, modern politicians are taking cues from Alaska and Wyoming. In 2018, Senator Mike Lee, a Utah Republican, single-handedly held up a major public land bill because his colleagues would not make Utah the third state, after Alaska and Wyoming, to be exempt from the Antiquities Act.[19] Senator Lee is still pushing for an exemption from the Antiquities Act in a bill called the Protect Utah's Rural Economy Act.[20] Whether or not Congress is passing these bills, they are affecting Congress's legislative agenda because they take up limited time for legislating and are used as bargaining chips in other public land legislation.[21]

This Note begins by discussing two braided concepts: public land bargain legislation and the rhetorical context surrounding its passage. First, it discusses pieces of modern public land bargain legislation and draws out important features of the rhetorical context around their passage.[22] Such rhetoric highlights how public land bargains are a product of a strained relationship between people in the nation's core and people on the nation's periphery.[23] Next, it discusses the arguments that modern advocates make in favor of bargain legislation and this legislation's potential costs. To do so, this Note discusses the recent Supreme

15. Sturgeon v. Frost (*Sturgeon II*), 139 S. Ct. 1066, 1073 (2019).

16. 54 U.S.C. § 320301 (2018) (amended in 1950 to include subsection (d) to limit its application in Wyoming); 16 U.S.C. §§ 3101–3233 (2018) (originally passed in 1980).

17. 54 U.S.C. § 320301(d).

18. *See* §§ 3101–3233; *Sturgeon II*, 139 S. Ct. at 1087 (interpreting Alaska's public land bargain).

19. Lee Davidson, *Sen. Mike Lee Sinks a Big Public Lands Package Because Congress Won't Stop Presidents from Creating National Monuments in Utah*, SALT LAKE TRIB. (Dec. 20, 2018), https://www.sltrib.com/news/politics/2018/12/20/sen-mike-lee-sinks-big/; *see infra* Subpart I.A (discussing the Antiquities Act in further depth).

20. Protect Utah's Rural Economy Act, S. 90, 116th Cong. (2019).

21. *See* Davidson, *supra* note 19.

22. *See infra* Subparts I.B, I.C.

23. *See id.*

Court case *Sturgeon v. Frost*, in which the Supreme Court squarely discussed several problems caused by Alaska's public land bargain.[24] Then, it develops a loose framework to evaluate a proposed piece of public land bargain legislation in light of its potential benefits and costs.[25] Finally, this Note proposes that federal agencies should use modern empirical research into the nature of building trust as a first-line response to the revolutionary rhetoric of modern-day bargain advocates.[26] In some instances, federal efforts to intentionally build trust with communities on the periphery may make it easier to avoid the costs of public land bargains.[27]

I. A TAXONOMY OF BARGAINS

There are infinite hypothetical public land bargains, but this Part only describes the three public land management regimes in place in the United States today. First, it describes the default public land management regime in place in the forty-eight states without public land bargains. Second, it describes Wyoming's exemption from the Antiquities Act, the first public land bargain. Third, it describes Alaska's unique public land regulatory regime created by the Alaska National Interest Lands Conservation Act (ANILCA), a grand bargain with the federal government.

This taxonomy explains many of the downstream consequences of public land bargains. For example, it explains why the National Park Service (Park Service) cannot exercise its general regulatory authority over rivers in Alaska, even if they flow through Park Service units.[28] This taxonomy also provides a foundation for assessing future public land bargains by presenting points of comparison for future bargains. When assessing the potential effects of a public land bargain in the future, legislators or voters can ask: Is this similar to the default public land regime, Wyoming's bargain, Alaska's bargain, or none of the above?

This Part also discusses the rhetorical context surrounding the passage of both Wyoming's and Alaska's public land bargains and its application today. In both Wyoming and Alaska, bargain legislation passed in response to local frustration over unilateral executive action under the Antiquities Act that limited local people's ability to monetize local natural resources.[29] Today, people across the West are also frustrated with presidential uses of the Antiquities Act that limit their ability to take full advantage of local natural resources.[30] In their frustration, modern bargain advocates are making many of the same arguments that people

24. *See infra* Subpart III.A.
25. *See infra* Parts II, III.
26. *See infra* Part IV.
27. *See id.*
28. *See Sturgeon II*, 139 S. Ct. 1066, 1087 (2019).
29. *See infra* Subparts I.B, I.C.
30. *See infra* Part II.

in Wyoming and Alaska made.[31] Thus, understanding the historical roots of these arguments may shed light on modern political sentiment and activity. Understanding this historical rhetoric also points toward alternative solutions that take local concerns seriously while avoiding some of the potential costs of public land bargains.

A. The Default, No Bargain: Forty-Eight States

In forty-eight states, the federal government manages public land under the default public land regime undisturbed by bargains. This accounts for approximately 59 percent of the total public land in the United States.[32] In states without bargains, Congress and the executive branch both have extraordinary power over public land.[33] The Property Clause of the Constitution gives Congress the "[p]ower to dispose of and make all needful [r]ules and [r]egulations respecting the [t]erritory or other [p]roperty belonging to the United States."[34] The Supreme Court has interpreted this power very broadly, such that the federal government can regulate private activity on state or private land if the activity threatens federal public land goals.[35] For example, in *Minnesota v. Block*, the Eighth Circuit held that the federal government can prohibit the private use of snowmobiles on state land adjacent to a federally designated wilderness area because snowmobiles "threaten the designated [wilderness] purpose of [the] federal lands."[36]

Though the Constitution vests Congress with authority over public land, Congress has delegated the management of public land to the executive branch.[37] The delegated public land management framework includes two major parts: (1) withdrawals and designations; and (2) general agency regulatory authority over public land.[38] Withdrawal and designation provisions allow the president or agencies to limit the uses of public land within a particular area and are found in many federal acts.[39] For example, under the Antiquities Act, the *president* can unilaterally designate a national monument to protect "unique natural resources

31. *See id.*

32. The United States has roughly 640 million acres of federally owned public land. If those acres were contiguous, they would form a state about 3.6 times the size of Texas. *See* CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020).

33. *See* U.S. CONST. art. IV, § 3, cl. 2.

34. *Id.*

35. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 546–47 (1976) (noting "it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control"); Camfield v. United States, 167 U.S. 518, 528 (1897).

36. Minnesota v. Block, 660 F.2d 1240, 1249–52 (8th Cir. 1981).

37. *See* Robert L. Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 3–7 (1984).

38. *See* Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 821–48 (1993).

39. *E.g.* 54 U.S.C. § 320301 (2018); 43 U.S.C. § 1714 (2018).

and human landscapes."[40] Among other things, such protections often limit new mining activity.[41] Other statutes, like the Federal Land Policy and Management Act, allow *agencies* to withdraw land from the public domain where they are generally open to extractive activities.[42] Withdrawals and designations both impose limitations on private activity and limit federal agency discretion to use public land for certain non-conservation-oriented purposes.[43]

Withdrawals and monument designations help define management goals for particular places, but federal agencies direct the day-to-day management of public land. Congress primarily delegates general regulatory authority to land management agencies through agency organic acts, which are federal statutes authorizing the creation of new executive agencies for specific purposes.[44] For example, the Federal Land Policy and Management Act is the Bureau of Land Management's organic act. It both authorizes the creation of the Bureau of Land Management and transfers regulatory authority from Congress to the Bureau of Land Management, enabling the Bureau of Land Management to regulate public land for multiple uses, such as "domestic livestock grazing, fish and wildlife development . . . mineral exploration and production, rights-of-way, outdoor recreation, and timber production."[45] Likewise, the National Forest Management Act creates the Forest Service and empowers it to regulate national forests in order to "improve and protect the forest within the boundaries, or for the purposes of securing favorable conditions of water flows and to furnish a continuous supply of timber."[46] The current model of public land management centralizes regulatory authority in federal agencies and ultimately concentrates power over federal land in management agencies headquartered Washington, DC, a fact central to many criticisms of the default management regime.

This framework does not entirely exclude state regulation of public land. In *Omaechevarria v. Idaho*,[47] the Supreme Court held that states presumptively have regulatory authority over activities on federal public land absent preemption. *California Coastal Commission v. Granite Rock Co.*[48] is a modern-day application of this principle. There, the Court held that federal law did not per se preempt the application of state environmental regulations to private

40. *See* Christine A. Klein, *Preserving Monumental Landscapes under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1338 (2002); § 320301(a).

41. *See, e.g.*, Proclamation No. 9476: Establishment of the Katahdin Woods and Waters National Monument, 81 Fed. Reg. 59,121, 59,126 (Aug. 29, 2016) (stating that all lands within the monument are "withdrawn from . . . location, entry, and patent under the mining laws").

42. 43 U.S.C. § 1702(l) (2018).

43. *See id.*; David H. Getches, *Managing the Public Lands The Authority of the Executive to Withdraw Lands*, 22 NAT. RES. J. 279, 279–80 (1982).

44. *See* Mansfield, *supra* note 38, at 831–45 (discussing the various statutory schemes that give regulatory authority to land management agencies).

45. 43 U.S.C. §§ 1702, 1711–12 (2018).

46. 16 U.S.C. § 475 (2018).

47. Omaechevarria v. Idaho, 246 U.S. 343, 351–52 (1918).

48. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 593–94 (1987).

mining activity on federal public land.[49] In this federal preemption framework, one sovereign (the federal government) can unilaterally supersede the decisions of another sovereign (the state).[50] Not unsurprisingly, people in subordinate sovereigns (states) sometimes experience preemption as a threat to their local autonomy. This may be true even if people in the subordinated sovereign are represented in the dominant sovereign, as they are in the United States' federalist system.

