

# PROPERTY LAW'S SEARCH FOR A PUBLIC

NADAV SHOKED\*

## ABSTRACT

*Public spaces—streets, sidewalks, parks, plazas, squares, and the like—form a major component of the physical environment. Therefore, disputes over the use and management of these spaces abound. Courts analyze each such dispute individually through the prism of the discrete property law doctrine that appears applicable. The result is a hodgepodge of inconsistent rulings that too often ignore the common normative principles implicated in all debates over public spaces. This Article advances a general framework for the legal treatment of public spaces. It argues that, at heart, every dispute over the use of a public space requires the law to answer one fundamental question: Who, in the case at hand, should be deemed the “public” actually holding the implicated public right? After all, the “public” is not a recognized legal entity. The law identifies disparate bodies that might stand for the “public” in a specific case—and accordingly be empowered to dictate the uses of the relevant public right. The options include the local government, the public at large, specific individuals, or a set of common law strictures. The Article constructs a test courts should employ when, in a given dispute over the use of a public space, they must pick among these alternatives. It does so by isolating the core normative concern animating the common law doctrines that deal with public spaces. The concern the Article identifies is the notion that some public spaces, but not others, have a natural use, and must thus be treated uniquely. In light of this core principle the Article develops an operative test to identify the “public” that should be afforded control over a given public space. Under the test, a court must determine whether a contested public space has a natural use, and if it does, how clearly defined that use is, who the actors funding the use are, and how trustworthy is the government when transacting in the space. To illustrate the test’s utility, it is employed to identify the pertinent publics that should control public rights in two of the most commonplace public spaces: parks and sidewalks.*

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\* Professor of Law, Northwestern University Pritzker School of Law. For invaluable comments on drafts of this article and for fruitful conversations about the ideas the article incorporates, I am grateful to David Dana, Nestor Davidson, Anna di Robilant, Nate Ela, Oren Kriegel, Timothy Mulvaney, Richard Schragger, Joseph Singer, and Laura Underkuffler. I also benefitted from the input of participants at the faculty workshop at Northwestern University School of Law, and at the Property Works in Progress Conference at Boston University School of Law. Finally, I am very thankful to Joey Becker, Thomas Lis, and Elliot Louthen who provided exceptional assistance in research.

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## INTRODUCTION

The former President and First Lady picked the site for the future Obama Presidential Center at the conclusion of a competition pitting against each other four proposals hailing from three different cities.<sup>1</sup> The winning bid singled out for the Center's location Jackson Park in Chicago's Hyde Park neighborhood,<sup>2</sup> the area President Obama once represented in the Illinois state legislature. An ecstatic mayor and city council approved the project in 2015.<sup>3</sup> The project faced a legal challenge, however. A public interest group dedicated to the protection of open spaces has questioned the project's legality.<sup>4</sup> The group contends that Jackson Park, originally designed in 1870 by the famed architects Frederick Law Olmsted and Calvert Vaux, is subject to the public trust doctrine. Spaces governed by that doctrine must remain publicly owned and open—free, that is, of structures.<sup>5</sup> The common law developed this venerable doctrine in the context of ownership rights in navigable waters and submerged land.<sup>6</sup> The central question the parties to the Presidential Center litigation and the many intervening amici curiae—

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1. Julie Bosman & Mitch Smith, *Chicago Wins Bid to Host Obama Library*, N.Y. TIMES (May 12, 2015), <https://www.nytimes.com/2015/05/13/us/chicago-president-obama-library.html> [https://perma.cc/7WYB-9YTY].

2. Act of Feb. 24, 1869, § 4, 1869 Ill. Laws 358, 359–60.

3. CHI., ILL., ORDINANCE § O2015-192 (2015).

4. Complaint, *Protect Our Parks, Inc. v. Chi. Park Dist.*, 368 F. Supp. 3d 1184 (N.D. Ill. 2019) (No. 18-cv-3424).

5. See *infra* notes 135–142 and accompanying text.

6. See *infra* notes 144–145 and accompanying text.

counting among them all existing U.S. presidential libraries,<sup>7</sup> all major Chicago museums,<sup>8</sup> and numerous law professors<sup>9</sup>—debate is whether the public trust doctrine also covers a park. If it does, the Presidential Center is doomed. For structures may not be erected on public trust land.<sup>10</sup>

Other than timing, this case appears to share very little with another set of cases that has emerged recently: litigation over electric scooters. Electric scooters began appearing on city streets—starting in Santa Monica, California, and spreading to other cities in the United States and elsewhere<sup>11</sup>—in September 2017.<sup>12</sup> Companies operating the service—first those dedicated solely to scooters, such as Lime and Bird, then those with broader transportation portfolios, such as Lyft and Uber—invite users to download a smartphone app which allows the user to locate an available scooter on a city's sidewalk and unlock it.<sup>13</sup> The user rides the unlocked scooter, and then drops it off when she arrives at her destination—leaving the scooter on the sidewalk to be located, and then unlocked, by the next user. Operators of the service have been embroiled in legal battles ever since its introduction.<sup>14</sup> Upon the scooters' first appearance, many cities issued cease-and-desist letters requiring that the scooters be removed from their

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7. Brief of Thirteen Presidential Foundations as Amici Curiae in Support of Defendants' Motion for Judgment on the Pleadings, *Protect Our Parks, Inc. v. Chi. Park Dist.*, 368 F. Supp. 3d 1184 (N.D. Ill. 2019) (No. 18-cv-3424).

