
ARTICLE

NATIONAL PARKS, INCORPORATED

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Public lands and private enterprise exist in an uncomfortable equilibrium. Since their founding, the national parks have embraced some forms of private enterprise, including privately-run accommodations, to bring members of the public to the parks to enjoy and appreciate their beauty. Corporations have provided financial support to the national parks through philanthropy. And private firms have benefitted from marketing their associations with the parks. Marketing campaigns that call on the feeling of being in the woods and philanthropy to the parks that may benefit corporations by association do not deplete resources or ruin aesthetic experiences like a strip mine would. Yet they nonetheless in some fashion dilute the essential publicness of the national parks. In debates over the purpose of public lands and the proper role of private enterprise within them, relationships between private firms and public lands in which the firms neither extract commodities from the parks nor physically harm them have not received sufficient attention. This Article makes three claims. First, as a descriptive matter, it identifies a set of non-extractive relationships between private firms and national parks as a distinct phenomenon. Second, as a normative matter, the Article argues that these relationships deserve greater attention in both policy and scholarship because they shed light on important questions about the significance of the public in national parks. Finally, as a prescriptive matter, the Article concludes that these non-extractive relationships between private firms and

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the national parks warrant clearer restrictions in government policy to preserve the essential publicness of these lands.

INTRODUCTION	34
I. CONSERVATION, PRESERVATION, AND THE NATIONAL PARKS	43
II. PUBLIC AND PRIVATE IN THE PARKS	48
A. <i>The Value of Publicness in the Parks</i>	49
B. <i>Protecting the Public from the Private</i>	54
C. <i>A Role for Private Enterprise—But Not Too Much</i>	62
1. The Early Years	63
2. The Organic Act	65
III. NON-EXTRACTIVE CORPORATE ACTIVITY WITHIN THE PARKS	67
A. <i>A Hotel by Any Other Name: Ownership of Intangible Property</i>	67
B. <i>Corporate Philanthropy and Cause-Related Marketing</i>	78
1. Corporate Philanthropy and Cause-Related Marketing Generally	78
2. Philanthropy and Cause-Related Marketing in the National Parks	80
3. Corporate Cause-Related Marketing in State Parks	83
IV. THE BENEFITS AND HARMS OF CORPORATE ACTIVITY WITHIN THE PARKS	89
A. <i>Benefits to Corporations from Relationships with the Parks</i>	89
B. <i>Potential Effects on the Parks</i>	96
1. Benefits to the Parks	96
2. Harms to the Parks	97
a. <i>Co-optation</i>	97
b. <i>Associative Risk</i>	100
c. <i>Erosion in Support for Public Funds</i>	102
d. <i>Exclusion of the Public</i>	104
V. IMPLICATIONS AND CONCLUSION	105

INTRODUCTION

In 2019, an Advisory Committee to the Department of the Interior made several recommendations designed to “improve the quality of National Park Service (NPS) facilities:”¹ “Our recommendations would allow people to opt

¹ Louis Sahagun, *Trump Team Has a Plan for National Parks: Amazon, Food Trucks, and No Senior Discounts*, L.A. TIMES (Nov. 4, 2019, 5:00 AM), <https://www.latimes.com/environment/story/2019-11-04/trump-administration-privatize-national-parks-tourism> [<https://perma.cc/Q2PP-DKXX>].

for additional costs if they want, for example, Amazon deliveries at a particular campsite We want to let Americans make their own decisions in the marketplace.”² Consistent with this characterization of national parks as a marketplace, the Committee noted that “evidence suggests that occupancy rates at many campgrounds could grow and additional services, from WiFi to utilities, equipment rentals and camp stores” among others would “substantially boost net agency revenues, especially when operational costs are transferred to private sector partners.”³ In addition, the Committee recommended allowing concessioners⁴ both to make improvements to campgrounds and to benefit financially from these improvements.⁵ The prospect of Amazon deliveries and privatized campgrounds led some conservation advocates to reject these proposals as a “transfer of public assets to private industry.”⁶

Public lands and private enterprise have long existed in an uncomfortable equilibrium.⁷ Since the creation of the national parks, the relationship between people and these unique public lands has often been mediated and facilitated by corporations and other business firms. In the nineteenth century, major railroad companies actively supported the creation of the national parks, convinced that these attractions would pull eastern populations westward via rail.⁸ In the statutes creating the national parks, Congress specifically authorized the provision of accommodations by private

2 *See Id.* (quoting Derrick Crandall, Vice Chairman, “Made in America” Outdoor Recreation Advisory Comm.); *see also* Juliet Eilperin, *Zinke Creates New Outdoor Recreation Panel Made Up Almost Entirely of Industry Advisers*, WASH. POST (Mar. 26, 2018, 3:53 PM), https://www.washingtonpost.com/national/health-science/zinke-creates-new-outdoor-recreation-panel-made-up-entirely-of-industry-advisers/2018/03/26/04f3e960-2f9a-11e8-8688-e053ba58f1e4_story.html [<https://perma.cc/3NMY-67AG>] (“Crandall has also endorsed privatization as a way of financing upgrades to campgrounds such as ready access to WiFi and hot showers, saying that current ones ‘lack the amenities sought by today’s campers.’”); *cf.* Letter from Bill Yeargin, Chair, Outdoor Recreation Advisory Comm. & Derrick Crandall, Vice Chair, Outdoor Recreation Advisory Comm., to David L. Bernhardt, Sec’y Interior (Oct. 10, 2019), <https://www.nps.gov/orgs/1892/made-in-america-rac.htm> [<https://perma.cc/YBZ4-B6VB>] [hereinafter Transmittal Letter]. Crandall is also the chief executive of the American Recreation Coalition. Eilperin, *supra*.

3 Transmittal Letter, *supra* note 2, attach. 3.

4 The NPS refers to private entities holding concessions within the parks as “concessioners.” 54 U.S.C. § 101913.

5 Transmittal Letter, *supra* note 2, attach. 3.

6 Sahagun, *supra* note 1. On November 1, 2019, shortly after these recommendations were made public, the NPS disbanded the Advisory panel, while noting that its recommendations were under review. Rob Hotakainen, *NPS Scraps Industry-Stacked Advisory Panel*, E&E NEWS (Nov. 14, 2019, 2:37 PM), <https://www.eenews.net/stories/1061549123> [<https://perma.cc/X2PQ-4WXW>].

7 *See, e.g.*, Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991 (2014).

8 *See* Michael Mantell, *Preservation and Use: Concessions in the National Parks*, 8 ECOLOGY L.Q. 1, 6-10 (1979) (discussing the role of railroads in supporting the creation of the parks “to encourage travel on their lines to the West” and their role in establishing hotels and other accommodations).

firms to bring visitors and tourists to enjoy their beauty.⁹ Indeed, Stephen Mather, the first director of the National Park Service, observed that “[s]cenery is a hollow enjoyment to the tourist who sets out in the morning after an indigestible breakfast and a fitful night’s sleep on an impossible bed.”¹⁰

Extractive corporate practices like mining, timbering, and fossil fuel development,¹¹ or even less extreme examples like recreational snowmobiling

⁹ See *infra* Section III.C. While the purpose of the national and state parks was to set aside land for public use and recreation, the concept of who counted as a member of “the public” was not always racially inclusive. See Reed Engle, *Laboratory for Change*, RES. MGMT. NEWSL. (Jan. 1996), reprinted in *Segregation and Desegregation at Shenandoah National Park*, NAT’L PARK SERV. (Oct. 12, 2018), <https://www.nps.gov/articles/segregation-and-desegregation-at-shenandoah.htm> [https://perma.cc/AB3A-FPRX]; Kathryn Miles, *Shenandoah National Park Is Confronting Its History*, OUTSIDE (Sept. 23, 2019), <https://www.outsideonline.com/2401541/shenandoah-national-park-segregation-history#close> [https://perma.cc/AB3A-FPRX]. Between Reconstruction and World War II, the NPS essentially followed local Jim Crow laws and customs in each park, designating and constructing separate recreation and picnic facilities, as well as accommodations, for African American visitors. See SUSAN SHUMAKER, *UNTOLD STORIES FROM AMERICA’S NATIONAL PARKS: SEGREGATION IN THE NATIONAL PARKS* 21-22 (2009), <http://www.pbs.org/nationalparks/media/pdfs/tnp-abi-untold-stories-pt-01-segregation.pdf> [https://perma.cc/5BH6-M458] (offering a detailed discussion of segregation in the national parks and at national monuments). This practice began to change in 1939 in Shenandoah National Park when the NPS began to remove official signage indicating segregation by race, and developed an integrated picnic ground. *Id.* at 29-30. On December 4, 1945, Harold Ickes, Secretary of the Interior, issued a regulation which prohibited discrimination in the furnishing of public accommodations within the parks by the proprietors of any hotels, inns, lodges, or other public accommodations. Discrimination in Furnishing Public Accommodations, 10 Fed. Reg. 14,866 (Dec. 8, 1945) (codified at 36 C.F.R. § 2.61). The Supreme Court held segregation of state and local parks to be unconstitutional in 1955. *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam). However, actual desegregation of the parks proceeded more slowly in light of concessioner protests. Shumaker, *supra*, at 31-32; Engle, *supra*. For the extensive documentation of the longstanding history of segregation within the state parks, many of which were constructed with federal funds during the Great Depression, see WILLIAM E. O’BRIEN, *LANDSCAPES OF EXCLUSION: STATE PARKS AND JIM CROW IN THE AMERICAN SOUTH* (2015). The history of segregation has had lasting effects. See CAROLYN FINNEY, *BLACK FACES, WHITE SPACES: REIMAGINING THE RELATIONSHIP OF AFRICAN AMERICANS TO THE GREAT OUTDOORS* 5 (2014) (“By excluding the African American environmental experience (implicitly or explicitly), corporate, academic, and environmental institutions legitimate the invisibility of the African American in the Great Outdoors and in all spaces that inform, shape, and control the way we know and interact with the environment in the United States.”).

¹⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-302, *NATIONAL PARK SERVICE: CONCESSIONS PROGRAM HAS MADE CHANGES IN SEVERAL AREAS, BUT CHALLENGES REMAIN* 1 (2017) (quoting Stephen Mather, Former Director of the Park Service).

¹¹ Although fossil fuel extraction and mining are widely practiced on public lands in the United States, and some legacy claims for mining and extraction remain in the national parks, fossil fuel extraction is not a major issue in the national parks. The 1976 Mining in the Parks Act closed the national parks to any new mining claims. Pub. L. No. 94-429, 90 Stat. 1343 (codified at 16 U.S.C. § 1908). However, more than 1,000 legacy mining claims exist in fifteen of the parks. *Mining Claims*, NAT’L PARK SERV. (Jan. 9, 2017), <https://www.nps.gov/subjects/energyminerals/mining-claims.htm> [https://perma.cc/Z6AQ-ZT9]. Further, according to the NPS, about 200 national park units contain nonfederal mineral rights claims. *Other Energy and Mineral Development*, NAT’L PARK SERV. (Nov. 16, 2016), <https://www.nps.gov/subjects/energyminerals/mineral-materials.htm>

tours that are merely noisy,¹² physically harm nature and exclude members of the public from enjoying these wonders. Some of these activities also physically extract commodities from the parks for sale in private markets. These activities are core to the notion of private property rights. Indeed, many scholars of property law would argue that the right to exclude is the sine qua non of private property rights.¹³ Others have focused on the right to destroy.¹⁴ Such values associated with private property—exclusion, commodification, and destruction—many would argue, have no place in the parks, which must remain open to the public.¹⁵

However, not all commercial activity within the parks excludes the public or destroys nature. Indeed, many commercial activities like providing accommodations and recreational opportunities, corporate philanthropy to the parks, and corporate cause-related marketing of associations with the parks do not, on their face, appear to cause such physical harm.¹⁶ Nor do they remove anything tangible from the parks and seek to commercialize or commodify it for sale in markets. Marketing campaigns that call on the feeling of being in the woods and philanthropy to the parks that may benefit corporations by association do not deplete resources or ruin aesthetic experiences like a strip mine would. Some of these corporate activities—like

[<https://perma.cc/8LSE-SBPW>]. Regulations govern the exercise of nonfederal mineral rights in the parks. See 36 C.F.R. §§ 9.1-9.18, 9.30-9.210 (2019) (governing exercise of mineral rights and non-federal oil and gas rights in the National Park System). However, the Trump administration has sought to open more areas of public land to energy extraction. See, e.g., Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (directing federal agencies to review regulations that “potentially burden the development or use of domestically produced energy resources”).

¹² See, e.g., *Wyoming v. U.S. Dep’t of Interior*, 674 F.3d 1220, 1223 (10th Cir. 2012) (discussing history of regulatory action by the NPS with respect to snowmobiles dating back to 1974, and litigation dating back to 1997); Elizabeth Shogren, *15 Years of Wrangling Over Yellowstone Snowmobiles Ends*, NPR (Oct. 22, 2013, 4:38 PM), <https://www.npr.org/2013/10/22/239705610/new-rules-mean-more-and-cleaner-snow-mobiles-in-yellowstone> [<https://perma.cc/FUE3-H7JG>]; 36 C.F.R. § 7.13 (2020) (regulating snowmobiles in Yellowstone National Park); 36 C.F.R. § 7.54 (2020) (same in Theodore Roosevelt National Park); 36 C.F.R. § 7.66 (same in North Cascades National Park).

¹³ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 752 (1998); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360-64 (2001); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711 (1986); 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (defining property as the “sole and despotic dominion . . . over the external things of the world, in total exclusion of the right of any other individual in the universe”).

¹⁴ See e.g., Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

¹⁵ For a discussion of the value of publicness in the parks, see *infra* Section II.A.

¹⁶ Of course, it is conceivable that an overabundance of accommodations could lead to significant congestion that itself could physically harm the parks. See, e.g., Mantell, *supra* note 8, at 3. But this Article aims to narrow its scope to focus on private corporate activity within the parks that does not cause such harm, such as in the cases of a concession for an existing property that does not increase the number of hotel rooms, disputes over ownership of the property’s famous name, and corporate philanthropy to and cause-related marketing with the parks.

philanthropy and cause-related marketing—actually contribute substantially to park funding. Likewise, they do the opposite of exclusion—they bring members of the public to the parks. Yet even such arguably benign actions still raise objections about the proper role of corporations and other private actors within the parks. The concern appears to be that these relationships in some way dilute the essential *publicness* of the national parks. Commercial activity within the parks that neither physically harms nature nor removes physical assets for sale in markets thus focuses a spotlight on essential questions about the proper boundary between public and private in the national parks, the nature of publicness itself, and the purpose of the parks.¹⁷

This Article therefore seeks to highlight as a distinct phenomenon a set of corporate interactions with the national (and in some cases, state) parks that are commercial, but non-extractive and not physically harmful. It identifies three case studies of such corporate interactions with the parks as examples of this larger phenomenon: (1) corporate concessions within the national parks for hotel accommodations; (2) corporate claims to ownership of the names to historic hotels and other property; and (3) corporate philanthropy to and cause-related marketing with national and state parks.

Each of these forms of interaction raises questions regarding the proper balance between public and private when it comes both to ownership and profit. A recently settled dispute over ownership of the trademarks to the historic names of landmarked hotels within Yosemite National Park exemplified the serious concerns about this boundary.¹⁸ Corporate philanthropy to and cause-related marketing with both national and state parks has led some conservation advocates to worry that these entanglements will lead to the renaming of Coca-Cola Yellowstone or Amazon Grand Canyon National Park.¹⁹ The states have adopted a continuum of approaches

¹⁷ For a discussion of the value of publicness in the context of the national parks, see *infra* Section II.B. For a discussion of these issues in the context of urban public spaces, including privately owned public open spaces, see Sarah Schindler, *The “Publicization” of Private Space*, 103 IOWA L. REV. 1093, 1100-04 (2018).

¹⁸ Sarah Kaplan, *A Private Company Trademarked the Phrase ‘Yosemite National Park.’ Should the U.S. Pay to Get It Back?*, WASH. POST (Mar. 21, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/03/21/a-private-company-trademarked-the-phrase-yosemite-national-park-should-the-u-s-pay-to-get-it-back> [<https://perma.cc/PRT3-3TD6>].

¹⁹ See *infra* Part II; Lisa Rein, *Yosemite, Sponsored by Starbucks? National Parks to Start Selling Some Naming Rights*, WASH. POST (May 9, 2016, 10:23 AM), <https://www.washingtonpost.com/news/powerpost/wp/2016/05/09/yosemite-national-park-brought-to-you-by-starbucks> [<https://perma.cc/AFP6-6VMU>] (“A Coca-Cola Visitor Center will still be off limits, but an auditorium at Yosemite National Park named after Coke will now be permitted And parkgoers could sit on a bench named for Humana health insurance—and store their food in a bear-proof locker emblazoned with the Nike swoosh.”); Joe Davidson, *Park Service and Corporate Advertising, a Dangerous Mix*, WASH. POST (May 9, 2016, 7:00 AM), <https://www.washingtonpost.com/news/powerpost/wp/2016/05/09/park-service-and-corporate-advertising-a-dangerous-mix>

to corporate philanthropy and cause-related marketing with state parks. At the most restrictive end of the spectrum, California requires a nexus between the donor firm's business and outdoor recreation.²⁰ At the opposite end, Tennessee has entered into an agreement with a local brewery that sells "State Park Blonde Ale" with an image of the state naturalist on the label, and with a portion of the proceeds going to benefit the Tennessee State Park system.²¹

Corporations benefit from these relationships through direct profit (in the case of hotel accommodations) and, more indirectly, by building brand awareness and improving the broader perception of their brands through a "halo effect" of association with these beloved national icons.²² These benefits for the corporations come, in some cases, with corresponding benefits to the parks in the form of cash or in-kind donations. Indeed, these forms of corporate activity offer an arguable counterpoint to the twin harms of exclusion and destruction. They provide lodging for visitors, funding for enhanced access for underserved populations, and can fund trail repairs. But they can also impose intangible harm on the national parks and their reputations. At the very least they raise the risk of "stigma by association"²³ if ever these corporate partners were to suffer an injury to their reputation or corporate scandal. And they raise concerns about co-optation of public priorities by private interests. Considered together, these interactions require a deeper exploration of the proper scope of corporate activity within the parks, and how prescriptive the law should be about expanding or limiting that role in different contexts.

These issues are significant. The national parks are big business. A recent report by the U.S. Department of the Interior found that national park visitors generated \$40.1 billion in economic output in 2018, supporting 329,000 jobs both within the parks themselves, and in surrounding communities near national parks, in industries like hotels, restaurants,

[<https://perma.cc/7W8T-4NQ8>] ("Already parks hoist banners with Budweiser beer and other corporate logos. Where will it stop? Can you imagine Disney presents Yellowstone?"). The law expressly prohibits the naming of national parks after sponsors. *See infra* note 285 and accompanying text.

²⁰ *See infra* Section III.B.3.

²¹ *See infra* Section III.B.3; *State Park Blonde Ale*, TENN. BREW WORKS, <https://www.tnbrew.com/beer/stateparkblonde> [[https://perma.cc/TM\]2-JLT8](https://perma.cc/TM]2-JLT8)]; Christian Spears, *Tennessee Brew Works Expands Philanthropic Efforts to Tennessee State Parks*, CRAFTBEER.COM (Dec. 10, 2019), <https://www.craftbeer.com/news/brewery-news/tennessee-brew-works-expands-philanthropic-efforts-to-tennessee-state-parks> [<https://perma.cc/PTT3-3XM7>].

²² *See infra* Section IV.A.

²³ Elizabeth Pontikes, Giacomo Negro & Hayagreeva Rao, *Stained Red: A Study of Stigma by Association to Blacklisted Artists During the "Red Scare" in Hollywood, 1945 to 1960*, 75 AM. SOCIO. REV. 456 (2010); Mary-Hunter McDonnell, Kate Odziemkowska & Elizabeth Pontikes, *Bad Company: Tactics, Stigma, and Shifts in Support for Environmental SMOs after the Horizon Oil Spill* (Dec. 2019) (unpublished manuscript) (on file with author).

transportation and recreation.²⁴ That figure represents a fifty percent increase in visitor spending since 2012.²⁵ According to a Report by the Government Accountability Office (GAO), in 2015, 488 commercial concessioners within the national parks earned total gross revenues of \$1.4 billion, yet paid only approximately \$104 million in franchise fees to the NPS.²⁶ In 2015, each of the five largest concession contracts for lodging, food, and retail services in the parks generated more than \$50 million in gross revenues.²⁷ With respect to corporate philanthropy and cause-related marketing, for fiscal year 2018, corporations contributed \$31.1 million to the parks.²⁸ And while the COVID-19 pandemic may affect these numbers for 2020, there is no doubt that reopening of the national parks during the pandemic has been symbolically important.²⁹

Despite the widespread nature and economic significance of these corporate relationships, they have not received sustained attention as such in legal scholarship on the national parks. Within the literature on the national parks, many scholars have examined the appropriate balance between current use and preservation for future generations of these public lands,³⁰ including

²⁴ Press Release, National Park Visitor Spending Contributed \$40 Billion to U.S. Economy U.S. Dep't of the Interior (May 23, 2019), <https://www.doi.gov/pressreleases/national-park-visitor-spending-contributed-40-billion-us-economy> [<https://perma.cc/NF2J-CEK4>]. The Report found that “318 million visitors spend \$20.2 billion in communities within 60 miles” of a national park, and that of the 329,000 jobs supported by this economic activity, “more than 268,000 jobs” are located in “park gateway communities.” *Id.*

²⁵ *Id.* (showing that in 2012, visitors spent \$26.8 billion).

²⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-302, NATIONAL PARK SERVICE: CONCESSIONS PROGRAM HAS MADE CHANGES IN SEVERAL AREAS, BUT CHALLENGES REMAIN 4 (2017).

²⁷ *Id.* at 5. These contracts were for lodging, food, and retail services in Yosemite, Yellowstone, and the Grand Canyon national parks, as well as the Statue of Liberty National Monument and Glen Canyon National Recreation Area. *Id.*

²⁸ NAT'L PARK FOUND., 2018 ANNUAL REPORT 38 (2018), <https://www.nationalparks.org/about-foundation/financial-reports> [<https://perma.cc/ZE6J-4J2N>]. In addition, individuals and family foundations collectively donated a total of \$34.3 million to the parks. *Id.* In 2018, institutional foundations contributed \$9 million and government grants contributed \$10.3 million. *Id.*

²⁹ Rob Hotakainen, *'The Parks Are Opening, and Rapidly.' But It's Complicated*, E&E NEWS GREENWIRE (May 14, 2020), <https://www.eenews.net/greenwire/stories/1063135399> [<https://perma.cc/KY63-XDX6>].

³⁰ John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861, 863 (2015) (identifying and discussing the ongoing conflict between “use” and “preservation” as core to the Organic Act that created the national parks in 1916). For discussions about the history and purpose of the national parks, see generally MICHAEL FROME, REGREENING THE NATIONAL PARKS (1992); JOHN ISE, OUR NATIONAL PARK POLICY: A CRITICAL HISTORY (1961); ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE (4th ed. 2010); JOHN MUIR, OUR NATIONAL PARKS (Gibbs Smith 2018) (1901); JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980); RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY (copy. 2009).

between “quiet” and “noisy” forms of use.³¹ Some of these debates appear to turn, at least in part, on whether the use at issue imposes physical harm. For example, whether to permit snowmobiles or e-bikes in the national parks raises issues not only of whether noisy or quiet recreation within the parks is consistent with their purpose, but also the very practical question of whether the addition of mechanized vehicles would harm nature, cause erosion of the trails, spook the wildlife, or create noise pollution that would limit the enjoyment of those seeking quieter forms of recreation and contemplation.³² More recent debates have focused on the issue of congestion within the parks and how increasing congestion affects the use/preservation debate. With respect to corporate activity in the parks, several articles have examined the law governing concessions within the parks, and one student note has examined the trademark dispute between a concessioner and the NPS over ownership of the names of historic hotels.³³ However, these scholars have not identified concessions or the trademark dispute as examples of a broader category of corporate activity that is arguably neither exclusionary of the public, physically harmful, nor extractive of goods for commercial purposes.³⁴ Although legal scholars have examined the tax and corporate governance consequences of corporate philanthropy and cause-related marketing,³⁵ and one article has addressed the phenomenon of individual “patriotic philanthropy” to government agencies,³⁶ no legal scholarship appears to focus

³¹ JOSH EAGLE, JAMES SALZMAN & BARTON H. THOMPSON, JR., *NATURAL RESOURCES LAW AND POLICY* 196 (2017); cf. Sarah Krakoff, *Mountains Without Handrails . . . Wilderness Without Cellphones*, 27 HARV. ENV'T L. REV. 417 (2003).

³² Policy Memorandum 19-01 from Deputy Dir., Nat'l Park Serv., U.S. Dep't of the Interior to the Reg'l Dirs., Assoc. & Assistant Dirs., Superintendents, and Chief of the U. S. Park Police, Nat'l Park Serv., U.S. Dep't of the Interior (Aug. 30, 2019), https://www.nps.gov/subjects/policy/upload/PM_19-01 [<https://perma.cc/2P2Q-K8H9>] (permitting use of pedal-assist e-bikes where ordinary bicycles are permitted).

³³ Megan Elaine Ault, Note, *This Name Is Your Name: Public Landmarks, Private Trademarks, and Our National Parks*, 67 DUKE L.J. 145 (2017) (focusing on using the trademark implications of this dispute as a way to preserve the parks from commercial intrusion).

