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# NOT IN MY FRONT YARD: FREEDOM OF SPEECH AND STATE ACTION IN NEW YORK CITY'S PRIVATELY OWNED PUBLIC SPACES

*Stephen Tower\**

## INTRODUCTION

Beginning on September 17, 2011, a protest group known as Occupy Wall Street (“Occupy”) took up residence in Zuccotti Park in downtown Manhattan, just a short walk from the New York Stock Exchange.<sup>1</sup> This grassroots, leaderless movement sought to draw attention to the financial industry centered around New York’s Wall Street. The participants believed that the industry’s influence over the democratic process was responsible for the failures in regulation and policy that led to the recession of 2008.<sup>2</sup> Over time, Occupy grew to encompass many other causes, including “immoral and illegal wars,”<sup>3</sup> collective bargaining rights for workers, and oppressive student debt. They used their continued presence in downtown Manhattan as a tool to draw

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\* J.D. Candidate, Brooklyn Law School, 2014; B.A., University of Massachusetts at Amherst, 2006. I would like to thank my parents, Christine and Steve Tower for all their support and encouragement throughout the process of writing this Note. Thanks to the staff of the *Journal of Law and Policy* for helping me through this process and making editing as painless as possible. Special thanks to all my friends for keeping me motivated, Occupy Wall Street for keeping me inspired, and the great city of Boston for ensuring that my heart never strays far from my roots.

<sup>1</sup> *Waller v. City of New York*, 933 N.Y.S.2d 541, 543 (N.Y. Sup. Ct. 2011).

<sup>2</sup> Mattathias Schwartz, *Pre-Occupied*, NEW YORKER (Nov. 28, 2011), [http://www.newyorker.com/reporting/2011/11/28/111128fa\\_fact\\_schwartz](http://www.newyorker.com/reporting/2011/11/28/111128fa_fact_schwartz).

<sup>3</sup> THE NYC GENERAL ASSEMBLY, THE DECLARATION OF THE OCCUPATION OF NEW YORK CITY 14 (2d ed. 2012).

attention to these various social issues.<sup>4</sup>

On November 15 at 1:00 A.M., after Occupy's nearly two month-occupation of Zuccotti Park, the New York Police Department ("N.Y.P.D.") mounted a raid on the park. Police officers forcibly evicted the protesters camping there and arrested 142 protestors who refused to leave.<sup>5</sup> The following morning, in *Waller v. City of New York*, a New York Supreme Court judge denied a temporary restraining order against the eviction, finding that the permanent occupation of Zuccotti Park with tents and other equipment did not constitute First Amendment-protected speech.<sup>6</sup> Finding that the occupation of Zuccotti Park was not constitutionally protected speech enabled the court to sidestep another major issue raised by the late-night eviction: whether Zuccotti Park's private owner could restrict the protestors' speech and assembly.<sup>7</sup>

Unlike Battery Park and Central Park, which are both publicly owned spaces,<sup>8</sup> Zuccotti Park is a privately owned public space<sup>9</sup> owned by Brookfield Properties, Inc.<sup>10</sup> Zuccotti Park was originally developed as a permanently public space as part of an incentive zoning scheme that granted developers leeway with height, floor-space, and setback restrictions<sup>11</sup> if they made a

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<sup>4</sup> *Id.*

<sup>5</sup> James Barron, *City Reopens Park After Protesters Are Evicted*, N.Y. TIMES (Nov. 15, 2011), <http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html>.

<sup>6</sup> See *Waller*, 933 N.Y.S.2d at 545.

<sup>7</sup> *Id.* at 544.

<sup>8</sup> *List of Parks*, N.Y.C. PARKS & RECREATION, <http://www.nycgovparks.org/park-features/parks-list?boro=M> (last visited Nov. 8, 2013).

<sup>9</sup> "Privately Owned Public Spaces . . . are an amenity provided and maintained by a developer for public use, in exchange for additional floor area." See *Privately Owned Public Space*, N.Y.C. DEP'T OF CITY PLANNING, [http://www.nyc.gov/html/dcp/html/pops/pops\\_history.shtml](http://www.nyc.gov/html/dcp/html/pops/pops_history.shtml) (last visited Nov. 8, 2013).

<sup>10</sup> See *Waller*, 933 N.Y.S.2d at 543.

<sup>11</sup> The Department of City Planning ("DCP") defines a setback as "the portion of a building that is set back above the base height (or street wall or perimeter wall) before the total height of the building is achieved." *Zoning Glossary*, N.Y.C. DEP'T OF BLDGS., <http://www.nyc.gov/html/dcp/>

portion of their property open and accessible to the general public.<sup>12</sup> Thus, while it remains open to the free use and enjoyment by the public, Zuccotti Park remains the private property of Brookfield Properties.

Prior to Occupy, “the only visible rules posted in the park forbade skateboarding, rollerblading, and bicycling.”<sup>13</sup> In response to Occupy, Brookfield Properties, instituted new policies that further limited the public’s use.<sup>14</sup> After the protesters arrived in Zuccotti Park, Brookfield Properties instituted several new sets of regulations.<sup>15</sup> These ranged from prohibitions on sleeping or lying down in the park to rules against using tents or tarps to construct dwellings in the park.<sup>16</sup> After Occupy’s eviction in November 2011, Brookfield enacted even stricter regulations, barring a number of items and activities, including large backpacks or suitcases, yoga mats, large amounts of food and beverages, musical instruments, books, serving food, and drumming.<sup>17</sup> Additionally, for several months after Occupy was evicted from Zuccotti Park,

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<http://zone/glossary.shtml> (last visited Nov. 8, 2013).

<sup>12</sup> Brief for New York Civil Liberties Union as Amicus Curiae Supporting Defendant at 9, *People v. Nunez*, 943 N.Y.S.2d 857 (N.Y. Crim. Ct. 2012) (No. 2011NY082981).

<sup>13</sup> Christian Salazaar, *Zuccotti Park Barricades Removed: Occupy Wall Street Protesters Stream Back into Former Camp*, HUFFINGTON POST (Jan. 11, 2012), [http://www.huffingtonpost.com/2012/01/10/zuccotti-park-barricades\\_n\\_1198129.html](http://www.huffingtonpost.com/2012/01/10/zuccotti-park-barricades_n_1198129.html).

<sup>14</sup> Andrea Swalec, *Zuccotti Park’s Rules: No Tents, No Tarps and No Lying Down*, DNAINFO (Nov. 15, 2011), <http://www.dnainfo.com/new-york/2011/11/15/downtown/zuccotti-parks-rules-no-tents-no-tarps-no-lying-down>.

<sup>15</sup> *Rights Groups Urge City to Halt Illegal Restrictions at Zuccotti Park*, N.Y.C.L.U. (Jan. 9, 2012), <http://www.nyclu.org/news/rights-groups-urge-city-halt-illegal-restrictions-zuccotti-park> [hereinafter *Rights Groups Urge City*].

<sup>16</sup> Colin Moynihan, *At Least 4 Arrested at Zuccotti Park After Occupy March*, N.Y. TIMES (July 12, 2012), <http://cityroom.blogs.nytimes.com/2012/07/12/a-least-3-arrested-at-zuccotti-park-after-occupy-march/>.

<sup>17</sup> Colin Moynihan, *Police Enforcing Unposted Rules at Zuccotti Park, Memo Indicates*, N.Y. TIMES CITY ROOM BLOG (Aug. 6, 2012, 12:08 PM), <http://cityroom.blogs.nytimes.com/2012/08/06/police-enforcing-unposted-rules-at-zuccotti-park-memo-indicates/>; Christopher Robbins, *Sleepless in Zuccotti: Occupiers Confront New Park Regulations*, GOTHAMIST (Nov. 16, 2011, 12:13 PM), [http://gothamist.com/2011/11/16/sleepless\\_in\\_zuccotti\\_occupiers\\_fin.php](http://gothamist.com/2011/11/16/sleepless_in_zuccotti_occupiers_fin.php).

steel barriers completely enclosed the park, and security forces tightly controlled access to the park.<sup>18</sup> These guards only allowed visitors into or out of the public space via two security checkpoints, where guards searched visitors' bags and containers.<sup>19</sup> Even after Brookfield Properties removed this permanent security wall in January 2012, any time Occupy Wall Street planned a large gathering at Zuccotti Park, including May Day and the movement's six-month and one-year anniversaries, Brookfield re-installed the same security fence and checkpoints.<sup>20</sup> These actions demonstrate a clear pattern of intentionally discouraging the political activities of Occupy within Zuccotti Park by the park's private owner.

The constitutional restrictions that bind state actors, the government, or its agents, do not ordinarily bind private actors.<sup>21</sup> However, Section 1983 of the United States Code allows

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<sup>18</sup> Salazaar, *supra* note 13; *City Removes Illegal Barriers at Zuccotti Park One Day After Rights Groups Send Threatening Letter*, N.Y.C.L.U. (Jan. 10, 2012), <http://www.nyclu.org/news/city-removes-illegal-barriers-zuccotti-park-one-day-after-rights-groups-send-threatening-letter>; Nate Rawlings, *Occupy Wall Street Branches Out After Regaining Its Home Base*, TIME (Jan. 12, 2012), <http://newsfeed.time.com/2012/01/12/occupy-wall-street-branches-out-after-regaining-its-home-base/>.

<sup>19</sup> Robbins, *supra* note 17; *Rights Groups Urge City*, *supra* note 15.

<sup>20</sup> See Sarah Berman, *On #Occupy Anniversary in NYC, New Tactics on Both Sides of Police Barricades*, TYEE (Sept. 17, 2012, 5:30 PM), <http://theyee.ca/Blogs/TheHook/Rights-Justice/2012/09/17/Occupy-Anniversary/> (describing the security entrances through which visitors to Zuccotti Park had to pass); Chris Miles, *Occupy Wall Street Retakes Zuccotti Park, Kicks Off 2012 Protests*, POLICYMIC (Mar. 17, 2012), <http://www.policymic.com/articles/5595/occupy-wall-street-retakes-zuccotti-park-kicks-off-2012-protests> (police respond to a protest marking the sixth month anniversary of the Occupy Wall Street movement); Steve Rhodes, *Police and Barricades Surround Zuccotti Park in New York*, DEMOTIX (Sept. 15, 2012), <http://www.demotix.com/photo/1451218/police-and-barricades-surround-zuccotti-park-new-york> (police erect barricades in anticipating of protests on the one year anniversary of Occupy Wall Street); Lynette Wilson, *Trinity Wall Street Hosts May Day Teach-in: Occupy Protesters March on Zuccotti Park*, EPISCOPAL NEWS SERV. (May 1, 2012), <http://episcopaldigitalnetwork.com/ens/2012/05/01/trinity-wall-street-hosts-may-day-teach-in/> (police preemptively barricade Zuccotti Park on news of a planned May Day Protest).

<sup>21</sup> *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976).

individuals, who have been deprived of their constitutional rights by actors who are acting under the authority of the state, to hold those actors liable.<sup>22</sup> For instance, when a private actor performs a public function,<sup>23</sup> becomes deeply entwined in the action of the state, or is specifically authorized and encouraged to act by the state, courts have found the private actor is acting with the authority of the state as its surrogate.<sup>24</sup> In those cases, the action is treated by the court as an action of the state, and the otherwise private actor becomes subject to the same constitutional restrictions imposed on state actors.<sup>25</sup> State and local governments

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<sup>22</sup> Section 1983 reads:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983 (2012).

<sup>23</sup> A private party performs a public function where it has “been delegated some authority by the state that is historically an ‘exclusive prerogative of the sovereign.’” Richard H.W. Maloy, “*Under Color of*”—*What Does It Mean?*, 56 MERCER L. REV. 565, 600 (2005) (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 (1978)).

<sup>24</sup> Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. C.R. L.J. 203, 210 (2001). See also *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 624 (1991); *West v. Atkins*, 487 U.S. 42, 56 (1988); *Evans v. Newton*, 382 U.S. 296, 302 (1966).

