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## The "Publicization" of Private Space

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# The “Publicization” of Private Space

Sarah Schindler\*

*ABSTRACT: Recently, many urban areas have moved away from the creation of publicly owned open spaces and toward privately owned public open spaces, or “POPOS.” These POPOS take many forms: concrete plazas that separate a building from the sidewalk; glass-windowed atriums in downtown office buildings; rooftop terraces and gardens; and grass-covered spaces that appear to be traditional parks. This Article considers the nature of POPOS and examines whether they live up to expectations about the role that public space should play and the value it should provide to communities. This analysis is especially important because in embracing POPOS, cities have made a tradeoff—they allow developers to construct larger buildings in exchange for the provision of this publicly accessible (yet still privately owned) space. Although POPOS are the primary form of new urban public space in many areas, legal scholars have largely ignored them, and many cities have failed to educate the public about their existence. This Article suggests that POPOS regularly fail to achieve the goals of “good” public space, in part because they are often exclusionary; they only feel welcoming to certain people, and they only permit a limited number and type of activities. Thus, this Article provides suggestions for improving POPOS, by changing the laws that govern their design and use, and importing the norms that we typically associate with public space into these privately owned spaces—a process that this Article refers to as “publicization.” In this way, this Article aspires to map a path forward so that POPOS will function as a form of public space worthy of the tradeoff that cities are making.*

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## I. INTRODUCTION

There is a hidden garden on Fifth Avenue in New York that is open to the public. You cannot see it from the street; it is on the fourth and fifth floors of a tall building, and there is little signage directing you to it. The garden is not open to the public just because the building owner is generous; it is open to the public because it must be. The developer provided the garden in exchange for the right to make the building taller than it otherwise could have been.

Although you now know about the existence of this garden, accessing it requires a few more steps. First, you have to enter the building and put your bags through an x-ray machine. Then you have to take the escalator, if it is open (and it is often not), or the elevator, which is sometimes manned by security guards, up to the garden.<sup>1</sup> Even after all of this, the garden might be closed if the weather is bad. You will have to ask a security guard to be sure.

This garden is an example of privately owned public space. The private owner of this particular public space? Donald Trump. The location? Trump Tower.

The mention of urban public space might bring to mind a variety of images: a grand public park like San Francisco's Golden Gate Park, the many streets and sidewalks that traverse our cities, or a plaza in front of city hall. Historically, state and local governments owned and managed properties such as these.<sup>2</sup> However, in a number of cities, new public space of this sort is becoming rare; frequently, newly created public space is privately owned and managed.<sup>3</sup> There are numerous examples of spaces that are open to the public yet owned by private entities: malls, private university campuses, and pools that require membership. But this Article focuses on a creature developed by local governments known as privately owned public open space, or "POPOS."<sup>4</sup> POPOS are typically created in one of two ways: (1) They are

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1. Michelle Young, *The Privately Owned Public Space Inside Trump Tower Is Already Less Accessible*, UNTAPPED CITIES (Dec. 9, 2016), <http://untappedcities.com/2016/12/09/the-privately-owned-public-space-inside-trump-tower-is-already-less-inaccessible>.

2. Some cities now contract out management of these spaces to private, nonprofit organizations. For example, Manhattan's Central Park is managed by the Central Park Conservancy—which also provides approximately three quarters of the park's operating budget—under a contract with New York City. *About Us*, CENT. PARK CONSERVANCY, <http://www.centralparknyc.org/about/about-cpc> (last visited Dec. 17, 2017).

3. For example, New York, San Francisco, and London have all gained new POPOS in the past few decades. See *infra* notes 132–35 and accompanying text (giving data showing the prevalence of POPOS).

4. While San Francisco refers to these spaces as POPOS, New York and much of the urban planning literature refers to them as POPS: privately owned public spaces. This Article will generally use the term POPOS, but will use POPS when quoting existing literature from New York. Also, though the term as defined here is singular, it will occasionally be necessary to use POPOS to refer to privately owned public open spaces (plural). The distinction should be clear from the text.

offered by a private developer in exchange for a density bonus, which allows the developer to build a taller or bulkier building than would otherwise be permitted under the zoning;<sup>5</sup> or (2) they are required as a condition of development approval.<sup>6</sup> The space is still privately owned, but it is legally required to be accessible to the public. The idea behind such a tradeoff is that the public space will counteract some of the negative effects of density, such as crowding or loss of light or air. While a small number of sociologists and urban theorists have studied POPOS, they have been largely ignored by legal scholars.<sup>7</sup> Further, the only book on the subject was written nearly two decades ago.<sup>8</sup>

There is a growing body of literature about the *privatization* of public space, which is becoming more common in urban centers.<sup>9</sup> In many cities, the mall replaced the town square as the place where people gather and socialize.<sup>10</sup> More recently, as malls have grown out of favor in some areas, developers are now building new “lifestyle centers” that often resemble stylized, traditional main streets, but are effectively outdoor malls on private property.<sup>11</sup> Public parks are often now managed by private non-profit entities or Business Improvement Districts (“BIDs”).<sup>12</sup> In some cash-strapped cities, officials have sold public land to private developers,<sup>13</sup> and it is common to see

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5. This was the case with Trump Tower. Aaron Elstein, *Donald Trump Has a Secret Garden*, CRAIN'S N.Y. BUS. (June 19, 2016, 12:01 AM), [http://www.crainsnewyork.com/article/20160619/REAL\\_ESTATE/160619862/in-1979-donald-trump-made-a-deal-with-new-york-city-that-hed-provide](http://www.crainsnewyork.com/article/20160619/REAL_ESTATE/160619862/in-1979-donald-trump-made-a-deal-with-new-york-city-that-hed-provide).

6. For example, certain projects require a conditional use permit before they can be built. A requirement that the developer construct and maintain public open space on the project site might be one of the conditions attached to the permit. JEROLD S. KAYDEN ET AL., *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* 15 (2000).

7. A Westlaw search for the terms “Privately Owned Public Open Space” or “Privately Owned Public Space” return 42 law review articles mentioning the terms. Most of these are a cursory mention or a citation to Kayden’s aforementioned book. See *Secondary Resources*, WESTLAW, <https://1.next.westlaw.com> (in secondary resources, search “privately owned public open space” or “privately owned public space”) (last visited Dec. 17, 2017).

8. See generally KAYDEN ET AL., *supra* note 6 (discussing POPOS in New York).

9. See Robert B. Reich, *Secession of the Successful*, N.Y. TIMES MAG. (Jan. 20, 1991), <http://www.nytimes.com/1991/01/20/magazine/secession-of-the-successful.html> (“As public parks and playgrounds deteriorate, there is a proliferation of private health clubs, golf clubs, tennis clubs, skating clubs and every other type of recreational association in which costs are shared among members.”). See generally John L. Crompton, *Forces Underlying the Emergence of Privatization in Parks and Recreation*, 16 J. PARK & RECREATION ADMIN. 88 (1998) (discussing the privatization of public space).

10. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 257–61 (1985); JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPE* 119 (1993).

11. Judy Keen, *As Enclosed Malls Decline, ‘Lifestyle Centers’ Proliferate*, MINNPOST: CITYSCAPE (Aug. 30, 2013), <https://www.minnpost.com/cityscape/2013/08/enclosed-malls-decline-lifestyle-centers-proliferate>.

12. See Michael Murray, *Private Management of Public Spaces: Nonprofit Organizations and Urban Parks*, 34 HARV. ENVTL. L. REV. 179, 185–93 (2010) (describing numerous private entities that control urban public spaces).

13. See *infra* notes 65–67 and accompanying text.

restaurants taking over large portions of city sidewalks for outdoor dining.<sup>14</sup> Privatized public spaces are often clean and well-maintained; they feel safe and comfortable to many.<sup>15</sup> Yet, a number of social scientists and geographers have asserted that privatized public space is problematic and a poor substitute for traditional public space.<sup>16</sup> It is exclusionary. It segregates. It is sterile. It diminishes opportunities for free speech. It prevents people from different walks of life from interacting with one another. It also raises concerns from a local government perspective: There is a fear of loss of democratic process when corporations and other private entities control public spaces and the public realm more than citizens do.

At first glance, POPOS appear to be examples of privatized public spaces, and the few commentators that have studied POPOS describe them as such.<sup>17</sup> POPOS are spaces that are—at least in theory—open and accessible to the public, but they are owned and operated by private entities. Not only are they descriptively similar to privatized space, but POPOS also appear to raise many of the same normative concerns that privatized public spaces do. For example, they are often exclusionary and sanitized. Further, though POPOS are sometimes outside along public streets, they are also often located inside office buildings or on rooftops, and thus are hidden from view and involve barriers to entry that some members of the public would not feel comfortable crossing. And while municipalities typically require that these spaces be open and accessible to the public during daylight hours, they often provide little additional guidance about how the spaces may or must be used.<sup>18</sup> The result is that private developers and their security guards, who manage both the private and public space within the commercial building, generally set and then enforce all the rules. These private actors may not have thought seriously

14. Sarah Schindler, *Café Creep*, U. ME. SCH. L. FAC. RES. BLOG (Aug. 19, 2016), <https://mainelaw.maine.edu/faculty/cafecreep> (describing the legal regime behind and concerns associated with al fresco dining).

15. Timothy Weaver, *The Privatization of Public Space: The New Enclosures*, 2014 ANN. MEETING AM. POL. SCI. ASS'N, Aug. 28–31, 2014, at 15 (“[P]art of the appeal of privately-owned public spaces is that people’s quotidian interaction with them conveys the sense that they are indistinguishable from public spaces, except that they appear to be safer, better maintained, and eerily bereft of the poor.”).

16. See, e.g., *infra* notes 112–21 and accompanying text. But see JASON HACKWORTH, THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM 60–76 (2007) (discussing benefits of privatization). Arguments both for and against privatization will be discussed subsequently in Parts II.C.2. and III.B.

17. See MARGARET KOHN, BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE 4–5 (2004) (describing private ownership of public spaces as privatization); BENJAMIN SHEPARD & GREG SMITHSIMON, THE BEACH BENEATH THE STREETS: CONTESTING NEW YORK CITY’S PUBLIC SPACES 53 (2011) (describing public spaces in high rises as being privatized); Jeremy Németh, *Defining a Public: The Management of Privately Owned Public Space*, 46 URB. STUD. 2463, 2465–66 (2009) (describing POPOS under the heading “Privatisation of Public Space”); Gregory Smithsimon, *Dispersing the Crowd: Bonus Plazas and the Creation of Public Space*, 43 URB. AFF. REV. 325, 327 (2008) (discussing “[t]he privatization process” that created POPOS).

18. See *infra* note 207 and accompanying text.

about the extent of public rights in these spaces—they are (perhaps justly) more interested in protecting the space for use by the building’s private, paying tenants. Thus, POPOS owners and guards are likely to create rules and enforce norms associated with the primary, private building use, rather than rules and norms that we associate with public parks. For all of these reasons, scholars have lumped POPOS in with the existing privatization literature.<sup>19</sup>

However, I assert that POPOS should be viewed differently from typical privatized public space. They are examples of *private* property that has been *made publicly accessible* by law;<sup>20</sup> they involve private property that has been “publicized” rather than public property that has been privatized. Because there are similar benefits and concerns with privatized public space and publicized private space, this Article engages the privatization literature. However, rather than viewing POPOS solely as another example of privatization, this Article considers them through the lens of “publicization,” which should suggest the application of different laws and norms than privatization.<sup>21</sup>

As I use it, the term “publicization” has both descriptive and normative components. Descriptively, I use it as a framework to suggest that privately owned property is literally being made available for use by the public. Thus, this property’s purely private character has diminished, and it has become “publicized.” Normatively, I begin with a conception of publicization as a

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19. See KOHN, *supra* note 17, at 9–14.

20. When developers decide to create a mall, they are affirmatively deciding to open their property broadly to the public. Contrast this with a developer’s decision to build an office building in a municipality that requires the provision of a POPOS as a condition of development approval. That developer only wanted to create an office building, with the assumption that her right to exclude the general public would be enforced. However, she is instead required to open up a portion of her private property to the public. I believe that this is distinct from the mall creation scenario.

21. Others have used the word “publicization,” though not exactly as I am using it here. However, I draw upon those definitions in crafting my concept of the publicization of private space in Part V of the Article. I draw most heavily upon Professor Jody Freeman’s use of the term. See, e.g., Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (“Instead of seeing privatization as a means of shrinking government, I imagine it as a mechanism for expanding government’s reach into realms traditionally thought private. In other words, privatization can be a means of ‘publicization,’ through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state.” (footnote omitted)); see also Gerald E. Frug, *Is Secession from the City of Los Angeles a Good Idea?*, 49 UCLA L. REV. 1783, 1784 (2002) (defining “publicization” [sic] as the process of “bringing government closer to its constituents”); John Braithwaite, *Strategic Socialism, Strategic Privatization and Crisis* 4 (Austl. Nat’l Univ, RegNet Research Paper No. 2013/11, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2249544](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249544) (defining publicization as “the percolation of public law values into private law and into corporate self-regulation. . . . includ[ing] the most critical public law values such as transparency, accountability, stakeholder voice and separations of powers”).

process through which space becomes more public.<sup>22</sup> To explain that process, I expand upon the concept of publicization as a scenario where "private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state."<sup>23</sup> I extend the term to the realm of property law, suggesting that we might find a way not only to make these spaces physically accessible to members of the public, but to also import norms that we typically associate with idealized forms of public space into these hybrid, liminal POPOS.

Describing POPOS as an example of privatization is both descriptively inaccurate and leads to bad results. In contrast, viewing POPOS through the lens of publicization allows us to envision spaces—spaces that feel more public and that serve public needs and desires—in a less exclusionary way than POPOS often currently do. The result should be spaces that provide greater value to the public. In order to achieve this end, cities must: (1) adopt and enforce more detailed regulations governing POPOS; and (2) work in conjunction with members of the public to enforce public-space norms in POPOS. Unless and until these interventions take place, POPOS will remain a fraught, unsuccessful means of creating new public space in our cities.

Part II of this Article begins by considering the value and importance of public space and the struggle of modern cities to create more of it. It then surveys the privatization literature, examining reasons that many cities have moved toward privatized public space. In Part III, the Article provides a nuts-and-bolts description of POPOS and the land-use process through which they are created. Part III also discusses the reasons that many cities allow developers to trade public space for bigger buildings. Part IV presents a critique of POPOS, considering the liminal legal space in which they exist, the democracy deficit that surrounds their rules of operation, their exclusionary nature, and their lack of authenticity.

Part V examines POPOS through a "publicization" lens. It suggests that an application of this framing could be used to ensure that POPOS owners and managers commit themselves to public space values in order to obtain development permits.<sup>24</sup> Part V considers the unexplored potential of POPOS to enhance conceptions of publicness and public space. Although the right to exclude others from one's private property is often said to be one of the most important sticks in the bundle of rights associated with private-property ownership, POPOS present an example of cities using land-use law to force the right to exclude to bend a bit, which could spur the expansion of public-space norms into these privately owned spaces. This expansion, in turn, might

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22. Myriam Houssay-Holzschuch & Annika Teppo, *A Mall for All? Race and Public Space in Post-Apartheid Cape Town*, 16 *CULTURAL GEOGRAPHIES* 351, 352 (2009) (defining publicization as "the process whereby private spaces acquire a more public dimension").

23. Freeman, *supra* note 21, at 1285.

24. *See id.*



foster a more progressive view of property.<sup>25</sup> Part V concludes by discussing ways that laws and norms could be used to make POPOS more public, thus enabling them to function as a form of public space worthy of the tradeoff that cities are making.

## II. PUBLIC SPACE AND ITS PRIVATIZATION

### A. THE VALUE OF PUBLIC SPACE

Public space means different things to different people. It has a number of different facets, each of which may yield a different definition. For example, if we focus on who may *use* public space, we may define it as space that is open and accessible to members of the public.<sup>26</sup> In contrast, if we focus on the *ownership* of public space, we may define it as space that is owned by the government.<sup>27</sup> Finally, if we focus on what public space is *in comparison to what it is not*, we may define it as space that is not private.<sup>28</sup> These are all social dimensions of public space, but public space also has a physical dimension.<sup>29</sup> Public space can be designed and constructed in ways that either increase its likelihood of use or that repel people from it. And of course, there is a difference between what people imagine public space ought to be and what it actually is. As I use the term here—especially because I will be focusing on privately owned public space—public space means space that is “open and accessible to all members of the public in a society, in principle though not necessarily in practice.”<sup>30</sup>

25. See generally Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) (focusing on situations where the right to exclude should be diluted in order to enhance human flourishing).

26. See, e.g., KOHN, *supra* note 17, at 10–11 (“Intuitively we take public to mean open or accessible, yet many public buildings are not open to all. Bureaucratic headquarters and military installations, for example, are owned by the government but inaccessible to most citizens.”); cf. Cédric Terzi & Stéphane Tonnelat, *The Publicization of Public Space*, 49 ENV’T & PLAN. A 519, 520 (2016) (“[D]iscrimination against categories of the population usually considered as minorities, women, people of color, homeless people, etc. is often taken as a reliable measure of the publicity of urban space.” (citations omitted)).

27. See, e.g., KOHN, *supra* note 17, at 11 (“In everyday speech a public space usually refers to a place that is owned by the government, accessible to everyone without restriction, and/or fosters communication and interaction.”).

28. *Id.* at 21 n.34 (“A private space . . . is characterized by the way individuals or groups can exclude outsiders. Thus private space is not only a matter of ownership but also of regulation and control of access.”).

29. *Id.* at 11; see also Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 24 (2016) (“In a purely physical sense, public space refers to any combination of a built and natural environment that is accessible to the *public as a whole* for collective or personal activities.”).

30. Zachary P. Neal, *Locating Public Space*, in COMMON GROUND? READINGS AND REFLECTIONS ON PUBLIC SPACE 1, 1 (Anthony M. Orum & Zachary P. Neal eds., 2010) (emphasis omitted).

Places that are open and usable by all carry with them a number of benefits and are a valuable feature of urban life.<sup>31</sup> Specifically, well-functioning public space: (1) fosters interaction between people with diverse viewpoints and from different socio-economic backgrounds;<sup>32</sup> (2) helps nurture democratic values by providing a site for democratic process and free assembly;<sup>33</sup> (3) serves as a "third place" and thus can build social capital and decrease atomization;<sup>34</sup> (4) is functional, allowing people to get from place to place;<sup>35</sup> and (5) provides space for those with nowhere else to go.<sup>36</sup>

Public space is often said to be the lifeblood of cities.<sup>37</sup> This characterization is in part because public space is where many of our interactions occur—especially those that are unplanned or accidental.<sup>38</sup> Further, public space provides the *situs*, and thus the opportunity, to interact

31. For a discussion of similar concepts in the context of private space and neighborhoods, see Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L.J. 699, 710 (2009).

32. See Rankin, *supra* note 29, at 25 ("[S]haring public space actually challenges our instincts to create social segregation by physically integrating us with diverse strangers.").

33. See, e.g., JOHN R. PARKINSON, DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE 4 (2012) (noting that academics have argued "democracy requires physical space for its performance").

34. Sarah Schindler, *The Future of Abandoned Big Box Stores: Legal Solutions to the Legacies of Poor Planning Decisions*, 83 U. COLO. L. REV. 471, 479 (2012) ("The third place provides a sense of community engagement and involvement, which is separate from those found at the first place (home) and the second place (work)."); see also generally RAY OLDENBURG, THE GREAT GOOD PLACE: CAFÉS, COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS, AND OTHER HANGOUTS AT THE HEART OF A COMMUNITY (1999) (explaining a number of gathering places which form important aspects of their respective communities).

35. KAYDEN ET AL., *supra* note 6, at 25–35.

36. See Terzi & Tonnelat, *supra* note 26, at 521 (suggesting that public space "must be maintained as a place of last resort for the part of the population that has nowhere else to go in a city increasingly devoted to leisure and consumption").

37. See, e.g., KAYDEN ET AL., *supra* note 6, at vii ("Physical public spaces are important contributors to the life of cities."); Jeremy Németh & Justin Hollander, *Security Zones and New York City's Shrinking Public Space*, 34 INT'L J. URB. & REGIONAL RES. 20, 21 (2010) ("Public spaces are the lifeblood of cities."); see also JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES chs. 2–6 (1992) (discussing the value of public space).

38. KAYDEN ET AL., *supra* note 6, at vii. Some have argued that this may no longer be true, and there is less need for physical public space due to the existence and prevalence of cyberspace and the internet. See Ash Amin, *Collective Culture and Urban Public Space*, 12 CITY 5, 5 (2008) ("In an age of urban sprawl, multiple usage of public space and proliferation of the sites of political and cultural expression, it seems odd to expect public spaces to fulfil their traditional role as spaces of civic inculcation and political participation."). See generally Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003) (discussing cyberspace as public space); Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005) ("Other Internet law scholars have claimed that the Internet should be conceptualized as one grand 'public forum' . . ."); Maureen A. O'Rourke, *Property Rights and Competition on the Internet: In Search of an Appropriate Analogy*, 16 BERKELEY TECH. L.J. 561 (2001) (discussing cyberspace as public space).

with people who are outside our typical social circles<sup>39</sup>—people who Gerald Frug refers to as “unfamiliar kinds of strangers.”<sup>40</sup> By encountering and engaging with these strangers in public space, people open themselves up to “unprogrammed” discussions and “diverse viewpoints.”<sup>41</sup>

Public space also provides citizens with a space for the performance of democracy.<sup>42</sup> Indeed, according to one commentator, democracy is *dependent upon* the existence of public space.<sup>43</sup> The Supreme Court seems to have recognized this important role that public space plays in the lives of its citizens. In 1939, it said:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.<sup>44</sup>

Here, the Court expressly values the importance of public space as a site for free assembly. It also values the role that this space plays in fostering communications and discussions about important public issues. As commentators have pointed out, freedom of expression and assembly are “essential elements of citizenship.”<sup>45</sup> Thus, public space provides a site for the performance and expression of these democratic values.<sup>46</sup>

39. See, e.g., Németh & Hollander, *supra* note 37, at 21 (“More than simple physical entities, truly public spaces are sites of interaction in which individuals are sometimes forced to interact with those whom they usually criticize or dislike.”).