³⁴ See, e.g., George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 DENV. L. REV. 729, 730, 734 (1997) (discussing the origin of the national parks and concessions policy through the Concessions Policy Act of 1965); Mantell, *supra* note 8, at 5 (arguing for an “urgent reevaluation by policy makers of concessions management” and focusing on heavy visitation encouraged by concessioners as inconsistent with the dual purposes of the parks).

³⁵ See, e.g., Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579 (1997); Terri Lynn Helge, *The Taxation of Cause-Related Marketing*, 85 CHI.-KENT L. REV. 883 (2010); Roy Shapira, *Corporate Philanthropy as Signaling and Co-optation*, 80 FORDHAM L. REV. 1889 (2012).

³⁶ Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129, 1157, 1165, 1170 (2018) (discussing philanthropy by wealthy individuals and foundations like the Gates Foundation for pet projects in education, health care, and other contexts, but not focusing on corporate philanthropy to national or state parks). For more on the term “patriotic philanthropy,” see *id.* at 1132 (citing Eleanor Clift, *Patriotic Philanthropy*:

squarely on these issues in the context of corporations and the national (and state) parks or as an example of this larger phenomenon.

Holly Doremus has come the closest to this issue, offering an in-depth account of corporate “bioprospecting” in Yosemite’s hot springs for biological substances with potential medical uses.³⁷ Doremus contends that while bioprospecting is done at such a small scale as to avoid physically harming the park, it nonetheless interferes with the park’s purpose to inspire wonder and awe.³⁸ While the bioprospecting project that Doremus discussed may not have physically harmed the parks, bioprospecting nonetheless extracts *something* physical from them for commercial benefit and commodification, even if the thing that is commodified is very small.

This Article therefore advances the literature by isolating the question of whether corporate activity within the national parks poses concerns about a loss of publicness that warrant policy responses, even if that corporate activity does not exclude the public, commoditize a natural asset within the parks, or physically harm nature. Marketing campaigns that call on the feeling of being in the woods do not deplete resources or ruin aesthetic experience like fossil fuel extraction does. Private ownership of a trademark to the name of a historic hotel in Yosemite National Park does not exclude anyone from staying at the hotel; nor does it otherwise implicate stewardship of the land for future generations.

In other words, these non-extractive corporate relationships with the parks do not “use” the land or interfere with “preservation” of its resources in ways that implicate traditional debates over “use” versus “preservation.” Nor do they commodify goods within the parks in the traditional sense by removing or allowing the removal for commercial benefit of timber, fossil

Not an Oxymoron, DAILY BEAST (Nov. 27, 2014, 5:54 AM), <https://www.thedailybeast.com/patriotic-philanthropy-not-an-oxymoron> [<https://perma.cc/7ZAS-B5TM>]; Sophie Gilbert, *David Rubenstein's Patriotic Philanthropy*, ATLANTIC (Oct. 29, 2014), <https://www.theatlantic.com/national/archive/2014/10/david-rubensteins-patriotic-philanthropy/382082/> [<https://perma.cc/DMD9-RN6P>]).

³⁷ Holly Doremus, *Nature, Knowledge and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America's National Parks*, 26 *ECOLOGY L.Q.* 401, 403-04 (1999) (identifying the phenomenon of “bioprospecting,” in which biotechnology companies seek to discover useful microorganisms for commercialization).

³⁸ *Id.* at 404 (noting that this process leads to “no detectable physical or biological impact on the park”). In the context of bioprospecting, Doremus contends that the national parks are about more than their physical resources:

The symbolism of the national parks is nearly as important to the nation as the natural resources they harbor. The fundamental purpose of the national parks is not merely to preserve nature. They should also inspire the populace with wonder, awe and fascination of nature, express the nation's respect for its natural wonders, and make those wonders available to all on an equal basis.

Id. at 406. Thus, she offers a Kantian critique of bioprospecting, contending that even when physical harm is not at issue, there remains a concern about preserving the parks’ “inspirational and expressive functions.” *Id.* at 407.

fuels, or biological substances. The parks themselves remain open to the public and no one is excluded from their use and enjoyment. Yet these corporate actions appear to work *some* kind of mischief—they are commodification in a different form.³⁹ They are still somehow disaggregating the bundle of public goods and values—including public goodwill—associated with public lands, just in a different way from extractive industries. This Article offers both a descriptive account of these non-extractive corporate interactions with the parks, and a normative account of what these relationships tell us about the nature of publicness in the national parks. Finally, it offers a set of prescriptions for the role that corporations ought to play within these public lands.

This Article is organized as follows. Part I offers a brief primer on the creation of the National Park System in the United States and introduces the traditional debate between preservationists and conservationists over the purpose of the parks. Part II examines the question of why the parks ought to be public at all. It first offers a normative account of publicness that embraces both the values to individuals and to the nation as a whole of commitments to public lands. It then takes a deep dive into the origin of the parks that focuses on concerns about preserving the parks' publicness against private and corporate encroachment. This Part concludes with the observation that the statutes creating the parks accepted at least some role for private enterprise, most notably concessions for accommodations. Part III examines two more contemporary cases studies: a recent dispute over ownership of trademarks to landmarked properties, and corporate philanthropy/cause-related marketing of associations with the parks. Part IV offers a normative assessment of the benefits of such interactions to corporations and potential benefits and harms to the parks, drawing on social science literature about corporate social responsibility. Finally, this Article concludes in Part V by arguing that the law governing the parks should be most concerned about exclusion, commodification of natural assets, and physical destruction. Yet the more intangible, associational harms identified here still demand caution and warrant more proactive policy responses.

I. CONSERVATION, PRESERVATION, AND THE NATIONAL PARKS

The history of the creation of the national parks is intertwined with the normative question of why land ought to be set aside for public use in the

³⁹ For a broad discussion of commodification, see generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). In Radin's account, "[s]omething that is market-inalienable is not to be sold, which in our economic system means it is not to be traded in the market." *Id.* at 1850. In other words, certain goods ought not be commoditized.

first place—a question that continues to have many, sometimes conflicting, answers. This Part focuses on the legal basis for creating the parks, and the debate between conservationists and preservationists over their purpose—whether the land should be used most efficiently subject to the limitation of preservation for future generations, or whether the space should be preserved in its natural state to inspire wonder and awe.

Article IV, Section 3, Clause 2 of the Constitution grants Congress the authority to designate and make laws regarding public lands, stating that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”⁴⁰ The Supreme Court has held that this power is “without limitations,”⁴¹ and has interpreted it to include the authority to adopt appropriate rules governing safety and use of public lands, for example to protect wildlife.⁴²

But why set aside land as national “parks” for public use at all?⁴³ Legal scholars, philosophers, and naturalists, among others, have long debated the value or values that the national parks should promote.⁴⁴ Two primary approaches have dominated this discussion: preservation and conservation. Preservationists argue that public lands should be preserved in their natural state as spaces of inspiration and contemplation in which people can achieve

⁴⁰ U.S. CONST. art. IV, § 3, cl. 2.

⁴¹ *United States v. City of San Francisco*, 310 U.S. 16, 29-30 (1940) (holding that Congress may expand or limit the public domain “to avoid monopoly and to bring about a widespread distribution of benefits”).

⁴² *Kleppe v. New Mexico*, 426 U.S. 529, 541 (1976).

⁴³ Other forms of public land in the United States, including National Forests managed by the U.S. Forest Service, National Wildlife Refuges managed by the U.S. Fish & Wildlife Service, and National Conservation Areas managed by the Bureau of Land Management have different purposes. *America’s Public Lands Explained*, U.S. DEP’T OF THE INTERIOR: BLOG (June 13, 2016), <https://www.doi.gov/blog/americas-public-lands-explained> [<https://perma.cc/RR8H-QR34>]. These various forms of public land display a “structured normative pluralism. [Public-lands law] integrates a range of competing values: privatization and extraction; motorized recreation and hunting; scenic preservation, hiking, and solitude; and ecological preservation and biodiversity.” Jedediah Britton-Purdy, *Whose Lands? Which Public? The Shape of Public-Lands Law and Trump’s National Monument Proclamations*, 45 *ECOLOGY L.Q.* 921, 939, 948-49 (2018) (noting the strong presumption in the law against presidential privatization of public lands to avoid corruption). For a sweeping theoretical discussion of how the concept of “nature” has evolved as a form of democratic self-governance throughout American history, see Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 *YALE L.J.* 1122 (2010). The focus of this Article, however, is the national (and state) parks, which embody a “far narrower range of potential uses” than other forms of public land. Britton-Purdy, *supra*, at 942. The most limited form of public land management is set forth in the Wilderness Act, which mandates the preservation of the lands’ “wilderness character” by permitting only “solitude” and “primitive and unconfined types of recreation.” *Id.* at 943 (citing 16 U.S.C. § 1131).

⁴⁴ See *supra* note 30.

transcendence and separation from their daily lives.⁴⁵ This preservationist approach is embodied in the life work of co-founder of the Sierra Club John Muir,⁴⁶ and landscape architect Frederick Law Olmstead.⁴⁷ Muir and the preservationists were influenced by “Romantic and Transcendentalist aesthetics” that valued “certain kinds of aesthetic and spiritual experience” that could be found only in “spectacular natural settings” like the parks.⁴⁸ This preservationist approach contrasts with that of the conservationists.⁴⁹ Conservationists, including Gifford Pinchot, the first head of the U.S. Forest Service, instead contended that public lands should be actively managed by experts to promote their best and most efficient use—a utilitarian approach—subject to the limitation that the land is conserved for the benefit of future generations.⁵⁰ Thus, at the time of the parks’ creation, the conservation approach was consistent with some substantial commercial use of public lands, though in highly regulated form.⁵¹ And while there were significant limits on what forms of commercial use could occur within the national parks,

⁴⁵ MUIR, *supra* note 30; Doremus, *supra* note 37.

⁴⁶ See MUIR, *supra* note 30; JOHN MUIR, *THE YOSEMITE* (1912); JOHN MUIR, *NATURE WRITINGS* (William Cronon ed., 1997).

⁴⁷ See *infra* notes 106–113 and accompanying text.

⁴⁸ Purdy, *supra* note 43, at 1139. Notably, as with the racially exclusionary history of the national parks themselves, the Sierra Club has recently acknowledged John Muir’s racism and attitudes toward people of color. The Sierra Club itself excluded people of color from membership, much as the parks themselves excluded people of color in the Jim Crow South. Michael Brune, *Pulling Down Our Monuments*, SIERRA CLUB (July 22, 2020), <https://www.sierraclub.org/michael-brune/2020/07/john-muir-early-history-sierra-club> [<https://perma.cc/NS9W-NHGU>] (noting that Muir’s harmful racist words and promotion of stereotypes “continue to hurt and alienate Indigenous people and people of color who come into contact with the Sierra Club”). Thus, it is important to take with a grain of salt sweeping pronouncements by the parks’ founders about the importance of making these lands open to “the public.”

⁴⁹ Of course, the idea that nature serves as a place to inspire wonder and awe in the human imagination—an idea embraced by preservationists—cannot be characterized as insensitive to consequences or as fully non-instrumental in nature.

⁵⁰ For example, Pinchot unsuccessfully sought to place the parks under the management of the Forest Service; however, Stephen Mather, the first Director of the Park Service succeeded in arguing that the “Forest Service’s mission of commercial exploitation of natural resources would destroy the parks.” Doremus, *supra* note 37, at 470 (citing SELLARS, *supra* note 30, at 58). Of course, this debate completely sidesteps the question of who the land belonged to before it was set aside for “public” use. Offering an account based in critical ethnic studies, environmental justice, and critical geography, Sarah Krakoff extensively examines this question as it relates to the Native nations who were dispossessed of these lands. Sarah Krakoff, *Not Yet America’s Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559 (2020). For an in-depth history of the conservation movement in the United States, see generally SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (Univ. of Pittsburgh Press 1999) (1959).

⁵¹ See generally HAYS, *supra* note 50 (discussing promotion by conservationists like Pinchot of commercial use with regulation in contexts of water power rights, mineral extraction, grazing, and timbering, among others).

Pinchot strongly believed that even the parks should be open to efficient management.⁵²

The debate between these two perspectives was perhaps best embodied in a dispute in the early twentieth century between Muir and Pinchot regarding whether a river flowing through the Hetch Hetchy Valley ought to be dammed to provide water to the City of San Francisco.⁵³ The river lay within what had been designated by Congress as Yosemite National Park. A dam would flood the Valley, destroying the ability of the public to enjoy its splendor. Pinchot argued that the benefits to San Francisco were significant and outweighed any interest in leaving the river and Valley in their natural state.⁵⁴ Muir rejected this utilitarian approach, contending that it was equivalent to damming “the people’s cathedrals and churches, for no holier temple has ever been consecrated by the heart of man.”⁵⁵ In his view, any exploitation of natural resources for instrumental benefit was dangerous and would lead down a slippery slope.⁵⁶ In 1913, Congress gave the victory to Pinchot’s approach when it passed the Raker Act and granted to the City of San Francisco a right of way “in, over, and through” the land in Yosemite National Park to dam the river.⁵⁷ By 1923, the dam was in place and the Valley flooded.⁵⁸

This controversy highlighted the distinction between conservation and preservation. However, the dispute was not about commercial use. Rather, the debate over Hetch Hetchy exposed the tradeoffs between two forms of public interest: that of preserving the park in its natural splendor, and that of the City of San Francisco in its need for water for its population.⁵⁹

While unsuccessful in stopping the construction of the dam, Muir’s position favoring preservation prevailed in some significant ways thereafter. Three years after passing the Raker Act, in 1916, Congress passed the Organic Act that created the National Park System and the National Park Service (NPS).⁶⁰ The Act’s statement of purpose declared that the NPS shall

promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures as conform to the fundamental purposes of the said parks,

⁵² *Id.*

⁵³ RUNTE, *supra* note 30, at 78-95; HAYS, *supra* note 50, at 192-97.

⁵⁴ RUNTE, *supra* note 30, at 78-95.

⁵⁵ JOHN MUIR, *Hetch Hetchy Valley*, in JOHN MUIR, *NATURE WRITINGS* 810, 817 (William Cronon ed., 1997).

⁵⁶ Doremus, *supra* note 37, 440 n.201.

⁵⁷ Act of Dec. 19, 1913, Pub. L. 63-41, § 1, 38 Stat. 242, 242.

⁵⁸ RUNTE, *supra* note 30, at 78-95.

⁵⁹ HAYS, *supra* note 50, at 193 (“[C]onflict between two public uses of the Valley was the crux of the controversy”).

⁶⁰ Act of Aug. 25, 1916, Pub. L. 64-235, § 1, 39 Stat. 535, 535.

monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.⁶¹

Thus, the Organic Act stated that the purpose of the parks was *both* preservation of the scenery and natural wonders for future generations *and* enjoyment of those wonders in the present. The Act created the NPS as a distinct entity within the Department of the Interior. This decision to situate the new NPS outside of the U.S. Forest Service that Pinchot controlled according to utilitarian/conservationist principles took place over Pinchot's strenuous objections.⁶² By designating both preservation and current enjoyment as goals—goals that are sometimes in conflict—the Act left a significant degree of discretion to the new NPS to determine how to balance among those competing considerations.⁶³

This debate over the purpose of the parks continues to the present day. With minor modifications, this dual purpose of conservation “for the enjoyment of future generations” and providing “for enjoyment” in the present remains in the current statutory language.⁶⁴ This language speaks to the tension between the present and the future. It has generated serious debate for over one hundred years as to the appropriate balance between these two interests.⁶⁵

To highlight just one example of the ongoing importance of what has come to be known as the use/preservation debate, Holly Doremus has discussed whether the NPS should enter into agreements with private firms to permit “bioprospecting” in the thermal pools of Yosemite.⁶⁶ Doremus has

⁶¹ *Id.* (emphasis added); see Nagle, *supra* note 30, at 862-63 (2015) (citing this as language authored by Frederick Law Olmstead, Jr., son of Frederick Law Olmstead, the American landscape architect who designed Central Park); see also *National Park Service: Hearing on H.R. 434 & H.R. 8668 Before the H. Comm. on Pub. Lands*, 64th Cong. 52, 52 (1916) (statement of J. Horace McFarland, President, American Civic Associations) (stating that Frederick Law Olmsted, Jr. “framed” this sentence of the Organic Act, and that the “fundamental thing that was in mind at the time was to be sure that there should be in the bill . . . a statement of what the parks were for”).

⁶² See *supra* note 60; HAYS, *supra* note 53, at 195-97.

⁶³ Nagle, *supra* note 30, at 867-90. Use conflicts in the environmental law context are not unique to the national parks. See generally Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law*, 60 DUKE L.J. 1505 (2011).

⁶⁴ 54 U.S.C. § 100101 (“The Secretary . . . shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”).

⁶⁵ Nagle, *supra* note 30, at 863-65 (documenting examples of the use/preservation debate and observing that the NPS retains significant discretion to balance among these sometimes conflicting goals).

⁶⁶ Doremus, *supra* note 37, at 406.

argued that the purpose of the parks includes preserving their symbolism and capacity to inspire awe.⁶⁷ Doremus thus offers a modern preservationist, Kantian vision of what kinds of scientific research should be permitted within the parks. She contends that “appreciative science”—a form of scientific research that has as its intent the understanding of nature—is permissible.⁶⁸ However, “instrumental science”—a form of research experimentation that sends the message that “nature has value not in itself, but only as a means toward human ends”—has no place in the parks and is “not the message parks should communicate.”⁶⁹ She notes that the “contrast between the instrumental and appreciative scientific traditions closely parallels that between Gifford Pinchot’s conservationist and John Muir’s preservationist views of the function of parklands.”⁷⁰ Thus, bioprospecting implicates the use/preservation distinction that frames many debates over the purpose of the parks.

But the use/preservation distinction does not fully capture concerns regarding the role of private commercial activity within the parks. Individuals and non-profit organizations can “use” or seek to “preserve” the parks just as corporations can. A non-profit university or hospital could seek to engage in bioprospecting instead of a commercial firm for the purpose of finding life-saving medicine rather than for the purpose of “understanding nature”. Individuals can participate in “noisy” forms of recreation that interfere with preservation for future generations or “quiet” forms of enjoyment that do not cause harm. And private corporations can interact with the parks in ways that do not exclude members of the public, that impose no physical harm on the parks, and that do not physically extract any goods. In other words, corporations can interact with the parks in ways that do not implicate either “use” or “preservation” in the traditional senses.

The next Part turns to the question of why we value publicness in the parks, and then offers a more detailed origin story of the parks that specifically highlights early and ongoing concerns about the role of private commercial enterprise.

II. PUBLIC AND PRIVATE IN THE PARKS

The tension over the appropriate balance between use and preservation was not the only significant debate as the parks were being created. Indeed,

⁶⁷ *Id.* at 406-07. While the bioprospecting agreement suggested that the practice would not physically harm the park, it would still remove certain natural compounds from the thermal pools for testing and, potentially, for commercial sale. *Id.* at 407-10.

⁶⁸ *Id.* at 458.

⁶⁹ *Id.* at 459.

⁷⁰ *Id.*

there were explicit debates about why the parks should be public, concerns about encroachment of private interests, and acknowledgement that some role for private enterprise could be appropriate. This Part first offers a normative and theoretical account of the value of *publicness* in the national parks. It then offers a more nuanced historical narrative about the creation of the parks that focuses on the public-private boundary. The designation of the parks was bound up with a distinct set of worries about how private property could lead to the exclusion of members of the public from the enjoyment of these natural wonders, commodification of the wonders themselves, and destruction of nature. And the story is intertwined with the creation of our collective national identity.

A. *The Value of Publicness in the Parks*

This discussion of the origin of the parks and their uneasy relationship between public and private raises a foundational question: what is the value of public space being public, rather than private? And in this specific context, why do we value *public* national parks, when there are other potential ways to enjoy nature? One alternative, for example, could include large parks owned by a private but generous individual or corporation, to which the public has access.⁷¹ This Article takes a pluralistic approach to the value of publicness in the parks, acknowledging many different values that have evolved over time. Most importantly, these values include not only those of importance to individuals but also collective value to the community and nation as a whole.

Scholars have offered accounts of the values that public spaces provide in many contexts. For example, with respect to urban public spaces like town squares, local parks, and sidewalks, Sarah Schindler has argued that such spaces are valuable as public spaces rather than private ones because they “foster[] interaction between people with diverse viewpoints and from different socio-economic backgrounds,” “nurture democratic values” by providing spaces to assemble and speak, afford people a “third place” beyond

⁷¹ There may be some forms of private property that guarantee benefits to the public into the future, such as private trusts, conservation easements, and other covenants that run with the lands to preserve them in perpetuity. See generally Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENV'T L. REV. 119 (2010) (discussing concerns about fraud and inefficiency in conservation easements and private land trusts and recommending reforms). Yet these private mechanisms of conservation did not come into widespread use until the 1950s. And while they are creative, they have been criticized as inefficient and subject to fraud and abuse. *Id.* Indeed, the first conservation easement in the 1880s served to protect “Frederick Law Olmstead’s Boston parkways,” and the NPS used easements in the 1930s to “protect its parkways as well.” *Id.* at 127. Notably, these early easements were held by public entities, not private ones. *Id.* at 126 (“Until the 1950s, conservation easements were used only sporadically and were held exclusively by governmental organizations.”).

home and work to interact, and create spaces “for those with nowhere else to go” like the homeless.⁷² While some of these values may have purchase in the parks context, national parks are not like the local town square that provides a public forum for public speeches, nor are they necessarily havens for the homeless.

As the following historical narrative demonstrates, the founders of the parks valued their publicness explicitly because it could limit the potential harms associated with private ownership of property—including the potential for destruction of natural resources, exclusion of anyone from enjoying of their beauty, and commodification of goods for profit. By virtue of the parks’ publicness, all members of the public—at least in an ideal world, if not the world in which the parks originated—ought to be welcome to enjoy their beauty and splendor, from the richest to the poorest in the nation.⁷³ The parks’ public nature—the fact that governments hold them in trust for the public interest—would ensure that they will not be destroyed or carved up into pieces. Their publicness would guarantee that members of the public of limited means could not be charged fees or tolls to enjoy their splendor. Rather, these awe-inspiring places would be preserved both for the enjoyment of today, and for the benefit of future generations.⁷⁴

The benefits noted thus far can be styled as benefits to individuals—the ability of anyone, of any means, to enjoy these spectacular places and be inspired with awe and wonder. But the mere fact that individuals can have these experiences is not in and of itself the sole explanation for the parks’ publicness. Their publicness is intimately bound up with the identity of the nation as a whole. The historical records bear this out. It is therefore worth pausing to examine how the publicness of the parks affords benefits both to individuals and to the community or collective, including the nation.⁷⁵

Carol Rose has identified two features of property that lead to a presumption of “publicness” rather than private ownership of specific categories of property: the holdout problem and the notion that property is more valuable when more people in a community use it.⁷⁶ Each of these rationales arguably applies to the national parks. The “holdout” problem is the risk that a private owner could block access, charge fees to members of

⁷² Schindler, *supra* note 17, at 1101 (citations omitted).

⁷³ See notes 111-112 and accompanying text (discussing Muir’s lament that only the wealthy could afford access to natural wondrous spaces in the country). *But see supra* note 9 (discussing the history of racial exclusion within national and state parks).

⁷⁴ See *supra* notes 38 and 50 and accompanying text.

⁷⁵ The notion of the parks’ benefits to the nation as a whole, and the relationship between public lands and the creation of the nation are most notably associated with the words and actions of President Theodore Roosevelt. See *infra* Section II.C.

⁷⁶ Rose, *supra* note 13, at 761. Such properties include roadways, navigable waters, and beaches, and their public nature has at times precluded efforts of individuals, but at times even of the legislature, to dispose of or privatize them.

the public, or otherwise prevent members of the public from using a property that is needed for some public purpose.⁷⁷ Thus, the anti-holdout rationale for designating property as public applies when the property is “physically capable of monopolization by private persons.”⁷⁸ A classic example would be when the government seeks to build a road, and sets about purchasing individual lots needed for the best route. One holdout along the route could stymie the whole project. Accordingly, the holdout problem has been offered as a rationale for the government’s power of eminent domain to take private property for public use.⁷⁹ The holdout problem is consistent with the twin concerns about exclusion and destruction and would certainly apply both to individuals and to the community more broadly. While Rose describes the holdout problem as a necessary condition for publicness, she nonetheless regards it as insufficient on its own.

The second characteristic necessary for publicness is also significant in the context of the national parks. That condition is the fact that “a property will be more valuable if open to public access than it would be under exclusive private control” because the more people that use it, the more enjoyment is generated.⁸⁰ For example, English custom allowed communities to hold maypole dances on private property over a landowner’s objection. On this custom Rose observed: “Activities of this sort may have value precisely because *they reinforce the solidarity and fellow-feeling of the whole community*; thus the more members of the community who participate, even if only as observers, the better for all.”⁸¹

Rose refers to these activities that require lands to be public as a “comedy of the commons” rather than a “tragedy of the commons.”⁸² The oft-described tragedy of the commons involves a situation in which increased use by individuals without some form of governance leads to depletion of a resource, the classic example being open grazing land.⁸³ In contrast, in a comedy of the commons, public use of land generates *greater* enjoyment when more members of the community participate; in Rose’s words, “the more the merrier.”⁸⁴ Only such broad community participation can generate solidarity

⁷⁷ *Id.*

⁷⁸ *Id.* at 762, 774.

⁷⁹ *Id.* at 749-50, 761.