<sup>25</sup> See VI. *Public Space, Private Deed: The State Action Doctrine and Freedom of Speech on Private Property*, 123 HARV. L. REV. 1303, 1305 (2010)

are barred from violating the bill of rights due to its incorporation via the Fourteenth Amendment's due process clause,<sup>26</sup> likewise, private individuals who take on the role of state actors are also barred from violating individuals' constitutional rights.<sup>27</sup>

The courts have yet to address whether the New York City Zoning Resolution<sup>28</sup> places the private owner of a public plaza in the position of state actor through its regulations of that space.<sup>29</sup> This remains true in the aftermath of *Waller*. In *Waller*, the court avoided the potentially treacherous task of blazing a trail of new jurisprudence by finding that the rules instituted by Brookfield Properties were reasonable restrictions even if Brookfield was subject to First Amendment limitations.<sup>30</sup> This sidestepped the question of whether Brookfield Properties qualified as a state actor.

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[hereinafter *Public Space, Private Deed*]; John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 579 (2005); Kennedy, *supra* note 24, at 210.

<sup>26</sup> See Kennedy, *supra* note 24, at 209; Wayne Batchis, *Free Speech in the Suburban and Exurban Frontier: Shopping Malls, Subdivisions, New Urbanism and the First Amendment*, 21 S. CAL. INTERDISC. L.J. 301, 308 (2012); *Gitlow v. New York*, 268 U.S. 652, 664, 666 (1925).

<sup>27</sup> See, e.g., *Public Space, Private Deed*, *supra* note 25; Fee, *supra* note 25; Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard*, 13 CORNELL J.L. & PUB. POL'Y 533, 551–52 (2004).

<sup>28</sup> The New York City Zoning Resolution incentivizes the creation of public spaces on private land developments by granting developers who establish public spaces meeting the criteria of the Resolution greater development rights, such as leeway with height, floor-space, and setback restrictions. See Brief for New York Civil Liberties Union as Amicus Curiae Supporting Defendant at 9, *People v. Nunez*, 943 N.Y.S.2d 857 (N.Y. Crim. Ct. 2012) (No. 2011NY082981).

<sup>29</sup> On April 30, 2012, City Councilman Ydanis Rodriguez and others filed suit alleging significant state action and violation of protestors' First Amendment rights by Brookfield Properties and owners of other privately owned public spaces used by Occupy Wall Street throughout New York. However, the court dismissed all claims against the property owners on September 26, 2013, finding that the plaintiffs failed to properly allege facts required to establish state action. See *Rodriguez v. Winski*, No. 12 Civ. 3389(NRB), 2013 WL 5379880 at \*5–11, \*16 (S.D.N.Y. Sept. 26, 2013).

<sup>30</sup> *Waller v. City of New York*, 933 N.Y.S.2d 541, 544–45 (N.Y. Sup. Ct. 2011).

Another case arising from the eviction of Occupy from Zuccotti Park is *People v. Nunez*.<sup>31</sup> Ronnie Nunez was arrested with many other Occupy protestors when the N.Y.P.D. evicted protestors from Zuccotti Park.<sup>32</sup> In refusing to dismiss the charges against Nunez, the court discusses the nature of the free speech claim put forth regarding their presence in Zuccotti Park.<sup>33</sup> The judge recognized that “[e]ven in public [spaces], reasonable restrictions on time, place, or manner of protected speech may be imposed, provided that the restrictions are content neutral, are narrowly tailored to serve a significant government interest, and leave open sufficient alternative channels for communication of that information.”<sup>34</sup> The *Nunez* court found that Nunez failed to demonstrate that the prohibitions on camping in the park did not meet the requirements of such restrictions. The court referenced the similarities to the situation in a United States Supreme Court case<sup>35</sup> where the Court upheld a National Park Service prohibition on sleeping in Washington, D.C. parks as a “defensible time, place and manner restriction.”<sup>36</sup> The *Nunez* court also concluded that Occupy’s presence in Zuccotti was not in itself protected speech, as their presence alone did not convey a particularized message.<sup>37</sup> Thus, while the *Nunez* court indicated that the restrictions imposed by Brookfield Properties probably would be held as reasonable restrictions of free speech, it likewise did not answer the question of whether Brookfield and other owners of privately owned public spaces would qualify as state actors.

This Note answers the issue adeptly avoided by the New York courts in *Waller* and *Nunez*. Namely, it will establish that the public nature of the space and the zoning relationship between private owners of public plazas, like Zuccotti Park, and the government are too tentative to establish that the private owners are state actors. This is done through an analysis of the 1961

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<sup>31</sup> *People v. Nunez*, 943 N.Y.S.2d 857 (N.Y. Crim. Ct. 2012).

<sup>32</sup> *Id.* at 862.

<sup>33</sup> *Id.* at 859, 864–66.

<sup>34</sup> *Id.* at 864.

<sup>35</sup> *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288 (1984).

<sup>36</sup> *Nunez*, 943 N.Y.S.2d at 865.

<sup>37</sup> *Id.*



Zoning Ordinance, its subsequent amendments, and current state action jurisprudence. That these private owners are not considered state actors will have a real impact on the countless New Yorkers who make daily use of the roughly eighty acres of privately owned public space throughout the city.<sup>38</sup> 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.<sup>39</sup> Therefore, as more privately owned public spaces are developed within the city, New Yorkers will face a significant threat to free speech, assembly, and public discourse in New York City's public spaces.

Part I of this Note identifies the history and development of the incentive zoning scheme at the heart of privately owned public spaces in New York City. Part II discusses the regulations and enforcement provisions that control the privately owned public spaces. Part III examines the U.S. Supreme Court's decisions on how state action relates to private entities. Part IV analyzes the state action doctrine, specifically how it applies to privately owned public spaces created through the New York City Zoning Resolution. This Part also argues that actions by owners of privately owned public spaces do not constitute state action. Part V concludes with a discussion of the consequences if owners of privately owned public spaces are not considered state actors. Specifically, it identifies significant long-term issues regarding free speech within New York City, and how the city may mitigate these problems by implementing changes to its Zoning Resolution.

## I. HISTORY OF THE NEW YORK CITY ZONING RESOLUTION

### *A. Creation and Early History*

New York City's first zoning ordinance dates back to 1916, dividing zoning districts by usage, height, and area in an effort to

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<sup>38</sup> Henry Grabar, *A Matchmaker for New York's Privately Owned Public Spaces*, THE ATLANTIC CITIES (Oct. 23, 2012), <http://www.theatlanticcities.com/design/2012/10/matchmaker-new-yorks-privately-owned-public-spaces/3646/>.

<sup>39</sup> *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976).

combat an explosion of skyscrapers and increasing congestion.<sup>40</sup> In 1960, the city adopted a major overhaul of the zoning ordinance, which went into effect in 1961.<sup>41</sup> The 1961 ordinance adopted a system of limiting development based on zoning districts with a maximum floor area ratio (“FAR”): total building floor area divided by the total area of the lot.<sup>42</sup> Additionally, the new ordinance adopted flexible regulations on heights and setback distances to encourage the greatest amount of “light and air, and to provide a general feeling of openness at street level.”<sup>43</sup> To promote this public goal of openness, the ordinance created incentives for developers to construct publicly accessible open spaces in exchange for more floor area and less stringent height-to-setback restrictions.<sup>44</sup> The 1961 zoning ordinance created two types of privately owned public spaces: plazas and arcades.<sup>45</sup> This incentive

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<sup>40</sup> JEROLD S. KAYDEN, *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* 7–8 (2000).

<sup>41</sup> *Id.* at 10.

<sup>42</sup> *Id.* “For a lot of 20,000 square feet, with a fifteen FAR, the basic maximum floor area would reach 300,000 feet.” If, for instance, a building in a ten FAR zone covered one hundred percent of the lot it was developed on, it could be ten stories tall. If it instead covered fifty percent of the lot, it could be twenty stories instead. *Id.*; see also N.Y.C. ZONING MAPS & RESOLUTION § 33-12 (1961), available at [http://www.nyc.gov/html/dcp/pdf/zone/zoning\\_maps\\_and\\_resolution\\_1961.pdf](http://www.nyc.gov/html/dcp/pdf/zone/zoning_maps_and_resolution_1961.pdf). The floor area bonus granted from creating a public space ranged from 1.5 square feet of development space per square foot of public space, to ten square feet per square foot of public space, depending on the development’s FAR zone and the type of public space created, and was capped at twenty percent of the base maximum FAR allowed for the development. See *id.*; KAYDEN, *supra* note 40, at 11–12.

<sup>43</sup> KAYDEN, *supra* note 40, at 10 (citation omitted).

<sup>44</sup> See *id.* at 11; see also N.Y.C. ZONING MAPS & RESOLUTION, *supra* note 42, § 81-251 (“The common purpose of these two sets of regulations is to offer maximum design flexibility while setting reasonable but firm standards to protect access of light and air to public streets and adjacent buildings.”).

<sup>45</sup> See KAYDEN, *supra* note 40, at 11–12. The 1961 Zoning Ordinance and the subsequent 1962 Amendment defined “plaza” as “[A]n open area accessible to the public at all times . . . [a] continuous open area along a front lot line, not less than 10 feet deep (measured perpendicular to the front lot line), with an area of not less than 750 square feet.” *Id.* at 11. Plazas also had restrictions relative to its height above or below street level, requiring that no portion of the plaza be located “more than five feet above not more than twelve feet below the curb

zoning scheme proved wildly popular with developers, as seventy percent of the commercial office buildings constructed in New York City between 1966 and 1975 provided public plazas.<sup>46</sup> The financial benefit from the additional floor area was enormous when compared to the quality and quantity of public space received in return.<sup>47</sup> Additionally, the limited requirements for a public plaza under the ordinance meant a developer could create an open concrete area and receive the full benefit of having built a usable public plaza.<sup>48</sup> From 1968 to 1973, several new public space definitions were adopted by amendment, but unlike prior amendments, the New York City Planning Commission (“CPC”) retained discretion and was largely responsible for the granting of additional floor area benefits.<sup>49</sup> As a result, developers had to

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level of the nearest adjoining street,” and that the plaza be “unobstructed from its lowest level to the sky.” *Id.* Certain obstructions, such as trees, fountains, and low railings, are acceptable, so long as they obstruct less than half the street frontage. *Id.* The ordinance described “arcade” as “a continuous area open to a street or to a plaza, which is open and unobstructed to a height of not less than twelve feet . . . accessible to the public at all times . . .” *Id.* at 12.

<sup>46</sup> *Id.* at 12.

<sup>47</sup> The development at 180 Water Street received a bonus of nearly 47,000 square feet for creating a thin strip of public space around the footprint of the building totaling just over 6,000 square feet and containing no amenities. Yolane Almanzar & Michael Keller, *The \$21 Million Sidewalk: Putting a Price Tag on Privately Owned Public Spaces*, N.Y. WORLD (Apr. 5, 2012), <http://www.thenewyorkworld.com/2012/04/05/21-million-sidewalk/>. With an estimated value of \$455 dollars per square foot, that adds roughly \$21 million to the value of the building. *Id.* Other properties throughout the City have received added value through the City’s incentive zoning of up to \$353 million. *Id.*; see also KAYDEN, *supra* note 40, at 89–90.

<sup>48</sup> KAYDEN, *supra* note 40, at 16. There is no discretion in allotting the bonuses under the original 1961 Ordinance. Once developers meet the very minimum requirements, they are granted the zoning benefits “as-of-right.” *Id.* This likely is the reason plazas under the 1961 standard constitute roughly one third of all public spaces in existence today. See *Privately Owned Public Space: History*, N.Y.C. DEP’T OF CITY PLANNING, [http://www.nyc.gov/html/dcp/html/pops/pops\\_history.shtml](http://www.nyc.gov/html/dcp/html/pops/pops_history.shtml) (last visited Sept. 17, 2013) [hereinafter *POPS History*].