8. Brief of Amici Curiae the Eleven Park Museums in Support of Defendants' Motion to Dismiss or for Judgment on the Pleadings, *Protect Our Parks, Inc. v. Chi. Park Dist.*, 368 F. Supp. 3d 1184 (N.D. Ill. 2019) (No. 18-cv-3424).

9. Brief of Property Law Professors as Amici Curiae in Support of Defendants, *Protect Our Parks, Inc. v. Chi. Park Dist.*, 368 F. Supp. 3d 1184 (N.D. Ill. 2019) (No. 18-cv-3424).

10. The fact that the city will retain ownership rights to the land and merely lease it to the Obama Foundation, CHI., ILL., ORDINANCE § SO2018-7136 (2018), is thus immaterial, according to the plaintiffs.

11. Megan Rose Dickey, *The Electric Scooter Wars of 2018*, TECHCRUNCH (Dec. 23, 2018, 2:05 PM), <https://techcrunch.com/2018/12/23/the-electric-scooter-wars-of-2018/> [<https://perma.cc/Z65W-MCK2>].

12. Noah Smith, *Sudden Appearance of Electric Scooters Irks Santa Monica Officials*, WASH. POST (Feb. 10, 2018, 6:18 PM), [https://www.washingtonpost.com/national/sudden-appearance-of-electric-scooters-irks-santa-monica-officials/2018/02/10/205f6950-0b4f-11e8-95a5-c396801049ef\\_story.html](https://www.washingtonpost.com/national/sudden-appearance-of-electric-scooters-irks-santa-monica-officials/2018/02/10/205f6950-0b4f-11e8-95a5-c396801049ef_story.html) [<https://perma.cc/2JJT-BLCC>]; Dara Kerr, *Lyft's Electric Scooters Hit the Streets of Santa Monica*, CNET (Sept. 17, 2018, 4:03 PM), <https://www.cnet.com/news/lyfts-electric-scooters-hit-the-streets-of-santa-monica>.

13. Smith, *supra* note 12; Kerr, *supra* note 12.

14. The companies have also been subject to a few private lawsuits, mostly focusing on issues of product liability. *See, e.g.*, *Borgia v. Bird Rides, Inc.*, No. CV 18-9685-DMG, 2019 WL 3814280 (C.D. Cal. Aug. 13, 2019).

sidewalks.<sup>15</sup> Several criminal prosecutions ensued,<sup>16</sup> and some cease-and-desist letters were challenged in court.<sup>17</sup> Operators have further disputed more recent city ordinances that regulate the scooters' access to sidewalks or cap their overall number.<sup>18</sup> Operators argue that cities lack the power to thereby unilaterally control sidewalks.<sup>19</sup> Cities respond by pointing at their general authorization to police sidewalks and by raising public nuisance tort claims against the operators.<sup>20</sup>

The Presidential Center and electric scooters disputes seem wholly unrelated. Courts clearly treat them as such. They involve disparate legal doctrines—the public trust doctrine in the case of the Center,<sup>21</sup> a city's regulatory powers (and public nuisance law)<sup>22</sup> in the case of the scooters.

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15. See, e.g., Cease and Desist Letter from Theresa Costonis, Metro. Attorney, Metro. Gov't of Nashville & Davidson Cty., to Bird Rides, Inc. (May 8, 2018), <https://media.bizj.us/view/img/10895612/5-8-18-letter-to-m-shaw201805081518.pdf> [<https://perma.cc/PZW7-HRRH>]; Faith E. Pinho & Ethan May, *Bird Scooters Are Being Removed from Indianapolis. Here's What Could Happen Next*, INDIANAPOLIS STAR (July 12, 2018, 3:54 PM), <https://www.indystar.com/story/news/2018/07/12/bird-scooters-removed-indianapolis-streets-follow-lime/780201002/> [<https://perma.cc/6TTM-3ZAQ>]; Rob Wile, *Scooter Companies Pulling out of Miami Just Weeks After Making Their Debut*, MIAMI HERALD (June 21, 2018, 7:00 AM), <https://www.miamiherald.com/news/business/technology/article213523839.html> [<https://perma.cc/U484-2RWR>].