⁸⁰ *Id.* at 761, 774 (noting that Calabresi and Melamed observed that “use of eminent domain to overcome holdout presumes that property taken is more valuable for governmental purpose than in hands of former owners” (citing Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-07 (1972))).

⁸¹ Rose, *supra* note 13, at 767-68 (emphasis added).

⁸² *Id.* at 768. In economic terms, Rose refers to these as “scale returns—greater value with greater participation.” *Id.*; see also Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

⁸³ See generally Hardin, *supra* note 82.

⁸⁴ Rose, *supra* note 13, at 767-68.

and “fellow-feeling.”⁸⁵ Rose uses this insight to explain why doctrines about “inherent publicness” applied to channels of commerce like roads and waterways, which were needed because “commerce requires the interaction of persons.”⁸⁶ But property necessary for commerce is not the only context in which this need for solidarity and fellow-feeling arises. As Rose notes, this second characteristic may be especially true of “unique” properties⁸⁷—a category into which national parks would certainly fit in light of their unique aesthetic beauty.⁸⁸

Other scholars have similarly identified the collective value of public goods in the context of public lands. For example, Joseph Sax refers to the concept of a “bandwagon effect” in which “the value of something to any given individual is itself dependent on whether it has value to others.”⁸⁹ Eric Orts and Amy Sepinwall seek to distinguish “collective goods” from the more well-known economic concept of public goods,⁹⁰ in which shared enjoyment of collective resources warrants a different analysis than the ordinary normative arguments for and against commodification of individual resources.⁹¹

To apply these normative frameworks to the national parks, in one important sense, it is their open access to all—their collectiveness—that reinforces their value to the nation. This publicness expresses something—it speaks of a nation’s commitment to certain values.⁹² According to Sax,

⁸⁵ *Id.* President Theodore Roosevelt, who played a crucial role in setting aside millions of acres of public lands in the early twentieth century, spoke of the creation of “fellow-feeling” to describe why public lands are needed. THEODORE ROOSEVELT, *Fellow-Feeling as a Political Factor*, CENTURY, Jan. 1900, reprinted in THE STRENUOUS LIFE 65, 71 (1902) (“[T]he fact remains that the only true solution of our political and social problems lies in cultivating everywhere the spirit of brotherhood, of fellow-feeling, and understanding between man and man, and the willingness to treat a man as a man, which are the essential factors in American democracy as we still see it in the country districts.”).

⁸⁶ Rose, *supra* note 13, at 770 (“In an odd Lockeanism, the public *deserved* access to these properties, because ‘publicness,’ nonexclusive open access, created their highest value.”) (emphasis in original).

⁸⁷ *Id.* at 761.

⁸⁸ *Id.* at 774.

⁸⁹ See Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. U. L. REV. 481, 486 (1983) (“Some of the value of such things doubtless lies in their capacity to stimulate feelings of national identity or cultural solidarity, and their value to any individual rises as they are embraced by the entire community as public values.”).

⁹⁰ See Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387-89 (1954) (identifying that public goods are non-excludable and non-rivalrous).

⁹¹ See Eric W. Orts & Amy J. Sepinwall, *Collective Goods and the Court: A Theory of Constitutional Commodification*, 97 WASH. U. L. REV. 637, 639 (2020) (“Collective goods cannot be bought or sold without destroying their essential nature. For example, to divide a national park such as Yosemite into parcels of real estate would destroy its value as a collective good meant for the enjoyment of all citizens in perpetuity.”).

⁹² Cf. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1995).

wilderness has this quality.⁹³ While an individual hiker derives value from visiting wild public lands personally, that hiker “may also derive some benefits from wilderness or historic preservation in some remote areas [they] will never use or see, *arising from the commitment of Americans to preserve wilderness as a community value.*”⁹⁴ To put it succinctly:

A commitment to wilderness (or to symbols of America’s historic greatness) yields such value to any given individual only if the community as a whole treats it as important. And in such cases the evidence of such value is an act of commitment by the whole community, such as embracing the national policy of historic preservation, wilderness, the flag or any of a host of symbols of national character or identity.⁹⁵

Indeed, economists have demonstrated that people benefit merely from knowing that such beautiful natural places exist, even if they do not use them.⁹⁶

When we speak of the value of publicness of the parks therefore, it is essential to speak not only of benefits to individuals, but also to the broader community and nation as a whole. Designation of these spaces as public expresses the nation’s commitment to the ideas that public lands must be preserved from certain forms of private economic activity. It likewise expresses the commitment that individuals of all means are entitled to share in experiencing the bounties of the nation’s beauty without needing to seek permission from wealthy individuals or corporations that could afford to set aside such lands without government intervention.

In a related context, the Supreme Court has observed that maintenance of national monuments *at public expense* is an essential element that facilitates their appreciation by ordinary citizens.⁹⁷ In the case of *United States v. Gettysburg Electric Railroad Company*, the Supreme Court was called upon to determine the legitimacy of an act of Congress that condemned land to create memorials at the Gettysburg battlefield site, including whether the taking was for a “public purpose.”⁹⁸ In upholding the act of Congress over the objection of a railroad whose land was taken for that purpose, the court wrote: “Here upon this battlefield is one of the proofs of that expenditure, and the

⁹³ Sax, *supra* note 89, at 486-87.

⁹⁴ *Id.* at 486.

⁹⁵ *Id.*

⁹⁶ Carolyn Kousky & Sarah E. Light, *Insuring Nature*, 69 DUKE L.J. 323, 325 (2019). Such value is referred to as “non-use value.” *Id.* at 334 (defining non-use values to include the “value of preserving an ecosystem as part of a community’s cultural heritage, or the value that people derive simply from knowing that a particular species continues to exist”).

⁹⁷ *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 682-83 (1896); *see also* Rose, *supra* note 13, at 777 & n.309 (citing *Gettysburg Electric Railroad* on this point).

⁹⁸ *Gettysburg Elec. Ry.*, 160 U.S. at 669-71, 678.

sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense.”⁹⁹

In other words, a commemoration at Gettysburg would not have been as meaningful if a private wealthy individual or corporation purchased the land at market value, conducted surveys to understand the history of the battle, and erected monuments to remember the acts that occurred on the battlefield. The commitment of public resources expresses the fact that what is being set aside is something of value to the nation as a whole. For the national parks, such public commitments have borne fruit in the American consciousness. The national parks have been referred to as America’s “best idea”¹⁰⁰ and are a source of national pride and public goodwill for the nation as a whole.

B. *Protecting the Public from the Private*

With this normative account in mind, it is now worth revisiting the story of the creation of the national parks to focus on the specific ways in which the founders of the parks sought to separate public from private. Going back in time to before the consolidation of the parks under the NPS in 1916 more fully reveals early concerns about the role of private commercial enterprise and the role these concerns played in the setting aside of public lands to create these parks.

Congress and the states had begun to designate discrete tracts of land across the United States for public use and recreation beginning in the early nineteenth century. In 1832, Congress enacted legislation designating Hot Springs Reservation (now Hot Springs National Park) as public land to be “reserved for the future disposal of the United States.”¹⁰¹ The legislation declared that the land “shall not be entered, located, or appropriated, for any other purpose whatever.”¹⁰² While this was the first federal reservation of land along these lines, Congress only officially designated Hot Springs as a

⁹⁹ *Id.* at 682-83.

¹⁰⁰ See *Famous Quotes Concerning the National Parks*, NAT’L PARK SERV. (last updated Jan. 16, 2003, 10:52 PM), <https://www.nps.gov/parkhistory/hisnps/NPSThinking/famousquotes.htm> [<https://perma.cc/Z44E-6ULE>] (“National parks are the best idea we ever had. Absolutely American, absolutely democratic, they reflect us at our best rather than our worst.” (quoting Wallace Stegner, 1983)).

¹⁰¹ Act of April 20, 1832, ch. 70, 4 Stat. 505. See generally *Hot Springs National Park: History & Culture*, NAT’L PARK SERV. (last updated Sept. 24, 2020), <https://www.nps.gov/hosp/learn/historyculture/index.htm> [<https://perma.cc/7M44-BRE5>]; Sharon Shugart, *Hot Springs National Park: A Brief History of the Park*, NAT’L PARK SERV. HIST. ELIBRARY (Nov. 2003), <http://www.npshistory.com/publications/hosp/bathhouse-row-brief-history.pdf> [<https://perma.cc/V6C9-QHL2>].

¹⁰² 4 Stat. at 505.

National Park in 1921, several years after the creation of the National Park System.¹⁰³

The origin story continues in California. In 1864, Congress deeded specific tracts of land in the Yosemite Valley—which ultimately became part of Yosemite National Park—to the State of California to be managed as a public trust.¹⁰⁴ Yosemite’s origin informs today’s debates over the appropriate dividing line between public and private in the parks and thus warrants detailed discussion. The 1864 grant to California explicitly underscored the park’s purpose stating that the State “shall accept this grant upon the express condition that the premises shall be held for public use, resort, and recreation; shall be inalienable for all time; but leases not exceeding ten years may be granted for portions of said premises.”¹⁰⁵ The park was unquestionably being set aside for a public purpose. However, this public purpose was deemed compatible with the notion of private, short-term leases of the land.¹⁰⁶

Landscape architect Frederick Law Olmstead served as one of the first appointed Commissioners of the land grant within Yosemite Valley and the Mariposa Big Tree Grove.¹⁰⁷ In that capacity, Olmstead wrote *Yosemite Valley and the Mariposa Big Trees*.¹⁰⁸ He described the natural beauty of the scenery, concluding, “[i]t is the will of the nation as embodied in the act of Congress that this scenery shall never be private property, but that like certain defensive points upon our coast it shall be held solely for public purposes.”¹⁰⁹ He articulated a rationale for preserving nature in public trust:

[T]he occasional contemplation of natural scenes of an impressive character, particularly if this contemplation occurs in connection with relief from ordinary cares, change of air and change of habits, is favorable to the health and vigor of men and especially to the health and vigor of their intellect beyond any other conditions which can be offered them, that it not only gives

¹⁰³ Act of Mar. 4, 1921, ch. 161, § 1, 41 Stat. 1367, 1407 (codified at 16 U.S.C. § 361).

¹⁰⁴ See Nagle, *supra* note 30, at 867 & n.18 (2015) (discussing controversy over claims to being the “first” national park); Act of June 30, 1864, ch. 184, 13 Stat. 325.

¹⁰⁵ § 1, 13 Stat. at 325.

¹⁰⁶ See *infra* Part II.C.

¹⁰⁷ *Draft of Preliminary Report upon the Yosemite and Big Tree Grove; Typed Transcription of Draft of Preliminary Report upon the Yosemite and Big Tree Grove; and Typed Transcription of Letter on the Great American Park of the Yosemite*, LIBR. OF CONG.: THE EVOLUTION OF THE CONSERVATION MOVEMENT, 1850-1920, [https://memory.loc.gov/cgi-bin/query/r?ammem/AMALL:@field\(NUMBER+@band\(amrvm+vm02\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/AMALL:@field(NUMBER+@band(amrvm+vm02))) [<https://perma.cc/QM9M-9LDH>].

¹⁰⁸ Robert Melnick, *Yosemite National Park*, SOC’Y OF ARCHITECTURAL HISTORIANS, <https://sah-archipedia.org/buildings/CA-01-043-8023> [<https://perma.cc/E3KC-MU8A>].

¹⁰⁹ FREDRICK LAW OLMSTED, *The Yosemite Valley and the Mariposa Big Tree Grove, in AMERICA’S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS* 5, 9 (Lary M. Dilsaver ed., 2nd ed. 2016).

pleasure for the time being but increases the subsequent capacity for happiness and the means of securing happiness.¹¹⁰

He lamented that only wealthy people had the means to enjoy the “choicest natural scenes in the country and the means of recreation connected with them.”¹¹¹ In his view, public land should be available for those of ordinary means.¹¹² He argued that present enjoyment of these parks must be tempered by “the rights of posterity” and a “duty of preservation” to future generations.¹¹³

Like Olmstead, but inspired by the Romantic notion of conservation, Muir also valued these “spectacular” settings where “something entirely different broke through in the mind” than in ordinary life.¹¹⁴ For Muir, the virtue of publicness of the park was twofold: first, to provide spaces for all people to interact with majesty and awe, which would bring them out of their ordinary lives; and second, to provide this majesty to those who were of average means and not wealthy, not merely to those who could afford access to such lands independent of public commitments.

Olmstead and Muir were not alone expressing concerns about preserving the land for public benefit against private encroachment. In 1871, J.D. Whitney, the State Geologist of California, prepared *The Yosemite Guidebook* at the direction of the Geological Survey of California for the primary purpose of calling “the attention of the public to the scenery of California.”¹¹⁵ He lamented the efforts of two individuals to claim private ownership of land within the Yosemite Valley, as well as efforts to pass bills (ultimately unsuccessfully) in the state legislature on their behalf:

What the result will be, if ever such a bill passes, it is not difficult to predict. The Yosemite Valley, instead of being held by the State for the benefit of the people, and “for public use, resort, and pleasure,” as was solemnly promised, will become the property of private individuals, and will be held and managed for private benefit and not for the public good.¹¹⁶

¹¹⁰ *Id.* at 11.

¹¹¹ *Id.* at 13.

¹¹² *Id.* at 13-14.

¹¹³ *Id.* at 17. Olmstead, *supra* note 107.

¹¹⁴ Purdy, *supra* note 43, at 1148-49.

¹¹⁵ J.D. WHITNEY, *THE YOSEMITE GUIDE-BOOK* 9 (Univ. Press: Welch, Bigelow, & Co., Cambridge, 1871) (1868), <https://quod.lib.umich.edu/m/moa/ajl3519.0001.001?view=toc> [<https://perma.cc/HBG5-BQYZ>].

¹¹⁶ *Id.* at 19-20. These men included J.M. Hutchings, who was running a small hotel on the claimed land, and James C. Lamon, who was residing on land he claimed was his. ISE, *supra* note 30, at 54. Although the legislation did not pass, Hutchings received a lease to continue operating his hotel and compensation, and the other claimant likewise received some compensation. *Id.* at 55.

He expressed concern that the Yosemite Valley might become privately developed like the areas around Niagara Falls in New York State, which even by the 1860s had been privatized to the extent that “not a single point remained in the United States from which the falls could be viewed without paying a landowner an entry fee.”¹¹⁷ Granting these two private claims could, in his view, lead to a slippery slope in which private parties could charge tolls or fees to the public to view the natural scenery, diminishing the publicness of the lands intended to be held in trust for the benefit of the people.¹¹⁸ He further lamented that if these private claims were granted, it would be impossible to deny subsequent private claims to this land that, in his view, must remain “inalienable for all time.”¹¹⁹ Thus, again, these concerns demonstrate a significant value of publicness as the prevention of exclusion and the “holdout problem” that can arise when private property rights encroach upon the public interest.

Despite these warnings, the Valley quickly became developed by commercial interests:

Under lax state management, the Yosemite Valley emerged as a crazy quilt of roads, hotels, and cabins, and pastures and pens for cattle, hogs, mules, and horses. Tilled lands supplied food for residents and visitors, and feed for livestock; irrigation dams and ditches supported agriculture; and timber operations supplied wood for construction, fencing, and heating. Amid the clutter of development stood one “luxury” hotel, the three-and-a-half-story Stoneman House, built in 1886.¹²⁰

By 1889, Muir became concerned about a different form of private action that might degrade the Valley: namely, that the lands “surrounding Yosemite Valley, which lacked government protection, were being overrun and destroyed by domestic sheep grazing.”¹²¹ This need to make these surrounding

¹¹⁷ Joseph L. Sax, *America's National Parks: Their Principles, Purposes, and Prospects*, NAT. HIST., Oct. 1976, at 57, 64; see also WHITNEY, *supra* note 115, at 20 (“As the tide of travel in the direction of this wonderful and unique locality increases, so will the vexations, restraints, and annoying charges . . . and the Yosemite Valley, instead of being a ‘joy forever,’ will become, like Niagara Falls, a gigantic institution for fleecing the public.”); Doremus, *supra* note 37, at 439 (referring to the Falls as “the epitome of crass commercialization”).

¹¹⁸ WHITNEY, *supra* note 115, at 20. This would later come to be referred to as a “holdout” problem, which is a reason to maintain property in public or government hands. See Rose, *supra* note 13, at 749-51 (discussing the anti-holdout rationale for public or government ownership or management of property in multiple contexts).

¹¹⁹ *Id.* at 21.

¹²⁰ SELLARS, *supra* note 30, at 18. See also ISE, *supra* note 30, at 71-73, 76-83.

¹²¹ *Yosemite National Park Established*, HISTORY: THIS DAY IN HISTORY, <https://www.history.com/this-day-in-history/yosemite-national-park-established> [<https://perma.cc/CNG3-PEYA>]. What is now Yosemite National Park consists of “two parts . . . the Valley, which was ceded to the state of California in 1864, and the high Sierra country surrounding the Valley,

lands public was acute because of the twin concerns of destruction and commodification—overgrazing of public lands could destroy them, as in the classic tragedy of the commons.¹²²

Muir enlisted the assistance of Robert Underwood Johnson, an “environmentalist and influential magazine editor,” and together they lobbied Congress to protect the areas surrounding the Valley by designating them as protected park lands by the United States.¹²³ On October 1, 1890, Congress did so, declaring that more than 1,500 square miles of land should be set aside; ultimately these lands became part of the consolidated Yosemite National Park.¹²⁴

After campaigns by the Sierra Club and Muir, among others, to press for recession of Yosemite Valley to the federal government, in 1905, the State of California enacted legislation granting back to the United States the protected land within the Yosemite Valley and Mariposa Big Tree Grove parks and the trusts created by Congress to be maintained “as a national park.”¹²⁵ In 1906, the United States accepted the recession of the land from the state and appropriated funds from the Treasury for the “management, protection and improvement of the Yosemite National Park.”¹²⁶ In 1912, Congress adopted an Act to acquire title to “any or all of the lands held in private ownership within the boundaries” of Yosemite National Park, offering in exchange certain “decayed or matured timber” that could easily be removed without otherwise impairing the “scenic beauty” of the park.¹²⁷

Although Congress set aside the land within the Yosemite Valley as a public trust managed by the State of California in 1864, the title of first *national* park created as such belongs to Yellowstone National Park.¹²⁸ Early

which was set aside as ‘reserved forest lands’ in 1890, a doughnut-shaped park, to which the Central Valley was added in 1906.” ISE, *supra* note 30, at 51; *cf. id.* at 55 (noting that the name “Yosemite” does not appear in the 1890 Act, and that Congress originally considered the reservation to be one of forest land). The 1890 Act “created a rather peculiar situation—a national park surrounding a neglected and abused state park—and this situation persisted for sixteen years, until 1906.” *Id.* at 58.

¹²² On the tragedy of the commons, see Hardin, *supra* note 82.

¹²³ *Yosemite National Park Established*, *supra* note 121.

¹²⁴ *Id.*

¹²⁵ Yosemite-Regranting to United States, ch. 60, 1905 Cal. Stat. 54. The state had had difficulty managing the land and protecting the wildlife. ISE, *supra* note 30, at 58-59 (discussing overgrazing, destruction of land, and loss of wildlife within the state park); *id.* at 74 (discussing recession of the park to the United States).

¹²⁶ S.J. Res. 30, 58th Cong., 33 Stat. 1286 (1905) (enacted). In 1893, it was estimated that approximately 65,000 acres within the Park were the subject of private claims for homestead and timber, among other claims, while that number was revised downward in 1898 to 53,931 acres. ISE, *supra* note 30, at 65-66.

¹²⁷ Act of Apr. 9, 1912, ch. 74, 37 Stat. 80, 80-81.

¹²⁸ 54 U.S.C. § 100101(b)(1)(a) (“[T]he National Park System began with the establishment of Yellowstone National Park in 1872”); *see also* Nagle, *supra* note 30, at 867; ISE, *supra* note 30, at 13 (“Yellowstone was really the first national park to be created, in 1872, although some do claim that distinction for Yosemite.”).

discussions highlight concerns about privatization and commodification of the park's precious resources. In 1872, Congress established a tract of land in the Territories of Montana and Wyoming near the headwaters of the Yellowstone River as "a public park or pleasuring-ground for the benefit and enjoyment of the people."¹²⁹ In the House Report that accompanied the bill, the Committee on Public Lands took pains to disclaim any potential for the land to be inhabitable, or a source of commercial revenue through mining or agriculture.¹³⁰ The Committee highlighted the importance of protecting these lands from those who would seek to profit from their natural beauty as privateers had near Niagara Falls:

Persons are now waiting for the spring to open to enter in and take possession of these remarkable curiosities, to make merchandise of these beautiful specimens, to fence in these rare wonders so as to charge visitors a fee, as is now done at Niagara Falls, for the sight of that which ought to be as free as the air or water.¹³¹

One Senator spoke in favor of the bill, contending that if the land were not set aside,

it is possible that some person may go there and plant himself right across the only path that leads to these wonders, and charge every man that passes along between the gorges of these mountains a fee of a dollar or five dollars. He may place an obstruction there, and toll may be gathered from every person who goes to see these wonders of creation.¹³²

These concerns echo the holdout problem identified by Carol Rose, in which private actors could prevent or increase the costs for members of the public to appreciate nature's splendor. The enacting legislation provided that the Secretary of the Interior had authority to make necessary rules and regulations to manage the land, to "provide for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition."¹³³

These early discussions at the time of the establishment of the parks surfaced a number of specific concerns that private or commercial interests

¹²⁹ Act of Mar. 1, 1872, ch. 24, 17 Stat. 32, 32.

¹³⁰ H.R. Rep. No. 42-26, at 1-2 (1872). The Committee further noted, "[i]f this bill fails to become a law . . . the vandals who are now waiting to enter into this wonderland will, in a single season, despoil, beyond recovery, these remarkable curiosities which have required all the cunning skill of nature thousands of years to prepare." *Id.* at 2.

¹³¹ *Id.* at 1. For other discussions of commercialization at Niagara Falls, see RUNTE, *supra* note 30, at 5-7.

¹³² ISE, *supra* note 30, at 16-17 (quoting Trumbull, CONGRESSIONAL GLOBE, Jan. 30, 1872, at 697).

¹³³ Act of Mar. 1, 1872, ch. 24, § 2, 17 Stat. 32, 33.

would (1) strip the land of its natural assets to sell them in private markets (destruction and commodification); (2) lay claims to private ownership of these wonders, and prevent members of the public from viewing them (exclusion); (3) otherwise limit the ability of the public to enjoy these aesthetic experiences by charging fees to view or enter these lands (exclusion and commodification); or (4) destroy the natural wonders through overuse, including through activities like grazing (destruction). In some sense, these concerns reflect the view that no private interest should be allowed to monopolize or exclude members of the public from enjoying their natural rights to these wonders, nor should their physical actions (removal or destruction of nature) prevent anyone from enjoying them in the present or the future.¹³⁴ The virtues of publicness of the parks are those that stand as foils to these concerns.

The creation of national parks was not merely the creation of *parks*; it was the creation of *national* parks. Between 1872 when Congress designated Yellowstone National Park, and 1916 when Congress ultimately passed the Organic Act, Congress created fourteen national parks by statute, providing similar language that these public lands were for the “benefit and enjoyment of the people.”¹³⁵ Within this time period came the presidency of Theodore Roosevelt, the President most widely associated with the conservation movement, who set aside more than 230 million acres of public lands as

¹³⁴ On the right to exclude, see sources cited *supra* note 13. On the right to destroy, see Strahilevitz, *supra* note 14.