<sup>49</sup> KAYDEN, *supra* note 40, at 12–13. These new public spaces added to the Zoning Resolution included variants on the older plaza and arcade designations, such as the elevated plaza, sunken plaza, and through block arcade, which as

submit proposals for these new types of public spaces to the CPC for approval.<sup>50</sup>

*B. Improvements and Amendments*

In 1975, New York City took steps to address the clear lack of quality and amenities like landscaping and seating in most privately owned public spaces.<sup>51</sup> The city enacted an amendment “imposing higher design standards, mandating functional amenities, and inaugurating a special administrative review procedure” for all future public spaces.<sup>52</sup> As part of the new procedure for creating public spaces under the 1975 amendment, a developer needed a certification approving the design from the Chairperson of the CPC.<sup>53</sup> The developer also was required to take out a performance bond, which the city would use to finance compliance with the specific requirements of the public space if the developer later refused to do so.<sup>54</sup> Additionally, the developer was required to file a restrictive declaration<sup>55</sup> on the property,

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their names suggest allowed developers to create plaza’s above or below ground level and arcades that cut through a city block. Other new definitions added to the Resolution included the entirely new public space designs such as the covered pedestrian space, an indoor space allowing for small shops and cafes, and the open air concourse, which allowed for below street level outdoor areas that allowed convenient access to the subway. *Id.*

<sup>50</sup> *Id.* at 23. These new types of public spaces generally saw little use compared to the traditional plazas and arcades. *Id.* at 16.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The 1975 amendment only applied changes to public spaces attached to office buildings in commercial districts, but a subsequent 1977 amendment applied the same changes to public spaces attached to residential buildings in commercial and residential districts. One difference remained: the residential public spaces were not subject to the same administrative certification, and were granted so long as they met the new, improved minimum standards. Public spaces were required to be southern facing, where possible, to maximize the amount of sunlight received, and shape restrictions were put into place to prevent oddly configured spaces that would be less appealing. *Id.* at 17.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> The DCP defines restrictive covenant as “a covenant running with the land that binds the present and future owners of the property. Restrictive

outlining the obligations agreed upon during the zoning certification process.<sup>56</sup>

Since 1975 several additional amendments to the zoning ordinance have significantly changed the landscape of the incentive zoning system. In part to discourage the use of privately owned public spaces by the homeless, the city adopted a zoning amendment in 1979 authorizing owners of certain public spaces to close those spaces at night, with permission from the CPC, if the owners agreed to upgrade the quality of the space.<sup>57</sup> A 1993 zoning amendment enlarged the number of privately owned public spaces that could close at night by agreeing to such upgrades, and a 1996 zoning amendment gave all remaining spaces the ability to close at night by agreeing to upgrade their facilities.<sup>58</sup> Moreover, the 1996 zoning amendment ended the city's policy of granting development benefits "as-of-right" for meeting the minimum statutory requirements for a constructed privately owned public space, and instead established a new discretionary policy for all future public spaces.<sup>59</sup> Under this change, rather than automatically receiving zoning concessions for building a privately owned public space that met the statutory requirements, the CPC would now have to approve the public space first before the developer could receive a development bonus.<sup>60</sup> However, none of these regulatory changes applied to spaces retroactively; the older regulatory standards which allow for lower levels of quality and amenities would still govern those spaces which were developed under those standards unless the owner voluntarily agreed to upgrade the

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declarations are used to implement the conditions of a land use approval or ensure implementation of environmental mitigations and project components." *Zoning Glossary*, N.Y.C. DEP'T OF BLDGS., <http://www.nyc.gov/html/dcp/html/zone/glossary.shtml> (last visited Oct. 2, 2013).

<sup>56</sup> KAYDEN, *supra* note 40, at 17.

<sup>57</sup> *Id.* at 19.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* The website for the New York City DCP notes that these changes were "[i]n response to the real and perceived failure of many of these spaces and to community dissatisfaction with their effectiveness, the types of public spaces permitted, and their locations." *POPS History*, *supra* note 48.

<sup>60</sup> KAYDEN, *supra* note 40, at 23.

public space to meet the current standards.<sup>61</sup> Most recently, amendments adopted in 2007 and 2009 consolidate the various types of plazas under the ordinance into one “public plaza” definition, require specific design specifications for any newly proposed privately owned public spaces, provide new regulations regarding kiosks and cafes, and optional nighttime closing of the plaza.<sup>62</sup>

Since New York began incentive zoning in 1961, the city has created more than 3.5 million square feet of privately owned public space<sup>63</sup> and has produced untold millions in additional value for those properties.<sup>64</sup> However, many New Yorkers question whether the public is truly receiving an adequate benefit for these concessions to developers.<sup>65</sup> If history provides any guide, these concerns will continue to drive changes in incentive zoning policy, as New York City seeks to maximize public gain while continuing to encourage economic development.

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<sup>61</sup> See KAYDEN, *supra* note 40, at 19. Zuccotti Park is among those older parks that is regulated by the older standards in place when it was built in 1968. Nancy Scola, *Owners of the Park and the Center of Occupy Wall Street Protests are Losing Patience, But What Can They Do?*, CAPITAL N.Y. (Oct. 4, 2011), <http://www.capitalnewyork.com/article/politics/2011/10/3608746/owners-park-center-occupy-wall-street-protests-are-losing-patience->.

<sup>62</sup> See §§ 37-70–37-78 of *Public Plaza 2007 Text Amendment*, N.Y.C. DEP’T OF CITY PLANNING, available at [http://www.nyc.gov/html/dcp/pdf/priv/101707\\_final\\_approved\\_text.pdf](http://www.nyc.gov/html/dcp/pdf/priv/101707_final_approved_text.pdf); see also *Privately Owned Public Plazas Text Amendment §§ 37-70–37-78* (Sept. 19, 2007), N.Y.C. DEP’T OF CITY PLANNING, available at [http://www.nyc.gov/html/dcp/pdf/pops/zoning\\_text\\_proposal\\_2009\\_02\\_09.pdf](http://www.nyc.gov/html/dcp/pdf/pops/zoning_text_proposal_2009_02_09.pdf).

<sup>63</sup> See *POPS History*, *supra* note 48.

<sup>64</sup> The value added to 180 Water Street alone by its public space is estimated to be more than \$21 million. See Almanzar & Keller, *supra* note 47.

<sup>65</sup> See, e.g., 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> (noting that “roughly 40 percent . . . [of public spaces] are practically useless, with austere designs, no amenities and little or no direct sunlight. Roughly half of the buildings surveyed had spaces that were illegally closed or otherwise privatized.”); Almanzar & Keller, *supra* note 47 (comparing estimated financial gain by developer to amenities and quality of space received by the public).

## II. LEGAL EFFECTS OF THE ORDINANCE

The Zoning Resolution does not merely lay out the process for the creation of privately owned public spaces and the standards which they must meet; it also establishes the law affecting the spaces after they have been established. It does so through provisions establishing the city's oversight of privately owned public spaces and the various mechanisms for enforcement.

*A. Regulatory Oversight*

Jerold S. Kayden,<sup>66</sup> a leading scholar on New York's privately owned public spaces, identifies the public's right to these spaces as a "legally binding right[] to access and use."<sup>67</sup> He analogizes this right to "an easement held by the public on the owner's property, whose extent is defined by the city's Zoning Resolution and by implementing legal actions."<sup>68</sup> Under his analysis, the owner has ceded the traditional property right to exclude anyone the owner wants in order to receive the associated development right from the city.<sup>69</sup> The burden upon the owner's traditional property right varies across New York's privately owned public spaces. There are different legal definitions, design requirements, and approval processes for the various types of public space depending on when the spaces were created, thus the law covering older developments may differ from the current standard applied to new ones.<sup>70</sup>

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<sup>66</sup> Jerold S. Kayden is a professor of Urban Planning and Design at the Harvard Kennedy School, founder of the non-profit organization, Advocates for Privately Owned Public Space, and a leading scholar on privately owned public space.

<sup>67</sup> KAYDEN, *supra* note 40, at 21.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 23.

<sup>70</sup> *Id.* at 16–19. Plazas, arcades, and residential arcades built prior to 1996 were granted "as-of-right" if they met the statutory requirements as determined by the City's Department of Buildings. Discretionary approval by the CPC was required for several less common types of spaces ("through block arcade, covered pedestrian spaces, through block gallerias, elevated plazas, sunken plazas, and open air concourses"). *Id.* at 23. The final method of approval, certification, applies to sidewalk widenings, open air concourses, urban plazas,

A public space has to conform to the legal requirements and operations of the Zoning Resolution in effect at the time of that privately owned public space's creation.<sup>71</sup> Privately owned public spaces created prior to 1996, when the last major changes to the Zoning Resolution were passed, may differ significantly from newer spaces.<sup>72</sup> However, current law governs more recently developed spaces, and requests to change the legal requirements of older spaces, if granted by the city, often bring a space under the current regulatory scheme.<sup>73</sup> The CPC will require owners of older public spaces to accept the current improved standards for the space and may require the provisioning of additional amenities before granting the owner the right to close at night or install cafes or kiosks in the space.<sup>74</sup>

The Zoning Resolution's requirements for ongoing maintenance by the owner of the public space are fairly minimal.<sup>75</sup> The owner must keep the space open during the prescribed hours of access; provide specified amenities to keep the space in good condition; manage litter, rodents and pigeons; and care for or replace vegetation as needed.<sup>76</sup> Additionally, the owner must maintain all landscaping and replace any damaged or dying landscaping at the next available planting season.<sup>77</sup> Depending on the approved specifications of the public space, the owner may be required to provide other services, such as rent-free access to the space for private non-profit groups.<sup>78</sup>

The Zoning Resolution is largely silent with regard to how the owner can manage the public's use of the privately owned public

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and post-1996 residential plazas. Although certification by the Chairperson of the CPC is not subject to full discretion, it does allow the Chairperson to closely examine a proposal for full compliance with the Zoning Resolution. *Id.* at 24.

<sup>71</sup> *Id.* at 25.

<sup>72</sup> *Id.* at 12–19.

<sup>73</sup> *Id.* at 39.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 38.

<sup>76</sup> *Id.*; N.Y.C. ZONING MAPS & RESOLUTION, *supra* note 42, § 37-77.

<sup>77</sup> N.Y.C. ZONING MAPS & RESOLUTION, *supra* note 42, § 37-93.

<sup>78</sup> KAYDEN, *supra* note 40, at 38.



space.<sup>79</sup> The Department of City Planning (“DCP”) set forth that the owners may subject the public space to “reasonable” rules and limitations.<sup>80</sup> In order to define the reach of this nebulous right held by the owner, the DCP turned to rules applicable to the city-owned parks as a guideline.<sup>81</sup> In applying those rules, the DCP has determined that requirements that dogs be leashed, bans on alcohol, or prohibitions on sleep can be enforced.<sup>82</sup> However, attempts to exclude particular groups of people or to set arbitrary time limitations on the use of the public space would be unreasonable.<sup>83</sup> The undefined nature and limit of the regulatory power held by the owners of public spaces may allow them to limit the space’s use in ways not foreseen by the drafters of the Zoning Resolution. However, the scope of these limitations has yet to be fully tested.

### *B. Enforcement Provisions*

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.<sup>84</sup> Instead, the DOB relies on complaints from the public and other municipal agencies such as

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<sup>79</sup> *Id.* However, for example, the Resolution permits the posting of a sign that prohibits behaviors that are not “[in]consistent with the normal public use of the public plaza,” such as the consumption of alcoholic beverages. N.Y.C. ZONING MAPS & RESOLUTION, *supra* note 42, § 37-752. Conversely, property owners may not prohibit “behaviors that are consistent with the normal public use of the public plaza such as lingering, eating, drinking of non-alcoholic beverages or gathering in small groups.” *Id.*

<sup>80</sup> KAYDEN, *supra* note 40, at 38.

<sup>81</sup> *Id.* For rules and regulations of New York City parks, see *Rules & Regulations*, N.Y.C. PARKS & RECREATION, <http://www.nycgovparks.org/rules> (last visited Sept. 17, 2013) [hereinafter N.Y.C. Parks & Recreation Rules].

<sup>82</sup> KAYDEN, *supra* note 40, at 38.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 40.

the DCP or the CPC.<sup>85</sup> The owner of the public space must also submit a compliance report to the Director of the DCP and the local community board every three years.<sup>86</sup>

Once the DOB determines that a public space is not in compliance with its required standards, it issues a “Notice of Violation” to the owner, who must then “appear before an administrative law judge of the Environmental Control Board.”<sup>87</sup> A Zoning Resolution violation constitutes a misdemeanor, which allows “[t]he Department of Buildings [to] pursue criminal action in state court to enforce the Zoning Resolution.”<sup>88</sup> As another option, the city’s Corporation Counsel may seek a restraining order or injunction against the owner in state court to halt the violation.<sup>89</sup> Continued non-compliance subjects the owner to possible “revocation of [their] building permit or certificate of occupancy.”<sup>90</sup>

In addition to judicial intervention, the city has other means of enforcing compliance. The city may use performance bonds taken out by the owners when the public space was first created to

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<sup>85</sup> *Id.* While the DCP does inspect public spaces, the inspections are “informal” follow-ups to public complaints, or inspections by employees acting “on their own initiative.” *Id.*

<sup>86</sup> N.Y.C. ZONING MAPS & RESOLUTION, *supra* note 42, § 37-78(b). Failure to submit a compliance report constitutes a violation of the Resolution, and “may constitute the basis for denial or revocation of a building permit or certificate of occupancy, or for a revocation of such authorization or certification, and for all other applicable remedies.” *Id.* § 37-78(d).