Most states tolerate or embrace the default public land management framework even though ultimate control over public land rests with the federal government. At least twice, though, the executive branch has overplayed its hand by taking unilateral action on public land over intense local opposition.

B. The Baby Bargain: Wyoming

After years of frustration over unilateral executive action under the Antiquities Act, Wyoming struck a "baby bargain" with the federal government in 1950.[51] This baby bargain limits the president's ability to use the Antiquities Act to unilaterally create national monuments in Wyoming.[52] This is a fundamental limitation on the president's authority over public land relative to other states. However, unlike Alaska's bargain discussed below, Wyoming's baby bargain leaves federal agencies' regulatory authority over public land in Wyoming completely intact.[53] This Subpart first discusses the history and passage of Wyoming's baby bargain. Then, it discusses the rhetorical context that led to its passage.

In the 1920s, John D. Rockefeller began buying up the privately owned lowlands in Jackson Hole near Grand Teton National Park.[54] The park was originally established in 1929 and only protected high mountainous terrain.[55] To protect the lowlands, Rockefeller offered to donate approximately 33,000 acres of privately owned lowlands to the federal government on the condition that it would be managed as a park.[56] The state of Wyoming consistently opposed congressional proposals to expand the park out of fear that it would decrease the

49. *See id.* at 594.

50. *See generally* JAY B. SYKES & NICOLE VANATKO, CONG. RESEARCH SERV., FEDERAL PREEMPTION: A LEGAL PRIMER (2019) (describing different modes of federal preemption under the U.S. Constitution's Supremacy Clause).

51. *See* 54 U.S.C. § 320301(d) (2018).

52. *See id.*

53. *See id*.

54. *See* Joseph L. Sax, *Buying Scenery Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709, 728 n.55 (1980) (noting Wyomingites' "bitterness stemming from [land] acquisitions that John D. Rockefeller made in the 1920s"); *see, e.g.*, JUSTIN FARRELL, BILLIONAIRE WILDERNESS: THE ULTRA-WEALTHY AND THE REMAKING OF THE AMERICAN WEST 154–57 (2020) (discussing Rockefeller's involvement and legacy associated with Grand Teton National Park).

55. *See* Grand Teton National Park Act, Pub. L. No. 817, 45 Stat. 1314 (1929).

56. Getches, *supra* note 43, at 304.

local tax base and limit state control over fish and game in the area.[57] After over a decade of congressional stagnation, President Franklin D. Roosevelt broke the gridlock in 1943 by using the Antiquities Act to unilaterally create Jackson Hole National Monument, which protected much of the land donated by Rockefeller.[58]

President Roosevelt's unilateral executive action frustrated many people in Wyoming, so Congress passed Wyoming's baby bargain through a simple amendment to the Antiquities Act.[59] When Congress incorporated the modern Grand Teton National Park in 1950, which absorbed much of Jackson Hole National Monument, it also amended the Antiquities Act to require congressional approval for the enlargement or creation of future monuments in Wyoming.[60] Congress imposed this limit on the executive branch "to note . . . displeasure with Roosevelt's action and to assuage state fears of its repetition."[61] This was a major victory for local landowners and politicians because it limited the ability of future presidents to repeat President Roosevelt's unilateral creation of a monument over local disapproval. To be sure, Congress can still create monuments in Wyoming. But the fact that the Wyoming congressional delegation was able to stall Rockefeller's park plan in Congress for almost two decades highlights the potential difficulty Congress will face if it wants to create new Wyoming monuments in the future.[62] Thus, Wyoming's baby bargain significantly increased Wyoming's ability to limit the creation of monuments within its borders.

Wyomingites used dramatic rhetoric to describe President Roosevelt's creation of Jackson Hole National Monument and to secure the passage of its baby bargain. Living far from Washington, DC, on the political periphery of the nation, many people in Wyoming perceived President Roosevelt's executive action as an act of undemocratic tyranny.[63] Wyoming Governor Lester Hunt threatened to deploy state police against any Park Service official attempting to assume authority in the monument.[64] A local journalist alleged that the action followed "the general lines of Adolf Hitler's seizure of Austria. They [President Roosevelt's administration] anschlussed a tract of 221,610 acres for [their] domain."[65] This rhetoric spurred action. In an act of defiance consistent with the revolutionary rhetoric of his peers, movie star Wallace Beery took up arms and

57. *Id.*

58. Proclamation No. 2578, 57 Stat. 731 (Mar. 15, 1943); *see* Getches, *supra* note 43, at 304–05.

59. Proclamation No. 2578, *supra* note 58; *see* Getches, *supra* note 43, at 304–05.

60. Brent J. Hartman, *Extending the Scope of the Antiquities Act*, 32 PUB. LAND & RES. L. REV. 153, 175 (2011).

61. Getches, *supra* note 43, at 305.

62. *See id.*

63. *See* FARRELL, *supra* note 54, at 154 (stating "[l]ocals resisted what they viewed as the tyranny of outside control, whether it be the billionaires or the federal government").

64. DAYTON DUNCAN & KEN BURNS, THE NATIONAL PARKS: AMERICA'S BEST IDEA 312 (2009).

65. Mac Blewer, *History of Conservation Efforts*, *in* RED DESERT: HISTORY OF A PLACE 363, 364 (Annie Proulx ed., 2008).

blatantly broke federal law by herding several hundred cattle into the monument without a permit.[66] The rhetoric analogizing federal actions to tyranny was a core aspect of the campaign that influenced Congress to amend the Antiquities Act.[67]

Though brief, this summary highlights an important similarity between historic bargain advocates and modern bargain advocates.[68] Both historic and modern bargain advocates analogize federal authority over public land to tyrannical forms of government. Just as Wyomingites compared President Roosevelt to the tyranny of Nazi Germany, a recent Utah state senator has compared modern uses of the Antiquities Act to "a monarchy [that can] designate where and where not the king's forest should be[.]"[69] As discussed below, bargain advocates in Alaska adopted similar rhetoric.[70] The consistency of this rhetorical theme suggests a deep frustration and distrust among the country's political periphery with the land management decisions of the country's political core in the federal government.

C. The Grand Bargain: Alaska

In 1980, Alaska secured a public land bargain that is much more substantial than Wyoming's baby bargain.[71] Alaska's "grand bargain" is embodied in a major piece of legislation called the Alaska National Interest Land Claims Act (ANILCA).[72] This Subpart first briefly recounts the history and rhetorical context leading up to the passage of ANILCA, which in many ways parallels the story of Wyoming's baby bargain. Then, this Subpart describes the ways in which ANILCA is a major departure from the default public land management regime.

ANILCA was the third of three major pieces of federal legislation that allocated jurisdiction over land in Alaska between the federal government, the state of Alaska, and Alaska Native communities. First, Congress passed the Alaska Statehood Act in 1958.[73] Then, Congress passed the Alaska Native Claims Settlement Act (ANCSA) in 1971.[74] After ANCSA, President Carter

66. Duncan, *supra* note 64, at 312.

67. *See id.*

68. This summary ignores the political machinations that led to the actual passage of Wyoming's baby bargain and the voices of people who opposed the baby bargain. *See* Blewer, *supra* note 65, at 366 (noting "[t]he conservation community swallowed the compromise in order to allow Teton's expansion").

69. Erik Neumann, *Proposal to Exclude Utah from Antiquities Act Clears Legislature*, KUER (Mar. 8, 2018), https://www.kuer.org/post/proposal-exclude-utah-antiquities-act-clears-legislature.

70. *See infra* Subpart I.C.

71. *See* Alaska National Interest Lands Conservation Act of 1979, Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. §§ 3101–3233).

72. *See id.*

73. *See* Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

74. *See* Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601–1629h).

used the Antiquities Act to create several national monuments in Alaska.[75] In response, Congress finally passed Alaska's grand bargain, ANILCA, in 1980.[76]

This historical progression of legislative acts began with the purchase of Alaska from Russia:

> The United States purchased Alaska from Russia in 1867. It thereby acquired "in a single stroke" 365 million acres of land—an area more than twice the size of Texas. You might think that would be enough to go around. But in the years since, the Federal Government and Alaskans (including Alaska Natives) have alternately contested and resolved and contested and . . . so forth who should own and manage that bounty.[77]

For almost one hundred years after the purchase of Alaska, the federal government legally owned all of the land in Alaska with minimal settler opposition.[78] Then, the twentieth century brought "newfound recognition of Alaska's economic potential," which was largely based on its abundant natural resources and the discovery of gold.[79] The discovery of gold attracted "tens of thousands" of new settlers who laid the foundation for Alaska's "emerging [natural resource] export economy."[80] This surge in extraction motivated the country's "foremost conservationists," including President Theodore Roosevelt, to advocate for the protection of Alaska's natural resources.[81]

Many of the regulatory strategies that the Roosevelt administration deployed to conserve Alaska's natural resources had another major effect: They substantially limited settlers' abilities to log timber and mine coal.[82] Alaskans responded by dumping "imported Canadian coal (instead of English tea) into the Pacific Ocean (instead of Boston Harbor)."[83] Like Wyomingites before them, Alaskans were living on the geographic periphery of the country far from Washington, DC, and they began to make analogies between the federal government seated in the country's political core and tyrannical European governments.