40. Gerald E. Frug, *Public Space / Private Space*, in *THE PRAGMATIST IMAGINATION: THINKING ABOUT “THINGS IN THE MAKING”* 82, 85 (Joan Ockman ed., 2000).

41. Németh, *supra* note 17, at 2463; see also Nicholas Blomley, *Introduction: Public Space to THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* 3, 3–5 (Nicholas Blomley et al. eds., 2001) (discussing public space and interaction).

42. PARKINSON, *supra* note 33, at 48 (“Democratic performance involves four primary roles: narrating interests, opinion, and experience; making public claims; deciding about those claims; and scrutinizing and accounting for decisions and actions.”).

43. *Id.*; see also Neil Smith & Setha Low, *Introduction: The Imperative of Public Space to THE POLITICS OF PUBLIC SPACE* 1, 1–2 (Setha Low & Neil Smith eds., 2006) (discussing public spaces as one of the last independent forums for public opposition in a civil society).

44. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

45. Weaver, *supra* note 15, at 14.

46. Setha M. Low, *The Erosion of Public Space and the Public Realm: Paranoia, Surveillance and Privatization in New York City*, 18 *CITY & SOCIETY* 43, 43 (2006) (describing “public space and the democratic values it represents”).

These features of public space—that it serves as a site for the assembly of diverse people and an exchange of diverse ideas—suggest that public space also often serves as an important “third place.”<sup>47</sup> Urban theorists distinguish the third place from the “first place,” which is the home, and the “second place,” which is the workplace.<sup>48</sup> The third place provides a location for people within a community to gather and exchange ideas. This interaction can lead to an increase in social capital and a reduction in feelings of isolation.<sup>49</sup> In many communities, the most common third place is the street or sidewalk. This fact suggests another, although admittedly less romantic, benefit of public space: It is functional. It allows people to get from place to place. Streets and sidewalks provide routes of connection between and through localities and are mostly used for transportation.

Finally, public space provides a location for people who lack access to a first or second place to exist. People who are homeless comprise the most obvious segment of society that needs and depends on public space in this way. Those who are homeless rely on public space “as a refuge, as a place to sleep, as a stopping point, as a place of community and conviviality.”<sup>50</sup> These benefits also accrue to those who are not homeless, but perhaps have small houses or apartments and thus can benefit from extra space in which to exist. The best public spaces would provide all of these diverse individuals with all

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47. See generally Schindler, *supra* note 34.

48. OLDENBURG, *supra* note 34, at 16.

49. See, e.g., Thomas G. Poder, *What Is Really Social Capital? A Critical Review*, 42 AM. SOCIOLOGIST 341, 342 (2011) (describing social capital as the sum of “social interactions [that] create social networks, foster confidence, influence the formation of values, support the norms and culture, and generate the community”); see also Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811, 812 (2013) (defining Putnam’s social capital as “the aggregate value of citizen participation in associations and organizations, social ties and networks, civic engagement, trust, and norms of reciprocity”). See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (discussing increasing isolation and fragmentation of society).

50. DON MITCHELL, *THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* 15, 28 (2003) (noting that “[b]y denying the right to sleep, defecate, eat or relax *somewhere* . . . contemporary anti-homeless laws . . . simply deny homeless people the right to *be* at all”); see also Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 300 (1991) (“The homeless are allowed to *be*—provided they are on the streets, in the parks, or under the bridges.”); cf. MITCHELL, *supra*, at 36 n.3 (New York City mayor Rudy Giuliani said: “Streets do not exist in civilized societies for the purpose of sleeping there. Bedrooms are for sleeping in . . .” (citing Elisabeth Bumiller, *In Wake of Attack, Giuliani Cracks Down on Homeless*, N.Y. TIMES (Nov. 20, 1999), <http://www.nytimes.com/1999/11/20/nyregion/in-wake-of-attack-giuliani-cracks-down-on-homeless.html>)).

of these diverse benefits.<sup>51</sup> While good public space ought to serve all of these functions,<sup>52</sup> not all public space does so in fact.

*B. AN ASIDE: PUBLIC SPACE AS ROMANTIC IDEAL OR EXCLUSIONARY REALITY?*

It is important to pause here and acknowledge that many people have an idealized vision of public space: what it ought to be, who it ought to be for, and what values it should serve. The reality is that public space does not always build community and foster discourse among diverse segments of the population. Public space—even when it is publicly owned and managed—is often exclusionary.<sup>53</sup>

There are a number of reasons for the exclusionary nature of public space that will be addressed in more detail below, but generally, these reasons involve the design, operation, and ownership structures of these spaces.<sup>54</sup> Even public parks often restrict activities that might seem to be acceptable and proper uses of public space.<sup>55</sup> For example, in *Clark v. Community for Creative Non-Violence*, the Supreme Court upheld a rule, put in place by the National Park Service, which prohibited people from sleeping in parks in Washington, D.C.<sup>56</sup> The Court found that rule to be an acceptable time, place, and manner restriction.<sup>57</sup> While this rule ostensibly applies to everyone, homeless people and those who are visibly poor have long been excluded

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51. See Németh, *supra* note 17, at 2463; see also Joseph B. Rose, *Preface* to KAYDEN ET AL., *supra* note 6, at viii (describing successful public spaces as those “that contribute positively to city life incorporat[ing] values of good site planning, urban context, and public accessibility and use into their design and operation”).

52. It is perhaps intuitive that some of the elements discussed here contribute to “good public space.” However, it is harder to decide whether other features of a space are normatively good. The next Subpart, II.B., will address those issues.

53. This is not a new phenomenon. As Don Mitchell pointed out, “the streets and parks of the city, like the Greek *agora*, Roman *forums*, or 18th-century German coffeehouses before them, have never simply been places of free, unmediated interaction. Rather, they have always also been spaces of exclusion.” MITCHELL, *supra* note 50, at 131–32 (citation omitted); see also Margaret Crawford, *Contesting the Public Realm: Struggles over Public Space in Los Angeles*, 49 J. ARCHITECTURAL EDUC. 4, 4 (1995) (noting that the agora was closed to women and slaves, and that current public space privileges “middle-class and masculine modes of public speech”); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1989 (2015) (discussing the way that cities use infrastructure to divide and segregate populations).

54. Low, *supra* note 46, at 44 (discussing threats to public space in the form of “design, management, and systems of ownership that reduce diversity”).

55. “Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.” *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990).

56. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298–99 (1984).

57. *Id.*

from public space, and laws criminalizing their behavior in public are becoming more common.<sup>58</sup>

That said, there remains a question: Can public space still have *some* value even if it is exclusionary and only caters to a particular segment of the population? If public space fails to foster the mixing of socio-economic groups and the mixing of ideas, is there still value in the existence of the space itself? The question of value is loaded and subjective, but it is certainly true that these spaces might still have some practical benefits. For example, these spaces can still provide for light and air. They may also provide a place of respite *for some* (even if not for all). Considering this evidence, some might believe that the existence of an exclusionary space is better than having no space at all.<sup>59</sup>

Another side of this discussion, which is relevant to an examination of inclusion and exclusion in public space, concerns "failed" or "unsuccessful" public spaces. It is possible that failed public spaces—those that are not well-designed, that make some people feel uneasy, and that are scary, dirty, and underused—could be inclusionary in some sense. For example, New York's Bryant Park was "a crime-ridden haven for junkies" that was transformed into "a six-acre jewel."<sup>60</sup> It is currently very popular with well-dressed workers and visitors. However, one could argue that, before it was "cleaned up," Bryant Park was inclusive with respect to the very people who are generally excluded from public and private spaces: the homeless and visibly poor.<sup>61</sup> It is hard to know how to measure inclusivity and exclusivity, and how they relate to the

58. See Jack Healy, *Rights Battles Emerge in Cities Where Homelessness Can Be a Crime*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/us/rights-battles-emerge-in-cities-where-homelessness-can-be-a-crime.html> (recognizing that cities are grappling with this problem, trying to decide whether to "open up public spaces to their poorest residents, or sweep away camps that city leaders, neighbors and business groups see as islands of drugs and crime"). See generally Rankin, *supra* note 29 (discussing criminalization of homelessness).

59. Of course, these are not necessarily the only two options: either exclusionary space or none at all. And others have grappled with this question. For example, Murray noted that a private park manager might decide to close a poorly maintained park because

this closure would actually advance the public good in the neighborhood, including the public good from the park, because of the negative externalities associated with an open but ill-maintained park. Closing the park entirely or for most of the time reduces the problems of drugs, crime, and loitering in the neighborhood and in the park itself, assuming spillover. Yet the public trust doctrine has no way to account for an increase in the public good associated with the park despite a non-park use—here closure—of the park.

Murray, *supra* note 12, at 245.

60. E.S. Savas, *Privatization and the New Public Management*, 28 FORDHAM URB. L.J. 1731, 1732 (2001).

61. "[T]he increased use of public spaces by homeless persons led owners to seek, and the City [of New York] to adopt in 1979, a zoning amendment allowing the City Planning Commission to authorize owners to close certain through block plazas and contiguous arcades at night if, among other things, they agreed to upgrade the space to urban plaza standards." KAYDEN ET AL., *supra* note 6, at 19 (citing N.Y.C., City Planning Commission, N 780630 ZRM (Jan. 22, 1979)).

value of a space. Certainly, in sheer numbers, Bryant Park is used by more people now than it was before its clean up. But does that necessarily make it more inclusionary? Failed public spaces have the potential to feel more inclusionary and less exclusionary when considered from the perspective of some segments of the urban population. The remainder of this Article will further develop these ideas surrounding the value of public space.

### C. THE PRIVATIZATION OF PUBLIC SPACE

#### 1. How Is Public Space Privatized?

In recent years, we have seen a rise in the privatization of the formerly public provision of goods.<sup>62</sup> One commentator describes this phenomenon as “the encroachment of corporate interests into civic life.”<sup>63</sup> Public space, a quintessential element of civic life, has not been exempt from this trend: Fewer cities are investing in the direct creation of new publicly owned public space, and there has been an increase in privatized public space.<sup>64</sup>

Just as public space has many meanings, so too does privatization. The privatization of public space can occur in many forms. At its most specific level, one could envision the sale of publicly owned land to a private entity.<sup>65</sup> For example, the Atlanta City Council recently agreed to transfer use and control of portions of three downtown streets to a private developer as part of a larger development deal.<sup>66</sup> Similarly, Salt Lake City sold a block of land in

62. Freeman, *supra* note 21, at 1287 n.7 (“In the United States, privatization encompasses a variety of arrangements through which private actors increasingly perform functions or provide services traditionally thought to be within the purview of government, usually with government financing or pursuant to government contracts, and with varying degrees of government involvement.”); see Jane K. Winn, *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, 58 ARIZ. L. REV. 193, 196–97 (2016) (discussing the privatization of public law).

63. Cassim Shepard, *Introduction to Douglas Woodward, Rules of Conduct*, URB. OMNIBUS (May 9, 2012), <http://urbanomnibus.net/2012/05/rules-of-conduct>.

64. See, e.g., SETHA LOW ET AL., RETHINKING URBAN PARKS: PUBLIC SPACE AND CULTURAL DIVERSITY 1 (2005) (noting the increase in privatization of urban public spaces); Murray, *supra* note 12, at 180 (“Private organizations control an increasing number of urban public spaces.”). Some commentators have suggested that the reason for this is because “alternative methods for securing small public spaces, such as buying them with money from the City’s capital budget, would be less worthwhile or simply unrealistic.” KAYDEN ET AL., *supra* note 6, at 307 n.6.

65. See Weaver, *supra* note 15, at 2 (stating that “the transfer of publically-owned [sic] land or resources to private entities seeking to enhance the ‘exchange value’ of the space or of the resources associated with it . . . is what most people mean by the term ‘privatization’”).

66. Scott Trubey & Leon Stafford, *UPDATE: Council OKs Plan to Abandon Streets to Finish Underground Sale*, ATLANTA J.-CONST. (Dec. 5, 2016, 3:02 PM), <http://www.ajc.com/news/local-govt—politics/update-council-oks-plan-abandon-streets-finish-underground-sale/MU7TBFvXr7ZPRUGdDBxAqO> (Portions of the streets “would be ‘abandoned’ by the city and become the property of WRS after a consummation of the Underground sale. That would give control of the streets to the developer . . . . WRS would have the power to shut off vehicular traffic, or potentially to keep pedestrians or bicyclists from using the roads . . .”).

their downtown area to the Mormon Church.<sup>67</sup> However, privatization encompasses much more than just straightforward conveyances. More generally, any sort of public space that has some type of private ownership, management, or control could be viewed as privatized public space.

For example, in many cities, a number of publicly owned parks are managed and operated by private entities.<sup>68</sup> New York's Bryant Park, mentioned earlier,<sup>69</sup> is still owned by the city.<sup>70</sup> However, it is run by a private non-profit, the Bryant Park Corporation, in conjunction with a local Business Improvement District.<sup>71</sup> These entities were also instrumental in the park's transformation. Another example is Manhattan's Madison Square Park, which was officially opened as a public park in 1847 and is now overseen by the nonprofit Madison Square Park Conservancy.<sup>72</sup> Its operations are financed in part through a food concession located within the park.<sup>73</sup> Even New York's famous Central Park is privately managed by the Central Park Conservancy, a "friends of the park," private, nonprofit group.<sup>74</sup>

Another example of this type of privatization involves suburban neighborhoods that are governed and managed by Home Owners

67. KOHN, *supra* note 17, at 3 (describing "the narrow sense" of privatization as "the sale of state-owned assets to individuals or corporations").

68. See, e.g., Patrick Arden, *The High Cost of Free Parks: Do Public-Private Partnerships Save Parks or Exploit Them?*, 27 NEXT AM. CITY 42, 43 (2010) ("Public-private partnerships are widely touted as the new model for cities to build and maintain parkland . . .").

69. See *supra* notes 60–61 and accompanying text.

70. Savas, *supra* note 60, at 1732.

71. The Bryant Management Corporation. See E-mail from Joe Carella, Joseph J. Carella Assocs., Inc. Pub. Relations, to Sarah Schindler (Dec. 9, 2016) (on file with author); see also Cathryn Swan, *Privatization of the Commons in Mayor Bloomberg's New York — Part II: Who Has Control?*, HUFFINGTON POST (June 26, 2013), [http://www.huffingtonpost.com/cathryn-swan/new-york-parks-privatization\\_b\\_3112139.html](http://www.huffingtonpost.com/cathryn-swan/new-york-parks-privatization_b_3112139.html).

In a BID, owners of nonexempt real property pay a periodic assessment to the municipality, over and above their ordinary municipal taxes. That assessment money is used to fund the construction of capital improvements to land in the district and the provision of certain services intended to promote business activity in the district.

*Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc.*, 158 F.3d 92, 94 (2d. Cir. 1998). For a definition of a Business Improvement District, see *infra* notes 104–06 and accompanying text.

72. *Park History*, MADISON SQUARE PARK, <https://www.madisonsquarepark.org/about-the-park/park-history> (last visited Dec. 18, 2017). According to the park's website, the park experienced "several decades of unfortunate neglect," which led to the City Parks Foundation—a nonprofit focused on bringing programming to parks—starting "the *Campaign for the New Madison Square Park*." *Id.*

73. Arden, *supra* note 68, at 43. That concession, Shake Shack, collected \$4.9 million in revenues in 2009, of which a little under \$350,000 went to the park (and less than that, about \$220,000, went to the City). *Id.* Of note, the Conservancy paid \$750,000 for the construction of the Shake Shack. See *Shake Shack*, MADISON SQUARE PARK, <https://www.madisonsquarepark.org/mad-sq-food/shake-shack> (last visited Dec. 18, 2017).

74. See Murray, *supra* note 12, at 203–29.



Associations (“HOAs”).<sup>75</sup> HOAs generally comprise groups of private individuals who live in a given neighborhood.<sup>76</sup> While the streets that run through those neighborhoods might technically be public streets, there is often a feeling of exclusivity, especially if one has to pass through a gate or entryway to access the neighborhood.

Scholars have also defined privatization to include spaces that appear to be public, but that are actually owned by private entities.<sup>77</sup> For example, the privatization literature discusses shopping malls, which are owned by private entities but used by members of the public.<sup>78</sup> Indeed, in many communities, the mall has supplanted a traditional town square and thus functions as traditional public space, despite being privately owned and managed.<sup>79</sup> Similarly, certain private plazas and atriums are required by law to be open to the public. These Privately Owned Public Open Spaces will be the focus of the remainder of this Article. Finally, the way that a space is used influences whether one views it as privatized or not. To the extent that access is very restrictive, the space might be viewed as private regardless of who owns or manages it.<sup>80</sup>

Just as there are many types of privatized public space, there are also many methods of establishing this type of space. Gerald Frug has pointed out ways that the law has been used to aid in the privatization of public space.<sup>81</sup> These methods include: funding for highways, where people ride in isolation in their cars, instead of funding for mass transit, which brings people into contact with one another;<sup>82</sup> gated communities, which often segregate by race and class;<sup>83</sup> and BIDs, where businesses tax themselves in order to fund

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75. See CMTY. ASS’N INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2015 COMMUNITY ASSOCIATION DATA 3 (2015), [https://www.caionline.org/PressReleases/Documents/2015\\_StatsReview.pdf](https://www.caionline.org/PressReleases/Documents/2015_StatsReview.pdf) (estimating that over 20% of the U.S. population resides in neighborhoods with community associations).

76. See, e.g., David L. Callies et. al., *Ramapo Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177, 199 (2003) (describing HOAs generally and noting that their “board of directors, which can only be made up of homeowners, must enforce the [neighborhood covenants, conditions and restrictions], manage the association’s assets, and provide upkeep for the common areas” (footnote omitted)).

77. See Weaver, *supra* note 15, at 1 (describing “the increasing prevalence of spaces that appear to be public but are in fact privately owned”).

78. See generally Anne Bottomley, *A Trip to the Mall: Revisiting the Public/Private Divide*, in FEMINIST PERSPECTIVES ON LAND LAW 65 (Hilary Lim & Anne Bottomley eds., 2007) (discussing shopping malls).

79. See KOHN, *supra* note 17, at 4.

80. See Low, *supra* note 46, at 45 (“Restricting access and posting extensive restrictions further privatizes” the use of public space.).

81. Frug, *supra* note 40, at 84–87.

82. *Id.* at 86 (“Mass transit and walkable streets are two of the major sources of public space in America: they enable the daily experience of crossing paths with different kinds of people.”).

83. *Id.* at 84–85.

specific projects within their boundaries.<sup>84</sup> In each of these instances, public spaces that were historically open to broad swaths of the community are being partially closed off and made unavailable to some.<sup>85</sup>

Privatization is a subject that evokes passionate feelings. Because the academic literature on the topic is so vast,<sup>86</sup> a thorough analysis is beyond the scope of this Article. However, at the most basic level, there are common arguments both for and against the privatization of public goods. These arguments apply in the context of public space, as the next Subpart will discuss.

## 2. Reasons for the Privatization of Public Space

There are a number of reasons that the privatization of public space has become popular. Perhaps the most commonly asserted benefit of the private provision of goods is that it is more efficient, allowing governments to obtain “high-quality services at the lowest possible cost.”<sup>87</sup> This rationale is appealing to local governments, many of whom lack sufficient resources to provide all of the services that their constituents demand, and thus are looking for ways to lower costs.

A good example of the efficient private provision of high quality public space is the aforementioned Bryant Park, the transformation of which has been hailed by many as a success.<sup>88</sup> By all accounts, the park now has more

84. *Id.* at 86–87.

85. *See id.* at 84.

86. While scholars have long been writing about privatization, a new vein of related work emerged over the past decade: New Governance scholarship. This literature is also vast and has encountered its share of critics, primarily because it tries to encompass so much that it seems to lack any precise meaning. *See, e.g.,* Bradley C. Karkkainen, “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 496 (2004) (noting that “New Governance is not a single model, but a loosely related family of alternative approaches to governance”). That said, many scholars have tried to cabin it. Karen Bradshaw notes that “[a] central feature of new governance is extralegal regulation that privileges private actors in rule setting and rule enforcement.” Karen Bradshaw Schulz, *New Governance and Industry Culture*, 88 NOTRE DAME L. REV. 2515, 2516 (2013). Douglas NeJaime pointed out that “New Governance scholars recognize recent trends of privatization and decentralization and seek to reconfigure them as locations for innovation in law and policy.” Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 325 (2009). And Lisa Alexander recognized that “[n]ew governance clearly encompasses familiar recent governance innovations such as privatization, devolution, decentralization [and] public-private partnerships.” Lisa T. Alexander, *Reflections on Success and Failure in New Governance and the Role of the Lawyer*, 2010 WIS. L. REV. 737, 739.