<sup>87</sup> KAYDEN, *supra* note 40, at 40. At this point, a first-time offender may admit and fix the violation within thirty-five days if the violation is non-hazardous and file a certificate of correction with the Buildings Department to avoid penalty, or they may settle to pay a reduced penalty. If the owner contests the accusation of violation, a hearing is held before an Environmental Control Board administrative law judge, who can impose up to a \$10,000 fine. A losing party may appeal this decision to the full Environmental Control Board, and after that, may bring an Article 78 action to the state court, which generally will only overturn the Board’s decision on a showing that it was “arbitrary and capricious.” *Id.*

<sup>88</sup> *Id.* at 41.

<sup>89</sup> *Id.*

<sup>90</sup> N.Y.C. ZONING MAPS & RESOLUTION, *supra* note 42, § 37-78(d).

correct compliance failures.<sup>91</sup> In some instances, a public space's restrictive declaration even stipulates that all rents collected from the owner's floor-area bonus are to be paid to the city if the owner is noncompliant.<sup>92</sup> Despite the patchwork of enforcement mechanisms in place, the limited system of oversight reduces the overall effectiveness of the city's regulation of existing privately owned public spaces.

### III. THE STATE ACTION DOCTRINE

The Fourteenth Amendment to the United States Constitution reads, in part,

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>93</sup>

However, these limitations on the power to "abridge the privileges or immunities," or deny due process and equal protection to citizens, only apply to the states.<sup>94</sup> The Fourteenth Amendment does not limit the power of private actors whose actions abridge the rights of citizens.<sup>95</sup> Due to this, Congress passed Section 1983 of the United States Code as part of the Civil Rights Act of 1871 and extended civil liability to private persons who deprive a citizen of "any rights, privileges or immunities secured by the Constitution and laws" under the "color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia."<sup>96</sup> Later Supreme Court

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<sup>91</sup> KAYDEN, *supra* note 40, at 41.

<sup>92</sup> *Id.*

<sup>93</sup> U.S. CONST. amend. XIV, § 1.

<sup>94</sup> Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 128 (2004).

<sup>95</sup> "Individual invasion of individual rights is not the subject-matter of the amendment." *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

<sup>96</sup> 42 U.S.C. § 1983 (2012).

rulings held that the reference to acting “under the color of law” also effected private individuals held to be state actors.<sup>97</sup> This means that private individuals acting under the color of law are bound by the same restrictions the Fourteenth Amendment places on the states with regard to the rights, privileges, and immunities of citizens.<sup>98</sup>

To determine whether a private owner of a public plaza is required to respect the constitutional rights of citizens, the court must first decide whether or not the owner qualifies as a state actor.<sup>99</sup> Unfortunately, as former U.S. Supreme Court Justice Sandra Day O’Connor once commented, “our cases deciding when private action might be deemed that of the state have not been a model of consistency.”<sup>100</sup> The Supreme Court’s decisions regarding state action tend to be highly fact-specific, and therefore predicting the outcome of a state action case before the Court is not an easy task.<sup>101</sup> However, the Supreme Court has recognized state action by private actors in a number of circumstances, notably in instances where the private actor (1) performs a public function,<sup>102</sup>

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<sup>97</sup> *Georgia v. McCollum*, 505 U.S. 42, 53 n.9 (1992) (“Although *Polk County* determined whether or not the public defender’s actions were under the color of state law, as opposed to whether or not they constituted state action, this Court subsequently has held that the two inquiries are the same . . . .”); *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 182 n.4 (1988) (“In this case the under-color-or-law requirement of 42 U.S.C. § 1983 and the state-action requirement of the Fourteenth Amendment are equivalent.”); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (“[I]t is clear that in a §1983 action brought against a state official, the statutory requirement of action ‘under the color of state law’ and the ‘state action’ requirement of the Fourteenth Amendment are identical.”).

<sup>98</sup> Magarian, *supra* note 94, at 129.

<sup>99</sup> *Id.* at 128.

<sup>100</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting).

<sup>101</sup> *Maloy*, *supra* note 23, at 648. *See also* *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) (“Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”).

<sup>102</sup> *See* *Georgia v. McCollum*, 505 U.S. 42 (2009); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Evans v. Newton*, 382 U.S. 296 (1966); *West v. Atkins*, 487 U.S. 42 (1988); *Marsh v. Alabama*, 326 U.S. 501 (1946).

(2) enters into a symbiotic relationship with the state,<sup>103</sup> or (3) jointly participates with the state<sup>104</sup> in depriving citizens of their constitutional rights.<sup>105</sup> The three forms of “state action” are pertinent to understanding why owners of privately owned public spaces do not qualify as state actors.

*A. The Public Function Doctrine*

An actor serves a public function when it fills a role traditionally exclusively performed by a public entity such as a local or state government.<sup>106</sup> Beginning in *Marsh v. Alabama*,<sup>107</sup> the Supreme Court began to recognize that a property owner’s ability to deprive citizens of their constitutional rights on the owner’s private land is not absolute when the land serves a public function.<sup>108</sup> In *Marsh*, a member of the Jehovah’s Witnesses was convicted of trespassing for distributing literature on the sidewalk of a company town owned by Gulf Shipbuilding Corporation.<sup>109</sup> The Supreme Court found that the town owner’s property rights were an insufficient grounds to allow the owner to restrict a citizen’s fundamental liberties.<sup>110</sup> While the Court did not specifically discuss the matter in terms of state action, it noted that the company town functioned in the same way as any other municipality.<sup>111</sup> The Court compared the sidewalks of the company

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<sup>103</sup> See *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 294 (2001).

<sup>104</sup> See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 636–37 (1991); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

<sup>105</sup> See *Kennedy*, *supra* note 24, at 210. See generally *Maloy*, *supra* note 23 (arguing that in order to impose penalties on an individual for deprivation of rights, there must be a connection between the individual and the sovereign).

<sup>106</sup> *Maloy*, *supra* note 23, at 600.

<sup>107</sup> 326 U.S. 501 (1946).

<sup>108</sup> *Id.* at 506 (“The 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>109</sup> *Id.* at 503.

<sup>110</sup> *Id.* at 509.

<sup>111</sup> *Id.* at 507.

town with sidewalks of a traditional municipality, to make the argument that sidewalks, even when privately owned, serve the role of a traditional public space.<sup>112</sup> If the state were to allow the application of the trespassing statute to the Jehovah's Witnesses' actions in a company town, then the private owners would be able to abridge First Amendment rights within any privately owned town.<sup>113</sup>

Twenty years later, the Supreme Court in *Evans v. Newton*,<sup>114</sup> further clarified the public function doctrine as it relates to state action. In *Evans*, a citizen bequeathed a park to the city of Macon, Georgia, provided that the park remained racially segregated.<sup>115</sup> When the city desegregated the park, members of the park's board of managers sought to have the park transferred to private trustees, who would then follow the testator's wish to segregate the park.<sup>116</sup> The Court held that the "public character of [the] park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment . . . ."<sup>117</sup> The Court recognized that a park "is more like a fire department or police department" than a "[g]olf club[], social center[], luncheon club[], or school[. . .]," in that "[t]he service rendered even by a private park of this character is municipal in nature."<sup>118</sup>

A mere six years after *Evans*, the Supreme Court began curtailing the applicability of the public function doctrine to real property. In *Lloyd Corp. v. Tanner*,<sup>119</sup> the Court recognized a limit to the *Marsh* line of public function cases. In *Lloyd Corp.*, protestors were threatened with arrest after hand-billing against the

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<sup>112</sup> *Id.* at 504. Traditional public spaces are those types of public spaces that have a long historical tradition of being publicly owned and accessible, such as streets, sidewalks, parks, and plazas. Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 692 (1991).

<sup>113</sup> *Marsh*, 326 U.S. at 505.

<sup>114</sup> 382 U.S. 296 (1966).

<sup>115</sup> *Id.* at 297.

<sup>116</sup> *Id.* at 297–98.

<sup>117</sup> *Id.* at 302.

<sup>118</sup> *Id.* at 301–02.

<sup>119</sup> 407 U.S. 551 (1972).

Vietnam War in a large shopping mall.<sup>120</sup> In finding that the protestors speech was not protected in the private shopping mall, the Court distinguished the case from *Marsh*, noting that the company town in *Marsh* took on all aspects of a municipality, while the protestors in *Lloyd Corp.* only alleged that the shopping center serve the function of a municipal business district.<sup>121</sup> The Court also distinguished *Lloyd Corp.* from a previous case, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,<sup>122</sup> where the Court had allowed union picketing in front of a store within a privately owned shopping mall.<sup>123</sup> In distinguishing *Lloyd Corp.* from *Logan Valley*, the Court explained that the picketing in *Logan Valley* was allowed because it was the only possible way for the picketers to reach their target audience, customers of the store where they worked.<sup>124</sup> The protestors in *Lloyd Corp.*, on the other hand, were expressing a general message to the public at large that could be effective in many other places, not merely on *Lloyd Corp.*'s private property.<sup>125</sup> It should be recognized that neither *Lloyd Corp.* nor *Logan Valley* specifically reference the public function doctrine or *Evans*, but focus on the aspects of the shopping malls that resemble traditional public spaces.

The Supreme Court continued to limit the right to free speech on privately owned but publicly accessible property. In *Hudgens v. N.L.R.B.*,<sup>126</sup> the Supreme Court recognized "that the reasoning of the Court's opinion in *Lloyd Corp.* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*," and considered *Logan Valley* to be fully abrogated by *Lloyd Corp.*<sup>127</sup> The facts in *Hudgens* were highly similar to those of *Logan Valley*; striking workers picketed inside a shopping mall in front of their

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<sup>120</sup> *Id.* at 555–56.

<sup>121</sup> *Id.* at 569.

<sup>122</sup> 391 U.S. 308 (1968).

<sup>123</sup> *Id.* at 309.

<sup>124</sup> *Lloyd Corp.*, 407 U.S. at 564.

<sup>125</sup> *Id.*

<sup>126</sup> 424 U.S. 507 (1976).

<sup>127</sup> *Id.* at 518.

employer's location and were threatened with arrest.<sup>128</sup> The Court found that a "large self-contained," privately owned shopping center did not serve the entirety of the same sort of municipal function as was found in *Marsh*, since the shopping mall lacked "residential buildings, streets, a system of sewers" and the other traditional trappings of a municipal.<sup>129</sup> On this basis, the Court found the union members who were denied the ability to hand-bill in front of the shop that employed them within a shopping center had no First Amendment claim against the center's owner.<sup>130</sup>

In addition, the Supreme Court has applied the public function doctrine in other situations outside the context of real property, notably when private doctors are contracted by the government to treat patients in state prisons<sup>131</sup> and through the use of peremptory challenges to strike jurors for perceived bias during jury selection in civil trials.<sup>132</sup> Conversely, in several instances, the Supreme Court has held that a private party is *not* a state actor, even if a public entity often serves that same function. For example, in *Jackson v. Metropolitan Edison Co.*<sup>133</sup> the Court held that a privately owned utility, heavily regulated by the state, was not a state actor in part because "supplying of utility service is not traditionally the exclusive prerogative of the State."<sup>134</sup>

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<sup>128</sup> *Id.* at 509.

<sup>129</sup> *See id.* at 519–21.

<sup>130</sup> *See id.* at 521.

<sup>131</sup> *See West v. Atkins*, 487 U.S. 42, 56 (1988) ("The State bore an affirmative obligation to provide adequate medical care to West; [and] the State delegated that function to respondent Atkins . . .").

<sup>132</sup> *See Georgia v. McCollum*, 505 U.S. 42, 52 (2009) (arguing that the reasons in *Edmonson* "apply with even greater force in the criminal context because the selection of a jury in a criminal case fulfills a unique and constitutionally compelled governmental function"); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) ("The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor.").