¹³⁵ Act of Aug. 9, 1916, ch. 302, § 1, 39 Stat. 442, 442-43 (establishing Lassen Volcanic National Park); Act of Aug. 1, 1916, ch. 264, § 1, 39 Stat. 432, 432 (establishing Hawaii National Park); Act of Jan. 26, 1915, ch. 19, § 1, 38 Stat. 798, 798-800 (establishing Rocky Mountain National Park); Act of May 11, 1910, ch. 226, § 1, 36 Stat. 354, 354 (establishing Glacier National Park); Act of May 22, 1902, ch. 820, § 1, 32 Stat. 202, 202 (establishing Crater Lake National Park); Act of Mar. 2, 1899, ch. 377, § 1, 30 Stat. 993, 993-94 (establishing Mount Rainier National Park); Act of Sept. 25, 1890, ch. 926, § 1, 26 Stat. 478, 478 (establishing Sequoia National Park, later King’s Canyon); Act of Oct. 1, 1890, ch. 1262, 26 Stat. 650, 650-51 (establishing Yosemite National Park); Act of Jan. 9, 1903, ch. 63, 32 Stat. 765, 765-66 (establishing Wind Cave National Park); Act of June 29, 1906, ch. 3607, 34 Stat. 615, 616-617 (establishing Mesa Verde National Park). See generally Nagle, *supra* note 30, at 867 & n.19 (listing these enactments and also noting that “[t]hree other early national parks are no longer national parks” including Sully’s Hill National Park, Platt National Park in Oklahoma, and Mackinac Island National Park) (citing JOHN COPELAND NAGLE, LAW’S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE 102-03 (2010)). In 1970 and 1978, Congress adopted the National Park System General Authorities Act and the Redwoods Act, respectively, to update the 1916 Organic Act. National Park system General Authorities Act, Pub. L. No. 91-383, § 1, 84 Stat. 825, 825 (1970) (codified as amended at 16 U.S.C. § 1a-1 (1994) (current version at 54 U.S.C 100101(b)); Redwoods Act, Pub. L. No. 95-250, § 101(b), 92 Stat. 163, 166 (1978) (codified as amended at 16 U.S.C. § 1a-1 (1994) (current version at 54 U.S.C 100101(b)). These two statutes reaffirmed that all of the national parks, regardless of the fact that they were established with different statutes, are “united through their inter-related purposes and resources” into a single system and are to be held to the same legal standards under the Organic Act. Nagle, *supra* note 30, at 871 & nn.36-37.

national parks, national monuments, and forests during his time in office.¹³⁶ Roosevelt repeatedly spoke of his goal of civic nation-building. In his speeches to the nation, Roosevelt emphasized the importance of elevating “the public interest’ as distinct from individual, class, or sectional interests.”¹³⁷ According to Jed Purdy, Roosevelt’s “‘new nationalism’ . . . treated conservation as both a master-metaphor for wise governance and as a source of concrete policies for civic improvement.”¹³⁸

Public lands served this new nationalism, according to Roosevelt, in at least three ways.¹³⁹ The first was the most abstract but arguably the deepest: the setting aside by government of public lands (including, but not limited to the national parks) was a public statement of common purpose “transcending faction” which could “unite a divided polity.”¹⁴⁰ This was consistent with Roosevelt’s strong anti-monopolist views, such as his statement that “natural resources must be used for the benefit of all of our people, and not monopolized for the benefit of the few.”¹⁴¹ Second, Roosevelt viewed public lands as a form of “civic commons” where Americans from different walks of life could interact, and thus escape factionalism according to class.¹⁴² Roosevelt’s words about the national forests could apply with equal force to the parks: they could offer “free camping grounds for the ever-increasing numbers of men and women who have learned to find rest, health, and recreation in the splendid forests and flower-clad meadows of our

¹³⁶ *Theodore Roosevelt and Conservation*, NAT’L PARK SERV., <https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm> [<https://perma.cc/W6L5-79WA>] (last updated Nov. 16, 2017). Like John Muir, President Roosevelt’s legacy with respect to inclusion and race is not unblemished. Robin Pogrebin, *Roosevelt Statue To Be Removed From Museum of Natural History*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/21/arts/design/roosevelt-statue-to-be-removed-from-museum-of-natural-history.html> [<https://perma.cc/R8WT-EE9Q>] (discussing the museum’s removal of Roosevelt’s statue as it was marred by racist imagery and his support of the eugenics movement, but noting the renaming of a Hall within the Museum to recognize his “conservation legacy”).

¹³⁷ Purdy, *supra* note 433, at 1152.

¹³⁸ *Id.* at 1156 & nn. 109-15; see also Theodore Roosevelt, *The Strenuous Life*, Speech before the Hamilton Club (Apr. 10, 1899), reprinted in *THE STRENUOUS LIFE: ESSAYS AND ADDRESSES* 1 (1902).

¹³⁹ Purdy, *supra* note 43, at 1156-59.

¹⁴⁰ *Id.* at 1157.

¹⁴¹ *Id.* (quoting THEODORE ROOSEVELT, *The New Nationalism*, Speech at Osawatomie (Aug. 31, 1910), reprinted in *THE NEW NATIONALISM* 21 (1910)). Roosevelt identified with the conservationist approach to public lands: “Conservation means development as much as it does protection.” ROOSEVELT, *supra*. But conservation did not “recognize the right to waste [natural resources], or to rob, by wasteful use, the generations that come after us.” *Id.*

¹⁴² Purdy, *supra* note 43, at 1157-58, 1158 nn. 120-21; ROOSEVELT, *supra* note 85, at 71 (“[T]he fact remains that the only true solution of our political and social problems lies in cultivating everywhere the spirit of brotherhood, of fellow-feeling and understanding between man and man, and the willingness to treat a man as a man, which are the essential factors in American democracy as we still see it in the country districts.”).

mountains.”¹⁴³ Again, the goal was to create a nation that would transcend factional interests. Third, the national parks and other public lands would promote the development of “vigorous character” including what Purdy refers to as the “masculine virtues” that come from “natural outdoor play.”¹⁴⁴ This purpose did not necessarily relate to avoiding factionalism (and was clearly restricted at the time to boys). However, it undoubtedly promoted “civic virtue” which the state has an obligation to promote on behalf of its citizens. Thus, the publicness of the parks is necessary, at least in significant part, to create the idea of the nation of the United States. The parks stand as an expression of the nation’s values.

President Roosevelt identified how the interests of “the few” might “sacrifice[e] the future of the Nation as a whole to their own self-interest of the moment.”¹⁴⁵ Although speaking of national forests rather than the parks, he clearly identified public forest lands with the Nation itself: “These lands, because they form a National asset, are as emphatically national as the rivers which they feed, and which flow through so many States before they reach the ocean.”¹⁴⁶ Thus, public lands—which include but are not limited to the national parks—do not merely provide a space for individuals to experience wonder and awe, or quiet contemplation away from the routines of ordinary life. They both build and constitute the nation itself. This nation-building role could overcome the narrow concerns of factions and private interests.

Despite these concerns in early years about dominant or monopolistic commercial enterprise and private factions destroying these public virtues, at least some forms of commercial enterprise, like private hotel accommodations, were expressly incorporated in the acts establishing the parks. In other words, not all private commercial enterprise was originally seen as incompatible with the idea of creating national parks for the benefit of the public. The next section demonstrates this ambivalence.

C. *A Role for Private Enterprise—But Not Too Much*

While setting aside these lands for public benefit, Congress recognized that accommodations were required in order to bring visitors to the parks. Only if members of the public visited the parks would constituencies develop to support their continued operation and the creation of more parks.

¹⁴³ Theodore Roosevelt, President of U.S., State of the Union Address (Dec. 3, 1901), in STATE OF THE UNION ADDRESSES OF THEODORE ROOSEVELT (2004) (ebook) <https://www.gutenberg.org/files/5032/5032-h/5032-h.htm#dec1901> [<https://perma.cc/SEH9-6WX3>].

¹⁴⁴ Purdy, *supra* note 43, at 1158-59.

¹⁴⁵ Theodore Roosevelt, President of U.S., State of the Union Address (Dec. 3, 1907), in STATE OF THE UNION ADDRESSES OF THEODORE ROOSEVELT, *supra* note 143.

¹⁴⁶ *Id.*

Accordingly, many of the individual statutes creating national parks, as well as the 1916 Organic Act itself, permitted the leasing of land to private third parties to erect accommodations for visitors.¹⁴⁷ Congress could have directed the Department of the Interior to create such accommodations under government ownership and control. However, it did not. Thus, from their inception, the national parks—these emblems of publicness—acknowledged some role for private enterprise.

1. The Early Years

In the Yosemite Valley and what ultimately became Yosemite National Park, small hotel accommodations were constructed beginning in 1855.¹⁴⁸ Beginning in 1878, privately run campgrounds were also being developed in the park.¹⁴⁹ In 1889, the Curry family, whose interests later were consolidated into the Yosemite Park & Curry Company,¹⁵⁰ developed privately run campsites and other services for visitors.¹⁵¹ They established entertainment traditions for park visitors like the popular “firefall” attraction, which involved pushing burning embers over Glacier Point and creating a visible cascade of fire after dark.¹⁵² The Curry family was so successful that they achieved “practical monopoly” status over tourist facilities in Yosemite by the time they merged with another entity to form the Yosemite Park & Curry Company.¹⁵³

In 1872, the legislation that established Yellowstone National Park also provided expressly for the Secretary of the Interior to enter into leases of up to ten years for “small parcels of ground, at such places in said park as shall

¹⁴⁷ See, e.g., Act of Mar. 1, 1872, ch. 24, § 2 17 Stat. 32, 33 (authorizing the Secretary of the Interior to lease “small parcels of ground” for up to ten years, and to use any revenue collected to provide for management of the park and the “construction of roads and bridle-paths therein” in Yellowstone); Act of Apr. 20, 1832, ch. 70, § 2 4 Stat. at Large 505, 505 (authorizing the governor in the Territory of Arkansas to “let out or lease said springs” for up to a five-year term, with the rents and profits being applied “to the opening and improving” of roads in the Territory). Similar language appears in the other enacting statutes. See Nagle, *supra* note 30, at 868 & n.20 (citing similar language in establishment acts of Lassen Volcanic National Park, Hawaii National Park, Glacier National Park, Mount Rainier National Park, Wind Cave National Park, Crater Lake National Park, and Sequoia National Park).

¹⁴⁸ See ISE, *supra* note 30, at 80-81 (describing the Lower Hotel, Black’s, the Upper Hotel, and the Hutchings Hotel, among others).

¹⁴⁹ *Id.* at 81.

¹⁵⁰ Frank Clifford, *Curry Co. Turns over Yosemite Concessions*, L.A. TIMES (Oct. 2, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-10-02-mn-41470-story.html> [<https://perma.cc/8LP9-PH86>]; *Yosemite Park & Curry Company Collection*, ONLINE ARCHIVE OF CAL., <https://oac.cdlib.org/findaid/ark:/13030/c8n302f3/> [<https://perma.cc/4HZL-2B8H>].

¹⁵¹ ISE, *supra* note 30, at 82.

¹⁵² *Id.*

¹⁵³ *Id.*

require the erection of buildings for the accommodation of visitors” with “all of the proceeds” from these leases going to fund the construction of roads and bridle paths” within the park.¹⁵⁴ As a result of the short lease terms, in the early years, many private entrepreneurs opted to seek leases for “camps and transportation facilities” rather than for hotels, as these movable assets could be “taken out of the park” if a lease was not renewed.¹⁵⁵ Even before 1872, several accommodations had been built in the area, even though the owners lacked “right or title,” to the land.¹⁵⁶

This role for private enterprise was limited by statute, however. In 1883 and 1894, in response to concerns that had arisen in the parks about the creation of a quasi-monopoly in a private concession agreement,¹⁵⁷ Congress more narrowly defined the potential lease terms by setting maximum acreage limits, prohibiting the leasing of natural “objects of curiosity or interest” like the geysers themselves, and prohibiting the exclusion of members of the public from free access to these natural wonders.¹⁵⁸

Some of the most prominent business firms of their day—the railroads—were also early supporters of and beneficiaries of the parks. In 1883, the Northern Pacific Railroad entered into a lease agreement with the Interior Department, having recognized the benefit to its railroad business of having a wondrous place to visit at a “reasonable” price.¹⁵⁹ Other concessioners developed permanent tent campgrounds with other services, and by 1910, \$1

¹⁵⁴ Act of Mar. 1, 1872, ch. 24, § 2, 17 Stat. 17, 32, 33. There was a widespread belief at the time that the park would be “self-supporting, that concessioners would pay as rents enough to provide for administration and protection” of the park and that thus, Congressional appropriations would not be necessary. However, this turned out not to be the case. ISE, *supra* note 30, at 20. Beginning in 1878, Congress appropriated some funds for the “protection, preservation and improvement of Yellowstone Park.” *Id.* at 29.

¹⁵⁵ ISE, *supra* note 30, at 32. The length of the contract term matters a great deal for the question of investment in immovable facilities. *Id.* at 612-13. Too short a term will discourage the construction of facilities with a long lifespan, as the amortization period is too short. In addition, short-term leases raise questions over how to compensate the concessioner if the concession contract is not renewed and some other entity is allowed to use the facilities under a new contract. *Id.*

¹⁵⁶ *Id.* at 33.

¹⁵⁷ See *id.* at 35-39 (discussing the cancelled Hobart-Douglas-Hatch quasi-monopoly lease, and the acts of 1883 and 1894 that defined the terms of leases for hotel accommodations).

¹⁵⁸ *Id.* at 39.

¹⁵⁹ *Id.*; see also *Modernizing the National Park Service Concession Program: Hearing Before the Subcomm. on the Interior of the H. Comm. on Oversight & Gov't Reform*, 114th Cong. 6 (2015) (statement of Lena McDowall, Chief Fin. Officer, Nat'l Park Serv., Dep't of the Interior) (“Concessions in our national parks predate the formation of the National Park Service. Most of the large concessions operations in our Western parks were begun in the late 1800s by the large railroads or companies looking to serve the growing demands of travelers from the eastern United States.”). In 1906, Congress further amended the law to permit concessioners to lease up to 200 acres of land, and to place mortgages on their properties. ISE, *supra* note 30, at 39.

million had been invested in Yellowstone. By 1912, concessioners had earned \$1 million in profits.¹⁶⁰

2. The Organic Act

When Congress established the National Park System in 1916, Director Stephen Mather largely sought to consolidate private concessions into a “regulated monopoly.”¹⁶¹ The Organic Act recognized that accommodations and other infrastructure would be needed to bring members of the public to enjoy and use the parks. However, these leases and permits to operate accommodations were limited in time and in other ways to ensure that the public would always have free access to the parks. The Act therefore authorized the Director of the NPS to

grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations herein provided for, but for periods not exceeding twenty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public¹⁶²

In the absence of adequate accommodations, it would be less likely that people would visit the parks, and visitors were desirable as they would create a natural constituency for the parks over time.¹⁶³ This authority was limited only by the term limit and by the proviso that “no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public.”¹⁶⁴

As John Ise points out in his history of the national parks, Congress could have opted for a different mix of public and private for the construction and operation of accommodations.¹⁶⁵ Ise concludes that because Congress failed to appropriate any money for construction and operation of facilities, in the early years, private construction was often the only option.¹⁶⁶ Early experiences in the parks demonstrated that in the absence of regulated

¹⁶⁰ ISE, *supra* note 30, at 40.

¹⁶¹ *Id.* at 82. In fact, while private enterprise was the norm, there were some government owned-and-operated accommodations in Yosemite, the Petrified Forest, and at Mount McKinley (now Denali), among others. *Id.* at 614.

¹⁶² Act of Aug. 25, 1916, ch. 408 § 3, 39 Stat. 535, 535. In 1958, Congress raised this to a maximum of 30 years. Act of May 29, 1958, Pub. L. No. 85-434, 72 Stat. 152 (codified at 16 U.S.C. § 3) (repealed and recodified as amended at 54 U.S.C. § 102101).

¹⁶³ *See supra* note 8 and accompanying text.

¹⁶⁴ § 3, 39 Stat. at 535.

¹⁶⁵ ISE, *supra* note 30, at 606.

¹⁶⁶ *Id.*

monopolies, competing concessioners sought to provide everything from transportation to lodging, but were unable to provide “reliable” service.¹⁶⁷ In contrast to those early years, Ise noted that there is now a great deal of competition between services provided inside the parks and those provided outside park boundaries by a more competitive market, especially now that cars allow people to travel easily across the boundary line.¹⁶⁸

Other forms of private enterprise have long existed within federal public lands, including the national parks, and have raised similar concerns regarding the appropriate balance between use and preservation. As Bruce Huber has pointed out, private claims to public lands include grazing rights, privately owned cabins, and mineral rights, among others.¹⁶⁹ Some of these private claims are held by individuals, and others are held by business firms. Huber demonstrated that such private claims to public lands have been surprisingly durable, even claims that potentially interfere with public access or that are consumptive, like grazing.¹⁷⁰ The forms of private activity that Huber focused on in his study fall into these areas of traditional concern. For example, some of these private claims are extractive and commodify the land: grazing and mining both remove something from the land, in some cases in exchange for a fee. Some of these forms of privatization can lead to the exclusion of the public. For example, building a private cabin on public land precludes members of the public from accessing or using the space.

This narrative demonstrates that while early advocates and creators of these parks feared encroachment of private enterprise, they nonetheless had to accommodate some private enterprise within the parks. Even in the earliest years, it was clear that limits needed to be set to ensure that what was meant for the use and enjoyment of the public would not be transformed into private property with members of the public excluded from the parks’ use and enjoyment.

There are, in addition to concessions, other private corporate actions that do not harm or extract anything from the parks, nor do they exclude members of the public from their use. Rather, they embody a different form of commercial benefit—commercial benefit through association with the national parks’ goodwill. It is to building out the contours of this phenomenon that the Article now turns.

¹⁶⁷ *Id.* at 607-08. Other concerns, for example, that tourists could not in their short visits properly inform themselves regarding the differences between two firms providing services, *id.* at 608, are likely unfounded in the internet era.

¹⁶⁸ *Id.* at 608-09.

¹⁶⁹ Huber, *supra* note 7.

¹⁷⁰ *Id.* at 1002, 1005, 1017.

III. NON-EXTRACTIVE CORPORATE ACTIVITY WITHIN THE PARKS

This Part is both descriptive and analytical. To add to the historical case study of concessions in the last Part, it offers two more recent examples that are shades of the same phenomenon—non-extractive corporate activities within the national parks that impose no physical harm and do not exclude members of the public, yet nonetheless raise objections regarding the appropriate line between public and private. These are corporate concessioners’ attempts to own trademarks to significant attractions within the parks and corporate philanthropy/cause-related marketing. The next Part will then take a deep dive into the normative questions regarding the benefits to business firms of these relationships and the potential impact—including both benefits and harms—on the parks.

A. *A Hotel by Any Other Name: Ownership of Intangible Property*

It is worth focusing on a controversy in which non-extractive corporate action within the parks nonetheless raised serious concerns about the appropriate boundary between public and private. That controversy is a recently settled dispute over who owned the trademarks to the names of historic landmarked properties within Yosemite National Park. Unlike the concerns about privatization a century ago, in this case, the private concessioner did not claim ownership to any natural wonders, or even to the hotels it operated. Such claims, if validated, would have raised the concerns that were at the forefront of the early park supporters’ minds: the ability of private actors to exclude members of the public or to raise fees and tolls to make entry to the parks more expensive, the potential to physically harm the parks, or the practice of removing and commodifying something within the parks for sale in a market. Instead, a concessioner claimed ownership over something intangible—the famous names of several historic hotels and properties, as well as the name Yosemite National Park itself. These claims of ownership over intangible property raised significant concerns about private encroachment on the publicness of the parks.

On September 17, 2015, Plaintiff DNC Parks & Resorts at Yosemite, Inc. (“Delaware North”) filed suit against the National Park Service (NPS), seeking damages under the Tucker Act¹⁷¹ resulting from an alleged breach of contract.¹⁷² The gravamen of Delaware North’s complaint related to the NPS’s

¹⁷¹ Tucker Act, 28 U.S.C. § 1491 (waiving the United States Government’s sovereign immunity with respect to certain claims).

¹⁷² Complaint ¶ 1, DNC Parks & Resorts at Yosemite, Inc. v. United States, No. 1:15-cv-01034-PEC (Fed. Cl. dismissed Aug. 30, 2019) [hereinafter DNC Complaint]; First Amended Complaint

conducting of a competitive bidding process for a new concession contract at Yosemite. When the NPS ultimately awarded that contract to a new concessioner, Aramark Hospitality (a subsidiary of the Aramark Corporation), Delaware North alleged that the NPS failed to insist that Aramark pay the full, fair market value of Delaware North's intangible property, including its intellectual property.¹⁷³ According to Delaware North, this intellectual property included trademarks it held in the names of several historic landmarked properties within Yosemite, including the famed Ahwahnee and Wawona hotels, as well as certain specific logos and designs relating to sites within Yosemite.¹⁷⁴

Delaware North had been awarded the concession contract with the NPS in 1993. Previously, the contract had been held by the Yosemite Park & Curry Co. (YP&CC), which held a near-monopoly on the concessions within Yosemite National Park since the early 1900s. In 1991, MCA, the parent company of the Yosemite Park & Curry Company, was acquired by the Japanese firm Matsushita.¹⁷⁵ No law expressly prohibited foreign ownership of a concessioner in the national parks. However, the Department of the Interior and the NPS, along with the National Park Foundation (NPF), agreed that the NPF would enter into an agreement with MCA to purchase 100% of MCA's stock in YP&CC for \$49.5 million plus interest, to be paid from revenues generated by concessions operations beginning in 1993.¹⁷⁶ According to the Secretary of the Interior, the goal of the agreement was to acquire and extinguish the possessory interest held by MCA/YP&CC, so that there would be no preferential right of renewal of the concession contract and new bidders could bid on an even playing field.¹⁷⁷ In 1992, the NPS bid out the contract to run the concession, including provisions in the request for proposals that the successor concessioner would acquire all of YP&CC's stock.¹⁷⁸ Delaware North won the contract. Relevant to this litigation, in 1988,

¶¶ 1-2, 13, 20, 25-33, *DNC Parks & Resorts at Yosemite, Inc. v. United States*, No. 1:15-cv-0-1034-PEC (Fed. Cl. dismissed Aug. 30, 2019) [hereinafter *DNC Amended Complaint*].

¹⁷³ *DNC Complaint*, *supra* note 172, ¶¶ 1, 19, 26.

¹⁷⁴ *DNC Amended Complaint*, *supra* note 172, ¶¶ 13, 20, 25-33.

¹⁷⁵ See *Proposed Sale of the Yosemite Park & Curry Co.: Hearing Before the Subcomm. on Pub. Lands, Nat'l Parks, and Forests of the Comm. on Energy and Nat. Res.*, 102d Cong. 7 (1991) (statement of Robert D. Hadl, Vice President and Gen. Couns., MCA, Inc.).

¹⁷⁶ *Proposed Sale of the Yosemite Park & Curry Co.: Hearing Before the Subcomm. on Pub. Lands, Nat'l Parks, and Forests of the Comm. on Energy and Nat. Res.*, 102d Cong. 4-5 (1991) (statement of Hon. Manuel Lujan, Jr., Sec'y, Dep't of the Interior, Accompanied By James Ridenour, Dir., Nat'l Park Serv.).

¹⁷⁷ *Proposed Sale of the Yosemite Park & Curry Co.: Hearing Before the Subcomm. on Pub. Lands, Nat'l Parks, and Forests of the Comm. on Energy and Nat. Res.*, 102d Cong. 22 (1991) (statement of Leonard L. Silverstein, Couns., Nat'l Park Found.).

¹⁷⁸ Delaware North alleged in its complaint that it purchased not stock but the assets of the YP&CC pursuant to contract CC-YOSE004-93. *DNC Complaint*, *supra* note 172, ¶¶ 5, 13.

YP&CC had filed a trademark application for “The Ahwahnee,” and in 2003, the USPTO registered that the trademark had been conveyed from YP&CC to Delaware North.¹⁷⁹

A brief explanation of the concession law that governed the contract is in order to help understand Delaware North’s complaint. In 1965, Congress adopted the National Park System Concessions Policy Act (Concessions Policy Act), to modernize the relationship between concessioners and the NPS.¹⁸⁰ The Concessions Policy Act declared:

the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused.¹⁸¹

Thus any concessions were to be “limited to those that are necessary and appropriate for public use and enjoyment” of the parks, and that are “consistent to the highest practicable degree with the preservation and conservation of the areas.”¹⁸²

While declaring its intent to protect the parks against damage, Congress nonetheless acknowledged the need for concessioners to “realize a profit on [their] operation as a whole commensurate with the capital invested and the obligations assumed.”¹⁸³ Accordingly, the Concessions Policy Act of 1965 gave significant privileges to concessioners. Principal among these privileges were a preferential right of renewal and a possessory interest in improvements.¹⁸⁴

¹⁷⁹ Amended Answer to Plaintiff’s First Amended Complaint ¶ 167, DNC Parks & Resorts at Yosemite, Inc. v. United States of America, No. 15-cv-1034 (Fed. Cl. 2018) [hereinafter Amended Answer to DNC Amended Complaint].

¹⁸⁰ Act of Oct. 9, 1965, Pub. L. No. 89-249, 79 Stat. 969, *repealed by* Act of Nov. 13, 1998, Pub. L. No. 105-391, § 415(a), 112 Stat. 3497, 3515 (1998).

¹⁸¹ *Id.* § 1, at 969. These sections were editorially transferred as a note under 54 U.S.C. § 101912, by Pub. L. No. 113-287, 128 Stat. 3094 (2014). Doremus, *supra* note 37, at 470 n.349.

¹⁸² § 1, 79 Stat. at 969.

¹⁸³ *Id.* § 3, at 969. The Act stated that concessioners needed protection “against loss of investment in structures, fixtures, improvements, equipment, supplies, and other tangible property provided by him for the purposes of the contract.” *Id.*

¹⁸⁴ *Id.* § 4, at 970. The Act permitted the Secretary to

authorize the operation of all accommodations, facilities, and services for visitors, or of all such accommodations, facilities, and services of generally similar character, in each area, or portion thereof [of a park] by one responsible concessioner and may grant to such concessioner a preferential right to provide such new or additional accommodations, facilities, or services as the Secretary may consider necessary or desirable for the accommodation and convenience of the public.

Id.

The purpose of the preferential right of renewal was to provide continuity of service and to encourage long-term investment in the facilities by those concessioners who satisfactorily performed their obligations under prior contracts.¹⁸⁵ If the Secretary chose to extend a contract, he was required to “give reasonable public notice of his intention so to do” and to consider other proposals, but the preference remained.¹⁸⁶ In addition, the possessory interest provisions made clear that if a concessioner “acquired or constructed . . . any structure, fixture, or improvement” within a park, the concessioner gained a “possessory interest therein, which shall consist of all incidents of ownership except legal title,” which vested in the United States.¹⁸⁷ This possessory interest was so strong that it would “not be extinguished by the expiration or other termination of the contract” and, if the improvement was “taken for public use,” required the United States to pay “just compensation.”¹⁸⁸

In reaction to criticisms that the 1965 Act gave too much power and profit to concessioners, in 1998, Congress enacted the National Park Service Concessions Management Improvement Act.¹⁸⁹ In that Act, Congress declared that

the preservation and conservation of System unit resources and values requires that public accommodations, facilities, and services that have to be provided within those System units should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that—

- (1) visitation will not unduly impair those resources and values; and
- (2) development of public accommodations, facilities, and services within System units can best be limited to locations that are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the System units.¹⁹⁰

Congress further declared that accommodations “shall be limited” to those that are “necessary and appropriate” for public use and enjoyment and that are “consistent to the highest practicable degree with the preservation and conservation of the resources and values” of the park.¹⁹¹

¹⁸⁵ *Id.* § 5, at 970.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* § 6, at 970.

