National Parks, Inc.

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Sarah Light, *National Parks, Incorporated*, 169 **U. Pa. L. Rev.** 33 (2020).

Any law review article that name-checks the Doritos Locos Taco warrants a read. But *National Parks, Incorporated*, by Sarah Light, does much more. The article presents a grounded inquiry into the nature of publicness that is fascinating in its own right and that tackles timely questions about the boundaries of the state at a time when they are being vigorously contested. Specifically, this article: presents a history of private enterprise on public lands to illustrate the tension between public interests and commercial interests that has been present since the inception of the national park system; describes how this tension has evolved and expanded in the modern political and economic context; and presents a framework for thinking about the value of publicness and where boundaries around private enterprise should be drawn to preserve it.

Light begins with an account of the political and legal history of the national parks, which was a pure delight for someone whose pandemic travel has consisted entirely of road trips to parks across the Western United States. More importantly, this part of the article reveals how the legislators, administrators, and activists instrumental in founding these institutions thought about the value of publicness in the parks and the threat posed to it by private, commercial interests. For them, in a nutshell, publicness was necessary to guard against two key harms associated with private property: exclusion and destruction. Publicness meant that any individual, of any means, could enjoy the natural splendor of the parks. And it meant that this natural beauty could not be consumed or defaced by profit-making enterprise. On top of these benefits to individuals, publicness also provided collective benefits. Committing public resources to park lands expressed the nation's shared commitment to the values of preservation, equal access, and democracy through civic interaction among Americans from all different walks of life.

The founders of the parks believed that these values could be preserved only if public lands were separate from private enterprise. Yet they recognized that private enterprise could be leveraged to support the public values embodied in the parks. For example, transportation and accommodations were necessary to bring visitors to the parks. The parks could realize their public ideals only if members of the public visited them. Thus, from the very beginning, federal legislation governing the parks authorized the leasing of land to private parties to erect accommodations and other amenities for visitors. However, Congress carefully limited the terms of these leases to ensure that park spaces would be preserved for the public's enjoyment and would not be transformed into private property.

Historically, Congress and conservation activists were most concerned about the threat to public lands posed by consumptive, extractive, and exclusionary private activities. Private activities such as mining, grazing, and construction of private structures raise obvious concerns that public spaces might be destroyed or withdrawn from public use. Light's key insight is that relationships between parks and private actors have evolved to include an array of non-consumptive, non-extractive, non-exclusive private activities that likewise threaten publicness. These relationships raise complicated questions about the appropriate line between public and private.

Light identifies three types of activity in this category: attempts by private business firms to own intellectual property in the parks and their attractions; corporate philanthropy; and cause-related marketing. For example, in recent years, private corporations have: trademarked the names of historic landmarked properties within Yosemite National Park; made (and marketed) sizeable donations to the national parks; and entered into cause-related co-marketing arrangements that allow companies to leverage their association with the parks to sell products that yield a portion of their proceeds back to the parks. (In this last category, State Park Blonde Ale, made by a Tennessee brewery under an agreement with the Tennessee State Park Conservancy, is the public-private co-branding analog to the Doritos Locos Taco.)

These activities impose no physical harm on the parks and do not exclude members of the public. And those in the latter two categories yield obvious benefits for the parks in the form of revenue. Yet they raise serious questions about the appropriate boundary between the public parks and the private enterprises with which they affiliate. Light raises four potential concerns about these non-extractive, non-exclusive corporate activities. First, large donations might lead to co-optation of the National Park Service (NPS) by private donors. There is some evidence for this. Coca-Cola, which had donated more than $13 million to the National Parks Foundation, objected to the NPS's proposed ban of plastic water bottle sales at the Grand Canyon, and the NPS initially scrapped the ban (before public outrage caused it to reverse course). Second, associating with corporate sponsors risks reputational spillovers to the parks if the sponsor's reputation is compromised. Many studies in the management literature document reputational spillovers from one business partner to another. Government entities subject themselves to such risks if they involve themselves in business relationships with private entities. Third, private sponsorship of the parks might erode support for public funding of parks, further increasing reliance on private funding and exacerbating the first two problems. Finally, in extreme cases corporate sponsorships can result in outright exclusion of the public from park lands, as it did when Pepsi and the National Football League erected physical barriers around the National Mall to commandeer it for a private event.

Light suggests that some of these problems can be addressed by maintaining autonomous decision-making for the NPS and encouraging democratic public participation in decisions about how private funding is used. I am not so sanguine. The problems she identifies are not only about resources and incentives and power, as in traditional public choice accounts of political and regulatory decision making. They go to much more fundamental issues about how decision-makers' preferences are shaped by their roles and relationships and about what the determinative decision-making criteria should be. People approach decision-making differently when they stand in the role of consumer than when they stand in the role of citizen. Consumer behavior, while sometimes influenced by values, tends to turn on cost-benefit calculations. Citizen behavior, while sometimes influenced by cost-benefit calculations, tends to be motivated by values. The donor and co-marketing arrangements Light describes seem to pull decision-making—even by the agency and by the public—from the terrain of shared values to the terrain of value maximization. Indeed, the sole aim of corporate marketing is to shape preferences. Thus, "preserving" decision-making primacy to populations whose identities and cognition have been shaped by corporate marketing provides cold comfort.

If the values embodied in public lands are to be preserved, along with the land itself, we need to consider more critically the way that government relationships with private enterprise shape us as citizens. Light makes a significant contribution by surfacing the new ways private interests are impacting the publicness of the national parks. She acknowledges at the end of the article that what might ultimately be at stake in these entanglements between parks and private enterprise is the expression of a set of core national commitments to preserving places of wonder and awe and to civic nation-building through equal access and shared experiences. This invites more thought about how these values—and the myriad other values implicated by administrative decision-making—can be preserved in the face of both long-standing and still-evolving pressures to calculate costs and benefits.

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