87. Freeman, *supra* note 21, at 1296.

88. *See, e.g.,* Julia Vitullo-Martin, *The Private Sector Shows How to Run a City*, WALL ST. J., May 20, 1998, at A14 (praising the transformation). *But see* Ethan Kent, *When Bad Things Happen to Good Parks*, PROJECT FOR PUB. SPACES (Sept. 1, 2004), <https://www.pps.org/reference/september2004bryant> (suggesting that the park feels “increasingly off-limits to the citizens of the city”); Murray, *supra* note 12, at 233 (the Bryant Park Corporation “discouraged visits by those individuals . . . view[ed] as ‘unsavory’ by preventing washing in the restrooms and sleeping on mats in the park”). Notably, the City of New York contributed about half of the necessary funds

users and is cleaner and safer.<sup>89</sup> Further, the City of New York contributes virtually nothing to its operational budget today.<sup>90</sup> When the Bryant Park Corporation's predecessor began its management of the park, it relied largely on donations and assessments from the BID to fund its operations.<sup>91</sup> Now, however, it is primarily dependent on market-based sources of revenue, including income from rents, concessions, events, and user fees.<sup>92</sup> The nonprofit corporation is also tasked with physical management of the space; this allocation results in lower monitoring costs than would be required if the public Parks Department were tasked with physical management, as that department has a number of other parks and tasks to oversee.<sup>93</sup> All of this frees up money so that the city can target tax dollars to parks that are in greater need of funding and oversight.<sup>94</sup> Success stories such as this one have led some scholars to suggest that the private sector can be used broadly and effectively to aid failing downtowns.<sup>95</sup>

Privatized public space can also be viewed as a response to "the tragedy of the commons."<sup>96</sup> Members of the public have economic incentives to exploit common property, but not to maintain or conserve it.<sup>97</sup> The problems of overuse and exploitation can be solved, in part, by privatizing the ownership and management of public space because private owners have economic incentives to keep the space well-maintained, and they do so at their own cost (not at the cost of the government).<sup>98</sup>

While many cities look to privatization as a way to save money, other cities use it to help them raise money. Privatized public space allows a city to raise money by, for example, charging groups for use of the space. Many parks rent

for the restoration of the park in the early 1980s. ALEXANDER GARVIN & GAYLE BERENS, *URBAN PARKS AND OPEN SPACE* 56 (1997); Murray, *supra* note 12, at 231.

89. Murray, *supra* note 12, at 238 ("Usership has increased. . . . Users also have conveyed feelings of safety in user surveys. . . . Eighty-eight percent of the businesses and residents surveyed in 2001 believed that 'conditions in the Park had greatly improved over the past ten years' . . .").

90. According to the Park's public relations firm, "no public funding" other than BID assessments are used to maintain or operate Bryant Park at this time. E-mail from Joe Carella, *supra* note 71. The P.R. representative stated, "Bryant Park is completely self-sustaining even though it's a city-owned park under the auspices of the Department of Parks & Recreation." *Id.*

91. Murray, *supra* note 12, at 229.

92. *Id.* at 229, 236 (showing that by 2007, only 10% of the park's revenue came from government, down from 40% in 1992, when the park reopened after renovations). Of note, the City is still responsible for the provision of fire and police service. *Id.* at 233.

93. *Id.* at 229.

94. Arden, *supra* note 68, at 43.

95. Németh, *supra* note 17, at 2465.

96. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968) (discussing the perils of common property ownership).

97. *Id.* at 1244.

98. This can result in a conflict of interest, because the private manager of the space has her own goals and may seek to manage the property so as to maximize her own utility rather than the utility of the public. Further, since the manager is not elected, she lacks accountability. See *supra* Part II.C.2.

out picnic tables, but the San Francisco Recreation and Park Department recently proposed a pilot program to rent portions of the grass in popular Dolores Park.<sup>99</sup> The fee for such rentals would have been between \$33 and \$260, depending on the size of the requesting group, plus a \$200 security deposit.<sup>100</sup> However, community uproar in response to this program led the city to repeal it.<sup>101</sup> The city continues to rent picnic tables,<sup>102</sup> and the fees are higher for corporations and businesses than they are for families, schools, and non-profits.<sup>103</sup>

Privatizing public space can also result in space that is cleaner and more secure. For example, some areas have set up BIDs.<sup>104</sup> The businesses within the boundaries of the district tax themselves in order to raise money for things like private security guards or private cleaning services.<sup>105</sup> These services can result in public spaces—including streets, sidewalks, and parks—that have less trash and feel safer than those without the additional services purchased through private funds.<sup>106</sup>

Finally, for many, privatization is a way to shrink government, which is viewed not only as less efficient than the private sector, but as intruding into spaces that the market should control.<sup>107</sup> Indeed, some view a reduction in the size of government as "an important goal in itself"<sup>108</sup> and a way to move

99. Brock Keeling, *UPDATE: City Suspends Dolores Park Reservations*, CURBED S.F. (May 24, 2016, 8:34 AM), <https://sf.curbed.com/2016/5/24/11760328/dolores-park-reservations>.

100. According to the city, the fees generated would be used, at least in part, to pay for trash pick-up at the park, which currently costs the city around \$750,000 per year. *See id.*

101. *See, e.g.*, Jane Kim (@JaneKim), TWITTER (May 23, 2016, 6:16 PM), <https://twitter.com/janekim/status/734915947778052098> ("I'm opposed to the plan to rent space at Dolores Park. Our city's not for sale and it shouldn't be for rent either."); Jack Morse, *Rec and Parks to Kill Dolores Park Rental Program Following Backlash*, SFIST (May 24, 2016, 11:05 AM), [http://sfist.com/2016/05/24/supervisor\\_jane\\_kim\\_announces\\_resol.php](http://sfist.com/2016/05/24/supervisor_jane_kim_announces_resol.php).

102. *See Dolores Park Children's Picnic Areas*, S.F. RECREATION & PARKS, <http://sfrecpark.org/destination/mission-dolores-park/dolores-park-childrens-picnic-areas> (last visited Dec. 19, 2017).

103. *Picnic & Impact Fees 2017*, S.F. RECREATION & PARKS, <http://sfrecpark.org/wp-content/uploads/Picnic-Impact-Fees-2017.pdf> (last visited Dec. 19, 2017).

104. *See* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 368–69 (1999) (describing BIDs); *see also* GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 113–14 (1996) (describing the functions of BIDs).

105. *See generally* KELLING & COLES, *supra* note 104.

106. *See, e.g.*, William J. Bratton, *New Strategies for Combating Crime in New York City*, 23 FORDHAM URB. L.J. 781, 789 (1996) (giving BIDs credit for improving safety and cleanliness); Daniel R. Garodnick, *What's the BID Deal? Can the Grand Central Business Improvement District Serve A Special Limited Purpose?*, 148 U. PA. L. REV. 1733, 1740 (2000) ("The BID's security patrol has produced a sixty percent drop in crime . . .").

107. *See generally* Janet Rothenberg Pack, *The Opportunities and Constraints of Privatization, in PRIVATIZATION AND ITS ALTERNATIVES* 281 (William T. Gormley, Jr. ed., 1991) (describing privatization and governance); Savas, *supra* note 60 (same).

108. PRESIDENT'S COMM'N ON PRIVATIZATION, *PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT* 244 (1988).

away from a monopolistic system of service-provision.<sup>109</sup> Thus, if there are fewer publicly owned parks to manage, local parks departments would need to hire fewer employees. This reduction in staffing might, in turn, lead to a reduction in taxes.<sup>110</sup>

Despite these justifications, many commentators share concerns about the privatization of public space. Generally, these concerns include that public space is often exclusionary,<sup>111</sup> sanitized, and unlikely to result in discourse between different segments of the population.<sup>112</sup> These concerns are exacerbated by the fact that privatization regimes tend to focus resources on public space in wealthy areas, while ignoring those in poorer neighborhoods.<sup>113</sup> This disparity results in “two-tier” park systems, where wealthy communities have “showplace parks” that are often managed and supported by private groups, like friends-of-the-park organizations.<sup>114</sup> In contrast, existing parks in poorer neighborhoods are often neglected, and new public space—privatized or otherwise—is rare.<sup>115</sup> Because these concerns with privatized public space also apply to POPOS—the focus of this Article—they will be discussed in more detail below.<sup>116</sup>

That said, a more general concern with privatization bears introduction now, as it is also central to the concerns of this Article: Some argue that privatization “erodes the public law norms” such as “accountability, due

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109. See generally John L. Crompton, *Forces Underlying the Emergence of Privatization in Parks and Recreation*, 16 J. PARK & RECREATION ADMIN. 88 (1998) (discussing privatization and reducing the size of government).

110. John B. Goodman & Gary W. Loveman, *Does Privatization Serve the Public Interest?*, HARV. BUS. REV., Nov.–Dec. 1991, at 26.

111. For example, while Bryant Park is now supported primarily by market-based revenues, which is a financial benefit to the City, some critics have argued that it is too exclusionary; the park is sometimes closed to the public and rented out for private events. See Harris Kenny, *Stossel Gets It Right on Parks Privatization*, REASON FOUND. (Dec. 2, 2010, 12:08 PM), <http://reason.org/blog/show/stossel-gets-it-right-on-parks-priv> (“[S]ince 1996 it has not required a single dollar from New York City taxpayers.”); Swan, *supra* note 71.

112. For example, one commentator has stated that “[t]he privatization of public space gradually undermines the feeling that people of different classes and cultures live in the same world” and “exacerbates the effects of racial and class segregation that already exist[] in housing patterns.” KOHN, *supra* note 17, at 8.

113. See Arden, *supra* note 68, at 43 (noting the “wide—and growing—disparities between lavish, showplace parks for the haves and cast-off parcels for the have-nots”); Timothy Williams, *Report Assails Poor Upkeep in City Parks*, N.Y. TIMES (June 16, 2006), <http://www.nytimes.com/2006/06/16/nyregion/16parks.html> (noting that “parks in poor and minority neighborhoods are so poorly maintained that the neglect is tantamount to a civil rights issue” while “parks in wealthier areas have increasingly become pristine” due in part to “private organizations like the Central Park Conservancy and the Bryant Park Restoration Corporation”).

114. Arden, *supra* note 68, at 43; Douglas Martin, *Trying New Ways To Save Decaying Parks*, N.Y. TIMES (Nov. 15, 1994), <http://www.nytimes.com/1994/11/15/nyregion/trying-new-ways-to-save-decaying-parks.html> (describing the fear of “a two-tier system of parks”).

115. See *supra* note 114 and accompanying text.

116. See *infra* Part III.

process, equality, rationality, and the like.”<sup>117</sup> One problem with the privatization of spaces like parks—where there is a transition from the government provision of a good to the private provision of a good—is that the government is able to avoid the obligations that it would have had if it were offering that good.<sup>118</sup> Thus, there is a risk that the norms associated with the public provision of public space—norms discussed in Part II.A—might wear away. The process of privatizing public spaces means that the government is able to avoid its former obligations and save money. Meanwhile, private parties get the benefits of added development rights (in exchange for the provision of public access)<sup>119</sup> and increased property value. On the other hand, citizens get fewer protections in these spaces than they would in traditional public fora.<sup>120</sup> While the move to privatize public space carries substantial benefits for both government and private developers, citizens lose something of value.

The bottom line is that there will be tradeoffs in any bargain of this sort. Perhaps public management would avoid some problems of privatization, but it is also possible that private management can provide for “better” spaces—spaces that are cleaner, safer, and more well-used.<sup>121</sup> At base, and despite the asserted problems with privatized public space, many localities do not have money to create new, truly public space, and thus these localities might believe that something is better than nothing.<sup>122</sup> This view could serve as a justification for, and a reason to encourage the creation of, privatized public space as a substitute for true public space.<sup>123</sup> Even if they are exclusionary, overly sanitized, or erode public norms—the argument would go—privatized public space still provides the public with open space. These supporters might also argue that, if not for privatized public space, we would have no new public space, or at least, far less.<sup>124</sup> Thus encouraging or requiring the creation of

117. Freeman, *supra* note 21, at 1301–02 (describing this as the “public law perspective” on privatization, which “prioritizes legally required procedures designed to guarantee public participation and due process”).

118. *Id.* at 1309; Tigran Haas & Krister Olsson, *Transmutation and Reinvention of Public Spaces Through Ideals of Urban Planning and Design*, 17 SPACE & CULTURE 59, 60 (2014) (defining public space as a public good).

119. See *supra* Part II (discussing POPOS).

120. See *infra* Part V.B.2.ii (discussing First Amendment and state action cases).

121. Murray, *supra* note 12, at 244 (“The choice is not between fully-funded government management and [private non-profit] management but between government management at the median voter level and [private non-profit] management at the residual demand level . . .”).

122. See *supra* Part II.B (discussing exclusionary space versus no space).

123. Not all cities take this view. For example, Toronto expressly notes that “POPS are intended to complement the City’s public parks, open space and natural areas, not replace them.” CITY OF TORONTO, POPS: CREATIVE PLACE MAKING TO ENHANCE URBAN LIFE 1 (2014), [http://www1.toronto.ca/City%20Of%20Toronto/City%20Planning/Urban%20Design/Files/pdf/P/POPS\\_guidelines\\_Final\\_140529.pdf](http://www1.toronto.ca/City%20Of%20Toronto/City%20Planning/Urban%20Design/Files/pdf/P/POPS_guidelines_Final_140529.pdf).

124. Of course, here we must consider why municipalities are not creating new truly public open space. For example, is it because they have insufficient funds to do so or because they are

privatized public space is a Pareto efficient move for a city: At least some people will be better off, while no one will be worse off.<sup>125</sup> Of course, privatized public space and no public space are not necessarily the only two options.<sup>126</sup> Further, there is a concern that by concentrating on the creation of privatized public space, cities risk losing out on the opportunity to develop laws and policies that encourage better truly public spaces. The result of focusing legal energy on the creation of privatized public spaces is that cities are stuck with them: liminal, hybrid spaces that fall somewhere between public and private,<sup>127</sup> and that satisfy only some of the functions of public space.<sup>128</sup>

### III. PRIVATELY OWNED PUBLIC OPEN SPACES

#### A. WHAT ARE POPOS?

Consider a tall office building in a busy downtown. It might have a large plaza outside, separating it from the street and sidewalk. Perhaps it has a light-filled lobby filled with tables, chairs, and art. There might be a rooftop garden—one that only those with insider knowledge are aware of—that is accessed by passing the security desk and taking the elevator up to the roof. These are all examples of space connected to private buildings and owned by a private developer or property manager. In some instances, that is where the story ends. These are private spaces for the use of the building's private tenants.

However, in many cities these spaces are open to the public. And they are not open to the public merely by default; they were created to be used by and accessible to all members of the public, including (and especially) those who have no other business being in the building to which the space is attached. These spaces are variously referred to as bonus plazas, Privately Owned Public Open Space (“POPOS”), and Privately Owned Public Space (“POPS”). Some developers of buildings containing POPOS were given the opportunity to provide these public spaces in exchange for the ability to build larger

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already getting new public space in the form of POPOS? There is a risk that cities feel that their public space needs are being met through POPOS, and thus they fail to invest in truly public space.

125. See JULES L. COLEMAN, *MARKETS, MORALS, AND THE LAW* 71–76 (2002) (describing Pareto efficiency); see also Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, 144 U. PA. L. REV. 1987, 1996–97 (1996) (discussing Pareto's views).

126. See *supra* text accompanying note 59.

127. See Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635, 636 (“Specifically, in the modern world of quasi-public entities and governmental privatization, attempts to categorize entities, properties, and activities as strictly public or private have led to frustration and uncertainty.”).

128. Empirical research is needed here. For example, to determine whether cities are obtaining “sufficient value” from POPOS, researchers could survey local citizens, or planning departments or city councils could look at numbers and observable data about how, when, and by whom POPOS are used, and make a decision about their value.

buildings than otherwise would have been allowed.<sup>129</sup> Others were required to provide them because their buildings were over a certain size or located in a certain district.<sup>130</sup> POPOS take various forms, including plazas, arcades, terraces, rooftop patios, widened sidewalks, through-block spaces, and offsite but nearby parks.<sup>131</sup>

POPOS ordinances have resulted in a large amount of privately owned public space. In the first years of New York’s program, from 1961 through 1975, Jerold Kayden estimates that 70% of building developers obtained the maximum development bonus (a Floor Area Ratio, or “FAR” bonus) in exchange for the provision of POPOS.<sup>132</sup> Currently in New York City alone, there are over 500 of these POPOS, totaling approximately 85 acres of space.<sup>133</sup> San Francisco has nearly 72,<sup>134</sup> and many major cities—both in the United States and elsewhere—now have similar bonus space programs.<sup>135</sup>

129. See e.g., N.Y.C., N.Y., ZONING RESOLUTION art. III, ch. 7, § 37-70 (2017) (discussing public plazas).

130. See S.F., CAL., PLANNING CODE § 138 (2015) (requiring open space to be provided at a ratio of one square foot per 50 square feet of occupied office space in certain districts).

131. KAYDEN ET AL., *supra* note 6, at 25–35.

132. Jerold S. Kayden, *Incentive Zoning in New York City: A Cost Benefit Analysis*, 201 LINCOLN INST. LAND POL’Y 11, 11 (1978).

133. KAYDEN ET AL., *supra* note 6, at 1; Németh, *supra* note 17, at 2464 (noting that “the proliferation of bonus spaces is staggering”). In New York City, “private office and residential developers between 1961 and 2000 built an extra 16 million square feet of private space above what they otherwise would have been allowed to build under applicable zoning rules in” exchange for the provision of POPOS. *Privately Owned Public Space in New York City*, ADVOCATES FOR PRIVATELY OWNED PUB. SPACE, <https://apops.mas.org/about/history> (last visited Dec. 19, 2017). “To put this trade in context, 16 million square feet of private floor area is the equivalent of roughly six Empire State Buildings, while 80 acres of privately owned public space equals 10% of Central Park.” *Id.* Of note, New York’s Central Park comprises 843 acres of land, which is 6% of Manhattan’s total acreage. *Frequently Asked Questions*, CENT. PARK, <http://centralpark.org/faq> (last visited Dec. 19, 2017).

134. *San Francisco Privately-Owned Public Open Spaces*, S.F. PLAN. DEP’T (Dec. 24, 2012), [http://sf-planning.org/sites/default/files/SF\\_POPOS.pdf](http://sf-planning.org/sites/default/files/SF_POPOS.pdf).

135. Németh, *supra* note 17, at 2464. For example, Seattle has over 40 POPOS. See *Privately Owned Public Spaces*, SEATTLE DEP’T CONSTRUCTION & INSPECTIONS, <http://www.seattle.gov/dpd/tools/resources/pops/default.htm> (last visited Dec. 19, 2016); see also SEATTLE MUN. CODE § 23.58A.040 (2017) (concerning bonus floor area for open space amenities). Toronto and London also have robust programs.

In order to provide this much needed open space within Toronto’s dense urban landscape, the City often negotiates with private developers to include [POPS] as part of the development application and review process. POPS are a specific type of open space which the public are invited to use, but remain privately owned and maintained. They are a key part of the city’s public realm network, providing open space in much needed locations across the city and complementing existing and planned publicly owned parks, open spaces and natural areas.

CITY OF TORONTO, *supra* note 123, at 1; see *Privately Owned Public Spaces*, LONDON DATASTORE, <https://data.london.gov.uk/dataset/privately-owned-public-spaces> (last visited Dec. 19, 2017).



B. WHY ALLOW DEVELOPERS TO CREATE POPOS IN EXCHANGE FOR LARGE BUILDINGS?

When considering the reasons for the rise of POPOS, one can consider the perspectives of the city, the developer, and the public; POPOS benefit at least two of these three entities. From the city's perspective, POPOS are an efficient and expedient way to obtain more public open space. Although legislative history for land-use ordinances is difficult to find, New York was the first city to develop a POPOS ordinance, and it provides substantial information.<sup>136</sup> When they were first incorporated into the zoning ordinance in 1961, POPOS functioned as a response to development pressures; they were seen "as a means of increasing light and air and green space, and easing the hard streetscape formed by towering buildings bordered by concrete sidewalks."<sup>137</sup> Over time, the program in New York has come to be viewed as means through which the city could get "new, high-quality public spaces" without expending its own funds.<sup>138</sup> Similarly, in San Francisco, the zoning code states that POPOS exist "to meet the public need for open space and recreational uses."<sup>139</sup> As Part II.C explained, cities are increasingly moving in the direction of using the market to aid in the provision of public goods and services, including public space.<sup>140</sup> If a city could obtain public goods for free, that would be of the greatest benefit to the public. Of course, developers generally expect something in return.

136. In San Francisco, POPOS were originally provided through a density bonus scheme that "stated [only] that 'the balance shall be suitable for walking, sitting and similar pursuits.'" See George Williams et. al., *Secrets of San Francisco*, URBANIST (Jan. 2009), <http://www.spur.org/publications/spur-report/2009-01-01/secrets-san-francisco>. Later, the city adopted a POPOS requirement as part of its Downtown Plan, "[t]he goal [of which] was to 'provide in the downtown quality open space in sufficient quantity and variety to meet the needs of downtown workers, residents and visitors.'" *Id.*

137. *Privately Owned Public Spaces*, N.Y.C. DEP'T CITY PLAN., <https://www1.nyc.gov/site/planning/zoning/districts-tools/private-owned-public-spaces.page> (last visited Dec. 19, 2017); see also KRISTINE F. MILLER, *DESIGNS ON THE PUBLIC: THE PRIVATE LIVES OF NEW YORK'S PUBLIC SPACES* 85 (2007) (suggesting that as it was originally written, the purpose of the New York POPS ordinance "was not to provide new public spaces" but "to bring more light and air into the city").