¹⁸⁸ *Id.* The compensation would be in the amount determined by a formula set forth in the Act. *Id.* at 970-71.

¹⁸⁹ National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497 (codified at 16 U.S.C. § 5901).

¹⁹⁰ National Park Service Concessions Management Improvement Act of 1998, Pub. L. No. 105-391, § 402(a), 112 Stat. 3503, 3503 (codified at 16 U.S.C. § 5951).

¹⁹¹ *Id.* § 402(b), at 3504.

The 1998 Act, which remains in effect, expressly requires competitive selection of contractors and requires public solicitation of proposals.¹⁹² The Act prohibits the Secretary from granting a preferential right of renewal,¹⁹³ except for very small outfitter and guide concession contracts resulting in gross annual receipts of less than \$500,000.¹⁹⁴ The Act clarifies that a preferential right of renewal in such cases means only that the existing concessioner has the opportunity to “match the terms and conditions of any competing proposal” that the Secretary has determined to be the “best proposal” under criteria set forth in the statute.¹⁹⁵ In addition, the NPS must now publicly solicit proposals for concession contracts. It is required to select the best proposal that meets the objectives of “protecting, conserving, and preserving resources of the System unit” and providing appropriate facilities at “reasonable rates,” taking into account the experience and financial capability of the entity submitting a proposal, as well as the subordinate consideration of the fees to be received by the United States.¹⁹⁶ The Act further limits the term of such concessions contracts from 30 years to a general rule of 10 years or less, but up to 20 years if the longer term is needed for the “required construction of capital improvements.”¹⁹⁷

Relevant to this litigation, the 1998 Act replaced concessioners’ “possessory interest” and its valuation formula with a “leasehold surrender interest” and a more straightforward valuation formula.¹⁹⁸ The leasehold surrender interest gives the concessioner “a right to compensation for the capital improvement to the extent of the value of the concessioner’s leasehold surrender interest,” which would be determined by a formula set forth in the statute.¹⁹⁹ However, title to any capital improvements in the National Park System “shall be vested in the United States.”²⁰⁰ The Act created a National Park Service Concessions Management Advisory Board,²⁰¹ and provides rules for approval of fees and rates to be charged by the concessioners.²⁰² However, legacy contracts entered into prior to 1998 remain governed by certain

¹⁹² *Id.* § 403, at 3504. One exception to the public solicitation requirement is for temporary contracts or extensions of 3 years or less to “avoid interruption of services,” after the Secretary has taken reasonable steps to avoid interruption of services. *Id.* § 403(11), at 3507-08.

¹⁹³ *Id.* § 403(7), (9), at 3506-07.

¹⁹⁴ *Id.* § 403(8), at 3506-07.

¹⁹⁵ *See id.* § 403(5), (7)(c), at 3505-06 (listing criteria for “best proposal”).

¹⁹⁶ 54 U.S.C. § 101913(1)-(5).

¹⁹⁷ § 404, 112 Stat. at 3508. *See supra* note 161 (noting that in 1958, the term of concession contracts was extended to a period of up to 30 years).

¹⁹⁸ § 405, 112 Stat. at 3508-10.

¹⁹⁹ *Id.* § 405(a)(1), (3), at 3508.

²⁰⁰ *Id.* § 405(d), at 3510.

²⁰¹ *Id.* § 409, at 3512-14.

²⁰² *Id.* §§ 406-407, at 3510-12.

provisions of the 1965 Act in certain circumstances, including those relating to the possessory interest.²⁰³

Delaware North thus asserted that the trademarks were “intangible property” in which it held a possessory interest, that it had been required to purchase this intangible property when it took over as concessioner from YP&CC, and that it was thus entitled to compensation from its successor.²⁰⁴ It valued the trademarks and other intangible property at “no less than \$44 million.”²⁰⁵

In response, the NPS alleged that Delaware North did not in fact own these trademarks and that Delaware North had misled the United States Patent and Trademark Office (USPTO) in applying for the marks in the first place. Specifically, in its responses to the Complaint and First Amended Complaint, the NPS asserted that at Yosemite National Park, “all of the hotels, restaurants and recreational infrastructure, known as Concession Facilities, are owned by the United States,” an arrangement that spares the private concessioners from paying property taxes.²⁰⁶ The NPS asserted that in its 1992/93 proposal for a concession contract, Delaware North notified the NPS of its intention to develop a “Yosemite National Park logo” which would be trademarked, and that Delaware North represented that it “would go forward with the program only with full [National Park Foundation] approval.”²⁰⁷ The NPS alleged, however, that Delaware North “never sought approval” from it or from the National Park Foundation²⁰⁸ with respect to its proposed trademarks “or even advised the NPS of the program directly.”²⁰⁹ Instead, according to the NPS:

in 2002, without providing notice to NPS of its intent to do so, Delaware North filed applications with the United States Patent and Trademark Office (USPTO) to register several trademarks related to properties owned by the United States at Yosemite. These included applications to register trademarks for the phrase “Yosemite National Park,” and for the names of iconic hotels

²⁰³ See 54 U.S.C. § 101915(c) (governing contracts entered into prior to Nov. 13, 1998, and listing specific rules depending upon whether an existing concessioner is awarded a new contract or whether the new contract goes to a new concessioner); 54 U.S.C. § 101915(e) (making clear that title to any improvements vests in the United States).

²⁰⁴ DNC Amended Complaint, *supra* note 172, ¶¶ 10-33.

²⁰⁵ *Id.* ¶ 34.

²⁰⁶ Amended Answer to DNC Amended Complaint, *supra* note 179, ¶ 154-55. All of the allegations in the various complaints and responses thereto are merely allegations.

²⁰⁷ *Id.* ¶ 156.

²⁰⁸ The National Park Foundation is the official charitable partner of the National Park Service, which not only accepts charitable contributions, but also manages licensing agreements for the NPS logos. *Become a Corporate Partner, Licensing, NAT'L PARK FOUND.*, <https://www.nationalparks.org/support/become-corporate-partner> [<https://perma.cc/5KQR-6YJS>].

²⁰⁹ Amended Answer to DNC Amended Complaint, *supra* note 179, ¶ 156.

and recreation areas, including “The Ahwahnee,” “Wawona,” “Yosemite Lodge,” “Badger Pass,” and “Curry Village.”²¹⁰

The NPS noted that “Ahwahnee” is the name of the “historic hotel commissioned by the NPS in 1925–1927 to accommodate tourism in Yosemite National Park,” and that the hotel was designated as a National Historic Landmark in 1987.²¹¹ The Wawona Hotel was built in 1876, and renamed “Wawona” in 1883.²¹² The Wawona was designated a National Historic Landmark in 1987 as well.²¹³ Curry Village is a “historic tent and rustic lodging facility” in Yosemite that “carries the namesake of the original concessioners of the facility, David Curry and Jenny Foster Curry.”²¹⁴ The name of the village changed from “Camp Curry” to “Curry Village” in 1970 and the facilities were added to the National Register of Historic Places in 1979.²¹⁵ Badger Pass is a ski area within Yosemite National Park, but is not a historic landmark.²¹⁶ At each of these facilities, commercial services, including lodging, food and beverage, and related services, are provided to tourists by third-party private concessioners operating “under contract with the NPS.”²¹⁷

In perhaps its greatest show of chutzpah, in 2002, Delaware North applied to the USPTO to trademark the name “Yosemite National Park” itself.²¹⁸ Several months later, the USPTO rejected Delaware North’s application “in part, because the trademark would have presented a false association between Delaware North and the NPS.”²¹⁹ The examiner determined that “‘Yosemite National Park’ identifies the National Park Service, and Yosemite National Park ‘is an extremely famous national park.’”²²⁰ The NPS answer alleged that to counter this conclusion of a false association, Delaware North submitted three pages of its concession contract with the NPS, while redacting text demonstrating both the NPS’s control over merchandise and services within the Park, as well as the limited lifetime of the concession contract itself.²²¹

²¹⁰ *Id.* ¶ 157.

²¹¹ *Id.* ¶ 158.

²¹² *Id.* ¶ 160.

²¹³ *Id.*

²¹⁴ *Id.* ¶ 159.

²¹⁵ *Id.*

²¹⁶ *Id.* ¶ 161.

²¹⁷ *Id.* ¶¶ 158–61.

²¹⁸ *Id.* ¶ 162.

²¹⁹ *Id.* ¶ 163.

²²⁰ *Id.*

²²¹ *Id.* ¶¶ 164–65.

Subsequently, the USPTO “reversed its earlier ruling rejecting [Delaware North]’s petition” for this trademark.²²²

While the litigation was pending, Scott Gediman, the NPS Assistant Superintendent for Public and Legislative Affairs stated to the press, “[w]e feel Half Dome and El Capitan and the Ahwahnee Hotel (and other trademarked names at Yosemite) are part of the national park’s fabric. We feel those names are inextricably linked with Yosemite . . . and ultimately belong to the American people.”²²³ Notwithstanding this statement, the NPS temporarily changed the names of the properties at issue in the litigation in Yosemite National Park.²²⁴ During the pendency of the litigation, the NPS renamed the Wawona Hotel the “Big Trees Lodge” and the Ahwahnee Hotel the “Majestic Yosemite Hotel.” Curry Village became “Half Dome Village,” and Badger Pass Ski Area became the “Yosemite Ski & Snowboard Area.”²²⁵ The NPS contended that it did this to avoid any claim that it was infringing upon the disputed trademarks until the matter was resolved.²²⁶ Delaware North alleged, in contrast, that the NPS had “devised and implemented a plan to change the iconic names of properties in Yosemite” in order to “drive down the value” of the trademarks and to “create a public outcry that would force [Delaware North] to relinquish” its intangible property at less than fair market value.²²⁷

Indeed, a public outcry did follow these name changes.²²⁸ The NPS changed the names suddenly and without warning. In some cases, the iconic names were simply covered over with tape.²²⁹ Guests at the hotels reportedly removed some of the tape in “protest.”²³⁰ The *Washington Post* reported that while anywhere else this would be a simple trademark dispute, in Yosemite “it’s being perceived as an affront to the entire point of preserving nature for public use.”²³¹ Alfred Runte, historian of the park, commented, “Delaware

²²² *Id.* ¶ 166. During the pendency of the lawsuit, the NPS filed a petition to cancel Delaware North’s registrations for these trademarks. *Id.* ¶ 208. The USPTO upheld Delaware North’s motion to stay the proceedings until the Tucker Act litigation before the Court of Federal Claims was resolved. *Id.* ¶ 212.

²²³ James Lucas, *The Yosemite Trademark Dispute Explained*, CLIMBING (Mar. 16, 2016), <https://www.climbing.com/news/the-yosemite-name-dispute-explained/> [<https://perma.cc/BGY4-TEQK>].

²²⁴ DNC Amended Complaint, *supra* note 172, ¶¶ 10-33.

²²⁵ Robin Abcarian, *California Journal: Yosemite’s Big Switch to New Place Names? Park Visitors Would Love a Switchback*, L.A. TIMES (Mar. 4, 2016, 2:30 AM), <https://www.latimes.com/local/abcarian/la-me-0304-abcarian-yosemite-ahwahnee-20160304-column.html> [<https://perma.cc/35AG-YGZV>].

²²⁶ Amended Answer to DNC Amended Complaint, *supra* note 179, ¶ 69.

²²⁷ DNC Amended Complaint, *supra* note 224, ¶ 68.

²²⁸ Abcarian, *supra* note 225.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Kaplan, *supra* note 18.

North has seen a way to create a poison pill to discourage other would-be bidders,” and called efforts to trademark the historic names “ludicrous.”²³²

Ultimately, in 2019, the parties settled the lawsuit.²³³ Under the terms of the settlement, the NPS paid Delaware North approximately \$3.84 million and Aramark paid \$8.16 million for its intangible property.²³⁴ Aramark was permitted to use the historic names during the pendency of its concession contract, and at the end of the concession contract, the names would revert to the full control of the NPS.²³⁵ Future concession agreements will make clear that private firms cannot own the trademarks or names of features of the parks.²³⁶ Upon the announcement of the settlement, Gediman stated: “I’ve said from literally Day One that these names belong with these places, and ultimately belong to the American people.”²³⁷ When the tape and tarps were finally removed to reveal the original names after the settlement was announced, according to Gediman, “[p]eople were crying.”²³⁸

The irony, of course, is that while members of the public were outraged at the idea that a private corporation could “own” the name of a historic landmarked property in a national park, these hotels were built and run by private companies for their entire lifespan. The Ahwahnee Hotel was built between 1925 and 1927 by the Yosemite Park & Curry Company.²³⁹ In the 1986 Nomination Form to place the Ahwahnee Hotel on the National Register of Historic Places, the Architectural Historian of the National Park Service, Southwest Region,²⁴⁰ classified the building as privately owned, and listed the owner of the property as the Yosemite Park & Curry Company.²⁴¹

²³² Kurtis Alexander, *Names of Yosemite’s Sacred Sites Threatened by Trademark Spat*, SFGATE (Jan. 2, 2015, 9:45 AM), <https://www.sfgate.com/bayarea/article/Names-of-Yosemite-s-sacred-sites-threatened-by-5989558.php> [<https://perma.cc/Y8S7-Q3LG>].

²³³ Stipulation of Dismissal, *DNC Parks & Resorts at Yosemite, Inc. v. United States*, No. 15-1034 (Fed. Cl. July 15, 2019); *Lawsuit Settled Between National Park Service, DNC Parks and Resorts, and Yosemite Hospitality, LLC, over Trademarks and Service Marks*, NAT’L PARK SERV.: OFF. OF COMMC’N (July 15, 2019), <https://www.nps.gov/orgs/1207/lawsuit-settled-between-national-park-service-dnc-parks-and-resorts-and-yosemite-hospitality-llc-over-trademarks-and-service-marks.htm> [<https://perma.cc/ACS7-YTLH>].

²³⁴ Merrit Kennedy, *Yosemite Hotels Get Their Historic Names Back After Trademark Dispute*, NPR (July 16, 2019, 3:17 AM), <https://www.npr.org/2019/07/16/742081777/yosemite-hotels-get-their-historic-names-back-after-trademark-dispute> [<https://perma.cc/SDH7-HUZQ>].

²³⁵ *Id.*

²³⁶ Alex Wigglesworth, *Yosemite to Restore Names to Historic Attractions under \$12 Million Settlement*, L.A. TIMES (July 15, 2019, 5:13 PM), <https://www.latimes.com/local/lanow/la-me-ln-yosemite-national-park-trademark-lawsuit-settled-20190715-story.html> [<https://perma.cc/SWM8-W3AK>].

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Laura Soulliere Harrison, Nat’s Park Serv., National Register of Historic Places Inventory—Nomination Form: The Ahwahnee Hotel at 3 (1986) (on file with author).

²⁴⁰ *Id.* at 4.

²⁴¹ *Id.* at 1.

Despite this legal statement regarding the hotel's ownership, the Historic Landmark application form concludes by stating

Perhaps more important than the list of dignitaries and famous people who have spent time in the Ahwahnee is the hotel's place as the heart of the aesthetic idea of Yosemite. The magnificent scenery of the valley is enhanced by the building's artful contributions to the ambience of the Yosemite experience.²⁴²

Over the years, the hotel became identified with the publicness of Yosemite itself.

In 2014, while this dispute was brewing, Congress amended the law to make clear that, notwithstanding trademark law, buildings and structures “on or eligible for inclusion on the National Register” or otherwise having landmark status may “retain the name historically associated with the building or structure.”²⁴³ The prior version of this statute, which was in effect from 2000 to 2014, had not made clear that this ability to retain the name was “notwithstanding . . . the Trademark Act.”²⁴⁴ The settlement likewise made clear that private concessioners could not own trademarks to historic names of features within the parks going forward, and that efforts to seek trademarks without permission from the NPS would result in the concessioner being barred from future government contracts.²⁴⁵

Concerned about this dispute over landmarked properties in Yosemite, in 2016, the State of California adopted analogous legislation to address this issue going forward. The California Heritage Protection Act, AB 2249, prohibits concessioners in the state parks from registering trademarks in historic place names and requires any concessioner who seeks to do so to

²⁴² *Id.* at 8-9.

²⁴³ 54 U.S.C. § 302106 (“Notwithstanding section 43(c) of the Act of July 5, 1946 (known as the Trademark Act of 1946) (15 U.S.C. 1125(c)), buildings and structures on or eligible for inclusion on the National Register (either individually or as part of a historic district), or designated as an individual landmark or as a contributing building in a historic district by a unit of State or local government, may retain the name historically associated with the building or structure.”).

²⁴⁴ Compare 54 U.S.C. § 302106 (effective Dec. 19, 2014), with 16 U.S.C. § 470a (effective May 26, 2000 to Dec. 18, 2014).

²⁴⁵ See Settlement and Release Agreement, 11, DNC Parks & Resorts at Yosemite, Inc. v. United States, No. 1:2015cv01034 (Fed. Cl. Dismissed Aug. 30, 2019), https://www.nps.gov/aboutus/foia/upload/YOSE_settlement_for_web.pdf [<https://perma.cc/8VUS-F2UY>] (“Nothing in this Agreement shall be construed in any way to hinder or limit the United States’ ability to enact legislation or issue regulations concerning concessioners who, after the date of the execution of this Agreement and without express written authorization from NPS, register or file applications to register trademarks or servicemarks on the names of properties or parks owned by the United States, the effect of which would be to bar a concessioner from future Government contracts of any and all kinds, including both procurement contracts and non-procurement concession contracts, or to otherwise negatively affect a concessioner in connection with any bid for future Government contracts (of any and all kinds).”).

forfeit the right to bid on future state park concession contracts.²⁴⁶ In the statute's recitals, the law expressly mentions the many historic sites in Yosemite, including the Ahwahnee and Wawona Hotels.²⁴⁷ The recitals provide a rationale for the law:

California state park venues are held in public trust for the people of California. A legal claim by an individual to have a trademark right to a name or names associated with a venue within a state park derogates the interests of California and the shared history of Californians, and it is indicative of a lack of the individual's fitness to serve as a steward of the state's cherished cultural heritage and places.²⁴⁸

Thus, California concluded that such venues are part of the public trust of the state, and that the mere intention to seek profit through privatization of this public good warrants debarment from future concession contracts.²⁴⁹

Perhaps this historic association forms the basis of the claim that the names are themselves part of the public trust, just like the mountains and natural features of the Valley. Joseph Sax has argued that the public trust doctrine applies to the "greatest artifacts of our civilization," which must be protected against private efforts to destroy or withhold these treasures from the public.²⁵⁰ While the language of public trust is used colloquially here, it is not clear that ownership of a name implicates the concerns of the public trust doctrine in the same way as physical ownership of land. The private firm did not seek to destroy the hotel or exclude members of the public from staying there, nor could it, as the physical asset is owned by the United States.

While private ownership of these names could never exclude members of the public from staying at the hotel, visiting the park, or enjoying its splendor, this dispute over an intangible property right nonetheless took on a similar character to early disputes about the appropriateness of private corporate activity within the parks. The current dispute raises concerns about whether

²⁴⁶ California Heritage Protection Act, ch. 413, 2016 Cal. Stat. 3269 (codified as amended in scattered sections of CAL. PUB. RES. CODE 5080).

²⁴⁷ *Id.* § 2, 2016 Cal. Stat. at 3270.

²⁴⁸ *Id.* § 2(f), 2016 Cal. Stat. at 3270.

²⁴⁹ For more on the public trust doctrine generally, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1969). The public trust doctrine generally protects claims of the public to natural features of the landscape, most specifically rivers, the sea, and the seashore, from the assertion of claims of private property rights. *Id.* at 475. Its history traces back to Roman law, see J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?* 47 ECOLOGY L.Q. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440244 [<https://perma.cc/WMM4-UVX6>], although it has a uniquely American signature. Rose, *supra* note 13, at 727-30, 735-39 (discussing the development of the public trust doctrine in U.S. law with respect to submerged lands).

²⁵⁰ See, e.g., JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 1, 9-10 (1999).

private corporations can remove names that are deeply associated with the parks from the public domain and call them private. There is no question that nothing was *physically* extracted from the parks to be sold in markets during this dispute. Perhaps the harm here is that Delaware North sought to extract some intangible, public goodwill that has long been associated with the name of the hotel. The firm's outrage at the NPS decision to change the names during the pendency of the litigation, and thus perhaps to drive down their value, is evidence of this desire to profit from public goodwill. By seeking to commoditize the name of the hotel (and the park itself) for private gain (namely to sell it to the next concessioner if Delaware North did not receive a contract extension), the private firm crossed a line similar to that of private firms seeking to extract and sell timber from the parks. It is merely a different, less tangible form of interference with the publicness of the parks.

B. Corporate Philanthropy and Cause-Related Marketing

The second set of non-extractive corporate interactions with the parks is formal corporate philanthropy, including co-branding and cause-related marketing. Like the dispute over trademarks, these relationships do not physically harm the parks or physically extract a commodity for sale in private markets. Nonetheless, they implicate questions of how much corporate activity in the parks is too much, and where the boundary ought to be drawn between public and private.

1. Corporate Philanthropy and Cause-Related Marketing Generally

Corporate giving and marketing for the benefit of a non-profit or public organization can take many forms. Philanthropy includes direct contributions to organizations by corporations or their related foundations.²⁵¹ Co-branding is a marketing strategy that combines the use of multiple brand names to build on the strength of both brands. In some cases, both of the brands are private firms like Pottery Barn (home furnishings) and Sherwin-Williams (paints),²⁵² or Taco Bell and Frito-Lay's Doritos (which generated the Doritos Locos Taco).²⁵³ In other cases, the co-branding strategy involves a corporate brand and a nonprofit entity that allows the firm to promote a corporate social

²⁵¹ Kahn, *supra* note 35, at 587-88 (distinguishing charitable contributions (direct grants by corporations and corporate foundations) from cause-related marketing or other sponsorship events).

²⁵² *Pottery Barn, Sherwin-Williams Paint Partnership*, HOME FURNISHINGS BUS. (July 10, 2013), <http://hfbusiness.com/hfbnow/articleid/96/pottery-barn-sherwin-williams-paint-partnership> [<https://perma.cc/6W46-WNRY>].

²⁵³ *Taco Bell Partners with Frito-Lay on Doritos Locos Tacos*, CSP DAILY NEWS (Mar. 8, 2012), <https://www.cspdailynews.com/snacks-candy/taco-bell-partners-frito-lay-doritos-locos-tacos> [<https://perma.cc/G8SY-4PY4>].

responsibility initiative.²⁵⁴ This type of co-branding is sometimes referred to as “cause marketing” or “cause-related marketing.”²⁵⁵

There are many well-known examples of cause-related marketing campaigns in which a corporation partners with a non-profit or charitable organization to raise money for the charity while raising brand awareness for the corporate partner. One example is American Express’s efforts to raise money for the restoration of the Statue of Liberty.²⁵⁶ During the fourth quarter of 1983, the firm donated one cent to the restoration efforts each time an American Express card was used.²⁵⁷ The effort raised \$1.7 million dollars for the restoration and the firm reported that usage of its card increased by thirty percent during that quarter, although it was not possible to attribute all of that increase to the marketing campaign.²⁵⁸ Another significant cause-related marketing example is Bank of America’s support for the Susan G. Komen Foundation, which raises money for breast cancer research.²⁵⁹ Bank of America has pledged to donate to the Foundation for each new Susan G. Komen Cash Rewards Card opened and used for purchases.²⁶⁰ Since 2009, the campaign has raised over \$9.5 million for the cause.²⁶¹

Cause-related marketing can also include in-kind donations. For example, since 2006, Pampers, a unit of Proctor & Gamble (P&G), has partnered with UNICEF to donate one tetanus vaccination for each pack of Pampers purchased (its 1 Pack = 1 Vaccine campaign).²⁶² To date, through this campaign, P&G has donated 300 million doses of the vaccine globally.²⁶³ Other firms, like the outdoor retailer Patagonia, engage in projects that are ongoing, rather than time-limited. Since 1985, pursuant to its 1% for the Planet campaign, Patagonia has pledged to donate 1% of its profits (totaling

²⁵⁴ Alexander Chernev & Sean Blair, *Doing Well by Doing Good: The Benevolent Halo of Corporate Social Responsibility*, 41 J. CONSUMER RSCH. 1412, 1412 (2015).

²⁵⁵ See Kahn, *supra* note 35, at 664 (discussing the distinction between cause-related marketing and charitable giving); NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, Director’s Order #21: Donations and Philanthropic Partnerships, (Dec. 28, 2016), https://www.nps.gov/policy/DOOrders/DO_21.htm [<https://perma.cc/8TE2-AYLC>] [hereinafter DO21] (using the term “cause marketing”).

²⁵⁶ Martin Gottlieb, *Cashing in on Higher Cause*, N.Y. TIMES (July 6, 1986), <https://www.nytimes.com/1986/07/06/business/cashing-in-on-higher-cause.html> [<https://perma.cc/Q2TB-JK6H>].