<sup>133</sup> 419 U.S. 345 (1974).

<sup>134</sup> *Id.* at 353. The Court also notes that the Pennsylvania courts reject the idea that providing utility service is a public function or duty. *See id.* (citing *Baily v. City of Philadelphia*, 39 A. 494 (Pa. 1898); *Girard Life Ins. Co. v. City of Philadelphia*, 7 W.N.C. 69 (Pa. 1879)).



Furthermore, in *Blum v. Yaretsky*,<sup>135</sup> the Supreme Court noted that it was “unable to conclude that the nursing homes perform a function that has been ‘traditionally the exclusive prerogative of the state.’”<sup>136</sup> The Court held that the nursing home was not a state actor when it moved patients to a lower care facility, and therefore, due process observations were not required.<sup>137</sup>

From these cases, it is clear that Supreme Court precedent has construed the public function doctrine of state action narrowly. The Court has limited it to functions that are traditionally exclusive to the state, like providing healthcare to state prisoners,<sup>138</sup> selecting juries,<sup>139</sup> and providing access to public spaces of the municipality.<sup>140</sup> The *Evans* Court’s notion that a park’s services are municipal in nature seems to stretch the *Marsh* concept of municipal-type public space functions to its furthest extreme. Indeed, as Justice Harlan’s dissent in *Evans* points out, prior to that decision, the Court had “declined to review two New York cases which in turn held *Marsh* inapplicable to a privately operated residential community.”<sup>141</sup> Any further expansion of this holding would seem to break with the “traditionally exclusive” standard put forward in *Jackson* eight years after *Evans* was decided. Additionally, *Jackson* demonstrates that even a function that is often a matter of state governance, such as providing utility service, cannot be considered a public function if it is not foremost a state function.<sup>142</sup> A comparison of New York’s privately owned public spaces and the private park in *Evans* demonstrates that a private owner’s operation of a public plaza does not constitute a public function.

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<sup>135</sup> 457 U.S. 991 (1982).

<sup>136</sup> *Id.* at 1011 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

<sup>137</sup> *See id.* at 995, 1012.

<sup>138</sup> *West v. Atkins*, 487 U.S. 42 (1988).

<sup>139</sup> *See Georgia v. McCollum*, 505 U.S. 42 (2009); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

<sup>140</sup> *See Evans v. Newton*, 382 U.S. 296 (1966).

<sup>141</sup> *Evans*, 382 U.S. at 321 (Harlan, J., dissenting) (citation omitted).

<sup>142</sup> *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

### B. Joint Participation

Another form of state action is joint participation: when a private actor acts jointly or in cooperation with public officials.<sup>143</sup> In order to be considered state action the cooperative behavior must be substantial.<sup>144</sup> The state merely regulating, even extensively, the challenged activity does not alone create joint participation in the activity.<sup>145</sup> In *Burton v. Wilmington Parking Authority*,<sup>146</sup> the Supreme Court acknowledged the importance of a case-by-case, fact-based analysis to determine the existence of state action by joint participation.<sup>147</sup> “Only by sifting and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”<sup>148</sup> In *Burton*, a municipal parking garage leased space to a privately operated coffee shop that discriminated against African-Americans.<sup>149</sup> Noting that the city owned and maintained the property and depended on the shop’s lease to keep the property profitable, the Court held that “[t]he State has so far insinuated itself into a position of interdependence with [the coffee shop] that it must be recognized as a joint participant in the challenged activity.”<sup>150</sup>

In *Jackson v. Metropolitan Edison Co.*, the Supreme Court identified a “nexus” test as a means of determining if the state is sufficiently interrelated with the private actor to constitute state action.<sup>151</sup> This fact-based examination requires “a sufficiently close nexus between the State and the challenged action.”<sup>152</sup> The Court in *Blum* later clarified the nexus test to require that the state should

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<sup>143</sup> See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941–42 (1982).

<sup>144</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

<sup>145</sup> See *Jackson*, 419 U.S. at 357–58.

<sup>146</sup> 365 U.S. 715 (1961).

<sup>147</sup> See *id.* at 722–26.

<sup>148</sup> *Id.* at 722.

<sup>149</sup> *Id.* at 716.

<sup>150</sup> *Id.* at 723–25.

<sup>151</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citation omitted).

<sup>152</sup> *Id.*

be responsible for the act that is the subject of the complaint.<sup>153</sup> This can be evidenced through either significant encouragement or coercion by the state.<sup>154</sup> In *Jackson*, the state of Pennsylvania extensively regulated Metropolitan Edison Company, and the utility terminated service in a manner legal under state law and approved by the state entity which regulates utilities.<sup>155</sup> Still, the Court held that state did not specifically authorize termination.<sup>156</sup> The “nexus” test laid out by the Court requires a higher burden for proving joint participation than mere state regulation of an actor and lawfulness of the questioned actions.

The Supreme Court further laid out an additional two-part test for finding joint participation in *Lugar v. Edmondson Oil Co., Inc.*<sup>157</sup> In *Lugar*, a corporate creditor, Edmondson Oil, received prejudgment attachment of the property of Lugar, a debtor, from a clerk of the state court.<sup>158</sup> The first element of the test requires that “the deprivation must be caused by the exercise of some right or privilege created by the State or by some rule of conduct imposed by the state or by a person for whom the State is responsible.”<sup>159</sup> The second element is that “the party charged with the deprivation must be a person who may fairly be said to be a state actor,” either as a state official, or as someone whose “conduct is otherwise chargeable to the State.”<sup>160</sup> The Supreme Court held that in “invoking the aid of state officials to take advantage of state-created attachment procedures,” Edmonson Oil exercised state

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<sup>153</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

<sup>154</sup> *Id.*

<sup>155</sup> *Jackson*, 419 U.S. at 347, 358.

<sup>156</sup> *Jackson*, 419 U.S. at 354–57 (“Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into ‘state action.’ At most, the Commission’s failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired.”).

<sup>157</sup> 457 U.S. 922 (1982).

<sup>158</sup> *Id.* at 925.

<sup>159</sup> *Id.* at 937.

<sup>160</sup> *Id.*

power by depriving Lugar of property through state officials,<sup>161</sup> here a court clerk and the county sheriff.<sup>162</sup>

The *Lugar* two-prong test would arise again in *National Collegiate Athletic Ass'n v. Tarkanian*.<sup>163</sup> In *Tarkanian*, the University of Nevada, Las Vegas (“UNLV”) suspended its head basketball coach to comply with National Collegiate Athletic Association (“NCAA”) policy and avoid sanctions from the association after an NCAA investigation determined he had violated several regulations.<sup>164</sup> The coach, Jerry Tarkanian, claimed that the NCAA was an actor because it coerced UNLV into complying with its rules and regulations and fired him without due process.<sup>165</sup> The Supreme Court held that while UNLV did perform the alleged state action, the NCAA did not jointly participate in that action despite all of the NCAA’s investigations and recommendations.<sup>166</sup> Specifically, the Court noted that UNLV had options other than complying with the NCAA recommendations: the school could have ignored the recommendations and accepted further sanctions, or the school could have withdrawn from the NCAA.<sup>167</sup> Therefore, Tarkanian’s claim failed the second prong of the *Lugar* test: the requirement that the party charged with the deprivation (the NCAA) “may be appropriately characterized as” a state actor.<sup>168</sup> Since the relationship between UNLV and the NCAA was more adversarial than cooperative during the investigative process, “[t]he NCAA cannot be regarded as an agent [of] UNLV.”<sup>169</sup> Likewise, by merely providing recommendations to one of its members (in this case, a state university), the NCAA did not perform actions that could be attributed to the state, particularly where the state entity (UNLV) then had the power to follow or ignore those

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<sup>161</sup> *Id.* at 924.

<sup>162</sup> *Id.* at 942.

<sup>163</sup> 488 U.S. 179 (1988).

<sup>164</sup> *Id.* at 180–81.

<sup>165</sup> *Id.* at 191–92.

<sup>166</sup> *Id.* at 195–96.

<sup>167</sup> *Id.* at 198.

<sup>168</sup> *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982).

<sup>169</sup> *Tarkanian*, 488 U.S. at 196.

recommendations.<sup>170</sup> Both the adversarial relationship that existed between the NCAA and the state, and the voluntary nature of the recommendations offered by the NCAA, demonstrate the lack of state action by the NCAA.

The Supreme Court in *Edmonson v. Leesville Concrete Co., Inc.*<sup>171</sup> identified another clear example of joint participation that meets the two-part test identified in *Lugar*. In *Edmonson*, the Court found that a civil defendant who used racially discriminatory peremptory challenges performed a public function and jointly participated in state action.<sup>172</sup> A peremptory challenge is a right the state grants, and here the exercise of the peremptory challenge caused the deprivation.<sup>173</sup> This clearly meets the first prong of the test laid out in *Lugar*, which requires that the challenged act be the result of a right, privilege, or rule created by the state. “[W]ithout the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist.”<sup>174</sup> As such, even when a private party in a jury trial exercises the peremptory challenge, this action is only given force when the judge, a quintessential state actor, dismisses the juror. This procedure closely mirrors the use of the county clerk and county sheriff in *Lugar*’s attachment procedure to deprive an individual of their constitutional rights, and thus meets the second prong of the *Lugar* test for joint participation. That the state “delegates some portion of this power to private litigants does not change the governmental character” of peremptory challenges.<sup>175</sup>

The Supreme Court has consistently refused to find joint participation in state action where the nexus between the private actor and the state was limited to public funding and regulation of the actor. In *Blum v. Yaretsky*, the Court did not find joint participation in state action between the nursing home, which moved patients to a facility that offered a lower level of care, and

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<sup>170</sup> *Id.* at 194–95.

<sup>171</sup> 500 U.S. 614 (1991).

<sup>172</sup> *Id.* at 622.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 626.

the state, despite heavy state regulation, state subsidies, and significant state funding.<sup>176</sup> The first prong of the *Lugar* test<sup>177</sup> was not met since the Court did not find that the exercise of a right, privilege, or rule of conduct promulgated by the state caused the nursing home's challenged deprivation of rights.<sup>178</sup> This was demonstrated by the fact that no state regulation deprived the patients of their higher level care or required the nursing home to deprive them of such care.<sup>179</sup>

Likewise, in a similar case decided the same year, *Rendell-Baker v. Kohn*,<sup>180</sup> the Supreme Court held that the state's mere regulation and public funding of a school did not make the school's decision to discharge several teachers state action.<sup>181</sup> In *Rendell-Baker*, the state regulated and funded a school for maladjusted students in a manner similar to the regulation and funding of the nursing home in *Blum*.<sup>182</sup> The Court in *Rendell-Baker*, making a comparison to *Blum*, found that the regulations and receipt of public funding did not make the school's decision to discharge several teachers state action.<sup>183</sup> Justice Warren Burger articulated the position of the Court, stating that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."<sup>184</sup> The Court in *Rendell-Baker*, similar to in *Blum*, held that where the exercise of a right, privilege, or regulation imposed by the state did not cause the nursing home to move patients to a lesser facility, the state did not cause the issue,

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<sup>176</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1005, 1011 (1982). The state paid for roughly ninety percent of the facility's patients. *Id.*

<sup>177</sup> *Edmonson Oil Co.*, 457 U.S. at 939.

<sup>178</sup> *Blum*, 457 U.S. at 1007–10.

<sup>179</sup> *Id.*

<sup>180</sup> 457 U.S. 830 (1982).

<sup>181</sup> *Id.* at 841–42.

<sup>182</sup> *Id.* at 832–33. Public funds accounted for somewhere between ninety and ninety-nine percent of the school's funding, and the school was required to comply with extensive regulations regarding recordkeeping, student-teacher ratios, and course plans. *Id.*

<sup>183</sup> *Id.* at 841–42.

<sup>184</sup> *Id.* at 841.

here the discharge of the teachers.<sup>185</sup> The application of the *Lugar* test should demonstrate that New York City's regulatory relationship with public plazas does not establish state action, via joint participation, where the private owners deprive the public of their rights.