16. Press Release, City of Santa Monica, City Attorney Files Criminal Complaint Against Illegal Business Operations by Bird Rides, Inc. (Dec. 7, 2017), <https://www.santamonica.gov/press/2017/12/07/city-attorney-files-criminal-complaint-against-illegal-business-operations-by-bird-rides-inc> [<https://perma.cc/3RYM-HVJU>]; *Bird Rides, Inc. Takes Plea Deal and Will Pay \$300,000*, SANTA MONICA DAILY PRESS (Feb. 14, 2018, 2:17 PM), <https://www.smdp.com/bird-rides-inc-takes-plea-deal-and-will-pay-300000/164437> [<https://perma.cc/NY5F-RVBB>]; Ivan Moreno, *Cities Grappling with How to Deal with Electric Scooters*, CHI. SUN-TIMES (July 12, 2018, 9:23 PM), <https://chicago.suntimes.com/2018/7/12/18409176/cities-grappling-with-how-to-deal-with-electric-scooters> [<https://perma.cc/96XY-WWNJ>] (reporting that Nashville sued and then impounded all of Bird's scooters).

17. Erin Lisch, *Lime Complying with Cease-and-Desist, but Bird Says Scooters Will Stay*, RTV6 (July 7, 2018, 3:36 PM), <https://www.theindychannel.com/news/local-news/indianapolis/lime-to-pull-scooters-off-indy-streets-following-cease-and-desist-letter> [<https://perma.cc/7YXX-4EKC>] (reporting on Bird's challenge to Indianapolis's cease-and-desist letter).

18. Andrew Giambrone, *Scooter and Bike Companies Say D.C.'s New Rules for Dockless Vehicles Are Too Restrictive*, CURBED WASH. DC (Nov. 17, 2018, 10:23 AM), <https://dc.curbed.com/2018/11/17/18098426/dc-scooters-dockless-bikes-rules-cap-pushback> [<https://perma.cc/Q4ZS-JZY7>].

19. See Moreno, *supra* note 16 (reporting that Bird argues that Milwaukee and Indianapolis could not treat the scooters as illegal).

20. *City of Milwaukee v. Bird Rides, Inc.*, No. 18-CV-1066-JPS, 2018 WL 5775920 (E.D. Wis. Nov. 2, 2018) (dismissing, on jurisdictional grounds, Milwaukee's suit against Bird where the city justified its fine and forfeiture request through a public nuisance theory).

21. A similar lawsuit against an expansion of a museum into a park—the American Museum of Natural History in New York's Central Park—was pursued under a different legal theory. Plaintiffs relied, in a failed effort, on specific statutes that they claimed mandated certain procedures and reviews be followed. *In re Cmty. United to Protect Theodore Roosevelt Park v. City of New York*, 98 N.Y.S.3d 576, 577 (N.Y. App. Div. 2019).

22. A public nuisance is a violation of a legal right common to the public as a whole. RESTATEMENT (SECOND) OF TORTS § 821(B) (AM. LAW INST. 1979). Under the traditional common law public nuisance claims could only be brought by public officials, and still today almost all suits are brought by state or city officials. JOSEPH WILLIAM SINGER, PROPERTY 124 (5th ed. 2017).

Yet, this Article will argue, behind the distinct doctrinal headings lurks a common, and foundational, question that must be settled in both the Presidential Center case and in the scooter cases.

Irrespective of their distinct doctrinal guises, in both courts are confronted with a stark choice. If the federal court in Illinois refuses to apply the public trust doctrine to the public space contested there—parks—it will thereby grant the power to draw the scope of allowable activities in that type of public space to the local government (i.e., the city will decide what structures can be built in parks). If, conversely, the court applies the public trust doctrine to parks, common law strictures will determine that scope (i.e., the court will decide which structures may, under the common law doctrine, be built in parks). If courts approve of cities' attempts to ban electric scooters from the relevant public space—sidewalks—cities will be allowed to set the contours of allowable activities on that public space. If, conversely, courts accept the operators' position, courts will allow private actors—individuals and businesses using the space—to make that determination.

In other words, in these disputes courts must decide who holds the power to determine to what use, or uses, a public space will be put. A court must identify who, or what, is the “public” in a public space—the “public” that should actually control the public right in that space.

And these two specific disputes are mere examples. The one question identified through them animates *any* case involving a public space. The disputes surrounding the Obama Presidential Center and the electric scooters are emblematic of prevalent, and ceaseless, conflicts over the design and regulation of public spaces—particularly when uses change or new uses are introduced. While current courts and commentators often conceive of each such dispute separately, applying to it the particular doctrinal set of rules implicated therein,<sup>23</sup> the resolution of each and every

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23. The most prominent example of the tendency to analyze each relevant doctrine individually is the academic fascination with the public trust doctrine. The many works addressing the public trust doctrine attempt to explain that doctrine as a unique legal tool, or to expand its reach precisely because it is allegedly so unique. Therefore, these efforts inevitably largely isolate the doctrine from other legal doctrines and approaches to public spaces. *See, e.g.*, William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 422 (1997); James L. Huffman, *A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 543 (1989); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006); Alexandra B. Klass, *Fracking and the Public Trust Doctrine: A Response to Spence*, 93 TEX. L. REV. 47 (2015); Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713 (1996); Symposium, *The Public Trust Doctrine: 30 Years Later*, 45 U.C. DAVIS L. REV. 663 (2012).

one of these disputes involves the need to answer that one basic inquiry identified here.