138. MILLER, *supra* note 137, at x-xi; cf. KAYDEN ET AL., *supra* note 6, at 16 (according to an original report recommending the creation of POPOS, "plazas had two goals: to foster greater light and air at street level and to create usable open spaces").

139. S.F., CAL., PLANNING CODE § 138(e) (2015).

140. Németh, *supra* note 17, at 2466 ("In the current period of increasingly lean local government budgets, most major downtowns in North America and Europe have turned to powerful public-private partnerships to manage and maintain their publicly accessible spaces."); see Matt Helms et al., *9 Ways Detroit is Changing After Bankruptcy*, DETROIT FREE PRESS (Nov. 9, 2014, 1:38 AM), <http://www.freep.com/story/news/local/detroit-bankruptcy/2014/11/09/detroit-city-services-bankruptcy/18716557>. See generally Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364 (2012) (describing local governments that have dissolved); Tridib Banerjee, *The Future of Public Space: Beyond Invented Streets and Reinvented Places*, 67 J. AM. PLAN. ASS'N 9 (2001) (describing the impact of fiscal crises in New York on public parks).

Thus, the creation of POPOS benefits developers as well: The city gets the additional public open space, but the developer often gets the ability to build a larger building than would otherwise be permitted under the zoning code. As will be discussed in more detail below, many cities use “incentive zoning,” whereby they waive certain height, bulk, or building footprint restrictions in exchange for the provision of publicly accessible space.<sup>141</sup> Because they gain additional private space to use or lease, developers also earn more: “[F]or every dollar spent on a public space, developers earned \$48 in additional profit.”<sup>142</sup>

Public open space—especially space located in dense urban areas, as many of these POPOS are—should benefit the residents of and visitors to a community as well. However, it is less clear that POPOS benefit the populace as much as they do local governments and developers. While the remainder of this Article will explore that idea, one community-focused justification for POPOS is that members of the public are better served by a city with POPOS and larger buildings than by a city with smaller buildings that sit flush with crowded sidewalks, that is filled with exclusionary private space, and that lacks light and air.<sup>143</sup>

### C. INCENTIVE ZONING, CONDITIONAL USE PERMITS, AND THE CREATION OF POPOS

Zoning is one of the most powerful tools that municipalities have for extracting public goods from private parties. In the absence of a governmental requirement, the private sector would likely prefer to only provide public goods and services when they receive compensation to do so.<sup>144</sup> For example, cities might allocate tax dollars to pay a private service provider to undertake a task for less money than it would cost the city to do so itself. However, this approach still requires the expenditure of public funds. Thus, cash-strapped cities have had to be creative in figuring out ways to encourage or require the private sector to provide public goods without having to pay for them. To accomplish this goal, many cities turned to their zoning codes.<sup>145</sup>

141. KAYDEN ET AL., *supra* note 6, at 22.

142. Németh, *supra* note 17, at 2465–66 (noting that developers often gain “increased profits—as a result of these transactions”).

143. KAYDEN ET AL., *supra* note 6, at 22 (“[P]ublic space is density-ameliorating, in that it more than counteracts whatever negative impacts, such as greater street and sidewalk congestion and loss of light and air, that may be associated with larger buildings.”).

144. See, e.g., Freeman, *supra* note 21, at 1327 n.179 (“Profit-making institutions should pursue profit and nothing else, according to the dominant view.”). Of course, some private actors are likely motivated by good will or other non-economic factors to provide public goods. See Emma L. Tompkins & Hallie Eakin, *Managing Private and Public Adaptation to Climate Change*, 22 GLOBAL ENVTL. CHANGE 3, 6 (2012).

145. KAYDEN ET AL., *supra* note 6, at 307 n.6 (“[I]ncentive zoning is credited with being a marvelously creative solution for obtaining public benefits without expenditure of taxpayer dollars, at a time when public sector budgets are increasingly constrained.”).

There are three primary ways that municipalities have used zoning to encourage or require the provision of public space: (1) incentive zoning; (2) discretionary approvals; and (3) public space requirements. In most cities, the zoning code provides a baseline for things like a building's height and bulk.<sup>146</sup> For example, regulations might provide that a new downtown building cannot be more than ten stories high and cannot occupy more than 60% of its lot's footprint. However, there are often ways around these types of limitations; one of these ways is incentive zoning.

Incentive zoning, also known as bonus zoning, "is a legislatively preset bargain"<sup>147</sup> whereby private developers are permitted to ignore the baseline zoning restrictions; they may build bigger and taller buildings in exchange for a promise to provide "urban design features"—including privately owned public space—to the city and its residents.<sup>148</sup> Sociologist William Whyte saw bonus zoning as a way to harness the greed of developers who wished to build the largest buildings that they could.<sup>149</sup> Under an incentive zoning scheme that allows for a bulkier building in exchange for a POPOS, the requirements for that POPOS would be set forth in the zoning ordinance itself.<sup>150</sup> This type of incentive zoning has been a primary mechanism through which cities, including New York, have obtained public space in recent years.<sup>151</sup>

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146. See, e.g., S.F., CAL., PLANNING CODE, art. 2.5 (2017) (governing "Height and Bulk Districts").

147. ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 327 (4th ed. 2013).

148. Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 3 (1991); see also ELLICKSON ET AL., *supra* note 147, at 326 ("New York City comprehensively overhauled its zoning resolution in 1961 to authorize (among other things) 'incentive zoning' wherein 'private developers could earn a higher floor area ratio (FAR) in return for providing publicly accessible spaces . . .").

149. WILLIAM H. WHYTE, CITY: REDISCOVERING THE CENTER 229 (2009) (describing incentive zoning as a process whereby planners would "downzone. They would lower the limit on the amount of bulk a developer could put up. Then they would upzone, with strings. The builders could build over the limit if they provided a public plaza, or an arcade, or a comparable amenity.").

150. See N.Y.C., N.Y., ZONING RESOLUTION art. III, ch. 7, § 37-70 (2009); see also ELLICKSON ET AL., *supra* note 147, at 327 ("[P]rices for extra density or other land uses are specifically defined in advance in the text of the zoning ordinance itself."); KAYDEN ET AL., *supra* note 6, at 1 (In describing the NYC incentive zoning scheme, it is noted that "the City offered floor area bonuses and other zoning concessions to office and residential developers if they would agree to provide plazas, arcades, atriums, and other outdoor and indoor spaces, governed by design standards articulated by the Zoning Resolution . . . that would be accessible to, and usable by, the public for as long as the buildings existed. Private ownership would reside with the developer and successor owners of the property, access and use with members of the public . . . . Cities across the country have followed New York's lead, distributing their own zoning incentives to encourage the creation of privately owned public spaces."); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 344 ("The available regulatory benefits—and their 'prices'—are typically spelled out in advance in a great deal of detail and publicly available to all prospective developers on equal terms.").

151. KAYDEN ET AL., *supra* note 6, at 22. The first incentive zoning program to permit the construction of larger buildings in exchange for open space was created in Chicago in 1957. *Id.* at 304 n.50. New York's 1961 incentive zoning ordinance was the first to expressly require the

In other locations, a city might have the discretion to approve a building above ten stories, on the condition that the developer provides something in exchange for that approval. In these jurisdictions, the city might require a Conditional Use Permit ("CUP"), Special Use Permit, or other discretionary approval for large buildings in certain districts, and the city will only issue those permits if the developer legally binds itself to provide something in return to the city.<sup>152</sup> Thus, unlike the structured incentive zoning programs—which are preset, before-the-fact, and generally applicable—this CUP approach is more discretionary and works on an individualized case-by-case basis.<sup>153</sup> In this instance, the requirements for the POPOS would not be contained within the zoning ordinance, but rather within the discretionary project entitlements as a condition of development approval.<sup>154</sup>

Finally, a city could simply require public space as part of a project where discretionary approvals were required. For example, in San Francisco, the zoning code was updated in 1985 so as to require developers to provide one square foot of publicly accessible space for every 50 square feet of commercial space that they developed.<sup>155</sup>

Under any of these methods, it is important to recognize that the developer is getting something of value in exchange for the provision of the public space: a development permit to construct a project. Under incentive zoning schemes in particular, developers are gaining a huge advantage. For example, Trump Tower in New York relied upon the city's bonus zoning scheme in its permitting and construction. In exchange for the provision of 15,000 square feet of public space in the form of public gardens and an atrium, the developer was permitted to construct an additional 200,000 square feet of building square footage.<sup>156</sup> This additional square footage

public space to be accessible to the public. *Id.* at 1; *see also* Németh, *supra* note 17, at 2466 ("The new code [in New York] lowered the density limit in commercial districts to 15 FAR, but allowed developers to add an extra 20 per cent of floor area if they provided a publicly accessible space, increasing the maximum FAR to 18.").

152. KAYDEN ET AL., *supra* note 6, at 15 ("Over the years, developers, seeking variances or special permits allowing them to obtain extra floor area beyond the base-authorized FAR or secure modifications of height and setback or tower coverage rules, would promise a uniquely crafted public space not formally described by the text of the Zoning Resolution.").

153. For example, Kayden describes a POPOS at 685 Third Avenue where "the developer sought a variance for an additional 70,577 square feet of floor area, . . . and the Board's Resolution granting this relief also required a 'vest pocket park,' a type of space not enumerated, let alone defined, anywhere in the Zoning Resolution." *Id.* (footnote omitted). A city could also have a general, legislative approach to requiring the provision of open space as a condition of development approval.

154. *See id.* at 13.

155. S.F., CAL., PLANNING CODE § 138(b) (2015); John King, *Little-Known Open Spaces Enhance Downtown S.F.*, SFGATE (Mar. 23, 2008, 4:00 AM) <http://www.sfgate.com/news/article/Little-known-open-spaces-enhance-downtown-SF-3220966.php>; *see also* L.A., CAL., MUN. CODE § 12.21(G)(2)(a) (1997) (requiring projects in a certain district to provide a portion of the lot area as publicly accessible open space).

156. Elstein, *supra* note 5.

translated to 20 additional floors.<sup>157</sup> Notably, Trump himself owns approximately 244,000 square feet of space in Trump Tower, which makes his portion worth approximately \$530 million.<sup>158</sup> It appears that the tradeoff was valuable.<sup>159</sup>

Regardless of the specific mechanism used to secure the provision of a POPOS, the developer is then tasked with operating and maintaining it as a space accessible to the public. This requirement might be secured through the filing of a declaration or restrictive covenant that runs with the land to subsequent owners,<sup>160</sup> or the granting of an easement to the city.<sup>161</sup> This Article will discuss the importance of the mechanism that is used below.<sup>162</sup>

#### IV. PROBLEMS AND CONCERNS: A CRITIQUE OF PRIVATELY OWNED PUBLIC OPEN SPACE

A small number of scholars in the urban studies, sociology, and planning fields have critiqued POPOS.<sup>163</sup> Just as many of these commentators view POPOS as a form of privatized public space, many of them have critiqued POPOS on the basis of the same general concerns they have with privatized public space.<sup>164</sup> Often, these scholars raise concerns with the way that POPOS are created and managed, suggesting that POPOS fail to replicate the functions we associate with ideal public space.<sup>165</sup> But there is an important yet

157. *Id.*

158. *Id.*

159. *See id.*; *see also* MILLER, *supra* note 137, at 77 (noting that IBM was able to build 147,600 square feet of additional space in exchange for the provision of an onsite POPOS; the value of that additional space is estimated at “an extra \$5,166,000 in annual rental revenues”).

160. KAYDEN ET AL., *supra* note 6, at 17 (describing the filing of a restrictive declaration).

161. *See, e.g.*, PORTLAND, OR., PLANNING AND ZONING CODE § 33.510.210(C)(17) (2017) (requiring open space provided as part of a FAR bonus to “be dedicated to the City” or requiring that “[a] public access easement . . . be provided that allows for public access to and use of all the open space”).

162. *See infra* Part IV.A.

163. Even some cities have recognized the mixed value of POPOS. For example, on its webpage, the City of New York states, with respect to POPS:

An impressive amount of public space has been created in parts of the city with little access to public parks, but much of it is not of high quality. Some spaces have proved to be valuable public resources, but others are inaccessible or devoid of the kinds of amenities that attract public use. Approximately 16 percent of the spaces are actively used as regional destinations or neighborhood gathering spaces, 21 percent are usable as brief resting places, 18 percent are circulation-related, four percent are being renovated or constructed, and 41 percent are of marginal utility.

*Privately Owned Public Space*, NYC PLAN., <https://www1.nyc.gov/site/planning/plans/pops/pops-history.page> (last visited Dec. 19, 2017).

164. *See supra* Part II.C.2.

165. Don Mitchell, *The Liberalization of Free Speech: Or, How Protest in Public Space is Silenced*, STAN. AGORA, 2003, at 16–20; Németh, *supra* note 17, at 2464 (“While creating publicly accessible space where there was none before, most scholars criticize privately owned public spaces for

underdeveloped legal angle here as well.<sup>166</sup> For example, the extent to which the law constrains behavior in these spaces is unclear because POPOS have not yet been fully tested in court.<sup>167</sup> Although POPOS now exist in a number of cities, members of the public are often unsure whether they are able to exercise the same rights in these spaces as they would in other truly public spaces. Because there is a lack of firm guidance from city ordinances and governmental officials about how members of the public can use these ostensibly public spaces, building owners fill the void. Thus, this uncertainty provides an area that is ripe for legal analysis and intervention. This Part will present some of the key concerns with POPOS and suggest that POPOS often do not live up to traditional expectations for truly public spaces.

#### A. LIMINALITY AND LEGAL STRUCTURES

It is often easy to regulate when regulatory lines are clearly defined; our legal system has developed set rules that apply to set categories of things. As one commentator has noted, the legal structures that govern purely public spaces tend to fall within the freedom-of-assembly jurisprudence.<sup>168</sup> In contrast, when we speak about purely private spaces, it is the law of property that governs and the right to exclude that dominates those discussions.<sup>169</sup> Private property is also often governed by contract law. Thus, we have clear yet distinct legal rules governing both traditional public spaces and purely private spaces.

POPOS are interesting from a legal perspective because they are neither purely public nor purely private; rather, they fall somewhere in between.<sup>170</sup> Because of the liminality<sup>171</sup> of POPOS, the legal authority is not completely

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restricting social interaction, constraining individual liberties and excluding certain undesirable populations." (citation omitted)).

166. See Daithí Mac Síthigh, *Virtual Walls? The Law of Pseudo-Public Spaces*, 8.3 INT'L J.L. CONTEXT 394, 396 (2012) ("[T]he question of public and non-public space is neglected within legal scholarship."); see also DAVID MEAD, *THE NEW LAW OF PEACEFUL PROTEST: RIGHTS AND REGULATION IN THE HUMAN RIGHTS ACT ERA* 118 n.2 (2010) (noting that protest law scholarship tends to ignore the location of the protest).

167. For example, how strong are First Amendment rights in POPOS? See *infra* Part V.B.2.ii.

168. Mac Síthigh, *supra* note 166, at 396 fig.I.

169. *Id.*

170. Terzi & Tonnelat, *supra* note 26, at 521–22 ("[S]paces and spheres can be placed along a continuum that goes from private to public.").

171. "The experience of liminal space poses a discontinuity and leads the occupant to question their surroundings, thus leading to heightened awareness of the space as a transformative threshold between distinct spaces." Patrick Troy Zimmerman, *Liminal Space in Architecture: Threshold and Transition* iv, 5 (May 2008) (M.Arch. thesis, University of Tennessee, Knoxville), [http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1489&context=utk\\_gradthes](http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1489&context=utk_gradthes) (defining liminal as "intermediate state or condition; an in-between condition in which the liminal entity has characteristics of what it is between, but at the same time is separate and distinct from them").

[I]n between are a series of gradations, 'liminal' spaces where the private and the public collide . . . . For urban theorists, it is at these boundary points between public

clear within these spaces.<sup>172</sup> For example, POPOS are often created through the use of contract law rather than property law/easements.<sup>173</sup> This structure raises questions as to whether those contracts would qualify as covenants that run with the land to bind future property owners and future potential uses.<sup>174</sup> Similarly, it is not immediately clear who would have standing to enforce the requirement of public accessibility.<sup>175</sup> The answers to these questions will necessarily depend on the way that the city structures the POPOS requirement with the developer.<sup>176</sup> Further, the legal authority that governs these spaces will develop as these spaces are used, challenged, and defined by their users.

The liminality of POPOS also raises questions surrounding the extent of rights that the public has in these spaces, especially with respect to state action and First Amendment jurisprudence. Although a thorough discussion of this topic is well beyond the scope of this Article,<sup>177</sup> at the most general level, owners of purely private property can restrict expressive activities on their property.<sup>178</sup> On the other hand, content-based restrictions in traditional public fora will be subject to strict scrutiny.<sup>179</sup> Further, courts have tended to protect free expression in spaces that are “traditionally understood as public, even if they are not publicly owned.”<sup>180</sup> POPOS fall somewhere in the middle

and private space where much of the conflict they study arises: . . . conflicts between haphazard, creative, and unscripted encounters between people and the highly scripted, controlled encounters preferred by some spatial designers.

PARKINSON, *supra* note 33, at 54.

172. Mac Síthigh, *supra* note 166 (noting that “pseudo-public spaces” have a “relatively clear lack of legal authority”); *see also* Melissa Harrison & Margaret E. Montoya, *Voices / Voces in the Borderlands: A Colloquy on Re/constructing Identities in Re/constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 392 (1996) (describing liminal spaces as those “filled with potentiality”).

173. *See* Noah M. Kazis, *Public Actors, Private Law: Local Governments’ Use of Covenants to Regulate Land Use*, 124 YALE L.J. 1790, 1811 (2015).

174. *Id.* at 1805–06 (noting that New York’s POPS program was originally administered using public law mechanisms but was subsequently modified to require a restrictive declaration); *see also* Jerold S. Kayden, *Meet Me at the Plaza*, N.Y. TIMES (Oct. 19, 2011), <http://www.nytimes.com/2011/10/20/opinion/zuccotti-park-and-the-private-plaza-problem.html>.

175. To the extent that POPOS requirements are guaranteed only by the zoning code, “courts allow citizens to enforce zoning provisions if they ‘can establish that they have suffered special damage.’” Kazis, *supra* note 173, at 1806 (quoting KAYDEN ET AL., *supra* note 6, at 41).

176. *See supra* Part II.A; *see also* KAYDEN ET AL., *supra* note 6, at 41 (explaining that New York required certain POPOS owners “to file a restrictive declaration against its property that not only . . . reiterates obligations vis à vis the space . . . but assigns rents obtained from the bonus floor area to the City if the public space is not provided as promised”).

177. *See infra* Part V.B.2.ii (discussing state action and First Amendment jurisprudence).

178. *But see, e.g.*, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85–88 (1980) (holding that a shopping mall is not a traditional private space because it invites the general public in, and thus opens itself up to some regulation).

179. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

180. *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1303 (2010) [hereinafter *Developments*] (“Although the Court treats some private entities as state actors, doing so in the free speech context creates tension between the autonomy and property rights of owners and the expressive rights of others.” (footnote omitted)).

of this discussion; they present examples of private property that has been opened to the public as a condition of development approval, but the space is not necessarily understood as *public* by the public due to the problems addressed in this Article.<sup>181</sup>

Though courts are equivocal, commentators have suggested that the private developers and security guards who are in charge of POPOS are likely not state actors.<sup>182</sup> Consequently, these developers and security guards could be less protective of the rights of members of the public visiting their POPOS than could police officers and city officials vis-à-vis visitors to a public park.<sup>183</sup> Although “[c]onduct that is formally ‘private’ may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action,” it is likely that the conduct of those overseeing POPOS is not so entwined.<sup>184</sup> In contrast, employees of city planning departments, or elected city council members who adopt the rules that govern the use of public space, would be considered state actors, and thus would be bound by constraints found in

181. See *infra* Part IV.

182. See KAYDEN ET AL., *supra* note 6, at 313 n.316 (“It is unlikely that the actions of private owners operating public spaces obtained under the Zoning Resolution would constitute ‘state action’ for purposes of constitutional analysis, thereby making applicable restrictions imposed by the Condition.”); Stephen Tower, Note, *Not in my Front Yard: Freedom of Speech and State Action in New York City’s Privately Owned Public Spaces*, 22 J.L. & POL’Y 433, 440 (2013) (suggesting that private owners of POPOS are not state actors). While commentators have been more straightforward in making this suggestion, courts tend to note the difficulty of the question, and then assume, without deciding, that the First Amendment applies. See, e.g., *Hotel Emps. & Rest. Emps. Union, Local 100 v. N.Y.C. Dep’t of Parks & Recreation*, 311 F.3d 534, 544 (2d Cir. 2002) (failing to reach the question of whether Lincoln Center was a state actor when regulations governing the use of its plaza were made pursuant to a licensing agreement with the City); *Rodriguez v. Winski*, 973 F. Supp. 2d 411, 423–24 (S.D.N.Y. 2013) (failing to find owners and operators of POPOS that were used during Occupy Wall Street to be state actors); *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 247–48 (D. Conn. 2012) (avoiding the state action question because the parties stipulated to the existence of a public forum); *Waller v. City of New York*, 933 N.Y.S.2d 541, 544 (N.Y. Sup. Ct. 2011) (assuming without deciding that the First Amendment was applicable).

183. See, e.g., Tower, *supra* note 182, at 440 (“As private actors, owners of privately owned public spaces do not have to consider the public’s constitutional rights, such as their right to free speech and assembly, or ensure protection from unreasonable searches and seizures, when instituting rules or regulations.”).