75. Proclamation No. 4611: Admiralty Island National Monument, 43 Fed. Reg. 57,009 (Dec. 1, 1978); Proclamation No. 4612: Aniakchak National Monument, 43 Fed. Reg. 57,013 (Dec. 1, 1978); Proclamation No. 4613: Becharof Monument, 43 Fed. Reg. 57,019 (Dec. 1, 1978); Proclamation No. 4614: Bering Land Bridge National Monument, 43 Fed. Reg. 57,025 (Dec. 1, 1978); Proclamation No. 4615: Cape Krusenstern National Monument, 43 Fed. Reg. 57,031 (Dec. 1, 1978); Proclamation No. 4616: Denali National Monument, 43 Fed. Reg. 57,035 (Dec. 1, 1978); Proclamation No. 4617: Gates of the Artic National Monument, 43 Fed. Reg. 57,043 (Dec. 1, 1978); Proclamation No. 4618: Enlarging the Glacier Bay National Monument, 43 Fed. Reg. 57,053 (Dec. 1, 1978); Proclamation No. 4619: Enlarging the Katmai National Monument, 43 Fed. Reg. 57,059 (Dec. 1, 1978); Proclamation No. 4620: Kenai Fjords National Monument, 43 Fed. Reg. 57,067 (Dec. 1, 1978); Proclamation No. 4621: Kobuk Valley National Monument, 43 Fed. Reg. 57,073 (Dec. 1, 1978).

76. *See* Alaska National Interest Lands Conservation Act, *supra* note 71.

77. *Sturgeon II*, 139 S. Ct. 1066, 1073 (2019) (citation omitted).

78. *Id.*

79. *Id.* (quoting Sturgeon v. Frost (*Sturgeon I*), 136 S. Ct. 1061, 1065 (2016)).

80. *Id.*

81. *Id.*

82. *See id.*

83. *Id.*

By the 1950s, many Alaskans insisted on becoming a state, and statehood advocates continued to invoke rhetoric reminiscent of the American Revolution.[84] They conceived of themselves as "tenants upon the estate of the national landlord."[85] Statehood advocates insisted that Washington politicians terminate Alaska's (pre-statehood) status as an "American Colon[y]."[86] In 1958, Congress responded by passing the first statute dividing jurisdiction over land in Alaska, the Alaska Statehood Act.[87] The Act brought Alaska into the Union and allowed the state to select for itself 103 million acres of "vacant, unappropriated, and unreserved" federal land.[88]

This land grant prompted legitimate land claims from Alaska Natives.[89] "Their ancestors had lived in the area for thousands of years, and they asserted aboriginal title" to much of the land in Alaska.[90] To resolve those claims (in the minds of people in Congress, at least), Congress passed the second major statute dividing jurisdiction over land in Alaska, ANCSA.[91] Among other things, ANCSA unilaterally extinguished Alaska Natives' aboriginal land claims, but it allowed them to select 40 million acres of federal land for themselves in return.[92] By giving the state government of Alaska 103 million acres of federal land and giving Alaska Natives 40 million acres of federal land, the federal government likely thought it had resolved all of Alaska's major land disputes.

However, ANCSA unintentionally created a new land dispute in Alaska. ANCSA specifically directed the Secretary of the Interior to recommend 80 million acres of the remaining federal land to Congress for inclusion in the national park and forest systems.[93] The secretary dutifully made his recommendation, but Congress failed to ratify it.[94] So, President Carter used the Antiquities Act to designate 56 million of the 80 million acres recommended to Congress as national monuments under Park Service authority, an action that limited Alaskans' ability to log and mine on the land.[95]

"Many Alaskans balked" at this seemingly radical, unilateral exercise of federal authority because it limited extractive activities.[96] Like Wyomingites in the 1940s, Alaskans responded to the new national monument designation by creating an atmosphere "reminiscent of the days before the American

84. *Id.* at 1073–74.
85. *Id.*
86. *Id.* at 1074.
87. *See* Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).
88. *Id.*; *Sturgeon II*, 139 S. Ct. at 1074.
89. *Sturgeon II*, 139 S. Ct. at 1074.
90. *Id.*
91. *See* Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601–1629h).
92. *See* 43 U.S.C. §§ 1605, 1610–16 (2012); *Sturgeon II*, 139 S. Ct. at 1074.
93. 43 U.S.C. § 1616(d)(2) (2018).
94. *Sturgeon II*, 139 S. Ct. at 1074.
95. *Id.*
96. *Id.*

Revolution."[97] As Justice Kagan recounted in *Sturgeon v. Frost*, the Supreme Court case discussing public land bargains most extensively:

> [P]rotesters demonstrated throughout the State and several thousand joined the so-called Great Denali-McKinley Trespass. "The goal of the trespass . . . was to break over 25 Park Service rules in a two-day period. One especially eager participant played a modern-day Paul Revere, riding on horseback through the crowd to deliver the message: "The Feds are coming! The Feds are coming!"[98]

Demonstrators shot at a large silhouette of King George III with the name "Carter" plastered underneath it.[99] Alaskan political leaders explicitly declared the monument regulations to be "clearly at odds with the Declaration of Independence."[100] And after the protest, the Alaska Miners Association and the governor of Alaska both filed suits against the federal government challenging Carter's action as a violation of the Alaska Statehood Act.[101] This backlash, and the revolutionary rhetoric it provoked, led directly to the passage of ANILCA, which is the grandest public land bargain of the twentieth century.[102]

The story of ANILCA parallels Wyoming's baby bargain in a few key ways. In each instance, politicians and voters in the periphery crafted a successful rhetorical narrative that involved three key elements. First, they each built narratives around a unilateral executive branch action that was perceived as a tyrannical encroachment on local sovereignty.[103] In both instances, the unilateral federal action was the designation of a national monument.[104] Second, state and local politicians analogized unilateral federal action to the behavior of tyrannical European political regimes.[105] Third, local land users organized to publicly violate federal regulations.[106] Many of these rhetorical elements are still central to modern arguments about public land bargains.[107]

Functionally, ANILCA bears some similarity to Wyoming's baby bargain, but it goes further by placing an additional limit on the executive branch's regulatory authority over public land in Alaska. Like Wyoming's baby bargain,

97. *Alaskans Protest Public-Land Action*, N.Y. TIMES, Jan. 15, 1979, at A8.

98. *Sturgeon II*, 139 S. Ct. at 1074 (citation omitted).

99. *Alaskans Protest Public-Land Action*, *supra* note 97 (stating "[m]uzzle-loading rifles were used for a turkey shoot whose target was a large silhouette of King George III, and the crowds roared at the frequent perforations of the southern part of the King's anatomy. Underneath the silhouette was printed 'Carter?'").

100. *Id.*

101. *See id.*

102. *Sturgeon II*, 139 S. Ct. at 1075.

103. *See id.*; Blewer, *supra* note 65, at 365.

104. *See Sturgeon II*, 139 S. Ct. at 1074; Blewer, *supra* note 65, at 363–64.

105. *See Sturgeon II*, 139 S. Ct. at 1073 (noting "Alaska's Governor . . . called on the country to 'end American colonialism'"); Blewer, *supra* note 65, at 363–64 (analogizing President Roosevelt to "Adolf Hitler").

106. *See Sturgeon II*, 139 S. Ct. at 1073 (describing the "Great Denali Trespass"); Blewer, *supra* note 65, at 364–65 (describing Wallace Beery's scheme to herd cattle across federal lands without a permit).

107. *See infra* Part II.

ANILCA essentially exempts Alaska from the Antiquities Act by requiring congressional approval for the creation of any new substantial monuments.[108] Then, it goes further. ANILCA also places a land ownership-based limitation on the executive branch's regulatory authority over public land by expressly limiting it to "land, waters, and interests therein . . . to which [the federal government holds title]."[109] Under ANILCA, the federal government's regulatory authority is coextensive with its land ownership.[110] This ownership-based regulatory limitation is a major departure from the default public land regulatory regime because the Property Clause ordinarily grants the federal government power to regulate activity on state- and privately owned land (nonpublic land) to achieve public land goals.[111] By removing this power, ANILCA creates a patchwork regulatory scheme for major swaths of land in Alaska, making it harder for federal regulators to manage healthy ecosystems and achieve congressionally mandated land management goals.[112]

II. THE ARGUMENTS OF MODERN BARGAIN ADVOCATES

Modern bargain advocates rely on many of the same arguments and rhetorical strategies people used in Wyoming and Alaska.[113] Specifically, many modern arguments focus on the connection between local sovereignty and public land decision making.[114] These arguments do not only structure debates about public land bargains,[115] they also inform the way that people in the periphery perceive people in the political core of the United States.[116] The goal of this Part is to briefly lay out the arguments that modern bargain advocates make by looking primarily to the most outspoken modern public land bargain advocate today, Senator Mike Lee. These arguments can be divided into three groups: arguments about autonomy, arguments about representation, and arguments about federal ineffectiveness. This Part also some presents responses to these arguments from modern opponents of public land bargains.

108. *See* 16 U.S.C. § 3213 (2018); 54 U.S.C. § 320301(d) (2018).

109. *See* 16 U.S.C. §§ 3103(c), 3102(1)–(3) (2018).

110. *See id.*

111. *See* Kleppe v. New Mexico, 426 U.S. 529, 546–47 (1976) (noting "it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control").

112. *See infra* Subparts III.A, III.B.