That question—who should have the power to set the course for the given public space—is raised, for example, in disputes about the power of the city to remove statues commemorating Confederate soldiers and leaders from streets and squares over the state’s objections<sup>24</sup> or those of the soldiers’ descendants;<sup>25</sup> in disputes over the power of private entities or neighborhood groups to place works of art of their choosing in the street or park;<sup>26</sup> in disputes over the power of a city to bar an owner from placing his name or logo, in huge lettering, on a skyscraper facing the city’s most prominent public space;<sup>27</sup> in disputes over a city’s power to force an owner to maintain a large advertisement sign atop a building once that sign has become closely associated with the city’s skyline;<sup>28</sup> and more. Once we acknowledge the fact that all such disputes involve the same task of identifying the entity that should control the public space—and once we

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24. One example is the suit filed by Norfolk against Virginia, challenging the state statute barring cities from removing Confederate monuments. The city argues that the “monument is the City’s speech” rather than the state’s speech, and thus the state, by interfering in it, restricts the city’s First Amendment rights. Complaint for Declaratory and Injunctive Relief ¶ 3, *City of Norfolk v. Virginia*, No. 2:19-cv-436 (E.D. Va. Aug. 19, 2019). On state statutes preempting cities from removing Confederate monuments, see Zachary Bray, *Monuments of Folly: How Local Governments Can Challenge Confederate “Statue Statutes,”* 91 TEMP. L. REV. 1 (2018).

25. The Fifth Circuit has held that the Sons of Confederate Veterans lack standing to challenge the decision by the University of Texas at Austin and by the city of San Antonio to remove Confederate monuments. Rejecting their claim for a First Amendment injury, the court explained that “[t]he fundamental and fatal flaw with Plaintiffs’ argument is that they conflate agreeing with speech with authoring speech.” It gave short shrift to the argument that the plaintiffs were “among the intended beneficiaries” of the “public charitable gifts” that these monuments were. It dismissed these arguments as “red herrings.” *McMahon v. Fenves*, 946 F.3d 266, 272–73 (5th Cir. 2020).

26. Zachary Small, *How Paparazzi Dogs and Rabbitgirl Conquered New York City Streets*, N.Y. TIMES (Jan. 3, 2019), <https://www.nytimes.com/2019/01/03/arts/design/gillie-marc-schattner-sydney-australia-art-paparazzi-dogs.html> [<https://perma.cc/79VS-HCP7>] (debating public-private partnerships’ power to choose specific works of art—that many deem subpar—to be placed in public spaces in New York City).

27. Emily Badger, *Donald Trump Just Inspired Chicago to Rewrite the Rules on Absurdly Large Building Signs*, WASH. POST (Sept. 25, 2014, 10:49 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/09/25/donald-trump-just-inspired-chicago-to-rewrite-the-rules-on-absurdly-large-building-signs/> [<https://perma.cc/6A5G-6JSU>] (discussing Chicago’s failed attempt to block the Trump Organization from placing a twenty-foot-high sign bearing the name on his hotel overlooking the Chicago River).

28. Ellie French, *City Commission Votes to Give Citgo Sign Landmark Status*, BOS. BUS. J. (Nov. 13, 2018, 8:06 PM), <https://www.bizjournals.com/boston/news/2018/11/13/city-commission-votes-to-give-citgo-sign-landmark.html> [<https://perma.cc/52R6-RMJT>] (discussing the Boston Landmark Commission decision to landmark the Citgo sign located in Kenmore Square, thereby mandating its continued presence even after the owner of the building’s planned redevelopment); see also David W. Dunlap, *Pepsi-Cola Sign in Queens Gains Landmark Status*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/13/nyregion/pepsi-cola-sign-in-queens-gains-landmark-status.html> [<https://perma.cc/77VZ-JPJP>] (discussing New York City’s decision to protect from removal or alteration a famous mid-century publicity sign).

develop a principled manner of approaching that task—disputes over public spaces can be resolved in a more consistent, and rational, manner.

By approaching this task, and highlighting the stakes involved, this Article promotes a more sophisticated appreciation of the legal treatment of public spaces. Such better understanding is of the utmost importance. For public space is all around us. Not a day goes by during which the average individual does not interact with at least one public space. Merely by leaving their home, a person is confronted by the street. Even when staying indoors, the public space is inescapable—views and noises will likely invade any private space. Public spaces mold our lives—our public and private lives both.

Accordingly, over the past decades, and with enhanced urgency in the last few years, commentators in a variety of fields have tackled these spaces' treatment.<sup>29</sup> Following Jane Jacobs's pivotal study of cities, which tied their vitality to "[t]he ballet of the good city sidewalk,"<sup>30</sup> scholars in sociology, psychology, and economics, as well as planners and designers, have all investigated the nature of sidewalks and other public spaces.<sup>31</sup> They have produced a multitude of recommendations respecting the form such spaces should take and the uses to which they ought to be dedicated if public spaces are to foster better cities—and better lives for city dwellers.<sup>32</sup> Pedestrian malls, greenery, public art, central squares fostering communal interaction, open vistas, bike lanes, and other suggestions have, thanks to these authors' work, become staples of popular thought and practice respecting the shape of our public spaces.