184. *Evans v. Newton*, 382 U.S. 296, 299, 302 (1966) (treating a park held as a charitable trust “as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law” due to its public character); see also *Mitchell*, 854 F. Supp. 2d at 247 (“[N]either the First Amendment of the Federal Constitution nor the corresponding provisions of the Connecticut Constitution limit restrictions of speech on private property—even property, like shopping centers, which the public is generally invited to use.”); *Forbes v. City of New York*, No. 05 Civ. 7331 (NRB), 2008 WL 3539936, at \*8 (S.D.N.Y. Aug. 12, 2008) (failing to find state action in the context of a publicly owned but privately licensed park). That being said, under California law, a strong argument could be made that they are state actors. See *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 810 (Cal. 2001) (holding that the state action requirement is met when private property is “freely and openly accessible to the public”).



their state constitution, as well as the federal constitution and other laws.<sup>185</sup> All this being said, of the few courts that have addressed these issues in the context of POPOS, most have said that even if the owners or managers were considered state actors, and even if the First Amendment applied, the rules imposed by POPOS management are likely reasonable time-place-manner restrictions.<sup>186</sup>

Although it relates less to the liminality of POPOS, another important legal issue of which cities and developers should be aware concerns whether POPOS should be considered exactions subject to heightened scrutiny under *Nollan*, *Dolan*, and *Koontz*.<sup>187</sup> Although the Supreme Court's jurisprudence here is in flux, it has not yet held that purely voluntary, incentive zoning is subject to analysis under *Nollan/Dolan*.<sup>188</sup> Thus, although there have been recent debates about the subject,<sup>189</sup> it is likely that POPOS created through an incentive zoning process—where the developer has a pre-defined, legislatively set choice of whether to build pursuant to the baseline regulations or to build a bigger building in exchange for the provision of open space—would not constitute exactions that would be subject to heightened scrutiny.<sup>190</sup> However, as was discussed above, not all POPOS fit that description; they are sometimes ad hoc or adjudicatory determinations, which would be subject to heightened scrutiny. Recent lawsuits have been filed challenging inclusionary zoning ordinances (which require developers to provide a certain percentage of new market-rate housing units at affordable rates or pay an in-lieu fee) as takings.<sup>191</sup> Further, under *Koontz*, where the

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185. KAYDEN ET AL., *supra* note 6, at 313 n.316; *see also infra* Part V.B.2.ii (discussing state action).

186. *See, e.g.*, *People v. Nunez*, 943 N.Y.S.2d 857, 863 (N.Y. Crim. Ct. 2012).

187. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) (heightened scrutiny under *Nollan* and *Dolan* are triggered even if a city denies a permit after an applicant refuses to comply with proposed conditions); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (the condition imposed must be “rough[ly] proportional[.]” to the proposed project’s impact); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (holding that there must be an “essential nexus” between the legitimate governmental interest at issue and the permit condition that is imposed).

188. KAYDEN ET AL., *supra* note 6, at 307 n.7; Fennell & Peñalver, *supra* note 150, at 328–29.

189. *See, e.g.*, *Abraham Bell & Gideon Parchomovsky, Givings*, 111 YALE L.J. 547, 570 (2001) (“[I]ncentive zoning is difficult to distinguish from cases involving exactions, like *Nollan* and *Dolan v. City of Tigard*, and some commentators have concluded that it should be viewed as a physical taking.” (footnote omitted)); Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 138 (2016) (discussing “the open question of whether legislative exactions should be subject to the same level of judicial scrutiny to which administrative exactions are subject in constitutional ‘takings’ cases”); Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill?—The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 TOURO L. REV. 455, 475 (2014) (suggesting that voluntary agreements would likely not be subject to heightened scrutiny under *Nollan/Dolan*).

190. *But see* *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1116–17 (1995) (Thomas, J., dissenting) (recognizing that state courts are split as to whether *Nollan* and *Dolan* apply to legislatively imposed permit conditions).

191. *Cf.* James S. Burling, *Do Inclusionary Zoning Laws Violate Nollan, Dolan, and the Doctrine of Unconstitutional Conditions?*, 8 ENGAGE 83, 84–85 (2007). *But see* *Cal. Bldg. Indus. Ass’n v. City of*

government provides the project proponent with a choice between the issuance of a permit (on condition of the provision of a public good) and not getting a permit at all, that may constitute an exaction.<sup>192</sup> *Koontz* failed to clearly answer the question of whether heightened *Nollan/Dolan* scrutiny applies to legislative enactments that are generally applicable, as well as to ad hoc adjudicative decisions.<sup>193</sup>

Even if a court determined that some types of POPOS ordinances, such as those requiring public space as a condition of development approval, would be subject to heightened scrutiny, it is possible that POPOS would withstand such scrutiny. Jerold Kayden briefly touched on this question, suggesting that they would pass *Nollan/Dolan* muster. He stated:

[I]t is heartening to be able to argue that there is, indeed, an "essential nexus" between the legitimate public interest in reducing congestion and a condition that secures density-ameliorating amenities, as well as a rough proportionality between the public space condition and any impact associated with the bonus floor area.<sup>194</sup>

I agree that there is little question about whether POPOS would meet *Nollan's* essential nexus standard, given that bigger buildings create more people and more density, and POPOS provide for light and air which ameliorate some of the harms of that density.<sup>195</sup> However, whether courts would find there to be rough proportionality between the required provision of public space and the impact of the bigger building is a closer question, and the answer would likely depend on the requirements of the POPOS, including its size and perhaps its hours of operation.<sup>196</sup> It is even possible that a progressive court could find rough proportionality lacking because POPOS fail to sufficiently mitigate the harm caused by the increased building density.<sup>197</sup>

#### B. A LACK OF SUFFICIENT LEGITIMACY, DEMOCRACY, AND GOVERNANCE

The rules that govern the use of a space are in large part responsible for the experience that users have while in that space. While the content of the

San Jose, 351 P.3d 974, 996 (Cal. 2015) (holding that inclusionary zoning ordinance was not a taking, but rather a permissible restriction on use).

192. *Koontz*, 133 S. Ct. at 2594–95.

193. *Id.* at 2608 (Kagan, J., dissenting).

194. KAYDEN ET AL., *supra* note 6, at 307 n.7. Of note, Kayden was writing prior to the Court's decision in *Koontz* and prior to the recent challenges to inclusionary zoning ordinances.

195. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

196. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Generally, developers get more additional square footage than they provide in open space.

197. This would be the reverse of a typical *Dolan* determination and would rely on a third party bringing the claim. See, e.g., Gregory M. Stein, *Reverse Exactions*, 26 WM. & MARY BILL RTS. J. (forthcoming 2018) (manuscript at 30–31), <https://ssrn.com/abstract=2933013>.

rules governing POPOS is important, this Subpart will first consider the process used to adopt those rules. Specifically, it will examine how that process differs from that which is used to adopt rules for publicly owned and publicly governed spaces, like public parks. Typically, the adoption of rules through a public hearing process engenders legitimacy in a way that private rule creation does not.<sup>198</sup>

There is a public process involved in the creation and adoption of rules that govern the use of *publicly* owned public spaces.<sup>199</sup> That public process incorporates the voice of the local citizens and provides procedural safeguards. First, the adoption of public rules governing parks in a given jurisdiction is subject to the same procedural rules that govern any public process, including requirements for notice and public hearings.<sup>200</sup> Further, if people are unhappy with the outcome and dislike an adopted rule, they have the option of voting those who approved that rule out of office. Additionally, the end result is a set of uniform rules that typically apply to all public parks in a given area, thus providing local residents with set expectations about what they can and cannot do in their public spaces.<sup>201</sup>

In contrast, while there is a public process used to create the rules that *create* POPOS,<sup>202</sup> like incentive zoning, the rules governing the *use* of POPOS

198. See Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47, 81 (2006) (suggesting that regulatory systems are "legitimate if they [can] be traced to a properly functioning organ of a state"). See generally Sarah B. Schindler, *Following Industry's LEED®: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285 (2010) (discussing private rule creation). "When legitimacy cannot be traced back to public lawmaking procedures, commentators have posited certain alternative bases of legitimacy. These include expertise, transparency, notice, and opportunity for voice and exit." *Id.* at 339.

199. For example, New York City's park rules are located in Title 56 of the Official Compilation of the Rules of the City of New York. N.Y.C., N.Y., RULES OF N.Y.C., tit. 56, ch. 2 (2017) (Department of Parks and Recreation); see also, e.g., HONOLULU, HAW., REV. ORDINANCES, ch. 10 (2017) (Rules, Regulations, Charges and Fees for Public Parks and Recreation Facilities); RALEIGH, N.C., CODE OF ORDINANCES pt. 9 (2016) (Parks, Recreation and Cultural Affairs); HOUS., TEX., CODE OF ORDINANCES, ch. 32 (2017) (Parks and Recreation). Cities post public notices of hearings when they plan to amend or revise these rules. See *Rules and Regulations of the N.Y.C. Department of Parks & Recreation*, OFFICIAL WEBSITE N.Y.C. DEP'T PARKS & RECREATION, <https://www.nycgovparks.org/rules> (last visited Dec. 19, 2017) ("Notice of Hearing: The Parks Department proposes to amend § 2-13 and § 2-14 of Chapter 2 of Title 56 of the Rules of the City of New York to allow a person with a disability to apply for a reduced membership fee using additional forms of documentation. The Department will hold a public hearing on the proposed rules at noon on October 16, 2017 at the Chelsea Recreation Center.").

200. *Rules and Regulations of the N.Y.C. Department of Parks and Recreation*, *supra* note 199.

201. *Id.*; see also Németh, *supra* note 17, at 2464-65 (describing "the experience of publicly owned spaces, where rules and regulations are generally uniform throughout a park district or jurisdiction").

202. See, e.g., *Downtown Area Plan, Policy 9.1*, S.F. GEN. PLAN, [http://generalplan.sfplanning.org/Downtown.htm#DTN\\_SCS\\_5\\_1](http://generalplan.sfplanning.org/Downtown.htm#DTN_SCS_5_1) (last visited Dec. 19, 2017) (explaining in Policy 9.1 that "[e]ach development should be required to provide open space in a quantity that is directly proportional to the amount of nonresidential space in the building"); see also Dean Macris & George Williams, *San Francisco's Downtown Plan*, URBANIST (Aug. 1, 1999), <http://www.spur.org/publications/urbanist->

are typically set by the private developer in charge of the space.<sup>203</sup> Thus, the creation of those rules is typically not subject to public oversight, resulting in a democracy deficit.<sup>204</sup> This failure is the result of substantial neglect on the part of the cities that have drafted POPOS ordinances. In recent years, some ordinances have been modified to be more specific, dictating certain infrastructure requirements that must be present in POPOS, such as lighting, seating, and art.<sup>205</sup> However, and in contrast to public parks ordinances, most POPOS ordinances are silent on how (and by whom) these spaces may be used.<sup>206</sup> The building owners generally fill in these details, and the rules they create are often quite subjective.<sup>207</sup>

Interestingly, privately created rules governing POPOS were often historically vague or non-existent; many of these spaces originally had no formal rules governing conduct within their boundaries.<sup>208</sup> The result was neutral spaces that were “waiting to be defined by the user rather than by the owner, but the owners didn’t know that,” at least originally.<sup>209</sup> However, the Occupy Wall Street (“OWS”) movement changed that dynamic. During the course of their protests, OWS occupied Zuccotti Park, which is a POPOS in Manhattan.<sup>210</sup> The occupation of that space led some owners and managers of POPOS to reconsider their rules (or lack thereof).<sup>211</sup> For example, with respect to Zuccotti Park itself, although no published rules for use existed at

article/1999-08-01/san-franciscos-downtown-plan (describing the lengthy public process that led to the adoption of the Downtown Plan).

203. WHYTE, *supra* note 149, at 114 (“Most incentive zoning ordinances are very specific as to what the developer *gets*. The problem is that many are rather mushy as to what he should give.”); Németh, *supra* note 17, at 2464 (“[T]he regulations governing [POPOS] use, are introduced and maintained by private interests rather than city planning or governmental agencies.”).

204. Németh, *supra* note 17, at 2465 (“[B]onus space rules and regulations are not necessarily vetted with public agencies, so much less is known about their management approaches than techniques in city-owned and controlled spaces.”); *see also* MILLER, *supra* note 137, at 76 (It is suggested that a POPOS that was physically modified without public input “was never public because, from its inception, decisions over how it would be managed over time were out of the hands of the public. . . . [P]hysical access is of course crucial to public spaces being public. But equally important is access to and agency within the processes that govern public spaces.”).

205. *See, e.g.*, CITY OF TORONTO, *supra* note 123, at 23–26; *Pedestrian Infrastructure*, VICTORIA WALKS, [http://www.victoriawalks.org.au/pedestrian\\_infrastructure](http://www.victoriawalks.org.au/pedestrian_infrastructure) (last visited Dec. 19, 2017).

206. KAYDEN ET AL., *supra* note 6, at 38.

207. Németh, *supra* note 17, at 2472.

208. For example, before Occupy Wall Street, Zuccotti Park had no published rules governing its use. *See* Order to Show Cause and Temporary Restraining Order at 2, *Waller v. City of New York*, 933 N.Y.S.2d 541 (N.Y. Sup. Ct. 2011) (No. 112957).

209. JEROLD S. KAYDEN, PRIVATELY OWNED PUBLIC SPACE 2 (2013), [http://functionlab.net/wp-content/uploads/2014/12/720-Privately-Owned-Public-Space\\_small.pdf](http://functionlab.net/wp-content/uploads/2014/12/720-Privately-Owned-Public-Space_small.pdf).

210. Brookfield Properties owned Zuccotti Park, a “privately owned public space” created in exchange for bonus development rights. *See* Verified Petition at 2, *Waller*, 933 N.Y.S.2d 541 (No. 112957).

211. After the OWS protests in Zuccotti Park, “new signs with deeper prohibitions [began] appearing.” Woodward, *supra* note 63 (noting that many of the new signs expressly prohibit OWS-type protest activities like camping and sleeping bags).

the time of the initial occupation, the building owners subsequently adopted rules that limited the types of items that people could have in the park and activities that people could undertake, including “[c]amping and/or the erection of tents or other structures. Lying down on the ground, or lying down on benches [and]. . . . [t]he placement of tarps or sleeping bags or other covering on the property . . . .”<sup>212</sup> Current rules governing other POPOS in New York forbid “disorderly behaviour,” “loitering,” “large packages,” or the failure to wear “appropriate attire.”<sup>213</sup> In New York, the zoning code allows for no more than one “Rule of Conduct” sign in public plazas, which “shall not prohibit behaviors that are consistent with the normal public use of the [public plaza]” including things like eating, drinking things other than alcohol, or lingering.<sup>214</sup>

Courts and city officials have determined that rules governing the use of POPOS must be “reasonable” and designed to address nuisance-related issues or activities that might be inconsistent with the ability of the general public to use the space.<sup>215</sup> At least in New York, the City Planning Department has been guided by the rules that apply to city-owned parks in determining what is reasonable with respect to rules for POPOS.<sup>216</sup> While the city has determined

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212. *Waller*, 933 N.Y.S.2d at 543. Of course, most public parks in New York are closed at night and have restrictions against camping. Woodward, *supra* note 63. Of note, OWS selected Zuccotti Park in part because it was a POPOS, which was “not subject to city park curfews and many of which are required by law to be open twenty-four hours a day.” Mattathias Schwartz, *Map: How Occupy Wall Street Chose Zuccotti Park*, NEW YORKER (Nov. 18, 2011), <https://www.newyorker.com/news/news-desk/map-how-occupy-wall-street-chose-zuccotti-park>.

213. Németh, *supra* note 17, at 2472; *see also* Woodward, *supra* note 63 (“[Conduct] signs express a view of public space as fundamentally inert, of public space as a refuge from urban life rather than as a place of engagement within it.”).

214. N.Y.C., N.Y., ZONING RESOLUTION § 37-752 (2017). Query the difference between lingering and loitering, and who makes that determination. *See infra* Part IV.C.2; *see also* Tower, *supra* note 182, at 433, 449 (“Enforcement of New York City’s privately owned public spaces relies on a complex and ineffective system. While the city’s Department of Buildings (‘DOB’) has sole authority for enforcing the Zoning Resolution, it does not regularly monitor or inspect privately owned public spaces. Instead, the DOB relies on complaints from the public and other municipal agencies . . . .” (footnote omitted)).

215. The only context in which courts seem to have addressed these rules is the OWS arrests and subsequent lawsuits. *See, e.g.*, *People v. Nunez*, 943 N.Y.S.2d 857, 863 (N.Y. Crim. Ct. 2012) (“[O]wners [of POPS] may establish ‘rules of conduct,’ so long as these restrictions on the use of [POPS] are reasonable and designed to address nuisance or other conditions that would interfere with or are inconsistent with the intended use of the [space] by the general public.”); *see also* *Waller*, 933 N.Y.S.2d at 544 (“The owner has the right to adopt reasonable rules that permit it to maintain a clean, safe, publicly accessible space consonant with the responsibility it assumed to provide public access according to law.”). New York City’s Planning Department has also determined that owners of POPOS can set forth rules of conduct that are “reasonable.” KAYDEN ET AL., *supra* note 6, at 38.

216. KAYDEN ET AL., *supra* note 6, at 38 (“In determining the definition of reasonable, the Department has looked to the rules of conduct applicable in City-owned parks for general guidance.”). It is unclear when the city would be required to, or would decide of its own accord to, consider the reasonableness of the rules governing POPOS. It is possible that this might only happen if those rules are contested.

that bans on sleeping in interior spaces are reasonable, it has found that the exclusion of “‘undesirable’ persons on some basis other than improper conduct, [and setting] limits on the amount of time a member of the public may sit in or otherwise use a space” are unreasonable rules.<sup>217</sup> So while standards are emerging in some locations, there is no consistency across POPOS, and local governments have not yet established universal, specific use standards.

### C. A LACK OF INCLUSION

In the public sphere, society seems to highly value inclusion; many people think that public spaces should be, and indeed are, open to all. In practice, however, this perception is not always true; truly public spaces can also be exclusionary.<sup>218</sup> In contrast, society tends to highly value exclusion in the context of private property. Most first-year law students learn that the right to exclude is perhaps the most important stick in the bundle of property rights.<sup>219</sup> Although POPOS are technically private property, the owner has expressly waived her right to exclude others, at least in some instances. Yet many of these POPOS are located inside buildings, or on rooftops or terraces, and thus they require a potential user to pass through doors and by security guards to access the public space. Such barriers to entry effectively serve to exclude.<sup>220</sup>

There is no question that using legal means to incentivize and require public open space as a condition of development approval has resulted in a large amount of open space that might not otherwise exist.<sup>221</sup> But as this Article has suggested, the success of that open space—whether it serves the purposes that open space ought to<sup>222</sup>—is less clear.<sup>223</sup> One of the strongest criticisms of POPOS is that they often result in spaces that are exclusionary, which means spaces that are not fully accessible to the public and where only certain people feel welcomed.<sup>224</sup> There are a number of reasons for this

217. *Id.* The city has also determined the following things to be reasonable: requiring dogs to be on leash and a prohibition on drinking alcoholic beverages. *Id.*

218. See Schindler, *supra* note 53, at 1937–38.

219. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

220. One could argue that, because the city allows POPOS to be located on rooftops and terraces, the city does not view this placement as exclusionary. This perspective might also support an argument that POPOS were not intended to be true equivalents to traditional public spaces.

221. KAYDEN ET AL., *supra* note 6, at 1 (describing New York and stating, “the street-level results of the 1961 Zoning Resolution’s public space provisions may be described without exaggeration as one of the most effective demonstrations of law’s power to promote specific design outcomes”).

222. See *supra* Part III.A.

223. See Németh, *supra* note 17, at 2464 (suggesting, based on his empirical research, that POPOS “contribute to, or perhaps accelerate, the demise of an inclusive public realm”).

224. LOW ET AL., *supra* note 64, at 1 (suggesting that an individual who feels welcome is “often a tourist or middle-class visitor”); Németh, *supra* note 17, at 2466–67; Joseph B. Rose, *Preface* to

exclusionary environment, but this Article suggests that the two primary reasons are (1) the design of the space and (2) the discretionary enforcement of the space's use.

### 1. Exclusion Through Design

Design is a form of regulation through architecture.<sup>225</sup> Though just as powerful as regulation through law, architectural regulation is less obvious; we often see design as pre-political and fail to recognize that it may be intentional—many spaces are created so as to direct behavior in a way that the architect desires.<sup>226</sup>

The rules and ordinances governing POPOS vary from jurisdiction to jurisdiction. While some regulations now contain details and directions for how to improve physical accessibility,<sup>227</sup> that was not always the case. For example, New York's original 1961 regulations did not set forth any requirements for aspects like seating or landscaping in POPOS.<sup>228</sup> The result was that “[w]ithout functional amenities such as seating, tables, and food service, and with available ledges punctuated with spikes, users would have to look elsewhere if they wanted a place for utilitarian or passive recreational activity.”<sup>229</sup> San Francisco only recently began to specify requirements for the size, location, and text of the signs designating that a given space is a POPOS.<sup>230</sup>

An important point here is that underused, exclusionary POPOS are quite common; according to Greg Smithsimon, “*most* bonus plazas are designed in ways that limit use by the public.”<sup>231</sup> Further, empirical research has shown that developers often intentionally create and design these spaces so as to make them uninviting to the public and exclusionary.<sup>232</sup> This research is counter to the suggestion from some scholars that privatized public space is often unintentionally inhospitable,<sup>233</sup> and that exclusion is the fault of

KAYDEN ET AL., *supra* note 6, at viii (“The record of ensuring that these spaces are well designed, open to the public, and operating in accordance with their approvals, frankly, has been mixed. . . . [M]any of the spaces have been neglected, and, in some cases, even privatized.”); *see also* Weaver, *supra* note 15, at 4 (citing Németh, *supra* note 17, at 2466–67). *But see supra* Part II.B (explaining how publicly owned space is also sometimes exclusionary).