113. *See, e.g.*, Press Release, Mike Lee, Senator, U.S. Senate, Senators Lee and Romney Introduce the Protect Utah's Rural Economy Act (Jan. 10, 2019), https://www.lee.senate.gov/public/index.cfm/2019/1/sens-lee-and-romney-introduce-the-protect-utah-s-rural-economy-act (providing "'[f]or too long, Washington bureaucrats have dictated to our counties, ranchers, and recreators how and if they can use their lands,' said Senator Romney"); *cf.* DANIEL KEMMIS, THIS SOVEREIGN LAND 50 (2001) (quoting 1931 report: "In eleven of our States a great part of the land is owned by a landlord from two to three thousand miles away who has done nothing to protect his neighbors").

114. Mike Lee, Senator, U.S. Senate, Reducing the Burdens of Public Land (Jan 15, 2014), https://www.lee.senate.gov/public/index.cfm/2014/1/reducing-the-burdens-of-public-land (discussing the role of state sovereignty in public land management).

115. *See id.*

116. *See id.*

A. Arguments about Autonomy

Modern bargain advocates argue that federal control of public land limits local autonomy and sovereignty in two ways. First, they argue that it limits local communities' decisional autonomy by concentrating decision-making authority in Washington, DC.[117] This argument is about *who* controls public land and *where* they make those decisions; agency employees with little perceived personal connection to western public land often manage public land from Washington, DC.

Because of the geographic distance between public land decision makers and the people most affected by the decisions they make, these arguments often analogize the political condition of people in public land communities to the political condition of pre-Revolution United States colonies.[118] In each instance, people geographically distant from a political capital were asymmetrically impacted by decisions made in the political core. In 2014, Senator Lee explicitly made this comparison by quoting a line from the Declaration of Independence to suggest that, like England before the Revolution, the modern federal government has "sent hither [to the periphery] swarms of Officers [from the core] to harass our people, and eat out their substance."[119]

Such rhetoric directly links modern-day advocates to their historical counterparts.[120] Recall the Alaskans who protested President Carter's use of the Antiquities Act in Alaska by reenacting the Boston Tea Party and Paul Revere's midnight ride.[121] Wyomingites compared President Roosevelt to Hitler.[122] The animating normative principle behind these arguments is that people ought to be able to determine for themselves how nearby land and natural resources should be used.[123] Failure to observe this principle is a hallmark of tyranny in the eyes of bargain advocates.

Conservationists who want to maintain national control over public land have developed a response to this argument.[124] They argue that all citizens "have legitimate interests in our nation's public forests."[125] All citizens can use public land for recreation; all citizens "depend on the waters that flow out of the forests"; all citizens can be "concerned with habitat and endangered species and

117. *See* Press Release, Lee, *supra* note 113 (noting "'[f]or too long, Washington bureaucrats have dictated to our counties, ranchers, and recreators how and if they can use their lands,' said Senator Romney").

118. *See supra* Subparts I.B, I.C.

119. *See* Mike Lee, Senator, U.S. Senate, Executive Abuse of the Antiquities Act (Oct. 4, 2017), https://www.lee.senate.gov/public/index.cfm/2017/10/executive-abuse-of-the-antiquities-act (quoting the Declaration of Independence).

120. *See id.*; *Sturgeon II*, 139 S. Ct. 1066, 1074 (2019).

121. *Sturgeon II*, 139 S. Ct. at 1073.

122. *See* BLEWER, *supra* note 65, at 364.

123. *See* Lee, *supra* note 119.

124. *See* Michael McClosky, *Local Communities and the Management of Public Forests*, 25 ECOLOGY L.Q. 624, 625 (1999).

125. *See id.*

want wilderness to survive."[126] To many conservationists, this larger community is a "population of co-owners who constitute a community of interest, if not a given place."[127] Thus, any increase in local autonomy would come at the expense of the ability of the larger community of legitimate stakeholders to participate in the decision-making process.[128] These two competing visions about control over public land are directly in tension with each other.

Bargain advocates on the nation's political periphery make a second argument about how concentrating control over public land in the core limits autonomy on the periphery.[129] They argue that federal control of public land deprives state and local governments of money that would otherwise be available through taxes and land monetization.[130] This deprivation in turn limits the ability of state and local governments to function effectively and make decisions that they would otherwise make.[131] Senator Lee put it this way: "When the federal government owns large amounts of land in your state[,] it means your schools are underfunded; fire, search, and rescue are underfunded; local government is underfunded."[132] Senator Lee is not wrong; federal ownership of public land limits the ability of local governments to generate tax revenue, which in turn limits their ability to finance decisions that require spending money.

There is a conceptually simple way to solve this problem: Compensate local governments for revenue lost by the existence of public land that would otherwise be under their jurisdiction. In fact, that solution is currently in place with the "payment in lieu of taxes" program.[133] Under this statutory program, the federal government makes yearly payments to eligible local governments based on local population, revenue-sharing, and the amount of federal land within the affected county.[134] This theoretically restores local governments' ability to make decisions requiring the money that would otherwise be generated from local taxes on land under their jurisdiction. But modern public land bargain advocates often ignore this or argue that payment in lieu of taxes is not enough, because the federal government unilaterally administers the program and sets the compensation rate.[135] Fundamentally, these arguments are about the ways that federal control limits local autonomy and sovereignty over public land.

126. *See id.*
127. *Id.*
128. *See id.*
129. *See, e.g.*, *Myth vs. Fact for February Lands Package*, MIKE LEE US SENATOR FOR UTAH: BLOG (Feb. 11, 2019), https://www.lee.senate.gov/public/index.cfm?p=blog&id=4FE8F3EA-B254-4CC3-8891-D04126A0F41F.
130. *See id.*
131. *See id.*
132. *Id.*
133. *See* 31 U.S.C. §§ 6901–07 (2018).
134. *See id.*
135. *See* Lee, *supra* note 129.

B. Arguments about Representation

Another argument bargain advocates make is that the federal public land decision-making structure does not adequately represent public land communities' interests, which can lead to the reorganization or destruction of local economies.[136] This argument has three parts. First, it recognizes that public land decision making often limits peoples' ability to extract resources.[137] For example, recently created national monuments in Utah, like the controversial Bears Ears National Monument, prohibit local communities from mining uranium and coal and limit new grazing.[138] This has often been true. Recall that President Carter limited extraction of resources in Alaska through the Antiquities Act as well.[139] Second, this argument recognizes that most of the country's public land is in the West, and therefore public land decisions disproportionately affect people in the West.[140] Third, because of these outsized, potentially negative impacts on western states, bargain advocates argue that western communities should play a larger role in determining what happens on public land than they do under the default public land management regime.[141] Essentially, bargain advocates argue that their interests are underrepresented because of the outsized, often negative, material impact that public land decisions have on western communities.

Bargain advocates routinely argue that the consequence of such underrepresentation is the reorganization and destruction of local economies.[142] Federal land management decisions often have direct, negative impacts on individuals who make a living by grazing, mining, or logging on public land.[143]

136. *See, e.g.*, Thomas Burr, *National Monuments Harm the Economy, Utah Public Lands Official Tells Congress*, SALT LAKE TRIB. (May 3, 2017), https://archive.sltrib.com/article.php?id=5244565&itype=CMSID (quoting a former head of Utah state public lands office: "The creation of these huge monuments has unnecessarily had significant and negative impacts upon the traditional uses of these lands and upon the lives and livelihoods of the local populations that have stewarded the lands for generations.").

137. *See, e.g.*, Proclamation No. 9476: Establishment of the Katahdin Woods and Waters National Monument, 81 Fed. Reg. 59,121, 59,126 (Aug. 29, 2016) (providing "[a]ll Federal lands and interests in land within the boundaries described on the accompanying map [of the monument] are hereby . . . withdrawn from all forms of entry, location, selection, sale . . . and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing").

138. *See* Proclamation No. 9558: Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1,139 (Jan. 5, 2017).

139. *See supra* note 75.

140. *See* Sen. Mike Lee, Address to the U.S. Senate: 116th Public Lands Package (Feb. 11, 2019), https://www.lee.senate.gov/public/index.cfm/speeches?ID=DDCD4445-B8E0-4315-9D27-09CDBC4BE9CA (stating "[federal land ownership is] a problem. Especially because it's distributed unevenly across the country, with the West bearing the brunt of this burden").

141. *See id.* (noting "[b]ut at the bare minimum, with the least shred of compromise . . . [we should] give Utahns justice, to give them a voice in managing and caring for their lands").

142. *See id.* (stating "[a]nd with so much of the land in the grip of federal bureaucrats, it is again limited in its use for development, infrastructure, and jobs that are crucial to our economy").

143. *See, e.g.*, UTAH STATE UNIV. EXTENSION & ECON. ASSOCS. OF UTAH, INC., ECONOMIC AND CULTURAL REPORT ON LIVESTOCK GRAZING IN THE GRAND STAIRCASE ESCALANTE NATIONAL MONUMENT TO THE KANE COUNTY BOARD OF COMMISSIONERS 8 (2015) (concluding that "the economic sustainability of the Garfield-Kane counties Economic Region is greatly weakened if [Grand Staircase-

These impacts can certainly ruin people's livelihoods.[144] As an empirical matter, though, the situation is complicated. There is competing evidence that managing public land for conservation purposes, as the federal government often does, can have an overall positive effect on local economies by encouraging the sustainable use of resources and increasing revenue from tourism.[145] Nonetheless, many public land communities believe that they would be better off if their opinions were more heavily represented in the public land decision-making process.[146]

The argument that rural communities are underrepresented in the federal government decision-making process makes little sense to many conservationists, who often argue against public land bargains. Former Sierra Club Executive Director Michael McCloskey has pointed out that "local communities already have a larger voice in debates over [public land]."[147] For example, lawmakers frequently defer to the recommendations of local congresspeople when it comes to public land decisions.[148] Also, the allocation of two senators per state regardless of population increases the relative political power of people in sparsely populated public land states. These responses acknowledge and embrace the fact that even proportionally (or over) represented minority groups with an outsized material interest in a political decision can sometimes be outvoted in representative democracy.