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Susan G. Komen® Cash Rewards Visa® Credit Card from Bank of America, BANK OF AM., <https://www.bankofamerica.com/credit-cards/products/susan-komen-credit-card/> [<https://perma.cc/U7A2-4W3X>].

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² UNICEF Corporate and Philanthropic Partnerships: P&G Pampers, UNICEF, https://www.unicef.org/corporate_partners/index_pampers.html [<https://perma.cc/57PW-S6M9>].

²⁶³ *Id.*

more than \$89 million to date), to support “domestic and international grassroots environmental groups.”²⁶⁴

2. Philanthropy and Cause-Related Marketing in the National Parks

The NPS accepts both monetary and in-kind donations through its official charitable partner, the National Park Foundation (NPF).²⁶⁵ Corporate partners can engage with the NPF in multiple ways that, according to the NPF, “not only contribute to the NPF’s mission but also provide sales, marketing and/or promotional value to our partners.”²⁶⁶ These forms of engagement include licensing, philanthropy, cause-related marketing, program or event sponsorship, and in-kind support.²⁶⁷ The NPS has a long history of receiving private philanthropy. In its earliest years, wealthy individuals like the Rockefellers, the Dorrs, the Mellons, the Kents, and the duPonts, along with their family foundations, donated land or money to create parks and museums, or to construct roads and visitor centers now under the control of the NPS.²⁶⁸ While individuals and family or institutional foundations remain significant donors to the parks, corporations are now also actively participating in this space.²⁶⁹ Indeed, for fiscal year 2018, while individuals and family foundations donated a total of \$34.3 million to the parks, corporations contributed \$31.1 million.²⁷⁰

With respect to licensing, the NPF explains that commercial use of the NPF or NPS trademarked logos is “expressly prohibited unless the producer completes a license agreement” with the NPF.²⁷¹ Cause-related marketing both benefits the parks and offers firms “integrated-marketing campaigns that enable corporations to leverage the popularity of America’s national parks to support corporate initiatives while helping increase public awareness and funding.”²⁷² Philanthropy allows firms to meet their “corporate responsibility

²⁶⁴ *1% for the Planet*, PATAGONIA, <https://www.patagonia.com/one-percent-for-the-planet.html> [<https://perma.cc/V5PT-A5V9>].

²⁶⁵ *Mission & History*, NAT’L PARK FOUND., <https://www.nationalparks.org/about-foundation/mission-history> [<https://perma.cc/749H-NU2F>].

²⁶⁶ *Become a Corporate Partner*, NAT’L PARK FOUND., <https://www.nationalparks.org/support/become-corporate-partner> [<https://perma.cc/749H-NU2F>].

²⁶⁷ *Id.*

²⁶⁸ Barry Macintosh, *Philanthropy and the Parks in the 20th Century*, NAT’L PARK SERV., <https://www.nps.gov/articles/philanthropy-and-the-national-parks.htm> [<https://perma.cc/NE5N-6NzL>].

²⁶⁹ NAT’L PARK FOUND., *supra* note 28, at 38.

²⁷⁰ *Id.* at 38. In addition, in 2018, institutional foundations contributed \$9 million and government grants contributed \$10.3 million. *Id.*

²⁷¹ *Licensing*, NAT’L PARK FOUND. <https://www.nationalparks.org/support/become-corporate-partner/licensing> [<https://perma.cc/XM4V-UH3C>].

²⁷² *Id.*

goals.”²⁷³ Finally, business firms can “direct their sponsorship to a specific NPF program or event,”²⁷⁴ such as programs to increase trail accessibility and reduce erosion, to protect and restore ocean wildlife in Alaska, or to improve student engagement at specific parks.²⁷⁵

The NPF has many corporate donors, some having provided more than \$1 million to date in support of the parks. Subaru, for example, has provided more than \$20 million in support since 2013, and has shared expertise on a zero-landfill initiative that has helped the parks to eliminate more than 6 million pounds of waste.²⁷⁶ Other donors contributing more than \$1 million to the parks include American Express, Budweiser, Coca-Cola, Hanes, L.L. Bean, Nature Valley, Nissan, and Union Pacific Railroad.²⁷⁷ Major donors contributing between \$500,000 and \$999,999 include Boeing and Winnebago Industries.²⁷⁸ There are many additional business firms that contribute smaller amounts to the NPF, including both national brands and smaller local brands.²⁷⁹

Congress has authorized the NPS to accept “money that may be donated for the purposes of the [Park] System.”²⁸⁰ In 2014, Congress enacted legislation governing the proper scope of national park donor acknowledgment.²⁸¹ That statute permits the NPS to recognize a donor to the national parks in certain specified ways.²⁸² However, no donor may be recognized as “an official sponsor” of the NPS or the National Park System.²⁸³ Nor may any donor state or imply NPS endorsement of a donor’s product or service.²⁸⁴ Further, despite concerns about naming the parks after corporate sponsors, Congress has expressly provided that no donor can be acknowledged in the naming of any unit of the National Park System or even

²⁷³ *Become a Corporate Partner*, *supra* note 266.

²⁷⁴ *Id.*

²⁷⁵ *All Programs*, NAT’L PARK FOUND., <https://www.nationalparks.org/our-work/programs/all-programs> [<https://perma.cc/QD2D-FSB9>].

²⁷⁶ *Corporate Partners*, NAT’L PARK FOUND., <https://www.nationalparks.org/about-foundation/partnerships/corporate-partnerships/corporate-partners> [<https://perma.cc/5G8A-9ZQG>].

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ 54 U.S.C. § 101101(2). This authorization is required to overcome the default rule that any money received by the federal government be deposited into the Treasury under the Miscellaneous Receipts Act. 31 U.S.C. § 3302(b).

²⁸¹ National Parks Service and Related Programs, Pub. L. No. 113-287, 128 Stat. 3094 (2014) (codified in relevant part at 54 U.S.C. § 100101 *et seq.*); Carl Levin & Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, § 3054(b), 128 Stat. 3292, 3806 (2014) (codified in relevant part at 54 U.S.C. § 101101).

²⁸² § 3054(b)(1), 128 Stat. at 3806.

²⁸³ *Id.* § 3054(b)(2)(A), 128 Stat. at 3806. In addition, donor acknowledgments may not use an advertising slogan or promote or oppose a political candidate. *Id.* § 3054(3)(C), at 3807.

²⁸⁴ *Id.* § 3054(b)(2)(B), 128 Stat. at 3806.

a facility within the parks, such as a visitor center.²⁸⁵ This statute, however, leaves discretion for the NPS to permit other forms of corporate acknowledgment within the parks. Indeed, the 2016 update to NPS Director's Order #21²⁸⁶ gave an expansive interpretation of this NPS discretion, leading some critics to decry the expansion of naming rights for corporations within the national parks for

interpretive and digital media (exhibits, waysides, and audiovisual productions); donor recognition boards and walls; plaques or nameplates; donor books; paving stones and park furnishings; on or inside a park visitor center or administrative facility; outside a visitor or administrative facility (including bench or other park furnishings, brick, pathway, area of landscaping, or plaza); near a park construction or restoration project (when related to the project); and limited opportunities for naming interior spaces, and NPS positions, programs, endowments.²⁸⁷

With respect to such acknowledgment of corporate donations, the Director of the NPS must expressly authorize the installation of any monument or other “commemorative installation” in a park area.²⁸⁸ And federal regulations prohibit the display and distribution of any “[c]ommercial notices or advertisements” on federally owned or controlled land within a park area without prior written permission of the specific Park Superintendent, who may grant such permission only if the notices are found to be “desirable and necessary for the convenience and guidance of the public.”²⁸⁹

Special rules exist for the Arrowhead Symbol, which has been the official insignia of the NPS since 1962, and the Parkscape Symbol, which is the “official tie tack or pin to be worn by all National Park Service uniformed employees.”²⁹⁰ The Director of the NPS may authorize the “reproduction, manufacture, sale, and use” of these two symbols for “uses that will contribute

²⁸⁵ *Id.*

²⁸⁶ DO21, *supra* note 255.

²⁸⁷ *Id.*; see also Lisa Rein, *Yosemite, Sponsored by Starbucks? National Parks to Start Selling Some Naming Rights*, WASH. POST. (May 9, 2016, 10:23 AM), <https://www.washingtonpost.com/news/powerpost/wp/2016/05/09/yosemite-national-park-brought-to-you-by-starbucks/> [<https://perma.cc/P7CY-2UZ2>] (“But the new brand of philanthropy is drawing fierce criticism from watchdogs and park advocates who accuse [NPS Director Jonathan] Jarvis of embracing a creeping commercialization they say has no place in the park system.”); Joe Davidson, *Park Service and Corporate Advertising, a Dangerous Mix*, WASH. POST. (May 9, 2016, 7:00 AM), <https://www.washingtonpost.com/news/powerpost/wp/2016/05/09/park-service-and-corporate-advertising-a-dangerous-mix/> [<https://perma.cc/R2PT-XDWU>] (“Already parks hoist banners with Budweiser beer and other corporate logos. Where will it stop? Can you imagine Disney presents Yellowstone?”).

²⁸⁸ 36 C.F.R. § 2.62(a) (2019).

²⁸⁹ *Id.* § 5.1.

²⁹⁰ *Id.* § 11.1.

to purposes of education and conservation as they relate to the program of the National Park Service. All other uses are prohibited.”²⁹¹ Such permission can be revoked if later found to be “injurious to their integrity” or inconsistent with the NPS programs of “conservation and recreation.”²⁹² Penalties for violation of these laws include a fine, imprisonment for up to six months, or both.²⁹³

Director’s Order #21 sets forth several additional “negative-screen” limitations on philanthropy and cause-related marketing in the parks. For example, the Order states that the NPS will not accept donations from organizations in which an NPS employee is an officer or director,²⁹⁴ from a party engaged in litigation with the NPS,²⁹⁵ or from a current concessioner or those seeking a contract.²⁹⁶ The NPS may not engage in fundraising that “identifies the NPS with tobacco or any type of illegal product,”²⁹⁷ or that would “generate controversy, harm public confidence, or associate the NPS with products that are inconsistent with [the NPS] mission.”²⁹⁸ Finally, the NPS “should only agree to a cause marketing campaign when the relationship strengthens its assets and brand.”²⁹⁹

3. Corporate Cause-Related Marketing in State Parks

In addition to philanthropic donations to the parks by national corporations, firms engage in other creative ways to provide funds to national and state parks. State parks have innovated in this regard with local businesses and have taken different approaches including partnerships and cause-related marketing with local breweries, wineries, and other businesses that donate a portion of proceeds from sales or events to the parks.

Because this Article thus far has focused on national parks, it is worth pausing for a moment to note that the state parks are experiencing some of the same challenges. State parks generate approximately 2.5 times as many visits annually as the national parks.³⁰⁰ While visits to the national parks increased to more than 330 million in 2017, in that same year, visits to state

²⁹¹ *Id.* § 11.2.

²⁹² *Id.* § 11.3.

²⁹³ *Id.* § 11.4; 18 U.S.C. § 701.

²⁹⁴ DO21, *supra* note 255, § 3.1.1.

²⁹⁵ *Id.* § 5.1.1. But see *id.* § 5.5 (“In some cases, however, the context of the proposed donation may be sufficiently removed from the litigation that it will not appear to be an attempt to influence the litigation.”).

²⁹⁶ *Id.* § 5.1.1.

²⁹⁷ *Id.* § 4.3.

²⁹⁸ *Id.* § 5.1.1.

²⁹⁹ *Id.* § 4.3.1.1.

³⁰⁰ Jordan W. Smith, Emily J. Wilkins & Yu-Fai Leung, *Attendance Trends Threaten Future Operations of America’s State Park Systems*, 116 PROC. NAT’L ACAD. SCIS. 12775, 127775 (2019).

parks reached 807 million.³⁰¹ The 807 million visits in 2017 represented a 25.6% increase since 1984, while the 300 million visits to national parks represented a 33% increase over the same time period.³⁰² During this time of significant increases in visitation, funding allocated to the state parks nationwide decreased from a peak of \$3.74 billion in 2006 to \$2.59 billion in 2017.³⁰³ Costs of managing the increasing numbers of visitors have not remained stable. In addition to ordinary maintenance from wear and tear, the parks face new challenges like climate change, which will likely alter visitation rates. Indeed, research suggests that visits will increase as ambient temperatures increase, up to a point.³⁰⁴

An increasing number of visitors combined with declining state appropriations to the parks has led some state park management agencies to seek funds from other sources, including through “entrance fees, permits, [and] donations.”³⁰⁵ Smith et al. note that in addition to increasing entrance fees, state park management agencies have implemented “innovative solutions” like “direct funding of individual state park units by corporations within the outdoor recreation industry;” sales of “unique license plates” that act as annual entrance permits; and “partnering with local communities in comanagement arrangements.”³⁰⁶

States have developed various rules governing these corporate philanthropic and cause-related marketing programs. These rules lie along a spectrum of comfort with corporate partnerships and acknowledgments. At the more restrictive end of the spectrum is the State of California, which employs a positive screen on philanthropy and cause-related marketing. California permits as corporate sponsors only those corporations whose missions share a “nexus” with the values that the California parks system seeks to promote, including a “particular emphasis on programs promoting environmental, historical and cultural awareness, healthful living, education, and high-quality outdoor recreation.”³⁰⁷ And California makes clear that, based on the “goals, mission, and identity of California State Parks,” park administrators “could justify prohibiting partnerships with those

³⁰¹ *Id.*; *National Park System Sees More Than 330 Million Visits*, NAT'L PARK SERV. (Feb. 28, 2018), <https://www.nps.gov/orgs/1207/02-28-2018-visitation-certified.htm> [<https://perma.cc/2GEE-K22V>] (counting the number of visitors to national parks in 2017).

³⁰² Smith et al., *supra* note 300, at 12775.

³⁰³ *Id.* The 2006 figure is inflation adjusted.

³⁰⁴ *Id.* at 12775-76 (discussing economic challenges that state parks will face in light of climate change and increased public demand for state parks, and offering tentative policy solutions to those challenges).

³⁰⁵ *Id.* at 12779 (noting that Colorado and Wyoming have increased entrance fees, with Wyoming implementing a peak-use pricing system).

³⁰⁶ *Id.* at 12779.

³⁰⁷ *Corporate Sponsorship Criteria*, CAL. DEP'T OF PARKS & RECREATION, https://www.parks.ca.gov/?page_id=25417 [<https://perma.cc/GNJ7-J7J9>].

organizations and companies that are inconsistent with this purpose.”³⁰⁸ Thus, major California “Proud Partners” who “align themselves” with an individual park or region and provide financial support include the Save the Redwoods League, Surflife, Jack’s Surfboards, the Smithsonian Institution, and Easy2Hike.³⁰⁹

At the other end of the spectrum of comfort with corporate partnerships is the State of Tennessee. Tennessee has entered into a creative cause-related marketing arrangement with a local brewery.³¹⁰ The State has authorized Tennessee Brew Works (TBW) to use the marketing label “State Park Blonde Ale” on one of its beers in exchange for the donation of a portion of the proceeds to benefit the Tennessee State Parks.³¹¹ According to Morgan Gilman, the Director of Revenue and Guest Experience for the Tennessee State Parks, informal discussions about the arrangement began four or five years ago when TBW opened in Nashville: “The owners of the brewery were very passionate about the environment, and about giving back to the state parks. We began discussions with them about how to create a beer that would give back to state parks.”³¹² Gilman noted that while other breweries in the state had previously supported one park or created a “limited” release, this was the first effort to create an agreement to support the state park system as a whole.³¹³

The program launched in the summer of 2017. Under the agreement, for each case of State Park Blonde Ale sold, TBW donates fifty cents to the Tennessee State Park Conservancy, a 501(c)(3) non-profit entity that accepts donations on behalf of the Tennessee state parks.³¹⁴ TBW has partnered with its distributors to match that donation. In total, the Tennessee state parks receive one dollar per case sold.³¹⁵ In exchange, Randy Hedgepath, the Tennessee State Naturalist, “agreed to allow the Brewery to use a drawing of his likeness wearing what resembles a state park Ranger hat on the beer bottle and packaging.”³¹⁶ In addition, according to Associate Counsel for the

³⁰⁸ *Id.*

³⁰⁹ *Proud Partners and Financial Support Programs*, CAL. DEP’T OF PARKS & RECREATION, https://www.parks.ca.gov/?page_id=24417 [<https://perma.cc/YUX9-NPGV>].

³¹⁰ Telephone Interview with Morgan Gilman, Dir. of Revenue & Guest Experience, Tenn. State Parks & Will Kerby, Assoc. Counsel, Tenn. State Parks (Nov. 21, 2019) (notes on file with author) [hereinafter Gilman & Kerby Interview]; Telephone Interview with Christian Spears, Founder and President, Tenn. Brew Works (Nov. 21, 2019) (notes on file with author) [hereinafter Spears Interview].

³¹¹ *See supra* sources cited note 310.

³¹² Gilman & Kerby Interview, *supra* note 310.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.* An image of the beer bottle is available online. *State Park Blonde*, TENN. BREW WORKS, <https://www.tnbrew.com/beer/stateparkblonde> [<https://perma.cc/GP95-E7JT>].

Tennessee State Parks Will Kerby, the state agreed that TBW could place an image of the Tennessee State Parks official logo on the bottle and packaging to “show a charitable relationship and that donations are going to the Tennessee State Parks Conservancy.”³¹⁷ He elaborated, “[t]hat is the only official image that the Brewery is permitted to use. We determined that the use of the logo in this limited fashion was appropriate in light of the relationship” under the particular agreement between the parties, “because it is not used in the branding of the product” but rather to “indicate a charitable relationship.”³¹⁸ Importantly, the officials from the State Parks made clear that this relationship with TBW is not exclusive; it is not the sole “official partner” of the parks. Indeed, the state parks would work with other private entities who sought to enter into similar charitable relationships to raise funds.³¹⁹ Since July 2017, the TBW-Tennessee relationship has raised approximately \$16,000 for the Tennessee state parks.³²⁰

From the perspective of Christian Spears, the founder and President of Tennessee Brew Works, the State Park Blonde Ale partnership was not only a way to promote the state parks specifically, but also a way to “launch our all-Tennessee sourced grains initiative Spirits are the number one export for Tennessee and breweries are the fastest growing industry. We want to develop a new cash crop for Tennessee.”³²¹ TBW is not a benefit corporation under state law or a certified B-Corp, but a for-profit LLC that nonetheless has “a strong mission to benefit the community.”³²²

Other states have entered into similar cause-related marketing agreements to benefit their parks. For example, the Michigan Department of Natural Resources (DNR) created the “Goods for Good” program.³²³ In 2004, the Michigan DNR lost all general revenue support from the state.³²⁴ The DNR runs the parks “like a business” by using campground fees to

³¹⁷ Gilman & Kerby Interview, *supra* note 310.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ See Spears Interview, *supra* note 310.

³²¹ *Id.*

³²² *Id.* A benefit corporation is a creation of state law, under which a business firm must pursue not only profit for shareholders, but both a general benefit and designate a specific social purpose. A certified B-corp, on the other hand, may or may not be a benefit corporation under state law, but rather is certified by B-Lab, a private non-governmental organization that requires a firm to designate a social purpose and meet certain criteria for continued certification. See Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 185-190 (2019) (discussing benefit corporations under state law and the parallel B-corp private certification scheme).

³²³ *These Goods are Good for Michigan*, MICH. DEP’T OF NAT. RES., <http://www.michigandnr.com/Publications/PDFS/TheseGoods/> [https://perma.cc/9P2E-QHL6] (listing beer, coffee, t-shirts, hats, artwork, candles, bug spray, and other goods that support the parks).

³²⁴ Telephone Interview with Maia Turek, Res. Dev. Specialist, Mich. Dep’t of Nat. Res. (Nov. 26, 2019) (notes on file with author) [hereinafter Turek Interview].

support the parks. However, the parks still have a significant infrastructure deficit.³²⁵ According to Maia Turek, Resource Development Specialist at DNR Parks and Recreation, the Goods for Good program began about six years ago.³²⁶ The goal is not only to raise money to run the parks, but to do so by “increasing awareness about the state parks without spending any advertising dollars.”³²⁷

The first program created by the DNR under the program was “Wines for the Outdoors” in 2015—a program open to any business with statewide distribution.³²⁸ Chateau Grand Traverse was the first partner and has created three “custom-labeled” wines for which fifty percent of net profits go to benefit the state park system.³²⁹ The program allows state residents to vote on how the proceeds of wine sales should be spent: to repair trails, to promote accessibility, or to replace trees.³³⁰ The winery does not dictate the use of the funds. A second partner under the Goods for Good program umbrella is Espresso Royale, a coffee roaster, which created the “Love Our Parks, Love Our Coffee” program in partnership with the DNR.³³¹ A portion of proceeds is donated to the parks.³³² In addition, the DNR partnered with New Holland Brewing, which partnered with REI Co-op, Merrell, and Woosah Outfitters, to “craft Lake and Trail Lager, a copper lager that according to the brewery is perfect for drinking after a day of hiking Michigan’s scenic state park trails.”³³³ Other businesses sell candles, bug spray, and athletic gear to support the parks under this program. The State has also partnered with small entities that wish to support a single local park, rather than the state park system as a whole.³³⁴ Michigan also has created a program called Tourism Cares, which supports restoration projects in the state parks. Firms and their employees can participate in short-term restoration projects through this program. The program has generated almost \$1 million in material and labor in support of

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ See Press Release, MyNorth News Service, *Chateau Grand Traverse’s Wines of the Great Outdoors* (May 19, 2015), <https://mynorth.com/2015/05/chateau-grand-traverses-wines-of-the-great-outdoors/> [<https://perma.cc/V6KY-GUUC>] (citing 50% figure).

³³⁰ *Id.*

³³¹ Jessica Haynes, *Ann Arbor Coffee Firm To Sell Outdoor-Themed Blends at State Parks*, MLIVE (Apr. 17, 2017), https://www.mlive.com/business/ann-arbor/2017/04/ann_arbor_coffee_company_unvei.html [<https://perma.cc/9GLN-AHJ7>].

³³² *Id.*

³³³ Brandon Champion, *New Holland Unveils Lager to Celebrate 100 Years of Michigan State Parks*, MLIVE (May 20, 2019), <https://www.mlive.com/news/2019/05/new-holland-unveils-lager-to-celebrate-100-years-of-michigan-state-parks.html> [<https://perma.cc/8PZ6-REMG>].

³³⁴ Telephone Interview with Maia Turek, *supra* note 324.

the parks.³³⁵ In 2019, these various partnerships and programs raised approximately \$150,000 for the state parks.³³⁶

A key concern on the part of the Michigan DNR is raising funds without compromising the publicness of the parks. As Turek explained: “[W]e don’t want marked parks or named parks with corporate names. We have to set limits for public lands.”³³⁷ Thus, while state parks recognize the financial and in-kind support they receive from corporate partnerships, even those states with the fewest restrictions, such as Tennessee and Michigan, recognize the importance of preserving the publicness of the parks.

Local corporate initiatives tend to have more public support than sponsorships by national corporations. There is a small empirical literature on public reactions to corporate sponsorship of state and local parks that bears this out. For example, one study found that members of the public were more supportive of local business firms financially sponsoring the parks than national corporations.³³⁸ The study asked participants about twenty-two different types of promotional activities between a corporation and a local park, varying whether the sponsor was a local or national business, whether there was off-site or on-site recognition of the sponsor, and whether the amount of the sponsorship to the park was small (\$1,000) or large (\$500,000).³³⁹ The results demonstrated that a significant majority (71%) perceived corporate sponsorship of public-sector parks and recreation favorably.³⁴⁰ However, sponsorships by local businesses were perceived more favorably than those by national corporations. And, importantly, sponsorships that included on-site recognition of the corporation in the title of the park and recreation facilities, as well as exclusive sponsorship contracts, among others, were perceived to be least appropriate.³⁴¹ These perceptions seem largely consistent with the regulations and guidance that govern corporate partnerships with both the state and national parks systems. Those

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ Andrew J. Mowen, Gerard T. Kyle & Mick Jackowski, *Citizen Preferences for the Corporate Sponsorship of Public-Sector Park and Recreation Organizations*, 18 J. NONPROFIT & PUB. SECTOR MKTG., no. 2, 2007, at 93, 93-94. The study’s authors define sponsorship as “a cash and/or in-kind fee paid to a property, typically a sports or event venue, in exchange for access to the marketable, commercial potential associated with that property” *Id.* at 94 (citations omitted). In addition to sporting and events venues, corporations increasingly sponsor non-profit and public sector organizations including parks and recreation programs. *Id.* The study consisted of mailing a survey to 2,250 households within the Harrisburg-Lebanon-Carlisle metropolitan area in Pennsylvania, which produced 578 results. *Id.* at 101-02. The demographics of the sample set generally matched the demographics of the general population in the target geography. *Id.* at 102.

³³⁹ *Id.* at 103.

³⁴⁰ *Id.* at 104.

³⁴¹ *Id.* at 105.

regulations and guidance eschew exclusive sponsorship arrangements, naming rights, and associations with firms in “undesirable” industries like tobacco that could tarnish the parks’ positive reputations or diminish the publicness of the parks in some fashion.