### C. Entwinement

Another way that state action can be found is through pervasive entwinement between a private actor and the state.<sup>186</sup> This requires that the entwinement be truly substantial, almost overwhelmingly so.<sup>187</sup> The first Supreme Court decision to explicitly recognize state action by means of entwinement was *Brentwood Acad. v. Tennessee Secondary School Athletic Ass'n*.<sup>188</sup> The Court found that a statewide high school athletic association was a state actor where (1) eighty-four percent of its more than 300-member schools were public institutions; (2) representatives drawn from its member schools conducted its administration; and (3) its employees were eligible for membership under the state's retirement system.<sup>189</sup> Although the Court's opinion in *Brentwood* did not expressly define "entwinement," it relied on *Evans*, which held that "the municipality remain[ed] entwined in the management [and] control of the park" even after the city transferred the park to private trustees.<sup>190</sup> The *Evans* concept of entwinement, which was never fully distinguished from the broader discussion of the public function of the park, relied largely on the significance of the park for city activities, the city's continued maintenance of the park, and the sense of "momentum" the park had acquired under its previous municipal ownership.<sup>191</sup> In *Brentwood*, the Court expanded on this concept of entwinement by noting that "the nominally private

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<sup>185</sup> *Id.*

<sup>186</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001).

<sup>187</sup> *Id.* at 302.

<sup>188</sup> *Id.* at 300.

<sup>189</sup> *Id.*

<sup>190</sup> *Evans v. Newton*, 382 U.S. 296, 301 (1966).

<sup>191</sup> *Id.*

character of the Association” was outweighed by the tremendous amount of control state officials had over the management and control of the agency.<sup>192</sup> Regarding the ostensibly private nature of the association, the Court stated that “[t]here would be no recognizable association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.”<sup>193</sup>

Since *Brentwood*, the Supreme Court has yet to revisit the issue of state action by pervasive entwinement. The lower courts have, however, applied entwinement in a variety of instances, usually finding state action through entwinement in otherwise private administrative agencies.<sup>194</sup> Whether or not privately owned public spaces are sufficiently entwined with the city of New York will depend largely on to what degree state and city regulations, officials, or agencies control the affairs of those spaces. Examining

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<sup>192</sup> *Brentwood Acad.*, 531 U.S. at 296, 298. The Association’s 345 members, 290 of which were public schools, were represented by their principals or appointed faculty, who vote to select other school officials to serve as members of the board of control and legislative council. *Id.* at 299.

<sup>193</sup> *Id.* at 300.

<sup>194</sup> See *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass’n*, 483 F.3d 1025 (10th Cir. 2007) (holding that association was a state actor where ninety-eight percent of its members were public schools, and all of the association’s directors were public school officials); *Horvath v. Westport Library Ass’n*, 362 F.3d 147 (2d Cir. 2004) (finding a library was a state actor when it terminated employment, the state legislature created the library, the town appointed half of the governing board of trustees was appointed, and ninety percent of the library’s funding came from the town); *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169 (6th Cir. 2008) (holding that the state was pervasively entwined with corporation’s management and control, given that state’s rules dictated what AAAs could and could not do, counties and cities were sole members of the corporation and appointed its board, and state approval was required for virtually every act of corporation). *But see Logiodice v. Trustees of Maine Cent. Inst.*, 296 F.3d 22 (1st Cir. 2002) (private high school operating high school for school district was not so entwined with the government as to be a state actor when it disciplined students, where there were some regulatory, budgetary, and administrative connections to the state, but the school was run by private trustees who had sole right to create and enforce all rules and regulations relating to student discipline).



the administrative relationship the city has with privately owned public spaces will demonstrate that the city is not impermissibly entwined with the private owners of those spaces.

*D. Pruneyard and State Constitutional Rights*

One last wrinkle in the Supreme Court's approach to the public function of otherwise private property bears relevance to the discussion of public function. In 1980, the Supreme Court in *Pruneyard Shopping Center v. Robins*,<sup>195</sup> affirmed a California Supreme Court case<sup>196</sup> that held that private owners of shopping malls must allow free speech activities on their property, subject to reasonable time and manner restrictions.<sup>197</sup> The U.S. Supreme Court recognized that state constitutions may grant individuals more rights than they would have under the U.S. Constitution alone.<sup>198</sup> Thus, the California court could rightfully find that the state constitution's protections of free speech extended beyond those in the U.S. Constitution.<sup>199</sup>

In coming to this conclusion, the Supreme Court addressed one of the challenges put forth by the shopping mall owner; that the state constitution's limitation of their right to exclude individuals from their property constituted a taking without just compensation under the U.S. Constitution's Fifth Amendment.<sup>200</sup> The Fifth Amendment prohibits the government from taking private property for public use without providing just compensation.<sup>201</sup> The Court notes that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," and that an unlawful taking occurs only where the "restriction on private property 'forc[es] some people

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<sup>195</sup> 447 U.S. 74 (1980).

<sup>196</sup> *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979), *aff'd sub nom.*, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

<sup>197</sup> *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. at 78, 88.

<sup>198</sup> *Id.* at 81.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 82.

<sup>201</sup> "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>202</sup> The Court found no merit in the claim that the California Constitution’s free speech protections constituted an unlawful taking, noting that the shopping mall was already open to the public, and the free speech activity would not unreasonably burden the mall’s use or value.<sup>203</sup> The Court also reaffirmed that the private owners could still impose time, place, and manner restrictions on speech within the mall, ensuring property owners still retain a significant degree of control over speech on their property.<sup>204</sup> Balancing the slight burden on the owner with the speaker’s right to free speech under the state constitution, “the Court deemed that no taking had occurred.”<sup>205</sup>

It should be noted that California’s approach to interpreting its state constitution in *Pruneyard* is in the minority among states; only New Jersey, Colorado, and Massachusetts have followed suit to any degree.<sup>206</sup> New York, the only state relevant for this analysis, has specifically rejected finding a greater right to speech in the New York state constitution.<sup>207</sup> As such, *Pruneyard* has no bearing on the issues of state action and free speech in New York city’s privately owned public spaces.

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<sup>202</sup> *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. at 82 (quoting *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960)).

<sup>203</sup> *Id.* at 83–84.

<sup>204</sup> Mulligan, *supra* note 27, at 551–52. Some of the wide ranging restrictions allowed by the Court include allowing the shopping mall to establish designated free speech zones within the mall, setting blackout periods during the busy holiday season from Thanksgiving until New Year’s day, requiring prior approval of signs and pamphlets, and requiring those engaging in speech activities to provide insurance and damage deposits to cover their activities. *Id.*

<sup>205</sup> Berger, *supra* note 112, at 678.

<sup>206</sup> Kevin Francis O’Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 455 (1996).

<sup>207</sup> *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1217 (N.Y. 1985).

#### IV. STATE ACTION AS IT RELATES TO NEW YORK CITY'S PRIVATELY OWNED PUBLIC SPACES

The system of incentive zoning that the New York City Zoning Resolution uses differs significantly from the relationships explored in the previous cases. However, by applying the various state action doctrines to the specific factual situation of New York's privately owned public spaces, it becomes clear that owners of those spaces are not state actors when they regulate public use of those spaces.

##### *A. Application of Public Function Doctrine to Privately Owned Public Spaces*

The privately owned public spaces of New York City do not perform a public function and therefore the actions of their private owners cannot be considered state action. Public plazas and other privately owned public spaces are largely analogous to the traditional public park, but there are some differences. While the Court in *Evans* recognized that parks fulfill a public function, much like a police department or fire department,<sup>208</sup> privately owned public spaces do not fulfill that same public function.

Unlike traditional parks, privately owned public spaces usually constitute a small portion of a much larger development, sharing a plot of land with the building which receives the zoning benefits resulting from the addition of the public space.<sup>209</sup> Examples of privately owned public spaces that stand wholly separate from the development they grant zoning benefits to, as Zuccotti Park does, are exceptionally rare.<sup>210</sup> As Zuccotti Park is one of the only such fully separate spaces created as a result of the Zoning Resolution's incentive zoning scheme, this variation from the general nature of privately owned public spaces should not matter for the purposes of this state action analysis.<sup>211</sup> Additionally, whereas the design of

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<sup>208</sup> *Evans v. Newton*, 382 U.S. 296, 302 (1966).

<sup>209</sup> See KAYDEN, *supra* note 40, at 75–300 (illustrating plots in New York City containing privately owned public spaces).

<sup>210</sup> See *id.*

<sup>211</sup> Uniquely, Zuccotti Park at 1 Liberty Plaza is separated from its host

traditional public parks usually serves recreational and social functions as a destination for the public, many privately owned public spaces serve a much more passive role in society.<sup>212</sup> These differences highlight the contrasting functions that privately owned public spaces serve compared to traditional parks.

In *Evans*, many facts specific to that case strengthen the recognition that there is a general municipal nature for *traditional* parks. For example, the private park was under the custodianship of the city of Macon, and served as a center of the city's community activities for years.<sup>213</sup> According to New York City DCP's own website, approximately fifteen of the city's more than 500 privately owned public spaces qualify as a "destination" that attracts significant community use.<sup>214</sup> *Evans* recognized the public nature of mass recreation in parks, a feature noticeably lacking from most privately owned public spaces.<sup>215</sup> As mentioned above, the size, design, and location of most privately owned public spaces do not suit mass recreation in the same manner traditional parks do.<sup>216</sup> Additionally, city officials maintained the park in *Evans*, and it qualified as tax-exempt under state law.<sup>217</sup> Privately owned public spaces do not share these features. Despite recognizing the municipal character of parks in general, the *Evans* finding that the park serves a public function seems limited to the facts of the case. The holding of *Evans* can be read as to specifically limit the Court's finding of public function to the specific park at hand. The Court states that "the public character of

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building by Liberty Street, giving it the impression of a standalone public space. *Id.* at 101.

<sup>212</sup> See *Privately Owned Public Spaces: POPS Report Wrapup*, THE BRIAN LEHRER SHOW (Nov. 9, 2011), <http://www.wnyc.org/shows/bl/2011/nov/09/privately-owned-public-spaces-pops-report-wrapup/> [hereinafter THE BRIAN LEHRER SHOW]; KAYDEN, *supra* note 40, at 1 ("Many spaces are nothing more than empty strips or expanses of untended surface."). Kayden describes many of the older privately owned public spaces as "barren, desolate, depressing, and sterile" and "completely unusable in any functional sense." *Id.* at 52, 16.

<sup>213</sup> See *Evans*, 382 U.S. at 301.

<sup>214</sup> See KAYDEN, *supra* note 40, at 51.

<sup>215</sup> See *Evans*, 382 U.S. at 302 (citation omitted).

<sup>216</sup> See *supra* note 212 and accompanying text.

<sup>217</sup> See *Evans*, 382 U.S. at 301.

*this* park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment.<sup>218</sup> The lack of facts supporting the holding in *Evans* tends to show that New York's privately owned public spaces do not fulfill the same public function as the park in *Evans*. Therefore, the private owners of such spaces cannot be considered state actors.

Another basis for concluding that private owners of New York's public spaces are not fulfilling a public function lies in the Supreme Court's limited application of the public function doctrine. After all, the Court has strongly limited the scope of *Evans* in the subsequent cases of *Lloyd Corp.* and *Hudgens*.<sup>219</sup> Moreover, since *Evans*, the Supreme Court has repeatedly upheld the rights of private owners to restrict speech on the publicly accessible areas of their private property. In *Lloyd Corp., Ltd. v. Tanner*, the Court held that the publicly accessible walkways and sidewalks within a private shopping center were not public and thus the owner could restrict Vietnam War protestors from hand-billing on them.<sup>220</sup> Several years later, the Court once again visited the issue of speech on private property that seems to serve the public in *Hudgens v. N.L.R.B.*, where it strongly affirmed *Lloyd Corp.* in holding that employees had no First Amendment right to picket a retail location within a shopping mall.<sup>221</sup> The Court held that the mere fact that the employees in *Hudgens* sought to use their speech to draw attention to their labor strike rather than hand-bill against the Vietnam War did not change the fact that the shopping mall was not public and therefore the owner could restrict their picketing.<sup>222</sup> These cases demonstrate the Court's

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<sup>218</sup> *Id.* at 302 (emphasis added).

<sup>219</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976).

<sup>220</sup> See *Lloyd Corp.*, 407 U.S. at 570. This was a dramatic departure from an earlier case, *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), where the Court held that a private shopping center served the same function as a traditional downtown business district for First Amendment purposes. *Id.*

<sup>221</sup> See *Hudgens*, 424 U.S. at 520–21.