The tension between national representation, public land decision making, and local economics raises a challenging normative question that both national and local politicians must reckon with: For whose material benefit should public land be managed, and who should get to decide?

C. Arguments about Federal Ineffectiveness

Modern bargain advocates also argue that the federal government should pass public land bargain legislation because the federal government is an ineffective land manager.[149] Modern bargain advocates make two distinct versions of this argument. In the first version, bargain advocates argue that the federal government is too big and bureaucratic to spend resources effectively and efficiently.[150] In a 2019 press release criticizing federal management of public land, Utah Senators Lee and Romney argued "the federal government is suffering from over $10 billion worth of maintenance backlogs . . . . The federal

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Escalante] livestock grazing allotments are lost by removing an industry, its supporting industries, and reducing the economic diversity of the Region").

144. *See id.*

145. *See, e.g.*, HEADWATERS ECONS., GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT: A SUMMARY OF ECONOMIC PERFORMANCE IN THE SURROUNDING COMMUNITIES (2017).

146. *See* Lee, *supra* note 140.

147. *See* McCloskey, *supra* note 124.

148. *See id.*; JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 242 (1989).

149. *See Towards a Better Land Deal in Utah*, *supra* note 129.

150. *See id.*

government should not be buying more land when it can't properly manage the land it has now."[151] Maintenance backlogs are essentially lists of infrastructure projects that the federal government has not completed, often because it does not have enough money. Senators Lee and Romney argue that the existence of these backlogs is proof that the federal government is an ineffective, or at least inattentive, land manager.[152]

The second version of this argument says that people with local knowledge can most effectively design land management plans responsive to the needs of public land communities and ecosystems.[153] This argument stems from the recognition that people who spend time interacting with a local ecosystem have particular knowledge about that place that can only be gained through experience. Such knowledge may be necessary for good public land management but may be ignored by federal land managers. [154]

For example, researchers in Alaska have studied the value to modern fishery of (mostly Indigenous) local knowledge techniques in the Bering Strait.[155] They found that local knowledge has "made substantial contributions to understanding marine environments and particularly resource management [of the region]."[156] It "contains explanatory data, models, and structures which have value in understanding entire ecosystems as well as component parts."[157] According to bargain advocates, one way to make sure this value is not ignored by potentially ineffective federal land managers is to transfer regulatory authority to state and local governments through public land bargains.[158]

III. A FRAMEWORK FOR ASSESSING BARGAINS

Public land bargains may sometimes address the arguments made by people in the country's political periphery, but they often come with costs. The goal of this Part is to develop a loose framework that people can use to assess whether a particular public land bargain is worth its costs. This requires understanding and considering two things beyond the arguments made by bargain advocates. First, people should consider the types of problems that a public land bargain can create. Many of these were explored in *Sturgeon II*, a Supreme Court case that arose out of the patchwork public land management regulatory scheme created

151. *See id.*
152. *See id.*
153. *See, e.g.*, MIKE LEE US SENATOR FOR UTAH: BLOG, *supra* note 129 (stating "States and local communities are more knowledgeable on how to properly maintain and use these lands that are in their own backyards . . . . In contrast, the federal government has a poor track record with little accountability, mismanagement, and maintenance backlogs").
154. *See id.*
155. *See* Julie Raymond-Yakoubian et al., *The Incorporation of Traditional Knowledge into Alaska Federal Fisheries Management*, 78 MARINE POL'Y 132, 139 (2017).
156. *See id.* at 136.
157. *See id.*
158. *See Myth vs. Fact for February Lands Package*, *supra* note 153.

by ANILCA.[159] Second, people should consider three contextual factors that shed light on whether a particular land bargain is likely to cause these management problems: the geographical context of the bargain, the implementation context of the bargain, and any overriding normative implications of the bargain.

Applying this framework will not fully determine whether a person chooses to advocate for or against a particular public land bargain. Any such decision will come down to personal value judgments. Hopefully, however, this framework can be used as a tool to clarify the nature of disagreements over public land bargains and limit the unintended consequences of new public land bargains.

A. *A Primer on the Problem with Bargains:* Sturgeon v. Frost

It is important to understand the problems that public land bargains can create in order to compare them to the benefits of bargains in a structured way. *Sturgeon II* is a recent Supreme Court case that arose out of ANILCA, Alaska's grand bargain, and is a case study in how the patchwork regulatory schemes that bargains can create may lead to management problems.[160] *Sturgeon II* demonstrates that patchwork regulatory regimes can make it harder for federal agencies to manage the health of ecological systems and achieve congressionally mandated land management goals.[161] This Subpart briefly lays out the facts of *Sturgeon II* before discussing how the Court interpreted ANILCA in light of the management problems that it creates.

For over forty years, John Sturgeon had used a hovercraft to access his favorite hunting ground by passing through the Yukon-Charley Rivers National Preserve, a park unit managed by the Park Service.[162] Sturgeon needed to use a hovercraft because the Nation River, which provided the only access to his customary hunting site and flowed through the Yukon-Charley Preserve, was too shallow to travel using a nonmotorized vehicle.[163] Park rangers stopped Sturgeon on one of his hunting trips and informed him that he was violating a general Park Service regulation prohibiting the use of hovercrafts within any Park Service unit.[164] Sturgeon went home empty-handed and sued the Park Service, arguing that the Park Service's hovercraft regulation violated ANILCA.[165]

Sturgeon's suit against the Park Service was long and winding. First, the lower courts denied Sturgeon's request for injunctive relief to allow him to

159. *Sturgeon II*, 139 S. Ct. 1066, 1073 (2019).
160. *Id.* at 1075 (providing "[ANILCA] swept in a vast set of so-called inholdings").
161. *See id.*
162. *Id.* at 1072.
163. *Id.*
164. *Id.*
165. *Id.*

resume hovercraft travel on the Nation River.[166] But in *Sturgeon v. Frost* (*Sturgeon I*), 136 S. Ct. 1061 (2016), the Supreme Court rejected the lower court's reasoning.[167] Ultimately, the Court remanded *Sturgeon I* for consideration of two questions: (1) Does the Nation River qualify as "public land" for the purpose of ANILCA; and (2) even if the Nation River does not qualify as "public land," does the Park Service have authority to regulate activity on the Nation River?[168]

On remand, the Ninth Circuit held that the Nation River is public land under ANILCA by deploying a novel analysis of the nature of federally reserved water rights.[169] Specifically, the Ninth Circuit held that while Alaska holds title to the land under the Nation River, the federal government retained federally reserved water rights to the Nation River when it protected adjacent land under ANILCA.[170] According to the Ninth Circuit, this reserved water right is a sufficiently strong property interest to make the Nation River "public land" under ANILCA.[171] Thus, the Ninth Circuit ruled in favor of the Park Service without reaching the second question posed by the Supreme Court.[172] On appeal, the Supreme Court was not satisfied with the Ninth Circuit's reasoning. The Court took up Sturgeon's case for a second time and answered both of the questions it posed in *Sturgeon I* on its own, ultimately reversing the Ninth Circuit.[173]

Both parties in *Sturgeon II* agreed that if the Nation River is "public land" under ANILCA, then the Forest Service has the authority to regulate activity on the river.[174] ANILCA defines both "public" and "land." "Land . . . means lands, *waters*, and interests therein."[175] Combined with the statutory definition of "public," "public land" then becomes any "land" (including waters and interests therein), "the title to which is in the United States."[176] So the relevant question in *Sturgeon* was: Does the United States hold title to the Nation River or to "an interest therein?"[177]

Contrary to the Ninth Circuit, the Supreme Court held that the United States does not hold title to an interest in, let alone title to, the Nation River under ANILCA.[178] Under the Submerged Lands Act, Alaska (not the federal

166. Sturgeon v. Masica, No. 3:11-cv-0183-HEH, 2013 WL 5888230, at *9 (D. Alaska Oct. 30, 2013), *aff'd in part*, *vacated in part*, 768 F.3d 1066 (9th Cir. 2014), *vacated sub nom*. Sturgeon v. Frost, 136 S. Ct. 1061 (2016), *aff'd*, 872 F.3d 927 (9th Cir. 2017), *rev'd*, 941 F.3d 953 (9th Cir. 2019).

167. *Sturgeon I*, 136 S. Ct. 1061, 1072 (2016).

168. *Id.*

169. *See* Sturgeon v. Frost, 872 F.3d 927, 932–36 (9th Cir. 2017), *rev'd*, 139 S. Ct. 1066 (2019), *vacated*, 941 F.3d 953 (9th Cir. 2019).

170. *Id.*

171. *Id.* at 936.

172. *Id.*

173. *Sturgeon II*, 139 S. Ct. 1066, 1087 (2019).

174. *Id.* at 1078.

175. 16 U.S.C. § 3102(1) (2018) (emphasis added).

176. *Id.* § 3102(1)–(3).

177. *See Sturgeon II*, 139 S. Ct. at 1079.