These highly impactful works from the social studies and the arts often leave one inescapable inquiry unaddressed, however. They overlook the question of how the decision to act on these suggestions—to maintain green

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29. Z. Muge Akkar, *Questioning the "Publicness" of Public Spaces in Postindustrial Cities*, 16 *TRADITIONAL DWELLINGS & SETTLEMENTS REV.* 75, 75 (2005) ("Public spaces . . . have become the subject of renewed concern among design professionals and researchers for more than two decades.").

30. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 50 (Vintage Books ed. 1992).

31. See, e.g., STEPHEN CARR ET AL., *PUBLIC SPACE* (1992); Mark Francis, *The Making of Democratic Streets*, in *PUBLIC STREETS FOR PUBLIC USE* 23, 24–28 (Anne Vernez Moudon ed., 1987); Ali Madanipour, *Public Space in the City*, in *DESIGN PROFESSIONALS AND THE BUILT ENVIRONMENT: AN INTRODUCTION* 117 (Paul Knox & Peter Ozolins eds., 2000); FRANCIS TIBBALDS, *MAKING PEOPLE-FRIENDLY TOWNS: IMPROVING THE PUBLIC ENVIRONMENT IN TOWNS AND CITIES* (1992); SHARON ZUKIN, *THE CULTURES OF CITIES* 49–78 (1995); Anastasia Loukaitou-Sideris, *Privatisation of Public Open Space: The Los Angeles Experience*, 64 *TOWN PLAN. REV.* 139 (1993); Ali Madanipour, *Dimensions of Urban Public Space*, 1 *URB. DESIGN STUD.* 44 (1995); Ali Madanipour, *Why Are the Design and Development of Public Spaces Significant for Cities?*, 26 *PLAN. & DESIGN* 879 (1999); Don Mitchell, *Introduction: Public Space and the City*, 17 *URB. GEOGRAPHY* 127 (1996).

32. For a recent review, see ERIC KLINENBERG, *PALACES FOR THE PEOPLE: HOW SOCIAL INFRASTRUCTURE CAN HELP FIGHT INEQUALITY, POLARIZATION, AND THE DECLINE OF CIVIC LIFE* (2018).

spaces, to place a work of public art, to close a street to traffic, to preserve vistas, etc.—is to be made and implemented.<sup>33</sup> Yet that question—the *legal* question—is, as the Presidential Center and electric scooters examples highlight, unavoidable for the realization of any real-world proposal pertaining to public spaces.

As those examples further illustrate, the question involves more than the mere allocation of ownership rights. Laypeople, lawmakers, and commentators too often assume that the main task of property law with respect to public spaces is to determine which spaces are public and which are private.<sup>34</sup> Once the label of public—as opposed to private—is affixed to the space, most of the law’s work is, supposedly, done.<sup>35</sup> That, however, simply is not the case in the examples provided above. The law clearly, and unquestionably, deems both the park and the sidewalks at issue in these disputes as publicly owned.<sup>36</sup> Yet in order to actually settle the disputes, the law must do more; it must decide who that public owning the property actually is.

This core theoretical insight of the Article builds on, and connects, important strands in two bodies of literature: property theory and local government law. Property theory, for more than a century, has focused on

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33. When debating the “publicness” of public spaces, non-legal works, naturally, address other, non-legal concerns. For example, they ask whether public space’s design and location augment stratification and gentrification, whether they serve a homogenous public and promote social filtering, and highlight the control over public uses now exercised through surveillance technologies. *See, e.g.*, Akkar, *supra* note 29, at 75–76; Stanley I. Benn & Gerald F. Gaus, *The Public and the Private: Concepts and Action*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 3, 6 (Stanley I. Benn & Gerald F. Gaus eds., 1983); Mike Davis, *Fortress Los Angeles: The Militarization of Urban Space*, in *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* 154 (Michael Sorkin ed., 1992).

34. The first work to note the limits of the traditional, binary privately owned versus publicly owned approach was Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986). In this highly important work Rose argued that there are two forms of public property: one owned by the government, another, “inherently public property,” owned by the general public. She thus accurately expanded the traditional category of public property beyond the too constrictive private versus public distinction. However, this work too is focused on the specific ownership labels affixed to property—while somewhat expanding the number of labels—rather than on powers of control. Further significant work in this field was done by Joseph Kearney and Thomas Merrill, who reviewed the old public dedication doctrine, which the modern common law abandoned, to highlight the promise and limits of a legal regime empowering specific individuals—but not others—to enforce public rights. They note how this approach diverges from current academic thinking which tends to assume that the public is a unitary category wholly distinct from the private. Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 NW. U. L. REV. 1417, 1524 (2011).

35. Compare with Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 297 (1998) (criticizing practitioners and scholars of property while noting that “[l]abeling something as property does not predetermine what rights an owner does or does not have in it”).

36. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1543 (1998) (“Of course, parks and sidewalks were . . . [public] property . . .”).



deconstructing the concept of private ownership.<sup>37</sup> The starting point is often found in Wesley Hohfeld's celebrated assertion that ownership is not a unitary legal institution that conveys the same (and absolute) rights on all owners of all assets at all times.<sup>38</sup> Rather, private property is a bundle of rights—a diverse and flexible assortment of entitlements leaving owners with varying powers and obligations that might change across owners and things owned.<sup>39</sup> As part of the explosion in sophisticated writing about property theory over the past two decades,<sup>40</sup> some scholars have tried to pinpoint the most important right in the ownership bundle, and to survey the variance in its potency across different settings.<sup>41</sup> Many scholars have zeroed in on the owner's right to exclude others from her land, stressing that said entitlement enables the owner to set the contours for the land's use.<sup>42</sup> One important recent contribution summarized such efforts by characterizing private property as the power to “set[] the agenda” for an asset.<sup>43</sup>

This Article imports into the realm of public property a version of that line of thinking: the main task of the law of public property is to identify those actors who may set an agenda for public assets. It suggests that the

37. Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS: PROPERTY 69, 69 (1980).

38. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710–11, 743–44 (1917).

39. See, e.g., Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1086 (1984) (“[P]roperty is simply a label for whatever ‘bundle of sticks’ the individual has been granted.”).

40. See generally, e.g., Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257 (2014); Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1015 (2008); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517 (2003); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001); Francisco J. Morales, Comment, *The Property Matrix: An Analytical Tool to Answer the Question, “Is This Property?”*, 161 U. PA. L. REV. 1125, 1129 (2013); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1893 (2005); Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897 (2007); Joseph William Singer, Essay, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009).

41. See, e.g., Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001) (tracing the worrisome rise of the modern legal economists' view of property as simply a list of rights, and advocating instead for a return to the conception of property as a distinctive in rem right); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000) (explaining that property is different since it has a core and as a result only certain property rights can be created).

42. See J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (1997); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 439 (2003); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1699 (2012).

43. Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1450 (2013).

ownership-focused approach to public property rights ought to be supplemented with, if not supplanted by, a version of this agenda-setting-focused approach.

This move will also connect the public property literature to the theoretical literature in the field of local government law. There, commentators stress that local power is a diverse concept that can be, and is, wielded by an exceptionally wide, and widening, group of actors.<sup>44</sup> Local government law is a framework for allocating decision-making powers over public services and assets among governments operating on different levels—state and local.<sup>45</sup> As recent writers explain, these levels themselves are also incredibly diverse internally. The local—as the alternative to the state—can be a city,<sup>46</sup> a county,<sup>47</sup> a special district,<sup>48</sup> or a school district.<sup>49</sup> It can consist of elected officials or administrators.<sup>50</sup> It can accommodate, in addition to these local level officers, micro-local level players of differing formal standings—a neighborhood referendum, a community board, etc.<sup>51</sup>

Local government law thus not only determines what should be left to local, as opposed to state, level decision-making; it must also decide what, or who, is the “local” empowered to make the local decision. The idea that a key component of local government law is identifying the “local” appropriate for each case should be transported to property law’s thinking about public property—the task at hand is to identify the “public” appropriate in each case.

The notion whereby singling out a space as subject to a public right is merely the first step in the analysis—whose following, more important step is identifying the relevant public—can thereby enrich our theoretical understanding of the concept of public property. It also aids in solving practical doctrinal challenges. The insight promoted here will refocus legal disputes on the meaningful question they involve—and away from the unhelpful issues currently preoccupying courts. For example, the important question should not be whether a park on which a presidential center is suggested has ever been submerged under water (and hence the public trust doctrine, under its historical reading, should be applied to it).<sup>52</sup> Rather, it

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44. See generally Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014).

45. GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW*, at xiii (6th ed. 2015).

46. See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1059 (1980).

47. Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010).

48. Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971 (2013).

49. Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U. L. REV. 945 (2017).

50. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017).

51. Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 508 (1997); Shoked, *supra* note 44.

52. See *supra* notes 6–10 and accompanying text.

should be whether it is sensible to enable a city through its democratic processes to decide to which uses a park would be put.<sup>53</sup> In addition to thereby isolating the true inquiry involved in such cases, the Article offers courts tools to tackle that inquiry. It develops tests that can be employed to determine who, or what, should have the power to direct the uses of a public space, such as a park: the local government, the public at large, an individual private owner, or a set of specific common law strictures.

These tests for settling specific disputes will be derived from the considerations that have historically animated the common law in its dealings with public spaces. A myriad of common law rules determine what spaces can become public and how. The key theme the Article uncovers as holding together the historical and doctrinal experience of these diverse common law rules is the focus on discerning whether a given, contested public space has a “natural” or “innate” use.<sup>54</sup> The Article thus suggests adopting this question as a criterion for also settling disputes over the use of public spaces. If a public space does not have such a use, then a court should refrain from intervening. Decisions respecting the space’s management, and potential changes to it, should be left to the relevant local government, as the public’s democratically elected representative.<sup>55</sup> Only if, conversely, the public space does have a natural or innate use, should the court consider inserting itself into disputes over the space’s management. In these situations the court ought to evaluate the role and interests of the local government, the public at large, and those individual residents uniquely invested in the specific public space.<sup>56</sup> In arbitrating the contest between these actors over decision-making powers in a public space that has an innate use, the court should consider the breadth of the space’s innate use (and its concomitant susceptibility to multiple interpretations), the identity of the parties liable to pay for maintaining the space, and finally, the potential for disinterested governmental decision-making in the specific circumstances.<sup>57</sup>

To establish this test and thereby complete its doctrinal, normative, and theoretical tasks, the Article proceeds as follows. Part I maps out our law of public spaces as constructed by different elements of property law. It explains that the law must always first determine the scope of a public right and then identify the “public” controlling that right. Summarizing and bringing together existing doctrines often understood separately, the

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53. *See infra* Part III.A.