225. Schindler, *supra* note 53, at 1944.

226. *Id.* at 1944–45, 1952.

227. *See infra* note 230 and accompanying text.

228. KAYDEN ET AL., *supra* note 6, at 10–11. William Whyte's research has suggested that usable seating is a key ingredient to creating a successful and well-used public space. *See* WILLIAM H. WHYTE, *THE SOCIAL LIFE OF SMALL URBAN SPACES* 27–28 (1981).

229. KAYDEN ET AL., *supra* note 6, at 16.

230. S.F., CAL., ORDINANCE 228-12 (2012) (codifying amendment to S.F., Cal. Planning Code § 138(i) (2012)).

231. Smithsimon, *supra* note 17, at 326 (emphasis added).

232. *See id.* at 331 (noting that plazas' “shortcomings are intentional rather than incidental, and are put in place because of developers' preponderant influence on such spaces' design”).

233. *Id.* at 329.

planners or modernist design itself.<sup>234</sup> Smithsimon believes that building owners and developers influence the design for the express purpose of creating exclusionary spaces.<sup>235</sup> Owners intentionally exclude in many ways, including through "locked gates, missing amenities, and usurpation by adjacent commercial activities."<sup>236</sup> Generally, the exclusionary design of POPOS can be thought of in three ways: (1) physical barriers to entry; (2) psychological barriers to entry; and (3) uninviting features.

The most straightforward examples of the exclusionary design of POPOS are physical barriers to entry. For example, unless there are rules prohibiting them, the developer of a POPOS might put up a wall around the space to block the space from view of the public. Similarly, the developer may install a gate that must be entered to access the space. Another physical barrier to entry that is common to many downtown POPOS is the guard desk and turnstiles that exist in many corporate office buildings. These types of boundaries and barriers make it difficult for certain people to pass into these spaces, which are supposedly open and accessible to the public.<sup>237</sup> For example, a guard might ask to see identification and require a signature before entering an office building that houses a POPOS. A person who is homeless might be without identification, or an undocumented immigrant might feel uncomfortable leaving her name.

There are also a number of exclusionary techniques that might be called "psychological barriers to entry," in that they prevent easy public access to POPOS. For example, people must have knowledge that these spaces exist, and that they are open to the public, in order to achieve success as inclusive public spaces.<sup>238</sup> Unless there are regulations requiring them to install substantial signage, it might be in the best interest of some project developers to avoid publicly denoting a space as public.<sup>239</sup> This observation is especially true for POPOS that are located inside office buildings or above the ground floor. Without adequate signage, people have to rely on word of mouth or internet listings (which only exist in some cities) to find spaces such as these, which are hidden from the outside or appear completely private. The aforementioned recent additions of on-site signage requirements in some

234. *Id.* at 328; see JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 22–25 (1992) (discussing modernist planners).

235. Smithsimon, *supra* note 17, at 326, 335 ("[D]evelopers play a larger and more intentional role in the creation of exclusive plazas than previously believed.")

236. KAYDEN ET AL., *supra* note 6, at 1.

237. See Schindler, *supra* note 53, at 1953–60 (discussing barriers to access).

238. Joseph B. Rose, *Preface* to KAYDEN ET AL., *supra* note 6, at viii ("The more that people know about these resources, the more likely it is that these spaces can fulfill their promise to the public."); see also *id.* at 28 ("Public knowledge about public space is a sine qua non for public use and access . . ."); Németh, *supra* note 17, at 2473–74 (discussing lack of signage as a problem).

239. Municipalities have, until recently, been derelict in making information about these spaces public in any organized manner. See *supra* note 230 and accompanying text.



cities that denote both the existence of POPOS and the fact that they are public has done some work toward achieving greater inclusivity.

Another psychological barrier involves “filtered spaces,” which use a variety of techniques to “filter or sort users to ensure an appropriate clientele.”<sup>240</sup> These techniques might include posting rules that are either subjective or general (which places great discretion in the hands of those patrolling the space or enforcing the rules),<sup>241</sup> displaying certain types of public art that only appeal to certain populations, or providing space for food trucks or kiosks along with seating that appears to require a person to buy food in order to use the space.<sup>242</sup> All of these physical design elements could result in psychological barriers to use for people who might feel that they will not “fit in” in this space. This feeling of exclusion relates to what Lior Strahilevitz has termed “exclusionary vibes”—although anyone is free to physically and legally enter, certain people feel that the messaging or signals of the space suggests that it is not meant for people like them: people who are homeless, people of color, foreigners, or otherwise outsiders.<sup>243</sup> Further, because many POPOS are located in downtown office buildings, they are commonly filled with people in business attire. Thus, someone who does not work downtown, or who is not dressed in this way, might feel out of place or unwelcomed in the space. As one commentator noted, people feel “programmed . . . to feel like trespassers in office buildings where [they] have no business, or hotels where [they] have no room . . . .”<sup>244</sup> The design and patronage of a space can enhance those feelings, even if a person *does* have business being there—as a member of the public who is entitled to use a POPOS.

A last psychological barrier involves the fact that POPOS are often under surveillance, either through the use of security guards or through the use of cameras.<sup>245</sup> As Foucault noted, there is self-policing in surveyed spaces, especially if people are unsure of the rules in those spaces: “He who is

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240. Németh, *supra* note 17, at 2470–72.

241. See *infra* Part IV.C.2.

242. Németh, *supra* note 17, at 2470–73; Emily Badger, *How to Make Privately Owned Public Spaces Truly Open to the Public*, CITYLAB (Dec. 17, 2012), <https://www.citylab.com/equity/2012/12/how-make-privately-owned-public-spaces-truly-open-public/4168> (“The presence of food vendors also has a way of making us feel like we must pay for something for the right to sit down.”).

243. Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1851 (2006) (“[The] exclusionary vibes approach involves the landowner’s communication to potential entrants about the character of the community’s inhabitants. Such communication tells potential entrants that certain people may not feel welcome if they enter the community in question, because they will not share certain affinities with existing or future residents.”).

244. Badger, *supra* note 242.

245. Low, *supra* note 46, at 44 (“[F]amiliar physical barriers such as bollards, planters, security gates, turnstiles, and equipment for controlling parking and traffic are now reinforced by electronic monitoring tactics—such as metal detectors, surveillance cameras and continuous video recording.”).

subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power . . ."246 Surveillance also functions as a form of "disorder suppression" in public space.<sup>247</sup> It thus makes sense that building owners, worried about their paying tenants who also often have to walk through POPOS to access their offices, would seek to survey its use.

Finally, many POPOS are exclusionary because they have been designed so as to be uninviting to members of the public. It is common sense that people will not want to spend a lot of time in places that make them uncomfortable. Developers have used that idea to their advantage in designing spaces of exclusion. For example, POPOS have long discouraged use by failing to install any usable seating, thus making it difficult for people to stay in the space for long.<sup>248</sup> Further, some POPOS might provide seating, but make it immobile and bolted into awkward positions. This design technique has been shown to be less inviting than seating that allows choices, such as movable chairs and tables.<sup>249</sup> A related trend that has become popular in POPOS around the world is the use of anti-homeless measures, such as metal spikes in the ground around buildings and the use of bench armrest dividers that prevent people from lying down.<sup>250</sup> These architectural tools prevent people from sitting or lying down in space that is meant to be public.<sup>251</sup> Another method of exclusion through uninviting features is a lack of diversity in terms of microclimates<sup>252</sup>: The POPOS might be either entirely in shade or completely without shade.<sup>253</sup> Depending on the local climate, this practice can make a space practically unusable. Additionally, although POPOS are often required to be open until dusk or later, developers might fail to install or operate lights in the spaces at night, thus making them feel

246. MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 202 (1977).

247. Mike Davis, *Fortress Los Angeles: The Militarization of Urban Space*, in *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* 154, 154–55 (Michael Sorkin ed., 1992); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 *STAN. L. REV.* 1, 7 (2004) (suggesting that the "first function of property regulation" is "disorder suppression"—seeking to curb bad behavior).

248. See Németh, *supra* note 17, at 2473.

249. See WHYTE, *supra* note 228, at 28 (suggesting the incorporation of choice into seating design); Nate Berg, *The Power of the Movable Chair*, CITYLAB (Oct. 8, 2012), <https://www.citylab.com/design/2012/10/power-movable-chair/3520> (describing the value of movable seating in public spaces).

250. Robert Rosenberger, *How Cities Use Design To Drive Homeless People Away*, ATLANTIC (June 19, 2014), <https://www.theatlantic.com/business/archive/2014/06/how-cities-use-design-to-drive-homeless-people-away/373067>.

251. As I have written about previously, these architectural tools are a form of regulation, just as laws are, and they create exclusionary spaces. See generally Schindler, *supra* note 53. See also KAYDEN, *supra* note 209, at 2 ("The idea that owners of these spaces should be able to design against these [undesirable] people, through insertions of spikes and dividers and other barriers, to me is political, is design against a politics of inclusion that is problematic.").

252. Németh, *supra* note 17, at 2473.

253. *Id.*

unsafe and uninviting.<sup>254</sup> Finally, it is worth noting that sometimes, even if the design is sufficient, the property may be poorly maintained—dead foliage, trash—such that it is no longer welcoming.<sup>255</sup>

It is important to recognize that some cities have become aware of certain design defects and have revised their POPOS ordinances to require design that is more inclusionary and user-friendly.<sup>256</sup> However, despite some progress in the design of these spaces, many are still not operated in an accessible manner. Thus, POPOS often see less public use than they should pursuant to the requirements inherent in their creation. The following Subpart addresses these concerns.

## 2. Exclusion Through Discretionary Enforcement of Rules and Norms

Even when POPOS have an inclusionary design and provide the necessary physical manifestations of good public space, that alone will not ensure that a space will be successful.<sup>257</sup> This is in large part because of the importance of the actions of those who enforce the rules and maintain decorum in the space.<sup>258</sup> Specifically, private-building owners and their security guards control the operation of these public spaces, and they may act in exclusionary ways if they do not like the way the space is being used by the public.<sup>259</sup> There are a number of methods through which building owners and managers exclude through their discretionary actions. These methods include: (1) the intentional non-compliance with clear rules; (2) the lack of awareness about governing laws and rules for the space; (3) the discretionary enforcement of vague rules; and (4) the enforcement of private space norms in POPOS.

Oftentimes, clear rules exist regarding the use and design of a space, but those in charge of the POPOS seek to violate those rules in order to halt a use of the space that they dislike. A common manifestation of perceived

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254. *See id.*

255. *See* Kent Barwick, *Preface* to KAYDEN ET AL., *supra* note 6, at viii (“Some plazas were badly designed or unfortunately sited. . . . More than a few, initially valuable, have been poorly maintained.”). Similarly, some POPOS are simply sited in undesirable locations, which makes their use unlikely.

256. For example, as has been mentioned earlier, New York now requires seating, and San Francisco requires signage. S.F., CAL., ORDINANCE 228-12 (2012); N.Y.C., N.Y., Zoning Resolution art. III, ch. 7, div. 37-741 (2009).

257. Joseph B. Rose, *Preface* to KAYDEN ET AL., *supra* note 6, at viii (“[H]igher regulatory standards, alone, do not assure a successful space.”).

258. *See supra* notes 203–07 and accompanying text; *see also* Rose, *supra* note 257, at viii (explaining that POPOS often “do not serve fully the purposes for which they were intended, occasionally because of poor design but primarily because they are operated in a way that restricts public use and access”).

259. *See, e.g.,* Németh, *supra* note 17, at 2474 (explaining that owners of these spaces have a tendency “to control space by actively discouraging public use”). Of course, as was discussed earlier, public spaces can have exclusionary management as well. *See supra* Part I.B.

“undesirable use” of a POPOS takes the form of homeless people entering and using corporate atriums that are POPOS. One striking example of this involves our current President, Donald Trump, and his headquarters, Trump Tower. Trump Tower opened in 1983,<sup>260</sup> and, as was mentioned earlier, developers agreed to provide on-site public space in exchange for additional square footage.<sup>261</sup> One of the design requirements of this POPOS was that it provide seating in the atrium in the form of a bench.<sup>262</sup> However, after Trump Tower opened, building management placed large planters on top of the bench, such that it was not usable for seating.<sup>263</sup>

Trump defended the move at the time, writing in a letter to the Department of City Planning, “We have had tremendous difficulties with respect to the bench—drug addicts, vagrants, et cetera have come to the atrium in large numbers.” He continued, “Additionally, all sorts of ‘horrors’ had been taking place that effectively ruined the beautiful ambience of the space which everyone loves so much.”<sup>264</sup>

In this instance, the city did require that the planters be removed, but these sorts of exclusionary behaviors by those who manage POPOS are not uncommon. Indeed, as recently as July 14, 2016, the bench was missing.<sup>265</sup> This example suggests that even when cities implement clear prescriptive design requirements that are meant to make POPOS more usable by the public, building managers are charged with carrying out those requirements. While city enforcement can help to remedy non-compliance, a city is generally only made aware of noncompliance when members of the public complain.<sup>266</sup>

Some building owners have gone so far as to actively discourage public use by instructing their guards “to discourage public entry.”<sup>267</sup> Of course, it is hard to know whether exclusionary actions on the part of security personnel are at the behest of their employers, or if their actions are based on incorrect assumptions about how public the space actually is.<sup>268</sup> But there have been

260. Robert Rosenberger, *Trump Tower and the Question of ‘Public’ Space*, ATLANTIC: BUS. (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/trump-tower-and-the-question-of-public-space/494027>.

261. See *supra* notes 156–59 and accompanying text.

262. Rosenberger, *supra* note 260.

263. *Id.*

264. *Id.* (quoting Matt A.V. Chaban, *An Altar to Donald Trump Swallows Up Public Space in Manhattan*, N.Y. TIMES (July 13, 2015), <https://www.nytimes.com/2015/07/14/nyregion/altar-to-donald-trump-swallows-up-public-space-in-manhattan.html>).

265. *Id.* The bench has since reappeared. Matt A.V. Chaban, *Disputed Benches Quietly Return to Trump Tower*, N.Y. TIMES (July 22, 2016), <https://www.nytimes.com/2016/07/23/nyregion/disputed-benches-quietly-return-to-trump-tower.html>.

266. See *supra* text accompanying note 214.

267. KAYDEN ET AL., *supra* note 6, at 16; see also Németh, *supra* note 17, at 2474 (explaining that owners of these spaces have a tendency “to control space by actively discouraging public use”).

268. Kohn provides an example of this, noting that “[p]rivate security guards expel political activists and other undesirables who violate a set of often unwritten rules. These rules are flexibly

reports that the security guards in Trump Tower “discourage people” from seeking out and visiting the public gardens.<sup>269</sup> Further, during Trump’s run for President, the public atrium of Trump Tower was often closed for press conferences without prior approval from the City.<sup>270</sup> Trump and his employees are not alone in these exclusionary behaviors. A study conducted by the Manhattan Borough President’s office in 2008 determined that 39% of the POPOS “on the East Side [of Manhattan] had cut off access, failed to clear litter or committed some other violation.”<sup>271</sup>

Some POPOS lack formal rules for use, or the rules that they have are vague and general. In these instances, enforcement is solely within the discretion of the building owners and the private security guards who patrol the space.<sup>272</sup> Even if formal rules do exist, unless and until these rules are challenged, the private security guards charged with their enforcement decide whether they are “reasonable.”<sup>273</sup> It is likely that these private actors are more interested in protecting the interests of their private employers (and the building’s private users) than protecting the rights of the public to use these spaces.<sup>274</sup> Because of this mindset, the norms of use that govern POPOS are often those established by the private guards, building owners, and building tenants, instead of members of the public.<sup>275</sup> These norms likely encourage an environment that matches the purely private space to which the

and differentially enforced in order to sustain an illusion of openness while maximizing management’s control. Exclusiveness is often achieved through indirect mechanisms . . . .” KOHN, *supra* note 17, at 13 (footnote omitted).

269. Rosenberger, *supra* note 260. Another reporter had the following experience:

It took this reporter six attempts over two weeks to get into the Trump gardens. The first try came on a recent Friday morning shortly after 9 a.m., when a security guard said the gardens didn’t open until 10 a.m. When I came back he changed that to 10:30. The third try came one afternoon at 5:15, and a guard said the gardens had closed 15 minutes earlier, even though they’re required to be open during store hours and the Starbucks on the second floor was selling iced coffees to tourists.

Elstein, *supra* note 5.

270. See Elstein, *supra* note 5.

271. *Id.*

272. *Id.* (“My fifth attempt [to enter the public gardens] came on a wet Wednesday at noon. I asked an elevator guard when the garden is open. ‘It is open from 10 to 5,’ he said. ‘May I visit?’ I asked. ‘No.’ ‘Why not?’ ‘It has started to rain. The garden is now closed.’”).

273. See, e.g., Németh, *supra* note 17, at 2481; *id.* at 2466 (noting that managers of these spaces “prioritise security concerns over social interaction . . . by employing a wide variety of interrelated legal, design and policy tools to exclude certain undesirable populations” (citation omitted)).

274. See *id.* at 2463 (“[A]s developer priorities are often fiscally driven, most approaches [to managing POPOS] severely limit political, social and democratic functions of public space and produce a constricted definition of the public. As such, [POPOS] have deleterious effects on concepts of citizenship and representation, even as they become the new models for urban space provision and management.”).

275. See, e.g., Elstein, *supra* note 5 (“Entering the elevators requires getting past security guards who seem to specialize in shooing people away.”).

POPOS is attached; for office buildings, this might be a space that is quiet, passive, and staid.

Another manifestation of exclusion involves the enforcers not actually knowing the rules. For example, a *New York Times* reporter recently brought a small group of people to an "impromptu pizza party[]" in the café area of a Manhattan hotel lobby, which was a designated POPOS.<sup>276</sup> The bartender told them that they were not allowed to consume outside food in the space and that they would have to leave.<sup>277</sup> However, according to the ordinances governing POPOS in New York, a POPOS is not permitted to limit usage to paying patrons.<sup>278</sup> Similarly, a number of journalists exploring POPOS have encountered security guards who ask them to leave or to stop filming their interactions.<sup>279</sup> Although these forms of exclusion are not unique, they should be impermissible given the public nature of the space.

As is evident from these examples, even if inclusionary design, access, and use policies are in place, they can be selectively enforced by the private guards in charge. This discretion may result in the exclusion of the "wrong type" of people and inclusion of those people to whom the building owners want to cater.<sup>280</sup> Empirical research would be helpful in determining how often this type of selective exclusion occurs.<sup>281</sup>

It is likely that some of these exclusionary behaviors occur *because* the space is privately owned, and they would not be present if the space were

<sup>276</sup>. Matt A.V. Chaban, *Unwelcome Mat Is Out at Some of New York's Privately Owned Public Spaces*, N.Y. TIMES (Sept. 7, 2015), <https://www.nytimes.com/2015/09/08/nyregion/unwelcome-mat-is-out-at-some-of-new-yorks-privately-owned-public-spaces.html>.

<sup>277</sup>. *Id.*

<sup>278</sup>. See N.Y.C., N.Y., ZONING RESOLUTION § 37-727 (2007). *But see* N.Y.C., N.Y., ZONING RESOLUTION § 37-73 (2016) (allowing for placement of kiosks and open-air cafes in some POPOS).

<sup>279</sup>. See Bradley L. Garrett, *The Privatisation of Cities' Public Spaces Is Escalating. It Is Time to Take a Stand*, GUARDIAN (Aug. 4, 2015, 3:15 AM), <https://www.theguardian.com/cities/2015/aug/04/pops-privately-owned-public-space-cities-direct-action> (A photographer in a POPOS in London had "set up a tripod there recently to take a photo, and was immediately asked by security whether he had a permit to do so. When he said he did not, he was ordered to move across the canal to get his image. In other words, he was kicked out of 'public' space."); Jerold S. Kayden, *Meet Me at the Plaza*, N.Y. TIMES (Oct. 19, 2011), <http://www.nytimes.com/2011/10/20/opinion/zuccotti-park-and-the-private-plaza-problem.html> (explaining that he has visited every POPOS in New York and that "[g]uards, sometimes accompanied by dogs, have from time to time stopped me from taking photographs or speaking into a handheld recorder"); *infra* notes 315–20 and accompanying text (discussing how Rebar members were asked to stop filming in POPOS).

<sup>280</sup>. See BRYANT SIMON, EVERYTHING BUT THE COFFEE: LEARNING ABOUT AMERICA FROM STARBUCKS 92–93 (2009) (discussing selective enforcement).