178. *See id.* at 1087.

government) holds title to the land beneath the Nation River's navigable waters.[179] This leaves the federal government with, at most, title to an interest in the water of the Nation River under the doctrine of federally reserved water rights.[180] The Court first questioned "whether it [wa]s even possible to hold 'title'" to such an interest.[181] It ultimately held that even if the federal government did hold such a title, associated property rights would only allow the federal government to protect water in the river from depletion; it would not suddenly convert the entire river to "public land" under ANILCA.[182]

The Supreme Court then applied general tools of statutory interpretation to conclude that only "public lands" within system unit boundaries created by ANILCA are subject to ordinary Park Service regulation.[183] By negative implication, even though nonpublic land (or water) might fall within the outermost geographical boundaries of Park System units created by ANILCA, they are not part of the Park System units created by ANILCA.[184] Further, the text of ANILCA exempts such nonpublic land from ordinary Park Service regulatory authority.[185] Reading ANILCA to authorize Park Service regulatory authority over nonpublic land despite ANILCA's clear statutory definitions would "undermine ANILCA's grand bargain" between Alaska and the federal government.[186] Thus, the Court held that the Park Service could not exercise its ordinary regulatory authority over the Nation River.[187] The full extent of this holding is not clear, but a broad reading would mean that the Park Service cannot regulate the Nation River at all. This inability to regulate rivers running through Park Service units ultimately creates management problems for the Park Service.

B. Management Problems and Thwarting Congressional Mandates

In her concurring *Sturgeon II* opinion, Justice Sotomayor presented a useful hypothetical to demonstrate the types of management problems that public land bargains like ANILCA can cause.[188] She also highlighted how these problems can make it challenging or impossible for land managers to achieve congressionally mandated management goals.[189] Imagine "Jane Smith" standing on the bank of a river in an Alaskan park with a bag of toxic trash in hand.[190] While on the bank of the river, generally applicable Park Service regulations

179. 43 U.S.C. § 1311 (2018); *see also Sturgeon II*, 139 S. Ct. at 1074.
180. *See Sturgeon II,* 139 S. Ct. at 1079.
181. *See id.* (quoting 16 U.S.C. § 3102(2) (2018)).
182. *Id.*
183. *Id.* at 1078.
184. *Id.* at 1081.
185. *Id.*
186. *Id.* at 1083.
187. *Id.* at 1087.
188. *See id.* at 1090–92 (Sotomayor, J., concurring).
189. *See id.* (providing "[s]o much for the Service's duty to maintain the 'environmental integrity' of the Charley River basin 'in its undeveloped natural condition'").
190. *See id.*

would prohibit Jane from dumping her toxic trash in the river.[191] They would also prohibit her from: "intentionally disturbing wildlife breeding activities, making unreasonably loud noises, and introducing wildlife into the park ecosystem."[192] If Jane stepped a few feet into the river, none of those generally applicable regulations would limit Jane after *Sturgeon II*.[193] Jane could dump her trash into the river and "amp up her speakers with impunity."[194] State law might forbid those activities, but Park Service personnel, the only law enforcement agents likely to be present in the park, would not have jurisdiction to enforce those state laws absent a collaborative enforcement arrangement with the state.

The hypothetical about Jane highlights how ANILCA creates two major problems. First, ANILCA makes it harder for the federal government to manage and promote healthy ecological systems. This is because of two foundational principles relevant to regulation of the environment: organisms and matter move through ecosystems without respecting political boundaries,[195] and many environmental harms are irreversible.[196] So, toxins or garbage released in the Nation River (state jurisdiction) may wind up deposited along the shore (federal jurisdiction) where they may cause irreversible ecological damage to plants, animals, or ecosystems.[197] In this framework, an unregulated jurisdiction can unilaterally frustrate the goals of another sovereign's environmental regulations for an entire area. This problem only exists because ANICLA splits jurisdiction over public land along a river course that bisects a large swath of land.[198] That is, absent ANILCA, the general Park Service regulations would apply to the Nation River, protecting it from potentially irreversible damage to the environment.

Fortunately for federal regulators, there may be ways around this problem in the case of ANILCA. Justice Sotomayor maintained that the Court did not decide whether the Park Service could regulate navigable rivers in Alaska, despite ANILCA, by promulgating a river-specific regulation (as opposed to relying on regulations of general, national applicability).[199] In a potential hint to Congress, Justice Sotomayor also noted that the Park Service could regulate the Nation River notwithstanding the holding of *Sturgeon II* if it were designated

191. 36 C.F.R. § 2.14(a)(1) (2019); *see Sturgeon II*, 139 S. Ct. at 1090–92 (Sotomayor, J., concurring).

192. *Sturgeon II*, 139 S. Ct. at 1090–92 (Sotomayor, J., concurring) (citations omitted).

193. *See id.*

194. *Id.* at 1090 (Sotomayor, J., concurring).

195. *See* Noah D. Hall, *Transboundary Pollution Harmonizing International and Domestic Law*, 40 MICH. J.L. REFORM 681, 681 (2007) (observing "[t]ransboundary pollution . . . is one of the oldest and most persistent problems in environmental law").

196. *See* Richard Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 744–45 (2000) (stating "[e]nvironmental law is often concerned about the avoidance of irreversible, catastrophic results").

197. *See Sturgeon II*, 139 S. Ct. at 1090–92 (Sotomayor, J., concurring).

198. *See id.* at 1087.

199. *See id.* at 1090–93 (Sotomayor, J., concurring).

under the Wild and Scenic Rivers Act.[200] These theories may provide consolation to federal regulators in the case of ANILCA, but the Park Service has not actively pursued either course yet.

Second and relatedly, public land bargains that split jurisdiction between sovereigns make it challenging for federal agencies to achieve public land management goals that Congress has identified.[201] Congress routinely directs management agencies to manage public land for certain purposes.[202] In the case of the Yukon-Charley River basin, Congress directed the Park Service to maintain the "environmental integrity" of the basin "in its undeveloped natural condition."[203] In order to achieve that goal, the Park Service needs regulatory authority over the entire area, including rivers.[204] Without uniform regulatory authority, Jane Smith can legally evade federal regulations meant to preserve the basin's "undeveloped natural condition" by simply walking into the river.[205] This highlights a significant tension between the statute creating the Charley-Yukon Preserve and Alaska's grand bargain.

Courts could resolve these tensions on a case-by-case basis as they did in *Sturgeon*, but that takes time, which could lead to irreversible environmental harm. Even though ANILCA seems inconsistent with Congress's command to preserve the Yukon-Charley River basin in its "undeveloped natural condition," courts have developed many tools of statutory interpretation to reconcile seemingly inconsistent statutes.[206] Congress could rely on courts to sort out potential inconsistencies between public land bargains and other statutes. The problem is that waiting for courts to clearly outline the scope of an agency's regulatory authority takes time and creates uncertainty.[207] The *Sturgeon* saga, for example, took seven years to weave its way through the court system. Seven years is more than enough time for problems involving toxins and pollutants to get out of hand.[208] Thus, legislators should be suspicious of bargains that will lead to protracted litigation over how to reconcile public land bargains with congressional mandates to agencies.

200. *See id.* at 1092–93 (Sotomayor, J., concurring).

201. *See id.* at 1091 (Sotomayor, J., concurring).

202. *See, e.g.*, 16 U.S.C. § 410hh(10) (2018).

203. *Id.*

204. *See Sturgeon II*, 139 S. Ct. at 1091 (Sotomayor, J., concurring) (asking "[h]ow can the service adequately protect Alaska's rivers if it cannot regulate?").

205. *See id.*

206. *See generally*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. OF CHI. L. REV. 800 (1983) (exploring statutory interpretation, both as an academic and practical pursuit).

207. *See Sturgeon II*, 139 S. Ct. at 1093 (Sotomayor, J., concurring) (stating "I recognize that today's decision creates uncertainty concerning the extent of Service authority over navigable waters in Alaska's parks").

208. *See* Lazarus, *supra* note 196, at 745 (noting "[e]nvironmental law must address harm that increases over time. The harm is dynamic and not static in character. An oil spill addressed quickly may be confined to manageable dimensions. But conversely, if not quickly addressed, it may rapidly and exponentially increase in scope to overwhelming dimensions. Legal regimes that are inherently . . . slow to react do not readily lend themselves to the quick action often necessary in the ecological context.").

Sturgeon II highlights the messy problems that a major public land bargain, ANILCA, has created. ANILCA splits jurisdiction over rivers and land between Alaska and the federal government.[209] This makes it harder for either sovereign to deal with threats to the ecosystem. It also makes it difficult for the federal government to achieve congressionally mandated land management goals. These problems, though not inherent in every potential public land bargain, will become relevant whenever a land bargain creates a patchwork regulatory landscape.

C. Three Contextual Factors to Consider in Determining Whether a Public Land Bargain Is Worth Passing

Even with the aforementioned potential costs, there may be specific public land bargains that are worth passing. Politicians and citizens should consider three factors in assessing whether a particular bargain is worth its cost: the geographical context of the bargain, the implementation context of the bargain, and specific normative implications of the bargain. Each of these factors may count in favor of a particular bargain, against a particular bargain, or be irrelevant for a particular bargain. Failing to consider them before passing a bargain, though, may lead to potentially negative downstream consequences as it did in *Sturgeon II*.

1. Geographical Context

People evaluating potential public land bargains should consider whether a bargain will split jurisdiction along lines that make sense geographically given the local ecology. Certain topographical features, like mountain ranges, can create meaningful physical divisions between different ecological systems. Though all of these ecological systems are interconnected in a broad sense, physical divisions may carve the landscape into area units that make sense to manage as distinct units. For example, mountain ranges often create hydrologically distinct watersheds, one on either side of the mountain range. Different watersheds might support different wildlife, different plant life, and different human communities. Giving one sovereign complete regulatory authority over an entire watershed may increase the likelihood that it is able to implement an integrated, uniform plan over the entire area. Such complete regulatory authority in turn may make it less likely that there are regulatory gaps with unintended negative consequences.