54. *See infra* Part II.

55. *See infra* Part II.

56. *See infra* Part II.

57. *See infra* Part II.

organizational framework that Part I offers should be useful to future lawmakers and analysts independently of the value of the normative review that follows. Part II turns to the normative exploration and draws on the doctrines surveyed in Part I to isolate the considerations that must affect the law when it attempts to designate the “public” that should control a given public right. To illustrate the utility of the criteria thereby developed, Part III applies the tests to the cases of parks and sidewalks—thus reconsidering the challenges presented by the disputes over the Presidential Center and the electric scooters that launched the discussion.

### I. THE LAW OF PUBLIC SPACES

In the modern market system, public rights are conceived as lying at the margins: the system prioritizes, and is sustained by, private property.<sup>58</sup> Property law doctrines thus focus on defining private rights and regulating conflicts between them;<sup>59</sup> when public powers are considered, it is mostly as part of property law’s effort to police the risks these powers allegedly pose to private property.<sup>60</sup> As a result, much of the law’s work in defining public rights is achieved through scattered doctrines, some of them only addressing the issue indirectly. To promote the Article’s goal of providing a better explanation of the law of public spaces, this Part assembles all these doctrines in an attempt to identify the overall structure they put in place. It argues that all the different property doctrines dealing with public spaces—some of them never before even perceived as dealing with public spaces—define those spaces by providing answers to two queries.

The first inquiry the law must address with respect to each and every space pertains to the degree of publicness assigned to it. After the law thereby determines the public right’s strength, it must then decide how that right is to be filled with specific substance: the law needs to identify the person or entity empowered to define and manage the public right’s specific uses.

The law first draws the external strength of the public right—it defines the right—and then it empowers a person or entity to define the internal contents of that public right—it defines the public.

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58. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 70–72 (1983).

59. SINGER, *supra* note 22, at 2.

60. *Id.* at 686.

### A. *Different Rights*

Any discussion of public spaces must commence with their definition. Unlike Roman law, the modern common law does not have a body of law specifically dealing with public spaces qua public spaces.<sup>61</sup> It does not, therefore, readily provide a unitary definition for such spaces. Perhaps the most famous illustration of this lacuna is found in the refusal of the courts—including the U.S. Supreme Court—to conclusively identify “public” spaces that, unlike “private” spaces, must be open to individuals exercising their First Amendment free speech rights.<sup>62</sup>

This legal attitude, generating inconsistent results and frustrating many,<sup>63</sup> is in fact, however, in line with the position of most social scientists and planners. Works in those fields insist that the “publicness” of a space is a matter of degree.<sup>64</sup> Spaces that are absolutely public are rare, as most spaces can be placed on a private to public spectrum.<sup>65</sup>

This spectrum is embodied in the scheme the property doctrines relevant to such spaces produce. The regime these laws institute can best be understood as granting to the public entitlements of varying strengths to the benefits of different spaces. The greater the portion of a specific land's fruits—in economic terms, the land's rents—to which the public holds a legal right, the more public that space is rendered.<sup>66</sup> The public's right to a space's rents can take one of three forms. The most robust public right is assured through ownership—since ownership supplies the owner, here the public, with all the residual rents from an asset. The least robust public rights are assured when the public has no entitlement to any rents from an asset but can block the asset's owner from deriving a certain rent from the asset. In between are public rights affording the public some, albeit limited and specific, rents from an asset. Translating these options into formal legal categories, the public may have fee ownership rights in an asset (the

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61. Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 801–03 (1979) (discussing Roman law); Rose, *supra* note 34, at 720–21 (unearthing the distinct historical doctrines the common law has separately employed starting in the nineteenth century to recognize properties that lie outside the realm of private property).

62. See, e.g., David Dana & Nadav Shoked, *Public, by Necessity*, 13 SEATTLE J. FOR SOC. JUST. 341, 360–64 (2014).

63. See *infra* note 181 and accompanying text.

64. See, e.g., MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE* 11–12 (2004).

65. Neil Smith & Setha Low, *Introduction: The Imperative of Public Space*, in *THE POLITICS OF PUBLIC SPACE* 1, 1 (Setha Low & Neil Smith eds., 2006).