<sup>281</sup>. Researchers could collect data on things like: the use of the POPOS; how many people get turned away; and how patrons' use of POPOS compares to use of other public spaces that are similarly situated (of comparable size, in a similar part of town). With this kind of comparative data, we could better assess whether POPOS are largely going unused or underused nationwide, and if they are failing to accomplish their stated purposes.

owned publicly.<sup>282</sup> This is because POPOS invite a conflict of interest; the private building owner would prefer not to have members of the public disturbing its residents and tenants. The presence of members of the public—and especially certain “undesirable” members of the public—causes problems that might not exist if the space were truly private. That conflict does not exist in the same way with publicly owned public space, as its function and goal is to provide access and entry to all citizens, at least theoretically.<sup>283</sup> Of course, recalling the idea of idealized public space addressed earlier,<sup>284</sup> even true public space—that which is owned and operated by the government—is often exclusionary and suffers from many of the same problems as POPOS. This is especially true with respect to how homeless people are treated in public space. As one commentator stated, “[h]istory is replete with examples of exclusionary laws that minimize the presence of ‘undesirable people’ in public space.”<sup>285</sup> Therefore, we must be careful not to compare an imperfect reality to a perfect yet imaginary alternative.

#### D. A LACK OF AUTHENTICITY

A final important problem with POPOS is that they often feel sanitized and inauthentic, lacking “the rough edges [and] unpredictability that make true public space so vital and democratic.”<sup>286</sup> At base, they are a simulacrum—an imitation of real public space.<sup>287</sup> This is a complaint that has been levied against other forms of privatized public space, including new outdoor malls and lifestyle centers.<sup>288</sup> However, discussions of authenticity are more the

282. Of note, “surveys consistently show that visibly poor people report more frequent harassment from private security or BID ambassador-type authority figures than from police officers.” Rankin, *supra* note 29, at 40.

283. *But see supra* Part I.B (discussing idealized views of what public space is and should be).

284. *See supra* Part I.B.

285. Rankin, *supra* note 29, at 13 n.41, 41 (discussing the increase in laws that criminalize the behavior of visibly poor and homeless people in public space); *see* Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 60–61 (2011) (noting the undesirability of homeless people in public space).

286. *See* HENRY SHAFTOE, CONVIVIAL URBAN SPACES: CREATING EFFECTIVE PUBLIC SPACES 77 (2008) (referring to privatized public spaces as “a kind of sanitized version of public space”); *see also* SIG LANGEGER, RIGHTS TO PUBLIC SPACE: LAW, CULTURE, AND GENTRIFICATION IN THE AMERICAN WEST 111 (2017) (defining authenticity as “a practice, not a trait” and “a sense of realness of experience that all people . . . strive to achieve in everyday life”).

287. *Simulacrum*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002). For an explanation of simulacrum, *see generally* JEAN BAUDRILLARD, SIMULACRA AND SIMULATION (1994).

288. *See, e.g.*, Angelo Carusi, *When Authentic is Fake*, NAT’L REAL EST. INV. (May 1, 2003), <http://www.nreionline.com/mag/when-authentic-fake>; Thaddeus Herrick, *Fake Towns Rise, Offering Urban Life Without the Grit: Mix of Office, Home, and Play Threatens the Real Thing; But Where’s the Grocery?*, WALL ST. J. (May 31, 2006, 12:01 AM), <https://www.wsj.com/articles/SB114904207386167125>; Terry Schwarz, *Urban-Suburban Inversion, in The Next Big Idea in Urban Design*, GREEN BUILDING & DESIGN MAG., <http://gbdmagazine.com/2015/the-next-big-idea-in-urban-design> (last visited Dec. 19, 2017) (“It’s easy to dismiss the ersatz urbanism of suburban lifestyle centers as somehow inauthentic . . .”). *But cf.* Philip Nobel, *Good Malls and Bad Cities*, METROPOLIS MAG. (Mar. 1, 2007), <http://www.metropolismag.com>.

province of urban sociologists; few legal scholars have written about authenticity as it relates to law and space.<sup>289</sup>

The question of what is authentic—and who gets to decide what is authentic—is itself somewhat problematic. One problem with authenticity as it relates to public space is that truly authentic places are often sought after, and thus colonized and gentrified, which can result in a perceived lack of authenticity.<sup>290</sup> This practice is not necessarily a bad thing though; many consumers of space today seek places that look authentic, but not those that feel or smell that way.<sup>291</sup> Privatized public space can fill that desire. It often presents as a “Disney-fied” version of public space—space that looks nice but lacks grit and a semblance of truth.<sup>292</sup>

This issue of authenticity in public space also evokes Laurence Tribe’s famous article that discussed the value of plastic trees and nature more broadly.<sup>293</sup> One could imagine that privatized public spaces are examples of what Tribe recognizes as “artificial objects and settings supplant[ing] those supplied by nature.”<sup>294</sup> While even the most public of urban public parks are constructs, they are meant to provide a natural respite from the density of the city. The private ownership of and control over a public space often results in

com/uncategorized/good-malls-and-bad-cities (“With free speech (thriving elsewhere) taken out of the equation, with all arguments based on ‘authenticity’ banished to the postmodern echo chamber . . . [lifestyle centers] look like unadulterated good news.”).

289. See, e.g., Lior Jacob Strahilevitz, *Historic Preservation and Its Even Less Authentic Alternative* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 777, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2838456](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838456); see also MAXINE GREENE, *THE DIALECTIC OF FREEDOM* xi (1988) (“the authentic public space” is defined as “one in which diverse human beings can appear before one another as, to quote Hannah Arendt, ‘the best they know how to be.’ Such a space requires the provision of opportunities for the articulation of multiple perspectives in multiple idioms, out of which something common can be brought into being.”). See generally SHARON ZUKIN, *NAKED CITY: THE DEATH AND LIFE OF AUTHENTIC URBAN PLACES* (2010) (discussing a connection between a demand for authenticity and gentrification); Margaret McFarland, *Urban Integrated Developments: Visible and Invisible Forces*, 45 REAL EST. REV. J. (2016) (“[A]uthenticity is less about historic elements and more related to a place that connects people to community and provides a bridge to one’s aspirations.”).

290. See generally ZUKIN, *supra* note 289 (discussing the pursuit of authentic public space).

291. Strahilevitz, *supra* note 289, at 13 (noting that historic preservationists “do not want to smell what previous generations smelled”).

292. See generally, e.g., Eric Rofes, *Imperial New York: Destruction and Disneyfication Under Emperor Giuliani*, 7 GLQ 101 (2001) (reviewing SAMUEL R. DELANY, *TIMES SQUARE RED, TIMES SQUARE BLUE* (1999)) (discussing the transformation of New York into a glorified version of itself); Sharon Zukin et al., *New Retail Capital and Neighborhood Change: Boutiques and Gentrification in New York City*, 8 CITY & COMMUNITY 47 (2009) (discussing the transformation of New York to the displeasure of the locals).

293. See generally Laurence H. Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974) (discussing fake trees in displacing nature’s objects). Tribe was responding to an article in *Science Magazine* that suggested that plastic trees could replace real ones—“that people’s love of nature is easily manipulable and that manufactured products could easily duplicate the utilitarian benefits of nature.” Daniel A. Farber, *From Plastic Trees to Arrow’s Theorem*, 1986 U. ILL. L. REV. 337, 344.

294. Tribe, *supra* note 293, at 1316.



spaces lacking a public spirit or character. These features give a sense that the space is fake, or at least less authentic than a traditional public park, and thus really not public at all.<sup>295</sup>

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Due to all of these problems, moving forward, cities should seriously consider refraining from the creation of new POPOS. Instead, they could focus energy on finding ways to create better truly public space. However, that path might not be possible for all cities. Further, given that a large number of these spaces currently exist, cities must find ways to improve them. The following Part will focus on ways to approach that challenge.

## V. PRIVATE SPACE AND ITS PUBLICIZATION

This Article has suggested that members of the public are likely not getting the benefit of their bargain in exchange for POPOS, given that they are exclusionary and less successful than ideal public space should be. Thus, this Part considers what might be gained by thinking of POPOS through a lens of “publicization” rather than privatization.<sup>296</sup> This Part begins descriptively, focusing on the fact that POPOS involve *private* property, but property which is being set aside—at least for the life of the building to which it is attached—for use by the *public*. Thus, this property has already been “publicized,” in the literal sense; if not for POPOS ordinances, this space would be purely private property and thus the owner’s right to exclude would be paramount. This Part goes on to consider the normative implications of a publicization framing, and it suggests ways that communities can use law, norms, and design to make POPOS more valuable forms of public space.

### A. FRAMING POPOS AS PUBLICIZATION NOT PRIVATIZATION

As this Article has explained, commentators have legitimately described POPOS as an example of privatized public space.<sup>297</sup> That framing leads to many of the concerns with POPOS addressed above. However, this Subpart suggests that POPOS are perhaps more accurately described as an example of the publicization of private space. Flipping the descriptive narrative and framing POPOS in this way allows us to talk about the potential unexamined benefits that inure when private property is made public, and thus more inclusionary. This publicization framework also allows us to view POPOS in conjunction with the progressive property theory literature, which will be discussed below.

295. See, e.g., Torben Huus Larsen, *The Museum of Appalachia and the Invention of an Idyllic Past, in PUBLIC SPACE AND THE IDEOLOGY OF PLACE IN AMERICAN CULTURE* 81, 85–86 (Miles Orvell & Jeffrey L. Meikle eds., 2009) (noting that we build spaces “around an idealized vision of a society void of unpleasant social and political issues, . . . [which] offer a spatial and temporal vacuum, presenting an escape not only from the modern world but also from history itself”).

296. See *supra* text accompanying note 21 (noting various scholars’ definitions of publicization).

297. See *supra* Part II.C.1.

In most instances, POPOS—and the buildings to which they attach—sit on urban land that was purely private and closed off to the public before the project at issue was constructed. In exchange for development rights, some landowners have decided to strike a publicization deal: They agree to provide public access to their previously purely private property. The private property owner’s right to exclude is being bent in the direction of public access, and the property owner herself is agreeing to bend that right in order to accommodate more comers. Of course, the public does not get to access this private property at no cost. In this exchange, the public is giving up something of value. The cost is that the municipality allows denser development, and thus all the harms associated with that denser development are visited upon the members of the community.<sup>298</sup> So while something is gained (access to POPOS), something is lost (compliance with the baseline zoning that would have resulted in more limited density).<sup>299</sup>

Through this exchange, private property owners agree to limit their right to exclude, and in turn, to make more generous use of their “right to include.”<sup>300</sup> As Professor Daniel Kelly noted in his article about this right, property owners can facilitate the inclusion of others onto their property either formally, through contract or property law, or informally, through social norms.<sup>301</sup> Currently, POPOS generally rely on inclusion through either property or contract law, depending on the city and the mechanisms it relies upon to secure public access in POPOS.<sup>302</sup> However, cities could use a publicization framing of POPOS to assist in fostering informal inclusion in these spaces through the importing of public space norms into POPOS, supplemented with updated and improved laws.<sup>303</sup> The following Subpart will further examine this idea.

### B. BETTER LIVING THROUGH PUBLICIZATION: MAKING POPOS MORE PUBLIC

Publicization is a descriptively useful term in thinking about how POPOS are different from traditional privatized public spaces, but publicization can also be a useful normative concept in thinking about how to improve POPOS. Jody Freeman used the term publicization to explain a new way of looking at privatization.<sup>304</sup> She suggested that privatization might in fact be a method

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298. The harms include things like loss of light and air, and more crowded sidewalks and public transportation. But there are also substantial benefits associated with density. *See infra* notes 382–83 and accompanying text. Thus, dense cities tend to be more sustainable and environmentally friendly. *See infra* notes 385–86.

299. *See, e.g.,* Weaver, *supra* note 15, at 4 (“[Z]oning restrictions are lifted in return for the construction of public space.”).

300. *See generally* Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857 (2014).

301. *Id.* at 859.

302. *See supra* Part III.A.

303. *See supra* Part IV.B.

304. Freeman, *supra* note 21, at 1285.

through which the government could infuse private actors with public values, norms, and goals.<sup>305</sup> Here, the Article suggests that we might carry the idea of publicization forward and extend Freeman's term into the fields of local government and property law. Instead of focusing broadly on public law goals and democratic norms as Freeman does, here the focus is on public *space* norms and laws. Specifically, this Part suggests that cities and citizens should use both norm change and legal change to make POPOS more public, democracy-enhancing, and able to carry and support the values of public space.<sup>306</sup>

### 1. Norms

Given the important values that traditional public space fosters and furthers, it makes sense that "new" public space should support those same values. Values are often expressed in a given locale through social norms, and "[i]nformal norms, rather than legal rules, have long governed the allocation of urban public spaces."<sup>307</sup> Regardless of the underlying rules that are put in place by the private property owner, communities can import and enforce social norms that are normally associated with truly public space into POPOS.<sup>308</sup> This importation of public space norms could be done formally, as Freeman suggests, through "budgeting, regulation, and contract," or informally, simply by regularly using these privately owned public spaces as one would true public spaces.<sup>309</sup>

From a formal perspective, extending Freeman's idea to POPOS might take the form of making a bonus zoning deal contingent on a POPOS owner's agreement to ensure her management of the POPOS adheres to the values and norms associated with traditional public space.<sup>310</sup> Indeed, compliance with public space norms could be a condition attached to the development permit. In this way, cities could use the law to influence norms, turning

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305. *Id.*

306. *Id.* at 1290.

307. Nicole Stelle Garnett, *Private Norms and Public Spaces*, 18 WM. & MARY BILL RTS. J. 183, 198 (2009) (noting that "police departments are again taking an interest in public-space norms of decorum").

308. These "public space norms" would include public law norms—"democratic norms of due process, rationality, equality, and accountability," and "universal access and nondiscrimination"—as well as behavioral norms that people might broadly associate with public space, such as, for example, relaxing, singing, eating, protesting, demonstrating, and arguing. Freeman, *supra* note 21, at 1325, 1351; *see also supra* Part IV. The key is that "residents should be involved in identifying and prioritizing which norms should be enforced and which should be suppressed." Garnett, *supra* note 307, at 193.

309. Freeman suggests using more formal methods to extend public law norms to private actors, including through "budgeting, regulation, and contract." Freeman, *supra* note 21, at 1285.

310. *Id.* ("[T]he state can exact concessions—in the form of adherence to public norms—in exchange for contracting out its work.").

building managers into public space norm enforcers.<sup>311</sup> However, it would likely be difficult to precisely pin down the relevant public space norms, and thus contracting and enforcement would be complicated.<sup>312</sup> Further, Freeman recognizes that this process might be “costly and burdensome,” which might “undermine [efficiency] gains from privatization.”<sup>313</sup> However, this is not something that cities have tried with respect to POPOS, and it seems to be an area where the costs might be worthwhile (especially given the great value that the private owner gets in exchange for the POPOS).

If localities are unwilling to take formal action with respect to norms, members of the public can do so informally, by acting as norm entrepreneurs. As Don Mitchell has said, “[p]ublic space is . . . socially *produced* through its use *as* public space.”<sup>314</sup> An example of this idea in practice was Rebar’s Commonsplace Project.<sup>315</sup> This art and design collective in San Francisco brought groups of people together to stage interventions in POPOS around San Francisco.<sup>316</sup> For example, 101 Second Street is a downtown office building, the first floor of which contains an indoor atrium that is a POPOS. A visitor to this space might typically observe people sitting and talking or eating lunch. The social norms that seem to govern the space are those of an indoor office building: people speaking in quiet voices, people wearing business attire, people walking and not running. To challenge the norms of this space, Rebar brought a group of people into the space.<sup>317</sup> The group sat in a circle on the floor and began performing a Balinese chanting ritual that involved both loud vocal chants and coordinated movements.<sup>318</sup>

311. See Garnett, *supra* note 307, at 194–98 (describing police officers’ roles as norm enforcers, in addition to law enforcers).

312. Freeman, *supra* note 21, at 1288 (explaining that the “government might insist on detailed contractual terms and on supervising compliance with them”).

313. *Id.* at 1290, 1339 (noting also that it is not “obvious that selectively adding due process, public participation, or oversight will undermine *all* of the economic gains and technical innovations that might come from reliance on private service providers. Surely it depends on the instruments we use”); see also Jon Pierre & Martin Painter, *Why Legality Cannot Be Contracted Out: Exploring the Limits of New Public Management*, in REASSERTING THE PUBLIC IN PUBLIC SERVICES: NEW PUBLIC MANAGEMENT REFORMS 49, 59 (M. Ramesh et al. eds., 2010) (“To become agents of ‘publicization’ private contractors would have to make significant investments in staff training and be willing to, as Freeman suggests, become quasi-agents of the state.”).

314. MITCHELL, *supra* note 50, at 129.

315. See *Commonspace*, REBAR, <http://rebargroup.org/commonspace> (last visited Dec. 21, 2017).

316. These actions included a group of people taking naps in a public solarium inside a corporate office building, and another group flying kites on an office building’s rooftop garden that was open to the public. These interventions were often met with resistance from local security guards. They were also often asked to stop video recording the interventions. *Rebar Commonsplace Podcast*, AIA S.F. (Oct. 19, 2007, 3:32 PM), <https://player.vimeo.com/video/348507>.

317. *Id.*

318. *Id.*; Matthew Roth, *Unlocking San Francisco’s Privately Owned Public Open Spaces*, STREETS BLOG SF (Jan. 20, 2009), <http://sf.streetsblog.org/2009/01/20/unlocking-san-franciscos-privately-owned-public-open-spaces>.

First, there is no law on the books would prevent this intervention. Second, it is likely that there were no POPOS rules of conduct in place at the time that would prevent this action. It is also questionable what such rules would look like and whether they would be “reasonable.” However, the chanting ritual certainly violated the social norms of the space; it is an activity one might expect to find in a public park in San Francisco, but not in a staid corporate atrium. Of course, a single intervention such as this likely will not change the norms of a POPOS overnight. However, repeated actions might.<sup>319</sup> During the course of Rebar’s Commonsplace interventions, the security guards who were faced with these actions attempted to stop them, sought out building management, asked the collective to stop filming the interventions, and (upon the insistence of an ACLU representative who accompanied the group) called the police.<sup>320</sup> It is likely that the security guards did not know whether any rules prevented this action, but sensed that it was in violation of the norms of the space. By taking actions that challenge the private space norms that currently exist in many POPOS, groups like Rebar and Occupy Wall Street are doing the work toward carrying out Kayden’s observation that POPOS were waiting to be “defined by the user rather than by the owner.”<sup>321</sup>

Even if there had been rules of conduct in place that prevented these sorts of interventions, that does not destroy the possibility of redefining these spaces. Throughout history, we have seen examples of people acting as agents of change in violation of local rules or laws, but in accordance with more progressive social norms. These transgressive actions sometimes result in a change in the underlying rules and laws.<sup>322</sup> And while chanting and occupation might seem extreme to some members of the public, there are ways that cities could assist their residents in extending public space norms to POPOS.<sup>323</sup> For example, studies have shown that norm change, though difficult, is possible through education.<sup>324</sup> Thus, cities could use public information campaigns to ensure that people are aware of the existence of POPOS and their rights in those spaces. Markets could also be employed here through the creation of apps that use GPS to tell people whether they are

319. See Dale T. Miller & Deborah A. Prentice, *Changing Norms To Change Behavior*, 67 ANN. REV. PSYCHOL. 339, 341 (2016) (explaining that interventions can modify norms and behavior).

320. Roth, *supra* note 318; see *Commonspace*, *supra* note 315. Of note, the police apparently agreed with Rebar’s interpretation of the use of the space and refused to respond to the call. *Id.*

321. KAYDEN, *supra* note 209, at 2.

322. Sarah Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, and the Local Food Movement*, 2014 WIS. L. REV. 369, 370; see, e.g., Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16, 17 (2015).

323. The role of the city here would not be out of character. As Nicole Garnett recognized, “city governments have become norm-entrepreneurs and norm-enforcers.” Garnett, *supra* note 307, at 184.

324. See Miller & Prentice, *supra* note 319, at 341.

close to a POPOS.<sup>325</sup> Cities could also make it clear that people have remedies if they feel that their rights in POPOS are not being honored.

Educational campaigns should target not just the residents of a locality, but also the people who own and manage POPOS. It is possible that once building owners and security guards are educated about the value of and need for true public space, they will assist in shifting the norms within these spaces. As one commentator noted, “[t]he process of publicization consists in making perceptible both the troubled situation and its problematic consequences, so that appropriate measures can be taken.”<sup>326</sup> Once the problems are known to the actors, citizens and municipalities can begin to work with owners to make efforts to change the norms.

Finally, the process of imbuing private actors with public space norms might also have the effect of expanding existing understandings of property and power.<sup>327</sup> Freeman notes that her conception of publicization might “find a warmer reception among corporate law scholars known for their communitarian views, . . . who may be more sympathetic to the idea that corporations have social obligations.”<sup>328</sup> Although she is writing generally about corporate law and governance, this concept is easily extended to property law: A number of property scholars view property through a social obligation lens.<sup>329</sup> And while law and economics scholars often tout the value and importance of the right to exclude others from private property, this new cadre of progressive property scholars—who tend to take a social obligation norm approach to property law—focus instead on situations when the right to exclude should be diluted to allow for greater human flourishing.<sup>330</sup> Indeed, courts have agreed that a property owner is not able to exclude all

325. San Francisco and New York now have websites that list all POPOS and allow people to comment upon and rate them. See *Privately Owned Public Space in New York City*, ADVOCATES FOR PRIVATELY OWNED PUB. SPACE (June 22, 2017), <http://apops.mas.org>; *Privately-Owned Public Open Space and Public Art (POPOS)*, CITY & CTY. S.F., <http://sf-planning.org/privately-owned-public-open-space-and-public-art-popos> (last visited Dec. 21, 2017). San Francisco also has an app, though it does not appear to be connected to GPS. See *Discover an SF Secret*, POPOS, [sfpopos.com](http://sfpopos.com) (last visited Dec. 21, 2017).