<sup>222</sup> *Id.* *Hudgens* is one of many cases limiting First Amendment protection regarding union activity on publicly accessible private property which is open to the public. See, e.g., *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992) (holding

clear reluctance to abrogate private owners' property rights to restrict speech on their property even when it is regarding publicly accessible areas of commercial properties.

The vast majority of New York City's privately owned public spaces are directly adjacent to, surrounding, or within otherwise commercial properties,<sup>223</sup> and thus present easy comparisons to the publicly accessible spaces of the shopping centers in *Hudgens* and *Lloyd Corp.* In light of these similarities, it seems unlikely the New York courts would split hairs to distinguish between the two types of properties. Therefore, the courts would likely not find that privately owned public spaces serve a public function. Such a decision would follow Supreme Court precedent for protecting private sovereignty even where the property in question serves the public in a manner similar to a traditional public forum.<sup>224</sup>

*B. Application of Joint Participation Doctrine to Privately Owned Public Spaces*

New York City's privately owned public spaces lack the substantially cooperative relationship with state actors required to impute state action to the private property owner. Mere regulation of public spaces through the Zoning Resolution is not enough on its own to create joint participation, even where the regulation is extensive and detailed.<sup>225</sup> Despite the detailed requirements for the

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that where union organizers have access to the employees by other means, the store owner did not have to allow them access on private store property); *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180 (1978) (holding that the arguably protected character of union's picketing did not provide sufficient justification for preemption of state court's jurisdiction over employer's trespass claim); *Cent. Hardware Co. v. N.L.R.B.*, 407 U.S. 529 (1972) (holding that the fact that the parking lot of employer was open to the public did not bring union's solicitation of employees in employer's parking lot to sign union authorization card within the protection of the First Amendment).

<sup>223</sup> See KAYDEN, *supra* note 40, at 75–300. Some privately owned public spaces are associated with residential properties, but even these properties often serve the business interests of the property owner, serving as driveways or loading docks for the property. See *id.* at 16.

<sup>224</sup> O'Neill, *supra* note 206, at 203.

<sup>225</sup> See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) ("The mere

creation and subsequent management of privately owned public spaces in the New York City Zoning Resolution,<sup>226</sup> and the varied means of enforcing those requirements,<sup>227</sup> such regulations alone also fall short of meeting the two-pronged test set out in *Lugar*.<sup>228</sup> A more direct “nexus” is required to show that the private owner actually acted in a manner where its actions “may be fairly treated as that of the State itself.”<sup>229</sup> Application of the *Lugar* test to privately owned public spaces indicates that First Amendment restrictions by the owners of such spaces fails to satisfy either prong of the *Lugar* test.

First, no right, privilege, or rule created by the state or any of its agents caused the restriction of First Amendment rights in Zuccotti Park. Unlike the prejudgment attachment of debtor’s property in *Lugar*, or the peremptory challenge to potential jurors during jury selection in *Edmonson*, the owner of a privately owned public space who prohibits protests or other free speech activity is not exercising a public right established by state law. Instead those owners are merely exercising their right to exclude, which is a private right related to their ownership of the property.<sup>230</sup> The state did not endow the owners of privately owned public spaces with any rights beyond those which any other private property owner

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fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed . . . do so.”)

<sup>226</sup> See KAYDEN, *supra* note 40, at 11–40; N.Y.C. ZONING MAPS & RESOLUTION, *supra* note 42, § 37-77.

<sup>227</sup> Jill Colvin, *Occupy Wall Street Puts Spotlight on Privately Owned Public Spaces*, DNAINFO (Oct. 10, 2011, 1:50 PM), <http://www.dnainfo.com/new-york/20111010/downtown/occupy-wall-street-puts-spotlight-on-privately-owned-public-spaces>; Lisa Foderaro, *Privately Owned Park, Open to the Public, May Make Its Own Rules*, N.Y. TIMES (Oct. 13, 2011), <http://www.nytimes.com/2011/10/14/nyregion/zuccotti-park-is-privately-owned-but-open-to-the-public.html>; KAYDEN, *supra* note 40, at 38–41; N.Y.C. ZONING MAPS & RESOLUTION, *supra* note 42, § 37-77.

<sup>228</sup> See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1974).

<sup>229</sup> *Jackson*, 419 U.S. at 351.

<sup>230</sup> See generally David L. Callies, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL’Y 39 (2000) (discussing case law surrounding the right to exclude).

may exercise. The state merely recognized their right to exclude, a cornerstone of the traditional bundle of property rights.<sup>231</sup> The state does impose additional rules on owners of the public spaces regarding the use of their property by the public, notably the requirement that any use restrictions implemented by the property owners must be “reasonable.”<sup>232</sup> However, these rules do not constitute a deprivation of access and use of the property by the public. Rather, the rules restrict the owner’s ability to exclude, an exercise of power owners of public spaces otherwise would be free to use to deprive the public of free speech on their property. Without the “reasonableness” rule, as nebulous and undefined as it is, there would be nothing to keep the private owner of a public space from instituting clearly unreasonable restrictions to use of the space, such as arbitrary restrictions on who could use the park or for how long.<sup>233</sup>

Second, the private property owner of Zuccotti Park who limits free speech on her land is neither a state official nor someone whose actions may be attributed to the state without more significant encouragement or coercion by the state.<sup>234</sup> Despite the Zoning Resolution, the state does not coerce or incentivize a private owner to exclude free speech, nor is the private owner doing so on behalf of the state. If anything, the limitation the Zoning Resolution places on the property owners to impose only “reasonable”<sup>235</sup> use rules and limitations conflicts with the owner’s right to limit use of the property by the public. In that regard, as in *Tarkanian*, the state is more an antagonist to the aims and actions

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<sup>231</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

<sup>232</sup> KAYDEN, *supra* note 40, at 38.

<sup>233</sup> Although the true extent of what constitutes a “reasonable” restriction of privately owned public space has not been specifically defined by either the DCP or the courts, I use these two examples which would be prohibited under the rules and regulations of city-owned parks, which the DCP uses as a guideline for determining what constitutes a reasonable restriction. *See* N.Y.C. City Parks & Recreation Rules, *supra* note 81.

<sup>234</sup> *See* *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982).

<sup>235</sup> *See* N.Y.C. Parks & Recreation Rules, *supra* note 81.



of the private actor than a joint participant in them.<sup>236</sup>

*C. Application of Entwinement Doctrine to Privately Owned Public Space*

Entwinement creates state action in a private actor where the entwinement between the private actor and the state is so pervasive that the state wields substantial management and control powers over the private entity.<sup>237</sup> New York City's privately owned public spaces fail to meet that degree of entwinement, and thus actions by the owners of these spaces to limit free speech do not constitute state action under the entwinement theory.

Unlike in *Brentwood*, where a significant majority of the decision-making authority was in the hands of state employees and officials,<sup>238</sup> managerial authority of privately owned public spaces remains primarily in the hands of the private owners.<sup>239</sup> While the various zoning regulations in the New York City Zoning Resolution may limit the full scope of an owner's control over their property decisions to some degree, those regulations are not nearly extensive or pervasive enough to establish state action. The requirements for public spaces to provide certain amenities and ongoing maintenance of spaces still require the owner's approval at the time the original agreement is signed. Thus, any enforcement provision relating to the zoning agreement is in a sense more a matter of holding the private actor to their prior managerial decisions than the state usurping the power to make those decisions. Since almost all management and control of privately owned public spaces remains with the owner, there is no significant entwinement between public spaces and the state.

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<sup>236</sup> See *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 196 (1988).

<sup>237</sup> See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001).

<sup>238</sup> *Id.* at 300.

<sup>239</sup> KAYDEN, *supra* note 40, at 38.

*D. Rodriguez v. Winski*

On September 26, 2013, the U.S. District Court for the Southern District of New York in *Rodriguez v. Winski*<sup>240</sup> granted motions to dismiss by Brookfield Properties and two other owners of property in New York City in the section 1983 suit by City Councilman Ydanis Rodriguez and sixteen other plaintiffs.<sup>241</sup> The “[p]laintiffs assert[ed] [forty-nine] separate causes of action” relating to violations of their state and federal constitutional rights, and violations of state tort law.<sup>242</sup> “To [prevail against] a motion to dismiss for failure to state a claim [under federal rule of civil procedure 12(b)(6)], the plaintiff’s ‘[f]actual allegations must be enough to raise a right to relief above the speculative level.’”<sup>243</sup> The court considered the allegations of joint action among the property owners and the N.Y.P.D., but rejected them, noting that nothing alleged in the complaint suggested the “substitution of private judgment for police judgment necessary to constitute joint action.”<sup>244</sup> The court dismissed the plaintiffs’ contention that *Evans* is relevant in the instant case by recognizing that *Evans* has been limited in scope by subsequent cases, and asserting that the plaintiff’s failed to allege the city was involved “in any way in controlling or maintaining” the properties in question.<sup>245</sup> As described in detail above, the city is involved in the control and maintenance of the spaces through the oversight and enforcement provisions of the incentive zoning scheme. This, among other aspects of the opinion, tends to indicate that *Rodriguez* is more a condemnation of the plaintiff’s poorly drafted complaint than a decision based on the merits of the plaintiff’s state action claims.

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<sup>240</sup> *Rodriguez v. Winski*, No. 12 Civ. 3389(NRB), 2013 WL 5379880 (S.D.N.Y. Sept. 26, 2013).

<sup>241</sup> *Id.* at \*1. One of the other owners, J.P. Morgan Chase, was not the owner of a privately owned public space in the Zoning Resolution, while the other, Mitsui Fudosan America, was. *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at \*5 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

<sup>244</sup> *Id.* at \*9.

<sup>245</sup> *Id.* at \*10.

Still, the *Rodriguez* dismissals lend support to the conclusion that activity in New York's privately owned public spaces cannot constitute valid state action claims against those property owners.

#### V. PRIVATELY OWNED PUBLIC SPACE WITHOUT STATE ACTION

##### A. How the "Reasonable Limitation" Standard Fails to Protect Free Speech

If the private owners of New York City's privately owned public spaces are not found to be state actors, then there is no guarantee of constitutional protection for public free speech within those spaces.<sup>246</sup> Instead, the only protection for the public's right to free speech within the privately owned public space is a rather nebulous and imprecise requirement that any rule or restriction imposed on public use by the property owner be "reasonable."<sup>247</sup> This simplistic restriction on the otherwise unlimited power of the private owners to exclude the public at will fails to provide sufficient protection of the public's right to free speech.

Since the DCP turns to the rules implemented by the New York Department of Parks and Recreation ("DPR") as a guideline for what is considered a "reasonable" restriction, the prohibitions on tents and sleeping are likely "reasonable."<sup>248</sup> However, other regulations, such as limitations on backpacks and security checkpoints, far exceed any restrictions imposed by the DPR on city-owned parks and therefore are likely unreasonably burdensome to the public under this guideline.<sup>249</sup> The construction of a security fence and security checkpoints to coincide with every major political action planned by Occupy Wall Street demonstrates a clear pattern of intentionally discouraging political activity within Zuccotti Park. Yet, despite the implementation of numerous rules and regulations which disrupted and discouraged the use of the space by the protestors, DOB inspectors found no problems

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<sup>246</sup> Magarian, *supra* note 94, at 128.

<sup>247</sup> See KAYDEN, *supra* note 40, at 38.

<sup>248</sup> See N.Y.C. Parks & Recreation Rules, *supra* note 81.

<sup>249</sup> See *id.*

with the operation of Zuccotti Park.<sup>250</sup> That such discouragement is permissible demonstrates that the current requirement that rules and regulations of privately owned public spaces be “reasonable” does not provide enough protection to the public’s free speech and assembly rights.

*B. The Long-Term Threat to Free Speech in New York and Elsewhere*

Without proper protection within privately owned public spaces, the future of all public speech in New York City faces a serious threat. As New York continues to become more densely populated,<sup>251</sup> space in the city will continue to be a highly valuable commodity. This will further incentivize developers to create privately owned public spaces to receive the additional development benefits. Additionally, privately owned public space will likely increase as the city continues to provide increased public services with limited public funding.<sup>252</sup> Meanwhile, over the last forty years New York City has continually reduced the budget of the DPR.<sup>253</sup> “In 1960 parks maintenance and operations claimed 1.4 percent of city funds,”<sup>254</sup> and by 2010, that percentage had

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<sup>250</sup> See Salazaar, *supra* note 13.