To summarize, the case of corporate philanthropy and cause-related marketing raises similar issues as the cases of corporate ownership of names of historic landmarks within the parks and concessions more broadly. In each case, the parks benefit in some way from the corporate activity—they receive necessary services (such as lodging and food for visitors), or cash and in-kind donations (in the case of corporate philanthropy and cause-related marketing). They can use these funds and services to improve or restore the parks themselves. And it is often, though not always, the parks or the public, rather than the firms, that define the agenda of what the money will do—whether that is through a competitive bid for a concession contract written by the NPS, or the procedure whereby members of the Michigan public decide whether donated funds should go toward trail repair, promote accessibility, or plant trees. The firms benefit as well by associating with the parks and their positive image. Yet the parks can suffer harm as well—some aspect of public goodwill is lost even if nothing is physically removed and the trails and public access are improved, rather than harmed. And if it is the corporate donor who dictates how the funds must be used, this can raise additional concerns about democratic legitimacy. The next Part takes up the normative questions of the benefits and harms of these non-extractive corporate activities within the parks.

IV. THE BENEFITS AND HARMS OF CORPORATE ACTIVITY WITHIN THE PARKS

This Part offers a normative account of non-extractive corporate activities within the parks. It first explores the business and management literature regarding corporate marketing to understand why, from the perspective of the corporation, these relationships are valuable. It then examines the actual and potential impact of these corporate activities on the parks themselves, drawing on literature regarding corporate philanthropy, corporate associations with nonprofit organizations, and greenwashing.

A. Benefits to Corporations from Relationships with the Parks

Corporations choose to engage in for-profit concessions activities, marketing, or philanthropic activity in the national parks for four primary reasons: (1) purely philanthropic intent to do good; (2) strategic intent to profit, including by increasing brand awareness in target populations,

improving brand perception through positive associations (a “halo effect”) with the goodwill of the parks, or by influencing park policies and actions in ways that benefit the donor; (3) a devious intent to provide a veneer of doing good to enhance the firm’s reputation and conceal or minimize the effect of other bad behavior, otherwise known as greenwashing; or (4) some combination of these motivations. To date, there has been no in-depth consideration within legal scholarship of the social science literature on the implications of such corporate actions, for either the firms or the parks as the recipients of firm philanthropy and marketing. There is, however, a significant literature within marketing, management, and business ethics scholarship on these topics. This literature helps to unpack both the motivations for and implications of these corporate activities. This section explores each potential motivation in turn.

Firms may engage in some aspects of corporate social responsibility (CSR) with purely good intentions—simply to do good. The literature on CSR refers to “political” CSR (as opposed to “strategic” CSR) as corporate activity that seeks to address or solve a social problem—whether for principled or pragmatic reasons.³⁴² Indeed, it was this form of corporate social responsibility that so troubled economist Milton Friedman, who argued that corporate actions that promote “general social interest[s]” impose an unrepresentative tax on shareholders.³⁴³ Yet, to the extent that firms market

³⁴² See, e.g., Dorothea Baur & Hans Peter Schmitz, *Corporations and NGOs: When Accountability Leads to Co-Optation*, 106 J. BUS. ETHICS 9, 17 (2012) (describing two variants of political CSR, one that focuses on altruistic motives and the other that focuses on business-related motives). See generally Andre Nijhof, Theo de Bruijn & Hakan Honders, *Partnerships for Corporate Social Responsibility: A Review of Concepts and Strategic Options*, 46 MGMT. DECISION 152, 152–67 (2008) (analyzing the effect of NGOs on corporations’ development of CSR strategies); Sushil Vachani, Jonathan P. Doh & Hildy Teegen, *NGOs’ Influence on MNEs’ Social Development Strategies in Varying Institutional Contexts: A Transaction Cost Perspective*, 18 INT’L BUS. REV. 446, 446–56 (2009) (examining the relationship between NGOs and corporations’ development of CSR strategies).

³⁴³ Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [<https://perma.cc/9FHX-U477>]; cf. Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) (“The efficiency goal of maximizing the company’s value to investors remains, in our view, the principal function of corporate law.”); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 307 (1976) (applying a profit-maximizing paradigm for analyzing the theory of the firm despite acknowledging the attempts in other literature to replace the profit-driven paradigm). But see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 299–305 (1999) (discussing the responsibility of firms to promote broader social interests valued by other stakeholders); Einer R. Elhauge, *Corporate Managers’ Operational Discretion to Sacrifice Corporate Profits in the Public Interest*, in ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS: PERSPECTIVES FROM LAW, ECONOMICS, AND BUSINESS 13–14 (Bruce L. Hay, Robert N. Stavins & Richard H.K. Vietor eds., 2005) (arguing that corporate managers have “considerable implicit and explicit discretion to sacrifice profits in the public

their philanthropy rather than donate anonymously, even the least skeptical observer would seek other explanations or at least find mixed motivations.

The remaining motivations are based at least in part in strategic considerations.³⁴⁴ As a general matter, because public sector organizations are “relatively uncluttered” with multiple competitors, such marketing sponsorships can be especially valuable to firms.³⁴⁵ One strategic reason to engage in corporate activity within the parks (be it through concessions, philanthropy, or cause-related marketing), is that it can be beneficial to firms to create brand awareness in their target populations. For example, it is beneficial for firms like Patagonia, L.L. Bean, and North Face that sell outdoor recreation-related products to market their association with the parks to a population that will buy their products. This explains why firms like L.L. Bean are major corporate sponsors to the national parks.³⁴⁶

But what about firms that do not sell specific outdoor-recreation-related products? Some of the biggest corporate donors to the national parks include Subaru, American Express, Budweiser, Coca-Cola, Hanes, and Nissan, among others.³⁴⁷ While one could make an argument that each of these firms sells products that enable potential customers to enjoy the parks, the links are more attenuated than for L.L. Bean or Patagonia. Arguably, firms with only attenuated relationships to the parks seek to build more general awareness of their brands and to generate a “halo effect” by associating their brands with the goodwill of the national parks.³⁴⁸ The marketing literature refers to this as building “brand equity.”³⁴⁹

Empirical scholarship has demonstrated that effective CSR campaigns, in some contexts, not only create a “benevolent halo” regarding the firm’s

interest”); Light, *supra* note 322, at 145-46 (arguing that corporate, securities, antitrust and bankruptcy law are all forms of environmental law and should be interpreted to prioritize the environment in corporate decision making).

³⁴⁴ “Strategic” corporate social responsibility is a form of CSR that is based on the view that taking certain socially responsible actions will ultimately be in the business interest of the firm and will increase profits. For one article espousing this view of CSR as a win-win, see Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78, 80; see also Joshua D. Margolis & James P. Walsh, *Misery Loves Companies: Rethinking Social Initiatives by Business*, 48 ADMIN. SCI. Q. 268, 270 (2003).

³⁴⁵ Mowen, Kyle & Jackowski, *supra* note 338, at 95.

³⁴⁶ *Corporate Partners*, *supra* note 276.

³⁴⁷ *Id.*

³⁴⁸ Chernev & Blair, *supra* note 254, at 1414; Lance Leuthesser, Chiranjeev S. Kohli & Katrin R. Harich, *Brand Equity: The Halo Effect Measure*, 29 EUR. J. MKTG. 57 (1995); Steve Hoeffler & Kevin Lane Keller, *Building Brand Equity Through Corporate Societal Marketing*, 21 J. PUB. POL’Y & MKTG. 78, 80 (2002); DO21, *supra* note 255, § 4.3.1.3 (“Sponsorship opportunities with the NPS or a philanthropic partner offer public recognition of the sponsor’s connection with a charitable cause, which may help it attract new customers or clients or bolster its reputation through the ‘halo effect’ (impressions of the organization’s goodwill.)”).

³⁴⁹ Keller, *supra* note 347, at 78.

general reputation, but also lead consumers to view the company's products more favorably.³⁵⁰ This boost in perceptions of product performance is present even when the acts of CSR are "unrelated to the company's core business," and even when actual product performance is "readily observable and consumers can directly experience the product."³⁵¹ However, the literature also demonstrates that when consumers believe that firms' actions are motivated by "self-interest rather than benevolence," there is no such benefit.³⁵² Several studies have suggested that the mechanism underlying this effect relates to moral judgments formed by consumers about firms engaging in CSR³⁵³ and the congruence or lack thereof between the firm's motivation and the consumers' own views about the importance of CSR and the role of business in society.³⁵⁴

In one well-known study, Alexander Chernev and Sean Blair undertook four experiments to test when a fictitious firm engaging in some form of CSR was able to attain a "halo effect" for its products. In each experiment, participants could observe product performance directly: the taste of wine; photos of a man's scalp before and after a hair-loss treatment; photos of teeth before and after the use of a whitening product; and the "sharpness" of text that a fictitious software firm used to scan and digitize books.³⁵⁵ In each experiment, the authors provided some of the test subjects with information about the firm's charitable giving/CSR, while control subjects did not receive this information.

In the first experiment, participants who received information about a fictitious winery's CSR concluded that the wine tasted better than those who received no information about CSR.³⁵⁶ The perceived effect was larger when the participants were not experts in wine tasting, as the experts were better able to evaluate objectively the taste of the wine "based on [its] intrinsic characteristics."³⁵⁷ In the second study, which concerned the hair loss treatment product, participants were primed with information stating either

350 Chernev & Blair, *supra* note 254, at 1413. The authors define the halo effect as the "tendency of overall evaluations of a person/object to influence evaluations of the specific properties of that person/object in a way that is consistent with the overall evaluation." *Id.* at 1414. For example, "health and nutrient-content claims on food packages induce a 'health halo' that leads people to rate these products higher on other health attributes not mentioned in the claims." *Id.* at 1414.

351 *Id.* at 1413. It is worth noting that "higher fit initiatives produce, in general, more positive consumer responses." Sankar Sen, Shuili Du & C.B. Bhattacharya, *Corporate Social Responsibility: A Consumer Psychology Perspective*, 10 *CURRENT OP. IN PSYCH.* 70, 71 (2016).

352 Chernev & Blair, *supra* note 254, at 1415, 1418; Sankar Sen & C.B. Bhattacharya, *Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility*, 38 *J. MKTG. RSCH.* 225, 238-39 (2001).

353 Chernev & Blair, *supra* note 254, at 1415

354 Sen, Du & Bhattacharya, *supra* note 351, at 238-39.

355 Chernev & Blair, *supra* note 254, at 1414-1420.

356 *Id.* at 1416.

357 *Id.*

that companies donate to charity because “they believe it is the moral thing to do” (benevolence/moral reasons) or “because they want the publicity” (selfish reasons). Participants were then asked what they thought about companies that make donations for either “moral” or “selfish” reasons.³⁵⁸ Half of the participants were then given information about the company’s significant donations to charities.³⁵⁹ Finally, all of the participants were asked to evaluate how effective a hair-loss treatment was by examining before-and-after photos.³⁶⁰ The authors observed an interaction effect for those participants exposed to the corporate benevolence/moral message *and* informed about the firm’s charitable donations: these participants rated the hair-loss treatment as more effective.³⁶¹ In contrast, those who were informed about the firm’s charitable donations primed with a message about corporate selfishness/publicity did not perceive the treatment to be more effective than the control group, who were not provided any information about the firm’s charitable donations.³⁶² In other words, “the positive halo of corporate social responsibility can be weakened in cases when consumers believe that the firm is motivated by self-interest rather than benevolence.”³⁶³

Chernev and Blair’s third experiment tested whether the source of the information about the firm’s charitable giving mattered, altering whether this information came from the firm itself or an independent third party, like a news source.³⁶⁴ The aim of this test was to assess how skeptical consumers are about the motivation of a firm that makes self-serving statements in advertising its CSR. The experiment demonstrated a second interaction effect: consumers who learned information about a firm’s charitable giving from an independent source rated the tooth-whitening treatment as more effective than the control group (those who did not receive information about the firm’s CSR at all).³⁶⁵ However, participants who learned about the firm’s CSR from the *firm’s own advertising* rated the treatment as essentially as the same as the control group (those who did not receive any information about the firm’s CSR).³⁶⁶ As in the second experiment, the firm’s perceived motivation for engaging in CSR affected whether consumers rated the products more highly.

³⁵⁸ *Id.* at 1417.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* at 1418.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

The fourth experiment attempted to test whether a participant's underlying views about the importance of firms "giving back to society" affected the impact of firm motivation on perceptions of product performance.³⁶⁷ The participants who "believed more strongly in the importance of social goodwill" and who were also primed with information about the firm's benevolent motive for its CSR concluded that the scanning technology performed better than those primed with information about the firm's self-interested motive (which did not match their own).³⁶⁸ For those who cared less about the importance of social goodwill and firms giving back to society, the difference in the firm's motivation was irrelevant to their perceptions of product performance.³⁶⁹ In other words, whether the firm's motivation matters depends on the moral values of the consumers.³⁷⁰ This last finding is consistent with that of Sen and Bhattacharya, who concluded that consumer responses to CSR depend upon the degree of perceived "overlap" between the firm's CSR efforts and their own character.³⁷¹

The lesson for firms here is that there is evidence for firms to undertake CSR based on the second (purely strategic) motivation, as well as a mixed motivation of doing good and strategically increasing brand awareness. A firm that seeks to increase its profits can do so by aligning its "values" with those of its customers by making charitable contributions or otherwise participating in CSR. In other words, firms can both create economic benefits and benefit society.³⁷² However, the firm must "internalize societal values and align its motivation with these values."³⁷³ In addition, it is beneficial for a neutral third party to speak about the firm's CSR programs to dampen speculation or concern that the firm is simply making self-serving statements in its advertising.³⁷⁴

It is worth noting that some scholars have suggested that consumers perceive firm motivations to be more than simply a binary choice between "other-centered" and "self-centered."³⁷⁵ Rather, these motivations can be a combination of either values-driven or stakeholder-driven on one axis, and strategic or egoistic on the

³⁶⁷ *Id.* at 1420-22.

³⁶⁸ *Id.* at 1421.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ Sen & Bhattacharya, *supra* note 352, at 228; *see also* Sen, Du & Bhattacharya, *supra* note 351, at 71 (reviewing relevant literature).

³⁷² Chernev & Blair, *supra* note 253, at 1421-22 (discussing the notion of "shared value" posited by Porter & Kramer, *supra* note 344).

³⁷³ *Id.* at 1422.

³⁷⁴ *Id.* at 1420-23.

³⁷⁵ Pam Scholder Ellen, Deborah J. Webb & Lois A. Mohr, *Building Corporate Associations: Consumer Attributions for Corporate Social Responsibility Programs*, 34 J. ACAD. MKTG. SCI. 147, 149 (2006).

other.³⁷⁶ The most positive combination is values-driven and strategic, while the most negative is stakeholder-driven and egoistic.³⁷⁷ Others have concluded that when a brand “positions itself on CSR, integrating CSR with its core business strategy,” the firm is more likely to generate long-term customer loyalty than when a CSR program is more fleeting.³⁷⁸

The most cynical explanation for these activities is that they are a form of corporate greenwashing. A firm engages in greenwashing when it misleads consumers or the broader public about the environmental performance of a product or service, or of the firm itself.³⁷⁹ In other words, some corporate concessioners and donors provide funds or services to the parks in order to boost their public reputation for environmental bona fides, which is not in fact genuine. In a clear case of greenwashing outside the national parks context, LG Electronics self-certified certain of its refrigerators under the Energy-Star label when they did not meet the energy-efficiency standards.³⁸⁰ Other firms have used vague claims that their products are “all-natural,” or made accurate but irrelevant claims about the environmental benefits of some aspect of a product that is minimally important.³⁸¹

There is some empirical basis for firms acting on this motivation as well. In addition to improving perceptions of product performance, CSR can insulate firms from negative word-of-mouth responses when their products or services “fail,” if the CSR is both substantial and aligned with consumer values.³⁸² The effect is even stronger when firms employ CSR programs that allow for consumer “choice” among beneficiaries, as this improves the “value alignment” between the consumer and the firm.³⁸³ In other words, CSR can serve as a “global insurance policy” against product or service failure, but only when customers “perceive a high degree of alignment with the firm’s values.”³⁸⁴ One explanation for this effect is that customers whose values are aligned with those of the firm’s CSR program “experience dissonance” if they choose to respond in a negative way to a service or product failure if that firm has

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 149-50.

³⁷⁸ Shuili Du, C.B. Bhattacharya & Sankar Sen, *Reaping Relational Rewards from Corporate Social Responsibility: The Role of Competitive Positioning*, 24 INT’L J. RSCH. MKTG. 224, 224, 237 (2007).

³⁷⁹ Magali A. Delmas & Vanessa Cuerel Burbano, *The Drivers of Greenwashing*, 54 CAL. MGMT. REV. 64, 66 (2011); William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 253, 255 (2003).

³⁸⁰ Delmas & Burbano, *supra* note 379, at 66.

³⁸¹ *Id.* at 67 (citing the “seven sins” of greenwashing adopted by TerraChoice).

³⁸² Jeff Joireman, Dustin Smith, Richie L. Liu & Jonathan Arthurs, *It’s All Good: Corporate Social Responsibility Reduces Negative and Promotes Positive Responses to Service Failures Among Value-Aligned Customers*, 34 J. PUB. POL’Y & MKTG. 32, 41-43 (2015).

³⁸³ *Id.* at 42.

³⁸⁴ *Id.*

“facilitated their ability to have a positive impact on society.”³⁸⁵ If, however, a customer’s values are not aligned with those of the firm’s CSR, there can be an increase in negative word of mouth and negative reaction to a service or product failure, as compared to a situation in which there was no CSR in the first place.³⁸⁶ It is important to note the limitation of this finding with respect to the seriousness of the failures: the service failures in Joireman et al.’s studies were an “unusually long wait time and incorrect drink order” at a coffee shop.³⁸⁷ They acknowledge that their study did not address the most serious types of service failures by firms, such as environmental disasters, defective products that cause significant harm, or corporate fraud, for example.³⁸⁸

B. *Potential Effects on the Parks*

With this deeper understanding of what motivates corporations to build relationships with the parks, this section explores the impact of these non-extractive corporate relationships on the parks themselves. When two entities are associated with one another, the association has multi-directional impacts. There are benefits to the parks, but also potential harms. The benefits in cash and in-kind donations may make it easier for parks to fulfill their missions. Yet each of these corporate interactions can also lead to some loss of publicness, often (though not always) in a different way from the concerns expressed in the early years. These risks include the risk of co-optation, associative risk, a risk of loss of support for public funding of the parks, and finally the risk of public exclusion from enjoyment of the parks.

1. Benefits to the Parks

The benefits to the parks are straightforward: the most important is financial support, which may be extremely valuable to fill gaps in operating budgets. In addition, corporate sponsors can share and transfer expertise to the parks, which can increase the efficiency and scope of their operations. As noted earlier, the NPF has received millions of dollars from corporate donations, enabling the parks to engage in many significant programs that otherwise might not have existed. Philanthropy to the parks has supported the digitization of oral histories at the Flight 93 National Memorial and Stonewall National Monument; awarded millions of dollars in field trip grants to more than 2000 schools, largely from underserved communities; supported youth conservation and service corps trips; trained teachers in

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 43. The authors refer to this as “CSR backlash.” *Id.*

³⁸⁷ *Id.* at 35.

³⁸⁸ *Id.* at 44.

using the national parks to support their curricula; and enabled children to participate in “citizen science” programs at the parks.³⁸⁹ From concessions, the national parks receive important services and accommodations for visitors, as well as a share of the profits from the concessioners in the form of fees. Finally, from cause-related marketing, the parks may be publicized to groups of people who have never visited or thought about visiting them.

2. Harms to the Parks

The potential harms and risks of corporate sponsorship and relationships with non-profit public sector entities like the parks include (a) the potential for co-optation, (b) stigma-by-association, (c) an erosion of support for public funding of the parks, and in extreme cases (d) exclusion of the public.³⁹⁰ The first three of these are substantively different from the early concerns about exclusion and commodification, and operate as more indirect assaults on the publicness of the parks. The fourth is more consistent with those early concerns.

a. Co-optation

The first concern is that corporate activity within the parks will lead to co-optation of the NPS. In the context of relationships between non-governmental organizations (NGOs) and corporations, Baur and Schmitz define co-optation as “the process of aligning NGO interests with those of corporations.”³⁹¹ In other words, powerful groups (often private corporations) seek to “water[] down” the interests of the non-profit or public sector entity to benefit the private corporation’s interests.³⁹² Co-optation can arise as a result of “sponsoring relationships, labeling agreements, and the personal ties established with corporate leaders.”³⁹³ Research suggests, for example, that NGOs that develop relationships with corporations may be less likely to

³⁸⁹ NAT’L PARK FOUND., *supra* note 28, at 12-13. Note that this a partial listing of the benefits of partnerships and is not limited only to corporate contributions.

³⁹⁰ There is a substantial literature discussing the impact of “co-branding” between for-profit and non-profit entities, some of which is relevant here. *See, e.g.*, Stavros P. Kalafatis, Natalia Remizova, Debra Riley & Jaywant Singh, *The Differential Impact of Brand Equity on B2B Co-Branding*, 27 J. BUS. & INDUS. MKTG. 623 (2012); Judith Washburn, Brian D. Till & Randi Priluck, *Co-branding: Brand Equity and Trial Effects*, 17 J. CONSUMER MKTG. 591, 591-604 (2000); Sonia Dickinson & Alison Barker, *Evaluations of Branding Alliances Between Non-Profit and Commercial Brand Partners: The Transfer of Affect*, 12 INT’L J. NONPROFIT & VOLUNTARY SECTOR MKTG. 75, 75-89 (2007); McDonnell et al., *supra* note 23, at 7-8.

³⁹¹ Baur & Schmitz, *supra* note 342, at 9-10 (noting that corporations seek “enhanced legitimacy” through associations with NGOs in corporate social responsibility initiatives, while NGOs obtain revenue and influence).

³⁹² *Cf. id.* at 11 (focusing on groups that are protesting corporate practices, rather than entities accepting donations, though there are similarities).

³⁹³ *Id.* at 10.

protest the actions of their corporate partners and tend to move to more moderate strategies of accommodation.³⁹⁴

An analog of co-optation in the regulatory context is regulatory capture, in which a regulated industry “captures” the regulator through cozy relationships and revolving doors in ways that ultimately influence policy.³⁹⁵ The Made in America Outdoor Recreation Advisory Committee could be seen as an example of either regulatory capture or co-optation of the NPS, as it was largely staffed with industry representatives.³⁹⁶

In the analogous context of donations by wealthy individuals or foundations to support government projects or services like education, outdoor monuments and parks, health care, or community programs (also known as “patriotic philanthropy”), Margaret Lemos and Guy-Uriel Charles have suggested the risk that “gifts to government may undermine norms of collective self-government by enabling certain individuals—wealthy ones—to exert outsized influence on public policy.”³⁹⁷ This can come in the form of problematic public decisions (such as a wealthy alumnus’s temporarily successful efforts to force the University of North Dakota to keep the name and mascot “Fighting Sioux” by offering \$100 million to build a new hockey arena with the name and logo prominently displayed). It can also lead to decisions that are more redistributive (such as private foundation support for public schools serving predominantly African-American children in the South when the states did not provide sufficient financial support).³⁹⁸ In other words, they posit that “gifts . . . are not entirely free.”³⁹⁹ One dividing line between gifts that are more or less problematic is whether the government entity continues to define its own goals, and donors may merely contribute to goals set through democratic procedures.⁴⁰⁰ More problematic in this context are those situations in which the donor can set the government’s agenda.

Co-optation can result from corporate sponsorships when the NGO or public sector entity becomes dependent upon the resources of the sponsor.⁴⁰¹

³⁹⁴ *Id.* at 11.

³⁹⁵ On the phenomenon of regulatory capture, see Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167 (1990); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18-19 (2010); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1685 (1975).

³⁹⁶ See *supra* notes 1-5 and accompanying text.

³⁹⁷ Lemos & Charles, *supra* note 36, at 1170.

³⁹⁸ *Id.* at 1167-77.

³⁹⁹ *Id.* at 1177.

⁴⁰⁰ Cf. *id.* at 1179 (citing the “less worrisome” system of competitive grants or government-initiated programs).

⁴⁰¹ Baur & Schmitz, *supra* note 342, at 13.

These sponsorship relationships create a new class of stakeholders who are important to the non-profit organization, and who, according to Baur and Schmitz, might crowd out the importance of other stakeholders who do not contribute financially, including the more diffuse beneficiaries of the NGO's mission.⁴⁰²

This risk of interference with public decision making is real. One prominent example of co-optation in the parks involved Coca-Cola, which had donated more than \$13 million to the NPF. Coca-Cola objected to the NPS's proposed plan to ban plastic water bottle sales in the Grand Canyon National Park.⁴⁰³ At the time, plastic water bottles accounted for approximately thirty percent of the waste generated within the parks.⁴⁰⁴ In light of Coca-Cola's objection, the NPS did not implement the ban.⁴⁰⁵ After public backlash, the NPS reversed its policy and imposed the ban.⁴⁰⁶ Subsequent reports demonstrated that the plastic bottle ban "resulted in yearly savings of up to two million water bottles."⁴⁰⁷ In 2017, the NPS again lifted the ban.⁴⁰⁸

A second, more normatively ambiguous example involves a donation from Delta Airlines of \$83,500 to keep the Martin Luther King, Jr. National Historic Park open on the federal holiday bearing King's name in 2019.⁴⁰⁹ At the time, the rest of the federal government was shut down. While the public has an interest in the parks being open to them, because Delta was able to

⁴⁰² *Id.* at 14 ("As NGOs increasingly add corporate actors to the list of external stakeholders to which they feel directly obliged, donors remain the dominant focus of accountability and beneficiaries will have an even more difficult time to be heard.")