326. Terzi & Tonnelat, *supra* note 26, at 527.

327. See Freeman, *supra* note 21, at 1327 n.179.

328. *Id.*

329. See, e.g., Alexander, *supra* note 25, at 747 (“[P]roperty owners owe far more responsibilities to others, both owners and non-owners, than the conventional imagery of property rights suggests. Property rights are inherently relational . . . .” (footnotes omitted)); see also LÉON DUGUIT, *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON* 21 (2d ed. 1920) (arguing that property has a social function that the owner has a duty to fulfill).

330. Alexander, *supra* note 25, at 745 (defining “human flourishing” as “enabling individuals to live lives worthy of human dignity”); *id.* at 747; Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 *CORNELL L. REV.* 743, 743 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 *CORNELL L. REV.* 821, 842–44, 854–56 (2009); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 *CALIF. L. REV.* 107, 138 (2013).

others from her private property in all instances; the right to exclude must sometimes bend in the face of important competing public policy concerns.<sup>331</sup> With respect to POPOS, the owner's agreement to limit the right to exclude brings the general public into private spaces, and further blurs the line between private and public space. This process of publicization may thus have the indirect effect of reshaping conceptions of private power and exclusion in a way that fosters these more progressive views of property. The result might actually be to "enhance public law norms by extending them to realms where they typically do not play a significant role"—here, private property.<sup>332</sup>

## 2. Laws

While I believe that norm change is key to realizing the full potential value of POPOS, the law also has a very important role to play. This Subpart will address methods of improving POPOS that could be used in conjunction with norm change so that these spaces provide greater value to all people in a locality. First, the most straightforward way that law could be used to achieve these ends is that cities could create more detailed zoning requirements that address not just the physical features that are required of POPOS, but prescriptive details about inclusion, accessibility, and use requirements as well. Similarly, cities might simply decide to impose their existing park codes on POPOS, with some modifications to the enforcement provisions.<sup>333</sup> Second, state courts could interpret their state constitutions so as to provide for greater free speech rights in POPOS than in more traditional privately owned spaces that are open to the public, like malls.<sup>334</sup>

### *i. Legislation/Ordinances*

A fairly obvious and easy step that cities could take to improve POPOS would be to adopt ordinances that prescriptively address both the design of POPOS and how these spaces may be used. Here, it is important to acknowledge that design requirements and use requirements are different solutions to two different problems—many POPOS are *designed* to be exclusionary, but many are also *operated* that way. Thus, local governments considering how to improve access and use of POPOS must address both problems: exclusionary design and exclusionary enforcement and operation.

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331. See, e.g., *State v. Shack*, 277 A.2d 369, 371–72 (N.J. 1971).

332. Freeman, *supra* note 21, at 1314 (emphasis omitted).

333. Perhaps this has not been done because such a step would be viewed as too great an intrusion into private property rights. However, given the discussion in this Article, I would suggest that imposing these rules would be proper.

334. See *supra* note 184.

## a. Design

When POPOS were first coming into use in New York, many of the plazas were not very functional.<sup>335</sup> Early POPOS were often “empty expanses of concrete, seen by users as desolate, depressing, cold, and aesthetically hostile environments.”<sup>336</sup> Spaces with poor designs will be poor public spaces, regardless of whether the ownership structure is public or private.<sup>337</sup> As was discussed earlier, these design decisions are often intentional on the part of developers who want to create exclusionary spaces.<sup>338</sup>

Seeing these trends, one commentator suggested that the POPOS zoning programs should “better counter developers’ private interests with public ones.”<sup>339</sup> One way to counter the influence of developers is for cities to create more specific design standards for the creation and operation of POPOS.<sup>340</sup> Indeed, recognizing the problems with POPOS, or perhaps responding to these criticisms, some municipalities have adopted more stringent design requirements for these spaces. For example, New York now sets forth six different types of seating that may be used to meet seating requirements—including movable seating, walls, steps, and benches—and also describes the best types of seating arrangements.<sup>341</sup> Strict design standards that evoke a public character are especially important with respect to indoor POPOS, which “run the inherent risk of being unnoticed by the passing pedestrian or other members of the public.”<sup>342</sup>

Cities should go further by specifically prohibiting things like border fences around exterior spaces and requiring floor to ceiling windows for interior spaces. Signage denoting the public nature of the space should be large, consistent, and noticeable. Cities should also refuse to allow POPOS to be located on upper stories or interior courtyards, or in any other location where a member of the public would have to pass through a security

335. KAYDEN ET AL., *supra* note 6, at 16.

336. *Id.*

337. For example, Portland, Maine’s Congress Square Park, which is owned by the City, has been derided as poor public space, in large because of its design, which involves a sunken concrete pit. In recent years, an active Friends of the Park group has raised money and organized programming that has made the park more successful and active. See *The Story of Congress Square Park: How a Derelict Plaza Got a New Identity Downtown*, PROJECT FOR PUB. SPACES (Oct. 1, 2014), <https://www.pps.org/blog/the-story-of-congress-square-park-how-a-derelict-plaza-got-a-new-identity-downtown>.

338. Smithsimon, *supra* note 17, at 326, 331.

339. *Id.* at 331.

340. As Whyte pointed out, “[I]ack of guidelines was a force for mediocrity. Developers wanted the minimum done . . . And that is what they got.” WHYTE, *supra* note 149, at 114.

341. See N.Y.C., N.Y., Zoning Resolution art. III, ch. 7, div. 37-741 (2009); see also *Privately Owned Public Space: Current Standards*, NYC PLAN., <https://www1.nyc.gov/site/planning/plans/pops/pops-plaza-standards.page> (last visited Dec. 21, 2017) (describing design regulations).

342. KAYDEN ET AL., *supra* note 6, at 33; see also N.Y.C., N.Y., Zoning Resolution art. VII, ch. 4, div. 74-873(c) (2009) (requiring that “the public character of the proposed covered pedestrian space shall be obvious from the outside of the building”).



checkpoint to enter. Moreover, cities could require specific maintenance standards, allow members of the public to report through an app if a space was not meeting those standards,<sup>343</sup> and impose fines for violations.

Finally, cities could consider modifying their POPOS ordinances to allow for public participation in the design process, as well as any proposed changes to existing POPOS designs in the future, whether “physical or programmatic.”<sup>344</sup> There are currently no real legal requirements for public oversight of or participation in changes to existing POPOS.<sup>345</sup> This gap in the system amounts to the existence of spaces that provide the public with physical access, but that bar them from access to governance processes, which is perhaps just as important.<sup>346</sup>

### b. Use

Cities should also add a section to their POPOS ordinances that addresses how these spaces may or must be used. Currently, there are no such provisions in the San Francisco or New York ordinances.<sup>347</sup> As Jerold Kayden noted, “the events at Zuccotti Park highlight[ed] the continued inadequacy of the laws regarding privately owned public spaces.”<sup>348</sup> And as was addressed above, this dearth of laws has been filled, in some instances, by private owners and operators who have stepped in to draft their own rules of use, while other spaces have no use rules in place, providing total discretion to those who oversee the spaces.<sup>349</sup>

Creating more detailed use regulations should not be difficult for cities, as they have created similar requirements in other contexts—the most obvious of which are their public parks codes. For example, public parks ordinances govern things like hours of operation,<sup>350</sup> camping,<sup>351</sup> leafletting and picketing,<sup>352</sup> use of musical instruments,<sup>353</sup> when and why parks may be

343. Many cities are already using an app called “See, Click, Fix” to report problems to public works and city officials. *Top Performing Cities*, SEE CLICK FIX, [https://en.seeclickfix.com/recent\\_place\\_stats](https://en.seeclickfix.com/recent_place_stats) (last visited Dec. 21, 2017).

344. MILLER, *supra* note 137, at 77.

345. *Id.* at 76.

346. *Id.*

347. See generally S.F., CAL., PLANNING CODE art. 1.2, § 138 (2015) (listing POPOS regulations); N.Y.C., N.Y., Zoning Resolution art. III, ch. 7 (2017) (listing POPS regulations); *Privately Owned Public Space: Current Standards*, NYC PLAN., <https://www1.nyc.gov/site/planning/plans/pops/pops-plaza-standards.page> (last visited Dec. 21, 2017) (describing POPS regulations).

348. Jerold S. Kayden, *Meet Me at the Plaza*, N.Y. TIMES (Oct. 19, 2011), <http://www.nytimes.com/2011/10/20/opinion/zuccotti-park-and-the-private-plaza-problem.html>.

349. See *supra* Part III.C.

350. See, e.g., S.F., CAL., PARK CODE art. 3, § 3.21 (2013) (regulating hours of operation); N.Y.C., N.Y., DEP’T PARKS & RECREATION, Rules & Regulations § 1-03, <https://www.nycgovparks.org/rules/section-1-03> (last visited Dec. 21, 2017) (regulating hours of operation).

351. See, e.g., S.F., CAL., PARK CODE art. 3, § 3.12 (2008) (prohibiting camping).

352. See, e.g., *id.* art. 7, § 7.08 (regulating petitioning, leafletting, picketing, and soliciting).

353. See, e.g., *id.* art. 4, § 4.01 (k) (regulating the use of percussion instruments).

closed,<sup>354</sup> and sale of goods or merchandise within a park without a permit or license.<sup>355</sup> Of course, some of these existing public parks rules are restrictive of rights. Even public decision-makers have made exclusionary choices when it comes to municipal infrastructure and use.<sup>356</sup> Thus, cities could go further by adding language that expressly requires POPOS to be open to all people, regardless of attire, or whether they are carrying bags. These ordinances should be inclusive so that even a person who is not dressed in business attire, or who is obviously homeless, would be welcomed into the space.<sup>357</sup> The key is that there must be a public process for adopting or changing rules that govern the use of POPOS.

*ii. Courts*

There is also a role for courts to play in ensuring that POPOS function as a substantial replacement for traditional public space. This role would first require courts to acknowledge the extent to which privately owned space is supplanting traditional public space in many cities.<sup>358</sup> This realization could then lead courts to review and potentially expand their First Amendment and state action jurisprudence, thus imposing public space laws on private actors who own and manage POPOS.<sup>359</sup> By treating private actors as state actors, courts might also require them to adhere to norms of democratic accountability.<sup>360</sup>

As the brief, earlier discussion of First Amendment and state action jurisprudence suggested, an expansion of either doctrine would aid in allowing POPOS to function more as traditional public space.<sup>361</sup> The Court's state action jurisprudence currently "requires a threshold showing of state involvement for most constitutional claims."<sup>362</sup> However, some commentators have suggested, as this Article does, that the state action doctrine should

354. See, e.g., *id.* art. 3, § 3.03 (noting that parks may not be closed "because of the content or viewpoint of expressive activities . . . to the extent such expressive activities are protected by the First Amendment to the United States Constitution").

355. *Id.* § 3.10.

356. See, e.g., Schindler, *supra* note 53, at 1953–72 (describing the ways cities are planned to limit access to certain areas).

357. Of course, norms would go a long way toward making the space feel inclusive; often inclusive laws are not enough.

358. Articles such as this one can help to deliver that information.

359. This currently seems highly unlikely.

360. Freeman, *supra* note 21, at 1319.

361. See *supra* notes 177–86 and accompanying text (discussing First Amendment and state action jurisprudence).

362. *Developments, supra* note 180, at 1303, 1305 (noting that in *Hudgens v. NLRB*, "[t]he Court held . . . that a threshold showing of state action is necessary to sustain a free speech challenge because the First Amendment is a check 'on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only'" (quoting *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976))).

account for the blurring of lines between public and private space.<sup>363</sup> For example, Erwin Chemerinsky wrote that the existing “state action doctrine is an absurd basis for choosing between the two liberties [those of violator and victim]. The concept of state action completely ignores the competing rights at stake and chooses based entirely on the identity of the actors.”<sup>364</sup>

Although the Supreme Court has not spoken directly about POPOS, it has spoken about other public–private hybrids. In *Marsh*, a woman was arrested for trespassing after distributing religious literature on a sidewalk in “a company-owned town.”<sup>365</sup> The town was owned and operated by a private corporation but otherwise resembled a normal municipality.<sup>366</sup> The Court there stated, “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”<sup>367</sup> Thus, First Amendment rights applied in this seemingly public space.<sup>368</sup>

The Court first extended, but then later contracted, this doctrine.<sup>369</sup> In *Lloyd Corp. v. Tanner*, anti-war protestors were attempting to distribute leaflets in a mall before being forced to leave by mall security.<sup>370</sup> There, the Supreme Court held that the First Amendment does not “limit restrictions of speech on private property—even property, like shopping centers, which the public is generally invited to use.”<sup>371</sup>

Where do POPOS fit in this jurisprudence? Although POPOS share features with company towns, that is not enough; the Court has suggested that “private property must be the functional equivalent of an *entire* town,” not just a portion of one.<sup>372</sup> But POPOS are also distinct from malls. They generally

363. *Developments, supra* note 180, at 1303–04 (discussing “the courts’ developing approach to free speech on private property”).

364. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 537 (1985) (footnote omitted).

365. *Marsh v. Alabama*, 326 U.S. 501, 502 (1946).

366. *Id.*

367. *Id.* at 506.

368. The curiosity is that company towns are an anachronism; they no longer really exist in the modern United States. See Adrienne Iwamoto Suarez, *Covenants, Conditions, and Restrictions . . . on Free Speech? First Amendment Rights in Common-Interest Communities*, 40 REAL PROP. PROB. & TR. J. 739, 748 (2006).

369. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 159 n.8 (1978) (expressing “doubt that *Newton* intended to establish [the] broad doctrine” that “operation of a park for recreational purposes is an exclusively public function”); *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (narrowing *Marsh*); *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968) (extending *Marsh* to shopping malls); *Evans v. Newton*, 382 U.S. 296, 301 (1966) (treating privately run parks as state actors).

370. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552–66 (1972).

371. *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 247 (D. Conn. 2012) (citing *Lloyd*, 407 U.S. at 551). In *Lloyd*, the Court read *Marsh* narrowly, but did not overturn it. *Lloyd*, 407 U.S. at 569–70.

372. Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. &

lack the commerce element, and owners of POPOS are not inviting the public into their space as part of their business model; they are required to do so under the relevant POPOS ordinance.<sup>373</sup> Some scholars have argued for extending state action to private community associations and malls, given the rise in suburbanization.<sup>374</sup>

However, I would go further. There was a time that public life centered around a public town square. Due to a number of factors, including government funding, many white families left city centers for the suburbs, hollowing out those cities and contributing to their decline and decreased tax base.<sup>375</sup> Victor Gruen designed malls so that suburbanites could experience the feeling of a town square without the trash and vagrants.<sup>376</sup> But in the last decade, malls have been dying and many people have been returning to city centers.<sup>377</sup> City-dwellers are now finding their public space wherever they can, including in hybrid spaces like POPOS, which often exist *because* cities were cash strapped and looking for ways to cut costs. This pattern of movement suggests that it might be time for the Court to reconsider its reasoning.<sup>378</sup> Justice Marshall dissented in *Lloyd*, stating:

It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. . . . As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. . . .

When there are no effective means of communication, free speech is a mere shibboleth.<sup>379</sup>

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MARY BILL RTS.J. 461, 474 (1998); *see also* Hudgens, 424 U.S. at 513 (stating that private property would be treated public if there were "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block'" (quoting *Marsh*, 326 U.S. at 502)).

373. *See supra* text accompanying note 20.

374. *See, e.g.*, Siegel, *supra* note 372, at 475 (making an argument that residential community associations are the modern-day equivalent of a company town and thus a "functional equivalent of a municipality"); Josh Mulligan, Note, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of PruneYard*, 13 CORNELL J.L. & PUB. POLY 533, 545 (2004) (suggesting a reconsideration of whether shopping centers are state actors in light of suburbanization).

375. *See* JACKSON, *supra* note 10, at 265–71.

376. *See generally* M. JEFFREY HARDWICK, MALL MAKER: VICTOR GRUEN, ARCHITECT OF AN AMERICAN DREAM (2004) (discussing Gruen's career, including his design of shopping malls).

377. *See generally* Schindler, *supra* note 34 (discussing the shuttering of enclosed malls and strip malls).

378. Some state courts have recognized this. *See* Fashion Valley Mall, LLC v. NLRB, 172 P.3d 742, 745 (Cal. 2007); *see also* *Developments*, *supra* note 180, at 1309–10 ("The court's argument is that shopping malls have become the new public fora as the concept is understood in First Amendment jurisprudence, not that California's constitution defines new types of public space.").

379. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 586 (1972) (Marshall, J., dissenting).

In many modern cities, privatization is so prevalent that opportunities to speak in a public forum have been diminished. It might thus be time to reinvigorate the *Marsh* doctrine.<sup>380</sup> By doing so, courts could aid in the publicization of hybrid spaces.<sup>381</sup> Indeed, some state courts have already recognized the move toward privately owned public space.<sup>382</sup> For example, California courts base their inquiry on whether the property is publicly accessible, rather than whether there are government actors involved, when determining whether state action exists.<sup>383</sup> Thus, POPOS would appear to qualify. If federal courts fail to expand their definition of state action, state courts can, and have begun to, intervene.<sup>384</sup>

## VI. CONCLUSION

For many years, scholars have been urging cities to build up, not out.<sup>385</sup> Dense municipalities are more sustainable municipalities.<sup>386</sup> But dense cities

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380. “Broadening *Marsh’s* scope could help account for factors on both sides of the debate by considering private title and public usage in state action analysis . . . .” *Developments, supra* note 180, at 1314; *see also* First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1131 (10th Cir. 2002) (“As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place.’ We think this is particularly true with respect to downtown public spaces conducive to expressive activities.” (quoting *United States v. Kokinda*, 497 U.S. 720, 737 (1990) (Kennedy, J., concurring in the judgment))).

381. These are hard questions, and they implicate the debate around formalism versus functionalism. Justice Marshall and I suggest a functional approach, but the Court has become much more formalist when it comes to the First Amendment. They also raise questions about rules versus standards; it is easier to have a bright-line rule that says private individuals and business are not governed by the Constitution. The Court has drawn that line repeatedly with other constitutional provisions (limiting, for example, the government’s power to regulate private actors using its Fourteenth Amendment enforcement power). Thus, adopting more expansive state statutes might be a more successful approach here.

382. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (explaining that a state may “adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution” and “a State in the exercise of its police power may adopt reasonable restrictions on private property” as long as it avoids a taking).

383. *Golden Gateway Ctr. v. Golden Gateway Tenants Ass’n*, 29 P.3d 797, 810 (Cal. 2001) (holding that the California free speech provision contains a state action requirement, which is met when private property is “freely and openly accessible to the public”).

384. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (calling for state courts to rely on state constitutions in order to vindicate and enhance individual rights); Paul W. Kahn, Comment, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (same); *see also* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1112 (1997) (looking at the extent to which states courts have acted to expand civil liberties under state constitutions).

385. *See, e.g.*, MIKE DAVIS, PLANET OF SLUMS 1–2, 134 (2006) (“Cities in the abstract are the solution to the global environmental crisis . . . .”); Robert Cervero, *Growing Smart by Linking Transportation and Urban Development*, 19 VA. ENVTL. L.J. 357, 358 (2000); William C. Clark, *A Transition Toward Sustainability*, 27 ECOLOGY L.Q. 1021, 1061 (2001).

386. Peter Newman, *The Environmental Impact of Cities*, 18 ENV’T & URB. 275, 285 (2006) (encouraging density over sprawl); Margaret E. Byerly, Research Report, *A Report to the IPCC on*

are also often crowded and shaded; residents need access to open spaces. These spaces should provide light and air, of course, but that is not enough. People need spaces that provide them with the benefits that public space has long aimed to provide: opportunities to build social capital, to nurture democratic values, and to have conversations with strangers from a variety of social strata. POPOS provide physical space, but they often fail to provide the same value and accessibility that public space should. Thus, cities and their residents are currently not getting the benefit of their bargain in the POPOS deal.

Once cities acknowledge and take seriously the problems with their POPOS, they can begin to formulate solutions. As this Article has suggested, if cities view POPOS through a lens of publicization, they can begin to see the potential embedded in these spaces. Indeed, it is possible that some POPOS could become more inclusionary than even public parks, as individual building owners could make decisions to allow things that cities often do not, such as camping.<sup>387</sup>

Moving forward, cities should also consider that POPOS might not be the best solution for their locality. For example, in a community that has existing un-built urban land, or urban land with derelict buildings that could be torn down and replaced with green space, it would likely be better to require developers to pay an in-lieu fee in exchange for greater density. This fee could be used to create new publicly owned public space in areas of the city where it is needed. Indeed, cities could even try to strike a similar deal with the owners of existing, suboptimal POPOS: The POPOS could become private space in exchange for a substantial contribution toward the creation of new publicly owned public space. The key is that cities must take action; developers should not be able to benefit from larger buildings, thus imposing density-related harms on the public, without providing a truly worthwhile, substantial benefit. In their current forms, POPOS fail to provide that benefit.

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*Research Connecting Human Settlements, Infrastructure, and Climate Change*, 28 PACE ENVTL. L. REV. 936, 938 (2011) (“[M]unicipalities can use the same land use authority to manage climate change through denser land use patterns . . .”).

387. See generally Greg Smithson, *A Stiff Clarifying Test Is in Order: Occupy and Negotiating Rights in Public Space*, in BEYOND ZUCCOTTI PARK: FREEDOM OF ASSEMBLY AND THE OCCUPATION OF PUBLIC SPACE 34 (2012) (suggesting that, while everyone expected spaces to become more restrictive after OWS, there was actually good reason to expect they would become more public and more usable).