<sup>251</sup> See *New York City Population Projections, 2000–2030*, DEP’T OF CITY PLANNING (Dec. 2006), available at [http://www.nyc.gov/html/dcp/pdf/census/projections\\_briefing\\_booklet.pdf](http://www.nyc.gov/html/dcp/pdf/census/projections_briefing_booklet.pdf).

<sup>252</sup> See, e.g., Allison Kilkenny, *N.Y.C. Bus Strike Kicks Off to Fight Privatization of Yellow Buses*, THE NATION (Jan. 15, 2013), <http://www.thenation.com/blog/172222/nyc-bus-strike-kicks-fight-privatization-yellow-buses#> (discussing the reduced financial costs of the City’s efforts to privatize school busing); Laura Vanderkam, *Parks and Re-Creation*, CITY J. (2011), [http://www.city-journal.org/2011/21\\_3\\_ny-parks.html](http://www.city-journal.org/2011/21_3_ny-parks.html) (describing efforts to improve New York’s park system through private capital rather than public funds).

<sup>253</sup> See *Mission*, N.Y.C. PARK ADVOCATES, <http://nycparkadvocates.org/mission> (last visited Dec. 1, 2012).

<sup>254</sup> Patrick Arden, *Issue 27 Preview: The High Cost of Free Parks*, NEXT AM. CITY (June 16, 2010), <http://americacity.org/daily/entry/issue-27-preview-the-high-cost-of-free-parks>.

been budgeted to drop to approximately 0.37 percent.<sup>255</sup> The budget for 2013 alone shows a twenty percent reduction in park spending from the 2012 fiscal year, with more than \$65 million less allocated to the DPR.<sup>256</sup>

New York City has increasingly turned to privatization of traditional public parks to avoid allocating public funds.<sup>257</sup> Since the Central Park Conservancy was founded in 1980, privatization efforts have involved many of New York's more prominent public parks, such as the Madison Square Park Conservancy, Friends of the High Line, and the Bryant Park Corporation.<sup>258</sup> Around 900 of New York City's parks and playgrounds, amounting to roughly half of such spaces in the city, rely at least partly on private funds to operate.<sup>259</sup> This trend of privatization of public services extends beyond the realm of public parks to many other public services<sup>260</sup> and will continue to be a driving force behind the approval and development of more privately owned public spaces in the city.

As private owners create more privately owned public spaces, such spaces will serve a growing role in New York's system of public space. Without constitutional protections, the increase in the number of public spaces threatens to undermine

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<sup>255</sup> See *id.* (suggesting that budget cuts would lower funding for parks maintenance and operations to 0.37 percent of city funds).

<sup>256</sup> See *Hearing on the Fiscal 2013 Executive Budget*, DEP'T OF PARKS & RECREATION, [http://council.nyc.gov/html/budget/fy13\\_documents.shtml](http://council.nyc.gov/html/budget/fy13_documents.shtml) (last visited Oct. 22, 2013).

<sup>257</sup> See Arden, *supra* note 254.

<sup>258</sup> See generally, e.g., *Mission*, MADISON SQUARE PARK CONSERVANCY, <http://www.madisonsquarepark.org/about-the-park/mission> (last visited Oct. 3, 2013); *Friends of the High Line*, HIGH LINE, <http://www.thehighline.org/about/friends-of-the-high-line> (last visited Oct. 3, 2013); *Bryant Park Corporation*, BRYANT PARK, <http://www.bryantpark.org/about-us/management.html> (last visited Oct. 3, 2013).

<sup>259</sup> Arden, *supra* note 254.

<sup>260</sup> See, e.g., *Park Privatization Elsewhere*, N.Y. DAILY NEWS (July 30, 2012), [http://articles.nydailynews.com/2012-07-30/news/32946358\\_1\\_muni-meters-citytime-profit-margin](http://articles.nydailynews.com/2012-07-30/news/32946358_1_muni-meters-citytime-profit-margin) (discussing the privatization of the City's public parking services); Aaron Short, *Privatizing New York City*, CITY & STATE (Aug. 21, 2012), <http://www.cityandstateny.com/privatization/> (discussing the privatization of garbage and waste removal); Kilkenny, *supra* note 252.

New Yorkers traditional access to forums that allow unfettered freedom of speech. If some public spaces protect and allow for free speech and assembly, and others do not, at some point the public will be unable to distinguish between the two.

This problem extends beyond New York City as well. Other American cities have emulated New York City's incentive zoning scheme and have created similar public spaces which also suffer from the same concerns regarding free speech and the right to assemble. Two of the more prominent examples of similar incentive zoning plans are in San Francisco and Seattle. In San Francisco, a series of sixty-six privately owned public spaces of varying sizes dot the downtown area.<sup>261</sup> Since 1966, Seattle has also had a program for creating privately owned public space, and currently downtown Seattle has over sixty privately owned public spaces.<sup>262</sup> Both these cities, as well as others that incentivize privately owned public space, will face the same long-term complications regarding public speech as those faced in New York. Unless the cities implement changes, the disparity between the rights in privately owned public space and the rights in publicly owned space will erode citizens' confidence as to what rights they are free to exercise and where they may do so.

### C. Potential Solutions

The simplest method to address freedom of speech concerns in privately owned public spaces would be for the city to amend its zoning regulations to include protections of the public's right to free speech, assembly, and political activity within those spaces. There are two potential ways to insert this sort of protection into the existing zoning regulations: (1) include a clarification of what

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<sup>261</sup> *Secrets of San Francisco: A Guide to San Francisco's Privately owned Public Open Spaces*, S.F. PLANNING & URBAN RESEARCH ASS'N., available at <http://www.spur.org/files/popos-guide.pdf>.

<sup>262</sup> *Privately Owned Public Open Spaces*, SEATTLE CITY COUNCIL, [http://www.seattle.gov/council/licata/public\\_space.htm](http://www.seattle.gov/council/licata/public_space.htm) (last visited Dec. 1, 2012). See also *Map Showing Many of Seattle's Public Open Space Including Privately Owned Public Spaces*, SEATTLE CITY COUNCIL, available at [http://www.seattle.gov/council/licata/attachments/2009public\\_space\\_map.pdf](http://www.seattle.gov/council/licata/attachments/2009public_space_map.pdf).

restrictions are “reasonable” under the existing standards; or (2) include a separate provision to the Zoning Resolution that requires private owners creating public spaces to agree to allow certain speech-related activities.

Clarifying the meaning of “reasonable restrictions” in the New York City Zoning Resolution would impose that new interpretation on all privately owned public spaces established prior to such an amendment, as well as all future public spaces created under the incentive zoning scheme. However, this could raise issues with regard to the Fifth Amendment’s takings clause.<sup>263</sup> It could be seen as unilaterally restricting an owner’s right to exclude others from their property without providing just compensation as required by the Fifth Amendment.<sup>264</sup> Although “[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights,” as the Court noted in *Pruneyard*, not all destructions of property rights are unlawful takings.<sup>265</sup> The Court, in two cases where an unlawful taking was found after *Pruneyard* was decided, has shed some light on how the Court might approach New York City, imposing clearer guidelines regarding what sort of reasonable restrictions an owner of a privately owned public space may impose.<sup>266</sup> In *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>267</sup> and *Nollan v. California Coastal Commission*,<sup>268</sup> the Court noted that the regulations that caused entry onto the private land created permanent physical invasions of the private land.<sup>269</sup> On the other hand, in *Pruneyard*,

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<sup>263</sup> “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

<sup>264</sup> See generally Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307 (2007).

<sup>265</sup> *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980) (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

<sup>266</sup> Berger, *supra* note 112, at 679–83.

<sup>267</sup> 458 U.S. 419 (1982) (finding an unlawful taking where a statute enabled firms to install cable equipment on apartment buildings the firm serviced in exchange for providing the owner a small fee).

<sup>268</sup> 483 U.S. 825 (1987) (finding an unlawful taking where beachfront owners were required to allow an easement across their property to access the water in order to receive a permit to improve their property).

<sup>269</sup> Berger, *supra* note 112, at 679–80. In the case of *Loretto*, a permanent

“the invasion was temporary and limited in nature”<sup>270</sup> and “would not result in the public gaining ‘permanent access’ to the shopping center.”<sup>271</sup> It is also worth noting that both the apartment building in *Loretto* and the beach in *Nollan* were not willingly opened to the public at large, while the shopping mall in *Pruneyard*, much like New York’s privately owned public spaces, invite the public onto the property.<sup>272</sup> As such, New York City’s limiting of the types of restrictions the owners of privately owned public spaces may use would impose a minimal burden on the property rights of the owner and would likely withstand legal challenge by the owners.

An alternative approach to protecting the rights of the public would be to amend the Zoning Resolution so that any proposal by a developer to create a new privately owned public space would require the owner to acknowledge and respect the speech and assembly rights of the public. This amendment to the Zoning Resolution would address the problem of ensuring the public’s right to use these spaces as a public forum, while providing some flexibility to the city. For instance, while most privately owned public spaces are accessible to the public twenty-four hours a day, the city may have some reservations about allowing political rallies at 3:00 A.M. on a Tuesday morning. As it stands, all of New York’s publicly owned parks close at night,<sup>273</sup> and large gatherings require permits.<sup>274</sup> The city could impose similar restrictions to privately owned public spaces. Also, while this solution would only provide constitutional protection to newly developed spaces, the city could institute a system similar to the current system used to improve the quality of older spaces. The current system requires

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installation of cable equipment was to be installed on the private property, and in *Nollan*, a permanent easement allowing public access over the private land was to be created. *Id.*

<sup>270</sup> *Loretto*, 458 U.S. at 434.

<sup>271</sup> Berger, *supra* note 112, at 680 (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 825 n.1 (1987)).

<sup>272</sup> *Id.* at 681.

<sup>273</sup> Foderaro, *supra* note 227.

<sup>274</sup> Permitting is required for groups of seventy-five or more at indoor locations, and two hundred or more at outdoor locations. *Place of Assembly Certificate of Operation*, N.Y.C. DEP’T OF BLDGS., <http://www.nyc.gov/html/dob/html/development/pa.shtml> (last visited Oct. 2, 2013).



the owner, in exchange for concessions allowing him or her to close the space at night, to upgrade the features of the space to the most current standards for privately owned public space development.<sup>275</sup> An added requirement for private owners to be compliant with the most current standards could include an agreement to have to agree to a free speech protection clause. This would allow the city to expand freedom of speech protection to public spaces already in existence.

Creating additional protections for free speech provides a major benefit to the public while imposing a relatively minor burden on the owners of privately owned public spaces. The creation of such public spaces remains extremely profitable for private owners,<sup>276</sup> and it is unlikely that this additional burden would dissuade potential developers. New York City would also still be able to achieve its goal of incentivizing private development of public space, while at the same time protecting public space's traditional role as a public forum.

#### CONCLUSION

Courts are not likely to find that owners of privately owned public spaces created under the New York City Zoning Resolution are state actors. Therefore, owners are able to restrict free speech on their property. This poses serious, ongoing complications for the public's right to express themselves in New York public spaces. To correct this problem, the city could amend or clarify the Zoning Resolution to provide for specific protections to the public's speech and assembly rights within privately owned public

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<sup>275</sup> KAYDEN, *supra* note 40, at 19.

<sup>276</sup> See, e.g., Almanzar & Keller, *supra* note 47; Yolanne Almanzar & Michael Keller, *Putting a Price Tag on Privately Owned Public Spaces*, THIRTEEN (Apr. 13, 2012), <http://www.thirteen.org/metrofocus/2012/04/putting-a-price-tag-on-privately-owned-public-spaces/>; Matt Chaban, *Just How Much Is That Privately Owned Public Space Worth? Millions and Millions of Dollars, Probably*, N.Y. OBSERVER (Apr. 12, 2012), <http://observer.com/2012/04/just-how-much-is-that-privately-owned-public-space-worth-millions-and-millions-of-dollars-probably/>.

spaces. These changes would more thoroughly reflect the principle that free speech is a fundamental characteristic of traditional public space and a core value of New York City.