ANILCA fails to give the state or the federal government regulatory authority over physically distinct geographic units, which is at the core of the problems in *Sturgeon II*.[210] Instead, ANILCA creates state regulatory corridors along rivers through otherwise federally regulated land.[211] Under this scheme,

209. *Sturgeon II*, 139 S. Ct. at 1073.
210. *See id.*, 139 S. Ct. at 1087.
211. *See id.*

creating regulations to manage wildlife, for example, requires that the state and the federal government pass complementary regulations because wildlife can be disturbed by activity occurring on land or on water. In general, when the jurisdiction of two sovereigns is interwoven geographically, both sovereigns will need to pass regulations to manage resources, like wildlife, that cross their jurisdictional boundaries.[212] This could be good, bad, or neutral depending on the topography of the area, the types of problems faced by land managers, and the working relationship between state and federal officials. Without considering how a bargain will split jurisdiction geographically, it will be hard to anticipate the potential consequences of a proposed bargain.

2. *Implementation Context*

The implementation context is a combination of technical and political factors to consider when evaluating a potential bargain. First, people should assess the technical context of future bargains, including what problems face land managers at a given time, what strategies and tools are available to solve those problems, and what problems might arise in the future.[213] This will shed light on whether structurally forced coordination will make land management more challenging in practice. For example, an area that routinely deals with pollutants moving through complex hydrological systems may require dynamic, relatively fast decision making that split jurisdiction can compromise.

Second, people should also consider the political context of the bargain. This includes investigating both state and national interests and whether or not a bargaining state has put into place safeguards to protect national interests in public land.[214] Assessing the reasons why a state is arguing for a bargain is important because it may decrease the concern that a state will ignore broader national interests in public land. For example, imagine two states that want public land bargains. The first state, which has a major budget surplus and a history of building infrastructure to increase access to public parks, is advocating for a bargain that would increase its regulatory authority over public land in order to develop several high-quality parks open to the national public. The second state has a history of supporting extractive industries and wants to bargain for the ability to increase and self-regulate all instate strip mining. The first state seems

212. *See* Thomas W. Merrill, *The Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 932 (1997) (discussing the problem of "pollution that originates in one state and spills over into another" as very difficult, which would apply equally to pollution originating in state jurisdiction and spilling over into federal jurisdiction).

213. *Compare* WILLIAM CRONON, NATURE'S METROPOLIS 149–206 (1991) (describing early timber harvesting practices), *with* Giovanni Pecora et al., *Optimization of Timber Harvesting Using GIS-Based System*, II PROCEEDINGS OF THE SECOND INTERNATIONAL CONGRESS OF SILVICULTURE 619, 892–94 (2014) (describing the role of GIS mapping techniques in modern forestry).

214. *See, e.g.*, Thomas Schumann, *Pushing the Boundaries of the Public Trust on the Last Frontier A Study in Why the Doctrine Should Not Apply to Wildlife*, 44 ECOLOGY L.Q. 269, 269 (2017) (discussing an "Alaska Supreme Court decision holding that [Alaska's] . . . state constitution created a public trust guaranteeing a broad right of access to natural resources").

much more likely to protect a broader set of public interests and limit irreversible environmental harms, which might decrease concern about passing a bargain that transfers regulatory authority to the state.

The third piece of the implementation context is the scope of the statute implementing the bargain and the nitty-gritty details of how the statute diverges from the default public land regulatory regime. For example, an exemption from the Antiquities Act will not cause many of the problems that a statute like ANILCA can cause.[215] An Antiquities Act exemption may make it more challenging for the federal government to protect important resources, but it does not create a patchwork regulatory scheme. Like the geographical context, the implementation context may increase or decrease the likelihood that a particular bargain will cause public land management problems.

3. *Overriding Normative Implications*

Finally, there may be overriding normative considerations that make bargains attractive enough to justify their costs. So far, this Note has dealt with the relationship of public land bargains between states and the federal government though that is not the only sovereign-to-sovereign relationship in the United States.[216] Native American tribes are also independent sovereigns that have legitimate claims to public land.[217] Sovereignty and territoriality are deeply linked.[218] Thus, bargain legislation may help solve complex normative problems and, in doing so, may justify the technical management problems that it can create.

The idea of bargaining with the federal government for jurisdiction over land in the United States evokes a long and sordid history of promises, treaties, and bargains that are part of a story of theft and genocide.[219] It is beyond the scope of this Note to discuss the complex relationship between the federal government and tribes. There is no doubt that splitting jurisdiction over land

215. *See infra* Subpart II.A.

216. *See* Cherokee Nation v. Georgia*,* 301 U.S. 1, 3–4 (1831) (stating "between the United States under their present constitution, and the Cherokee nation, as well as other nations of Indians: in all of which the Cherokee nation, and the other nations have been recognized as sovereign and independent states; possessing both the exclusive right to their territory, and the exclusive right of self government within that territory").

217. *See generally* Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment Changing the Balance of Power*, 39 VILLANOVA L. REV. 525, 527 (1994) (observing "[f]ederal common law, statutes and treaties recognize and protect Native American rights to occupy and use tribal lands").

218. *See Cherokee Nation*, 301 U.S. at 3–4; Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 244 (1923) (reasoning "the power of a sovereign to extend his own jurisdiction by statute must be, then, that he has such power so far as his own territory is concerned").

219. *See generally* Angelique Townsend Eagle Woman, *The Ongoing Traumatic Experience of Genocide for American Indians and Alaska Natives in the United States The Call to Recognize Full Human Rights as Set Forth in the United Nations Declaration on the Rights of Indigenous Peoples*, 3 AM. INDIAN L.J. 424 (2015) (discussing the history of European and U.S. genocide of Native peoples and the application of the U.N. Declaration on the Rights of Indigenous Peoples).

between the federal government and tribes can create many of the same problems caused by public land bargains with states. Such bargains increase the need for coordination across sovereigns, and they can create opportunities for one sovereign to veto an integrated management plan. Nonetheless, given the role that territoriality plays in sovereignty, the normative implications of bargains between the federal government and tribes are radically different in type from those between the federal government and states.[220] As such, people should think about land arrangements between the federal government and tribes differently than they think about those between the federal government and states. Because of the extreme injustice of the federal government's historical approach to dispossessing tribes of their ancestral homes, people should be less concerned about the technical management problems that public land bargains with tribes may cause.

D. Putting It Together

In assessing a potential public land bargain, politicians and citizens should consider two things beyond the arguments made by bargain advocates. First, people should consider the problems that public land bargains can cause. Bargains can lead to complicated patchwork regulatory schemes that make it harder for federal land managers to promote healthy ecological systems and achieve congressionally mandated public land management goals. Second, they should consider a handful of other contextual factors including the geographical context of the bargain, the implementation context of the bargain, and any overriding normative considerations of the bargain. Looking closely at each of these issues will clarify points of disagreement over the value of potential public land bargains.

IV. INSTEAD OF BARGAINING, BUILDING TRUST

Public land bargains are one response to a strained political relationship between people in the nation's core and on the nation's periphery. As discussed above, many people on the periphery think they are being unfairly governed by incompetent, potentially tyrannical bureaucrats. This has led to a deep sense of distrust among people on the periphery.[221] Knowing this, there may be other ways to improve the relationship between people in the core and on the periphery

220. *See* Padraic I. McCoy, *The Land Must Hold the People Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 421 (2003) ("Land is more important to contemporary American Indians and native communities than at any point in history . . . . [Land] sustains and shields Indian communities physically, culturally, and spiritually . . . .").

221. In Utah, for example, only 16 percent of people say the federal government is best positioned to make decisions that "impact" their lives. Bob Bernick, *Utah Voters Say They Trust Local Government the Most While They're Wary of the Feds*, UTAHPOLICY.COM (Nov. 18, 2019), https://utahpolicy.com/index.php/features/today-at-utah-policy/22217-utah-voters-say-they-trust-local-government-the-most-while-they-re-wary-of-the-feds (citing a Utah Policy Analytics survey).

without incurring the costs of bargains. Perhaps the federal government can work with public land communities to identify public land projects that present opportunities to build trust between the core and the periphery. In turn, this may make people on the periphery less likely to view federal decision makers as bordering on tyrannical.

Some research suggests that "a lack of trust is one of the primary barriers that impede natural resource decision-making."[222] When distrust leads to dysfunction, it strengthens arguments made by modern-day bargain advocates about federal ineffectiveness. It also makes rhetoric about federal tyranny more salient. To build trust with people on the periphery, federal agencies should do two things. First, they should take seriously modern social science research into the nature of trust. Researchers have developed models of trust that would help agencies measure and identify if and why people on the periphery do not trust them.[223] Second, they should look for ways to use the information that they learn from those models to build action plans that agency employees can use to proactively build trust with communities on the periphery.

Agencies in the core should begin by taking seriously social science research into the nature of trust. An excellent example of this research is the 2009 article *Determinants of Trust for Public Lands: Fire and Fuels Management on the Bitterroot National Forest*.[224] The major lesson from *Trust for Public Lands* is that there are ways to measure how much people and communities trust the government and why people mistrust the federal government.[225] Land managers can use these empirical research methods to begin to understand the specific reasons why people mistrust the government, and then they can change their behavior to address the specific concerns of the public.[226]

There is no generally agreed-upon definition of trust.[227] Most modern research accepts that it is a "context-specific psychological state," with three components: the trustor, the trustee, and the context in which they interact.[228] Beyond that, trust is: "The willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor or control the other party."[229] Because of this vulnerability, "risk is inherent in trusting others."[230]

222. Adam Lijeblad et al., *Determinants of Trust for Public Lands Fire and Fuels Management on the Bitterroot National Forest*, 43 ENVTL. MGMT. 571, 571 (2008).