⁴⁰³ Felicity Barringer, *Parks Chief Blocked Plan for Grand Canyon Bottle Ban*, N.Y. TIMES (Nov. 9, 2011), <https://www.nytimes.com/2011/11/10/science/earth/parks-chief-blocked-plan-for-grand-canyon-bottle-ban.html> [<https://perma.cc/VRT5-L47P>].

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ For example, a Change.org petition called for the NPS to reimpose the ban. Stiv Wilson, *Save the Grand Canyon from Coca Cola! Ban Plastic Bottles in the Park*, CHANGE.ORG, <https://www.change.org/p/save-the-grand-canyon-from-coca-cola-ban-plastic-bottles-in-the-park> [<https://perma.cc/5NBM-VFVB>].

⁴⁰⁷ Darryl Fears, *The National Park Service Showed that Its Bottled Water Ban Worked—Then Lifted It*, WASH. POST (Sept. 27, 2017, 7:00 AM), <https://www.washingtonpost.com/news/energy-environment/wp/2017/09/26/the-national-park-service-showed-that-its-bottled-water-ban-worked-then-lifted-it> [<https://perma.cc/2L5K-MQL9>].

⁴⁰⁸ *Id.*; *National Park Service Ends Effort to Eliminate Sale of Disposable Water Bottles*, NAT'L PARK SERV. (Aug. 16, 2017), <https://www.nps.gov/orgs/1207/08-16-2017-water-bottles.htm> [<https://perma.cc/853Y-JBJS>].

⁴⁰⁹ *Martin Luther King, Jr. National Historical Park to Reopen After Grant from the Delta Airlines Foundation*, DELTA NEWS HUB, <https://news.delta.com/martin-luther-king-jr-national-historical-park-reopen-after-grant-delta-air-lines-foundation> [<https://perma.cc/5XQ9-7XBT>]; *Martin Luther King, Jr. National Historical Park to Open Thanks to Grant from The Delta Airlines Foundation*, NAT'L PARK SERV. (Jan. 17, 2019), <https://www.nps.gov/malu/learn/news/deltagrants.htm> [<https://perma.cc/LK8T-E3FR>].

select a park unit of concern to it, rather than to make a donation to the NPS to make a determination about which park units should be reopened, at least one scholar has argued that the opening reflected a private concern, rather than a necessarily public one.⁴¹⁰

Corporate gifts can have an impact on the decisions of government actors—to ban or not to ban plastic water bottles or to keep a site open that is of interest to the donor corporation. Lemos and Charles argue that even when “well-meaning citizens contribute their fortunes to support a vision of the public good—and where the immediate consequences seem, at worst, innocuous,” private financing of government remains a concern.⁴¹¹ If only major corporations like Delta and Coca-Cola, but not ordinary citizens, can influence NPS decisions in a concrete way, then we should be concerned about an erosion of democratic legitimacy, as well as distributive justice considerations in these relationships between corporations and the government.⁴¹² It is arguably less problematic if such sponsorship goes to support existing programs defined by the NPS or Park Superintendents, much as it is less problematic when the NPS writes the terms of a bid for a concession contract. The key point is that the risk of co-optation is higher, and the legitimacy deficit increases, when corporate activity within the parks spells an erosion of public decision making authority and control.

b. *Associative Risk*

A second potential harm to the parks is associative risk. The concern is that negative publicity about the corporate sponsor will tarnish the reputation of the public sector or non-profit recipient of the sponsorship.⁴¹³ Pontikes, Negro and Rao addressed this type of risk in their study of the impact of “stigma by association” on artists who had worked with blacklisted artists in Hollywood during the “red scare.”⁴¹⁴ They found that when an artist’s *co-worker* was blacklisted, the *artist’s* chances of working again in a feature film

⁴¹⁰ Jon D. Michaels, Essay, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 498 (2020).

⁴¹¹ Lemos & Charles, *supra* note 36, at 1135.

⁴¹² *Id.*, at 1181 (raising an objection to gifts from wealthy individuals based on the norm of “equal political citizenship”). The authors note, however, that gifts to public parks tend to be more redistributive in nature than ordinary philanthropic gifts by individuals to government entities (which tend not to be redistributive, on average). *Id.* at 1184 (“Even if located in an exclusive neighborhood . . . a public park is still open to the public.”).

⁴¹³ Mowen, Kyle & Jackowski, *supra* note 338, at 96.

⁴¹⁴ Elizabeth Pontikes, Giacomo Negro & Hayagreeva Rao, *Stained Red: A Study of Stigma by Association to Blacklisted Artists During the ‘Red Scare’ in Hollywood, 1945 to 1960*, 75 AM. SOCIOL. REV. 456 (2010).

were reduced, even after a single association with that co-worker.⁴¹⁵ McDonnell and Werner applied the concept of “associative risk” or “stigma-by-association” to corporations and their affiliates in a recent study, which found that corporations targeted by boycotts created an “associative risk” for politicians who were the recipients of the firms’ corporate political activity.⁴¹⁶ They defined “associative risk” as the “perceived likelihood of accruing incidental damage by virtue of their mere association with a reputationally compromised organization.”⁴¹⁷

Associative risk increased when a corporation subject to boycotts had donated to a politician. In such cases, politicians were significantly more likely to refund campaign contributions from boycotted firms than from non-boycotted firms.⁴¹⁸ In addition, corporate officers from boycotted firms were significantly less likely to be invited to participate in congressional hearings than officers from non-boycotted firms and boycotted firms were significantly less likely to be awarded government procurement contracts than non-boycotted firms.⁴¹⁹

While McDonnell and Werner’s study focused on the associative risk and subsequent efforts of elected officials to distance themselves from targeted firms,⁴²⁰ other stakeholder groups can suffer reputational harm when associated with a firm whose reputation has been tarnished. For example, many museums, including the Metropolitan Museum of Art, have stated that they will no longer accept gifts from the Sackler family, whose firm, Purdue Pharma, manufactured and sold the opioid OxyContin, which has caused devastating effects in the opioid crisis.⁴²¹ Many universities have likewise been “tainted” by their association with sexual predator Jeffrey Epstein, who donated millions to schools including Harvard, MIT, and others in an effort to burnish his own reputation.⁴²²

⁴¹⁵ *Id.* at 456-57. While their study focused on the red scare, the authors note that the phenomenon is generalizable to other contexts, such as when “companies are targeted as sweatshops, the taint could mistakenly spread to partners or suppliers who have upstanding labor practices,” or when “drug use is uncovered in a sport, advertisers may pull sponsorships from all teams or even related sports.” *Id.* at 457; *see also id.* at 459 (listing other studies demonstrating stigma by association).

⁴¹⁶ Mary-Hunter McDonnell & Timothy Werner, *Blacklisted Businesses: Social Activists’ Challenges and the Disruption of Corporate Political Activity*, 61 ADMIN. SCI. Q. 584, 585-87 (2016).

⁴¹⁷ *Id.* at 587.

⁴¹⁸ *Id.* at 602.

⁴¹⁹ *See id.* at 602-04 (finding support for these three hypotheses).

⁴²⁰ *Id.* at 610.

⁴²¹ Peggy McGlone, *Citing Opioid Ties, the Met Says It Will No Longer Accept Gifts from the Sackler Family*, WASH. POST (May 15, 2019, 4:38 PM), https://www.washingtonpost.com/entertainment/museums/citing-opioid-ties-the-met-says-it-will-no-longer-accept-gifts-from-the-sackler-family/2019/05/15/e66ac2d8-7742-11e9-b7ae-390de4259661_story.html [<https://perma.cc/YL95-3R66>].

⁴²² Susan Svrluga, *Epstein’s Donations to Universities Reveal a Painful Truth About Philanthropy*, WASH. POST (Sept. 8, 2019, 4:24 PM), <https://www.washingtonpost.com/local/education/epsteins->

Likewise, if a major corporation were to engage in a public cause-related marketing campaign with the national parks, and then were subject to a serious corporate scandal, it is possible that the taint of the scandal would, by association, affect the parks and the public goodwill that the NPS has built up over more than 100 years. For this reason, perhaps, regulations and guidance governing philanthropy to the parks prohibit donations from tobacco firms and the proceeds of illegal activity. But in the context of the national parks, it may be the case that an associative taint arises out of the mere fact that a corporate sponsor is a private entity rather than the public itself. This area is worthy of additional empirical research.

c. Erosion in Support for Public Funds

A third potential harm to the parks' publicness is that private sponsorship, profits from concessions, and cause-related marketing will erode support for public funding of public entities.⁴²³ This issue of concern arises not only in the context of the national parks, but also in the broader context of private philanthropy from individuals and foundations to fund health care, education, museums, drug treatment programs, and other community development programs.⁴²⁴ The concern is that the public may be less interested in public funding for programs if they think the private funding is sufficient, or they may simply not perceive the government to need funding because it appears to be doing well.⁴²⁵

donations-to-universities-reveal-a-painful-truth-about-philanthropy/2019/09/04/e600adae-c86d-11e9-a4f3c081a126de70_story.html [https://perma.cc/3YH4-F2MF].

⁴²³ Mowen, Kyle & Jackowski, *supra* note 338, at 97. Indeed, in the early years, very little was appropriated for park budgets, with the thought that visitor fees and private concessions would be sufficient in lieu of public funds.

⁴²⁴ Lemos & Charles, *supra* note 36, at 1156, 1158-69 (discussing concerns about the "crowding out" of support for public funds for health and education among other public programs as a result of philanthropy to government by wealthy individuals and foundations, but not focusing on corporate giving); *see also id.* at 1163-68 (discussing patriotic philanthropy in the context of public facilities like community centers, and public spaces (like parks, museums and monuments) such as David Rubenstein's \$7.5 million gift to the NPS to fix a crack in the Washington Monument, and analogous gifts to public schools and museums from individuals and foundations); Arthur C. Brooks, *Public Subsidies and Charitable Giving: Crowding out, Crowding in, or Both?*, 19 J. PUB. POL'Y ANALYSIS & MGMT. 451 (2000) (suggesting that public and private support may not be incompatible).

⁴²⁵ In the context of philanthropy to government by private, wealthy individuals, Lemos and Charles characterize this concern as a potential "hollowing effect." Lemos & Charles, *supra* note 36, at 1134. They contend that citizens may be unable make "informed choices" about government because the philanthropic gifts may mask the government's true capacity to act; in other words, governments do more than they could in the absence of philanthropy, which "paper[s] over the government's weaknesses" or financial incapacities. *Id.* To address this concern, they prescribe transparency, so that citizens can know what private financial support exists for public programs and therefore do not under- or over-estimate the state's capacity. *Id.* at 1186-88.

This narrative raises an empirical question. Empirically, is it in fact true that corporate giving to national parks erodes support for public spending on the parks? It is also possible that corporate philanthropy can increase support for public funding, or is neutral and has no effect. This question is capable of empirical testing. While this hypothesis that private funding will crowd out public funding appears frequently in legal scholarship, there appears to be little empirical evidence on this precise question.

However, several studies have examined an analogous issue: whether private environmental governance—private actions by firms or industries to engage in pro-environmental behavior⁴²⁶—has any effect on support for public environmental law or regulation. For example, several scholars recently found that widespread industry adoption by corporations of private environmental governance (a commitment to use recycled content in packaging, or to manufacture vehicles with high fuel efficiency) significantly reduced support among environmental activists, members of the public, and government officials for public regulation on the same issues.⁴²⁷ In contrast, one working paper has found positive, rather than negative, spillover effects toward support for public climate policy when participants learn about private efforts to mitigate climate change.⁴²⁸ The authors found that when participants learned about private climate governance initiatives by corporations, conservatives and moderates were *more* supportive of public climate mitigation policies rather than less supportive.⁴²⁹ A third recent study found that private corporate environmental governance “can increase public support for legislation,” but that the effect is likewise focused in moderate and conservative members of the public, who are more likely to trust corporations as credible sources than more liberal members of the public.⁴³⁰

⁴²⁶ See, e.g., Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENV'T & ADMIN. L. 1 (2015) (defining and discussing private environmental governance); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129 (2013) (same).

⁴²⁷ Neil Malhotra, Benoît Monin, & Michael Tomz, *Does Private Regulation Preempt Public Regulation?*, 113 AM. POL. SCI. REV. 19, 32 (2019). For members of the public and government officials, this reduction in support for government regulation arose even when the corporate action was relatively small (e.g., a commitment to use thirty percent recycled content in plastic packaging), although for environmental activists there was a larger difference between the effect of a shallow commitment and a deep commitment on support for government regulation, with a shallow commitment leading to a smaller decrease in support for public regulation. *Id.* at 23, 26, 28.

⁴²⁸ Ash Gillis, Michael Vandenbergh, Kaitlin Rami, Alexander Maki & Ken Wallston, *Private Sector Action Can Reduce U.S. Conservatives' and Moderates' Opposition to Climate Change Mitigation* (unpublished manuscript) (draft on file with author).

⁴²⁹ *Id.*

⁴³⁰ See David A. Dana & Janice Nadler, *Regulation, Public Attitudes, and Private Governance*, 16 J. EMPIRICAL LEGAL STUD. 69, 69, 84 (2019) (studying the impact of private corporate action on support for public policy on sustainable forestry and cage-free eggs). Similar studies could be done to test support for public mask mandates in the wake of announcements by major retailers like

This study posits that corporate action leads more conservative members of the public to believe that a problem actually exists and is not illusory.⁴³¹

These studies tested whether private environmental governance by corporations erodes or increases support for public policy or regulation. Thus, testing whether corporate philanthropy reduces or increases support for public funding is likewise possible. Such testing could be conducted through surveys, where participants are exposed to information about private funding for the parks and asked their views on public financial support for the parks.⁴³²

Notably, however, there is one data point to contradict this negative spillover hypothesis. In July, 2020, Congress presented to the President for signature the Great American Outdoors Act.⁴³³ On August 4, 2020, the President signed the Act into law.⁴³⁴ Passed by overwhelming bipartisan majorities in both the House (310 to 107) and Senate (73 to 25),⁴³⁵ the law will provide up to \$9.5 billion over five years in a trust fund to address the maintenance backlog at the national parks.⁴³⁶

Thus, it remains important to acknowledge the possibility that private funding can have both positive and negative spillover effects on support for public funding of the parks. The direction and magnitude of that effect are capable of empirical testing and are worthy of further study.

d. *Exclusion of the Public*

Finally, a fourth potential harm can arise in extreme circumstances—exclusion. A well-publicized example of Pepsi’s and the NFL’s corporate

Walmart, Starbucks, Kohl’s, Walgreens, Publix, Target, and CVS that masks are required during the COVID-19 crisis. Bill Saporito, *Meet the New C.D.C. Director: Walmart*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/opinion/walmart-coronavirus-masks.html> [<https://perma.cc/KF7X-YY97>].

⁴³¹ Dana & Nadler, *supra* note 430, at 72.

⁴³² In one study, Elke Weber found that farmers who act to mitigate climate change “become less concerned about the overall effects of climate change,” even if their actions have no appreciable impact on risk reduction. MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* 93 (explaining Weber’s study and discussing possible negative spillover effects of private climate mitigation on support for government climate mitigation) (citing Elke U. Weber, *Perception and Expectation of Climate Change: Precondition for Economic and Technological Adaptation*, in *ENVIRONMENT, ETHICS, AND BEHAVIOR: THE PSYCHOLOGY OF ENVIRONMENTAL VALUATION AND DEGRADATION* 314 (Max H. Bazerman, David M. Messick, Ann E. Tenbrunsel & Kimberly A. Wade-Benzoni eds., 1997).

⁴³³ *Actions Overview H.R. 1957 – 116th Congress (2019-2020)*, CONG., <https://www.congress.gov/bill/116th-congress/house-bill/1957/actions> [<https://perma.cc/HF85-NQE8>]; see S. 3422, 116th Cong. (2020) (enacted).

⁴³⁴ Great American Outdoors Act, Pub. L. No. 116-152, § 200402 13 Stat. 682, 683-86 (2020) (codified at 54 U.S.C. § 200401).

⁴³⁵ *Actions Overview H.R. 1957 – 116th Congress (2019-2020)*, *supra* note 433.

⁴³⁶ § 200402, 13 Stat. at 683-86 (2020).

sponsorship of an event at the National Mall generated significant criticism, leading to a change in the law to prevent such exclusion from the Mall in the future. This example is important because it highlights the recognition by the NPS that exclusion of the public can—but should not—happen as a result of corporate activity. However, while the law now prohibits such exclusion on the Mall, it remains possible that such exclusion could occur elsewhere.

In 2003, the National Football League (NFL) was authorized to use the National Mall in Washington, D.C. (which is a unit of the National Park System) for its annual season kickoff event.⁴³⁷ The NFL sought additional corporate sponsors for the event, and PepsiCo contributed \$2.5 million to what ultimately became known as “NFL Kickoff Live 2003 From the National Mall Presented by Pepsi Vanilla.”⁴³⁸ The event included a concert headlined by Britney Spears.⁴³⁹ In the week leading up to the event, members of the public could not access the Mall because of the “stage, fencing, Jumbotrons, giant tents and signs,” including banners promoting Pepsi Vanilla.⁴⁴⁰ Two weeks later, Congress passed legislation prohibiting the use of federal funds for events on the National Mall unless the permit prohibits the “erection, placement, or use of structures and signs bearing commercial advertising” on the Mall.⁴⁴¹ While acknowledgement of event sponsors is permitted, such recognition “shall be consistent with the special nature and sanctity of the Mall” and letters may not be larger than a defined size.⁴⁴²

While perhaps such exclusion is less likely in the more spacious settings of national parks than on the National Mall, and thus the legislation focused on the Mall in Congress’s backyard, it remains the case that non-extractive corporate activity like cause-related marketing can, in extreme cases, result in the exclusion of the public.

V. IMPLICATIONS AND CONCLUSION

This final section concludes that the NPS should not be complacent about the risks of harm that arose in the parks’ early years—exclusion of the public, the removal or extraction of commodities for sale in markets, and the parks’ physical destruction. However, the associative and expressive harms to the

⁴³⁷ Nick Greene, *When Britney Spears and Pepsi Got the NFL Banned from the National Mall*, SLATE (Sept. 5, 2019, 10:51 AM) <https://slate.com/culture/2019/09/nfl-banned-kickoff-show-2003-britney-spears-national-mall.html> [<https://perma.cc/5TQT-4PSX>]. The event was organized to demonstrate public support for U.S. troops shortly after Operation Iraqi Freedom commenced. *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ Act of Nov. 10, 2003, Pub. L. No. 108-108, § 145, 117 Stat. 1241, 1280 (codified at 16 U.S.C. § 1a-1 note).

⁴⁴² *Id.*

parks that can arise from the non-extractive relationships with corporations that this Article has identified deserve greater attention, both in scholarship and policy. For example, more empirical scholarship is needed to determine whether corporate donations lead members of the public to be more or less supportive of public funding for the parks. Likewise, more empirical work could determine whether mere association of the parks with private corporate donors or concessioners—even with firms untainted by scandal—exposes the parks to stigma-by-association.

With respect to park governance and policy, a nuanced approach must take into account not only the tangible consequences of such relationships—both good and bad—but intangible ones as well. With respect to tangible harms, as the above discussion reflects, early promoters of public parks argued that if private interests were permitted to encroach on the publicness of the parks, even small private interests could ultimately destroy the parks themselves.⁴⁴³ They did not wish to allow the parks to turn into another over-commercialized Niagara Falls.⁴⁴⁴ While expressed in different forms, these concerns about private ownership of natural wonders generally echoed the ways in which we traditionally think about the bundle of sticks that makes up private property, including concerns about exclusion and destruction that dramatically unfolded in the early years and motivated the creation of the parks and limits on private action.

Some expressed the fear that private ownership of natural wonders would permit the physical exclusion of members of the public from enjoying them. Others were concerned that private ownership of nearby property or access routes would permit private interests to charge entry fees that would limit access. With respect to destruction, early experiences with development in the Yosemite Valley led to concerns that private interests would physically remove assets, like timber, from the parks, or that private interests would physically destroy the lands, as in the case of over-grazing. Even in the absence of tolls and fees, the public cannot enjoy these natural wonders if they no longer exist. The laws and regulations adopted by Congress and the NPS demonstrate generally adequate responses to these early concerns. They limit development, impose limits on private concessions to those that are “necessary and appropriate,” and negate private claims to natural wonders like Yellowstone’s geysers themselves.

But there has been, and there remains some role for private corporate action within the parks, even if that role is necessarily limited. Such private activity undoubtedly includes private concessions, and some private philanthropic support, including cause-related marketing. These forms of

⁴⁴³ See *supra* Parts II–III.

⁴⁴⁴ See *supra* notes 131–132 and accompanying text.

corporate activity do not implicate the core concerns about exclusion, commodification, and destruction that have long motivated park governance. Whether the Ahwahnee Hotel retains its historic name or is renamed the Historic Yosemite Lodge does not prevent visitors to Yosemite from staying in its rooms. And corporate philanthropy and cause-related marketing arguably have the potential to help the national parks by providing funds to maintain trails, improve the quality of ranger stations, or do other needed maintenance. In other words, not only do these forms of corporate action not implicate exclusion or the right to destroy, the exact opposite may be true. Accommodations provide access. And funding can support trail maintenance. Funding can also support access for underserved or disadvantaged groups. So how should park governance accommodate or even encourage the more positive aspects of these relationships while guarding against their potential drawbacks?

One approach might be to suggest that corporate relationships with and sponsorship of the parks could be harnessed to combat the harms of exclusion and destruction that are core to the publicness of the parks. For example, if private donations were significant, the parks could potentially waive entrance fees for some or all visitors. Private corporate concessioners could likewise reduce fees or adopt a sliding scale of fees to encourage visits from underserved members of the community. Such benefits could be required as features of concession contracts, rather than merely adopted through private generosity. Such a requirement would go a step further to promote public access to the parks than the provision added during the trademark dispute that essentially prohibits concessioners from seeking to trademark the historic names of park amenities.

But valuing these potentially positive consequences of corporate action should not come at the expense of acknowledging intangible harms. For example, even when corporate funding or concessions can improve access to the parks, these relationships nonetheless raise concerns that they are promoting some degree of private control or co-optation. Whether this is control of the governance agenda, or control of space, the concern is that private corporate activity within the parks may diminish (or appear to diminish) control by the public agency and its officials who have a responsibility to act in the public interest. To address this concern about co-optation, perhaps the law should not only restrict naming rights within the parks, but also make clear that decisions about how the donated money is to be spent must be determined, first and foremost, by the NPS, local park superintendents, or equivalent state officials. One way to do this would be to require the NPF to seek donations for particular, existing programs, rather

than to accept funds designated for programs of interest to the sponsors.⁴⁴⁵ Another option would be to follow the example set by Michigan, in which members of the public can vote on which of several programs should receive the private contributions. Alternatively, all funding could simply be donated to support the general NPS account, rather than to be earmarked for special programs.

Regardless of whether corporate activity promotes beneficial consequences—such as increased visits among communities that have previously been unable to access the parks—private corporate activity also raises expressive, intangible concerns. The legal rules governing the parks must likewise take these expressive considerations into account. For example, as Sax, Rose, and the Supreme Court have all suggested, public funding for parks and monuments express something about our nation's collective commitments.⁴⁴⁶ The corollary to this view is that private funding itself can undermine this expression of a national commitment to these treasures—regardless of the consequences on support for public funding. At a more abstract level, therefore, these relationships raise the question of whether corporate association with the parks dilutes their status as symbols of the nation and their role in civic nation-building.⁴⁴⁷ By associating with these popular parks, corporations undoubtedly benefit. But if the parks receive funds from corporate, rather than public, sources they could lose their expressive value in demonstrating the *public* commitment toward preserving places of wonder and awe. As noted above, even when individuals do not themselves visit the parks, they nonetheless derive benefits from knowing that such places exist. As the Supreme Court pointed out in the *Gettysburg* case, the fact that the government was setting aside land to commemorate the Battle at Gettysburg was itself meaningful, as evidence of a public commitment to the history of the nation.

Keeping these normative principles in mind, perhaps the best way to conceptualize the dispute over the trademark to the name of the historic hotels and properties within Yosemite National Park, despite its non-extractive nature, is that it too, was an effort to stake out a private “claim” to a wonder within the parks. Not a natural wonder, the Ahwahnee Hotel (and the other landmarked features) had become so intertwined with the goodwill of the parks that they came to be understood by the public as part of what the parks are. And perhaps the best way to conceptualize the issue of philanthropy and cause-related marketing is that, even though they are non-

⁴⁴⁵ Of course, it would likely be very difficult to police pre-donation conversations that shape the park superintendents' agendas.

⁴⁴⁶ See *supra* notes 84–99 and accompanying text.

⁴⁴⁷ See *supra* Section II.B.

extractive in nature, they nonetheless allow private firms to remove some aspect of goodwill from the public domain by making these national symbols more closely associated with private sponsors. In other words, park managers and regulators ought to be concerned about these intangible risks of harm to the parks, including co-optation, stigma-by-association, negative spillovers with respect to public funding, and the potential (in extreme cases) for corporate activity to exclude, rather than to include, members of the public.

This Article has offered several suggestions to think about how to address the implications of these new and old corporate relationships with the parks. Most importantly, the Article has identified how these relationships, though not traditionally “extractive” in the sense of taking something physical out of the parks, may in fact be extractive in an intangible sense. While the suggestions offered here are preliminary, the goal is to begin a discussion to rethink these relationships. We would do well to remind ourselves that even those relationships that do not extract physical commodities or exclude the public can nonetheless erode public goodwill. And scholars and policymakers should think more creatively about how to manage these relationships moving forward.

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