223. *See, e.g.*, *id.*; Russell Hardin, *The Street-Level Epistemology of Trust*, 21 POL. & SOC'Y 505, 505 (1993).

224. *See* Lijeblad, *supra* note 222.

225. *See id.* at 579–80.

226. *See id.*

227. *See* Roderick Kramer, *Trust and Distrust in Organizations Emerging Perspectives, Enduring Questions*, 50 ANN. REV. OF PSYCH. 569, 571 (1999).

228. Lijeblad, *supra* note 222, at 572.

229. *Id.*

230. *Id.*

Trust for Public Lands synthesized research from several fields and identified fourteen factors,[231] grouped into three dimensions,[232] that contribute to trust in a relationship.[233] Simply put, agency officials can generally increase public trust by demonstrating these contributors to trust. Not all of these contributing factors must be present in a trusting relationship.[234] But collectively, they "define a relationship's level of trust."[235]

Examining these contributors and dimensions highlights the complex nature of trust in the public land context. This deconstruction breaks the concept of trust into discrete parts, which allows agency management to develop concrete steps that agency employees can take to improve public trust in an agency. First and foremost, trust must be built on a foundation of "shared norms and values."[236] Demonstrating "agreement,"[237] "integrity,"[238] "compassion and understanding,"[239] "responsiveness,"[240] "procedural justice,"[241] and behavior "worthy of pride"[242] all contribute to shared norms and values.

"Willingness to endorse" is another major component of building trust in public land management.[243] One critical insight from modern research on trust is that trust is at least partially voluntary (it requires "willingness").[244] Thus, if certain conditions are not met, then people will not extend trust.[245] But when people "have confidence in a range of potential actions or outcomes, know they

231. The fourteen factors are: agreement, integrity, compassion, understanding, responsiveness, procedural justice, worthy of pride, confidence, political inclusion, trustworthy, previous experience, competence, effectiveness, uncertainty, and reliability. *Id.* at 572–73.

232. The three dimensions are: shared norms and values, willingness to endorse, and perceived efficacy. *Id.*

233. *Id.*

234. *Id.* at 573.

235. *Id.*

236. *Id.*

237. "Agreement . . . refers to [developing] parallel objectives the public shares with management agencies. It implies that the cooperating parties are oriented in corresponding directions and satisfied with that shared goal." *Id.* at 574.

238. "Integrity" means that "public lands managers and agencies that are perceived to behave with honesty, morality, good character, and honor in their actions are more likely to be trusted." *Id.*

239. "Compassion and Understanding . . . refer[] to managers and agencies that are sympathetic, caring, and concerned with the welfare of others, as exemplified by their benevolent actions and goodwill toward others. Especially in situations where people's lives or property is vulnerable such as forest fires." *Id.*

240. "Responsiveness . . . refers to a party's receptiveness and ability to pay attention to and adapt to changing needs and circumstances." *Id.*

241. "Procedural Justice . . . refers to fairness and equity of the processes used to make and implement decisions. Procedural Justice implies that agency relations with different people or organizations are consistent, just and impartial." *Id.*

242. "Worthy of Pride" refers to "resource managers and agencies that conduct themselves in a manner that is respectful, is discrete, and has high levels of commitment are more likely to gain the trust of the public." *Id.*

243. *Id.*

244. *See id.*; F. David Schoorman et al., *An Integrative Model of Organizational Trust Past, Present, and Future*, 32 ACAD. OF MGMT. REV. 344, 346 (2007) (providing "trust is the [voluntary] willingness to take risk").

245. *See* Lijeblad, *supra* note 222, at 574.

have a political voice, and know that others are behaving in a manner deserving of trust, they are more willing to endorse the actions of others."[246] Put another way, people are more willing to endorse the actions of land managers if they have "confidence"[247] in the process and believe that land managers engage in "trustworthy behavior"[248] that embraces "political inclusion."[249]

Perceived efficacy is the final dimension of trust in the public land context. This involves how effective people perceive an agency to be.[250] Simply put, people withhold trust when they perceive a partner as ineffective. "Competence,"[251] "reliability,"[252] "previous experience,"[253] "effectiveness,"[254] and "uncertainty"[255] all contribute to whether people trust an agency.

Understanding this theoretical framework allows public land managers to measure whether and how much people trust them. For example, in *Trust for Public Lands*, researchers developed a simple phone poll to measure how much the local community trusted the Forest Service to manage forest fires.[256] Each poll took about fifteen minutes.[257] They asked simple questions to measure how the public perceived the Forest Service's performance of contributor skill.[258] For example, to measure *Political Inclusion*, they asked:

> "How much attention, if any, have Bitterroot National Forest managers paid to what people think when managers decide what to do about forest fires?"[259]
>
> Respondents could answer:
>
> Don't know,
>
> Not Much Attention,

246. *See id.*

247. "Confidence . . . refers to parties' ability act with faith, certainty, or assurance, because they 'know' that a certain outcome or range of outcomes can be expected." *Id.*

248. "Trustworthy Behavior . . . refers to managers and agencies that conduct themselves in a manner that warrants the trust of others and implies that people have a reason to trust them and their claims about how then intend to behave, rather than relying on blind faith." *Id.*

249. "Political Inclusion" is "the degree to which people have a say or role in relevant decision-making processes. This means that agencies are open to, and receptive to, hearing the needs of people or other organizations." *Id.*

250. *Id.*

251. "Competence . . . refers to the ability of agencies to effectively implement their skills, knowledge, or expertise in a given arena." *Id.*

252. "Reliability . . . is the extent to which a party can be counted on to perform a given function, or behave in a certain predictable and consistent manner." *Id.*

253. "Previous Experience . . . refers to earlier interactions members of the public have had with others that color their attitudes of consistency and familiarity." *Id.*

254. "Effectiveness . . . refers to managers' ability to successfully accomplish goals and have a desired effect on what was intended, to live up to promises made, and to maintain good credibility." *Id.* at 575.

255. "Uncertainty . . . refers to the grades of knowability or unknowability associated with engaging in a relationship with certain parties or performing certain actions. The greater the uncertainty . . . the more hesitant people may be to trust." *Id.*

256. *Id.* at 576–77.

257. *Id.*

258. *Id.*

259. *Id.* at 581.

Some Attention, or

A Good Deal of Attention.[260]

By collecting the answers to these questions, researchers determined that respondents "generally [thought] the [Bitterroot National Forest team] acts with integrity, compassion, and responsiveness to local needs when fighting fires."[261] But they also found that "managers are, on average, not perceived to be paying a good deal of attention to what people think, and have only low levels of confidence from residents."[262] Under these conditions, a program that highlights agency integrity would be less likely to improve trust than one that actively solicits community involvement.[263]

By developing these highly targeted insights, agencies can coach personnel to change their behavior in specific ways that are designed to increase the public's trust.[264] And increasing public trust in federal agencies may make it less likely that people in the periphery view the federal government as tyrannical imperialists or advocate for public land bargains.

CONCLUSION

As of April 2019, one month after *Sturgeon II* was decided, public trust in the federal government was at a historic low.[265] Only 17 percent of Americans said they trust the government in Washington, DC to generally do what is right "just about always" (3 percent) or "most of the time" (14 percent).[266] And decisions made by public land management agencies have always been hotly contested because of their direct effects on the local culture and economies of communities on Washington's periphery.[267] This combination of mistrust and geographically distant, high consequence decision making about public land mirrors the conditions that precipitated the revolutionary rhetoric of historic public land bargain advocates.[268]

While public land bargains may satisfy some people on the periphery, they also come with costs.[269] They can slice up jurisdiction over ecological systems in ways that make it challenging for land managers to protect healthy ecological systems and to achieve congressionally mandated land management goals.[270]

Daniel Kemmis, former mayor of Missoula, Montana, offers one potential path away from public land bargains that still acknowledges the strained

260. *Id.*
261. *Id.* at 577.
262. *Id.*
263. *See id.*
264. *Id.* at 578.
265. *Public Trust in Government 1958-2019*, PEW RSCH. CTR. (Apr. 11, 2019), https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/.
266. *Id.*
267. *See infra* Subparts I.B, I.C.
268. *See id.*
269. *See infra* Subparts II.A–II.C.
270. *See id.*

relationship between the core and the periphery in America.[271] "If there are key ingredients that make . . . face-to-face democracy work, then two of them are honesty and trust. And if The Democracy is to send deep roots into these western landscapes, it will have to do it by speaking honestly and by building trust."[272]

The federal government, and particularly executive agencies, should take this advice seriously lest it one day face increased pressure to support public land bargain legislation limiting its own jurisdiction. Even if they do not face such pressure today, intentionally building trust with communities on the periphery may limit the political power of members of Congress who strategically use public support for public land bargains as leverage in other legislative fights. Building trust may not be glamorous work, but it may be in order as the looming climate crisis threatens to exacerbate already deep divides over how we use our public land.

271. *See* Daniel Kemmis, *Daniel Kemmis Replies*, *in* THE WAY OF IGNORANCE 156 (Wendell Berry ed., 2008).

272. *Id.*

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