66. See, e.g., YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 3–9 (2d ed. 1997) (defining property as “residual claimancy,” meaning that the owner is the one who gets the residual value after all other claims are satisfied).

strongest public right);<sup>67</sup> it might have an easement in an asset—rights of access to, or use of, an asset owned by a private owner (a weaker public right);<sup>68</sup> or it might benefit from a restriction—through a negative easement or a regulation—placed on the right of an owner to freely use her asset (the weakest public right).<sup>69</sup>

Public fee ownership is the most straightforward form of a public right to a space. It is also inherently the most encompassing. Although ownership's specific definition is hotly contested, it is undoubtedly the most robust property entitlement the law awards.<sup>70</sup> If the public holds the fee interest over a space, the public's standing is equivalent to that of the homeowner in her home. The public will thus hold the residual right to all the land's benefits.<sup>71</sup> Among the quintessential examples of spaces over which the public owns a fee interest, we often count city hall, public roads, or land submerged under water.<sup>72</sup>

But the public might have rights in a certain road, or in the beach fronting the water, even without owning a fee interest therein.<sup>73</sup> Properties that are privately owned by one person can be subject to another person's right to access them: one neighbor can hold a right of way—an easement—over the land of the other neighbor.<sup>74</sup> The same is true when the public is concerned: the public might hold an easement over privately owned land. As compared to a fee interest, an easement is less comprehensive. It is the right to do something—one specific thing—on someone else's land.<sup>75</sup> Thus, the holder of an easement—be it the neighbor or the public—is, unlike the holder of a fee interest, prohibited from altering the nature of her right, or from expanding it beyond its existing contours.<sup>76</sup> The fee owner of a road might have the power to replace the road with a yard; the owner of an easement over the road does not have that power.<sup>77</sup> She can only drive or walk along

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67. See *infra* notes 70–72 and accompanying text.

68. See *infra* notes 73–81 and accompanying text.

69. See *infra* notes 82–88 and accompanying text.

70. SINGER, *supra* note 22, at 3 (contesting the idea of ownership as an absolute right, portraying it instead as the fullest bundle of rights that the law will recognize).

71. Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2067 (2012) (arguing that ownership entails “residual managerial authority” and “residual accessory rights”).

72. See, e.g., *infra* notes 145–146 and accompanying text.

73. *Lewis v. Jones*, 1 Pa. 336, 337 (1845) (“[T]he right to the soil of a highway resides in the proprietor of the land over which it has been laid; and that the citizen has no more than a license to pass along it with carriages and cattle; an abuse of which, like the abuse of any other license given, not by the party, but by the law, makes him a trespasser . . .”).

74. SINGER, *supra* note 22, at 178.

75. *Id.*

76. See, e.g., *McCarthy v. City of Syracuse*, 46 N.Y. 194, 199 (1871) (explaining that the owner of the street, not the public holding an easement over it, held the right to excavate below it).

77. *Hartford v. Gilmanton*, 146 A.2d 851, 853 (N.H. 1958).

the road. Rights of passage through streets are the typical example for a public easement.<sup>78</sup> The historical right to roam that some systems recognize,<sup>79</sup> and rights to hunt that are still protected in many states,<sup>80</sup> are also examples of traditional public easements. More recently courts have similarly recognized public rights of access, for specific purposes, to private beaches.<sup>81</sup>

The intuitive notion of a public right involves one of the two forms of right just reviewed: a publicly held fee interest or a publicly held easement, empowering the public to do many things (in the case of a fee right), or one thing (in the case of an easement right), in a given space. A somewhat less discussed form of public right, however, does not include such a freedom to act awarded to the public. While the typical right—public or otherwise—takes the shape of the ability to do something on land, a right can also consist of the ability to block someone else from doing something on their land or to force them to do something there.<sup>82</sup> Thus a negative easement, for example, might empower an owner to stop her neighbor from building a second floor that will block the views from the owner's house; or a covenant might empower the owner to force the neighbor to maintain that neighbor's yard or pay homeowners association fees.<sup>83</sup> The public similarly can, and does, enjoy such rights to interfere with another owner's freedom. Historic preservation regulations (barring an owner from altering her landmarked building)<sup>84</sup> or conservation easements (prohibiting an owner from disturbing the natural or scenic values of her land)<sup>85</sup> are examples.<sup>86</sup> The public does not own,<sup>87</sup> or even have a right to enter, the landmarked building

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78. S. H. Kress & Co. v. City of Miami, 82 So. 775, 775 (Fla. 1919) (quoting Lord Mansfield's statement that "the king has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil").

79. See John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739 (2011).

80. See Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004).

81. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).

82. SINGER, *supra* note 22, at 226.

83. *Id.* at 227–28.

84. The Supreme Court approved of historic preservation ordinances in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

85. A conservation easement is "a qualified real property interest [contributed] to a qualified organization exclusively for conservation purposes." 26 C.F.R. § 1.170A-14(a) (2018). The earliest use of conservation easements was to protect the scenic views from highways. They are still mostly used to preserve open spaces. See 4 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 34A.02 (Michael Allan Wolf ed., 2018).

86. Another example is ordinances that create an inability to down "heritage" trees on your own land. See, e.g., *HIGHLAND PARK, ILL., ORDINANCE* § 94.403 (2009).

87. Therefore, the use of a landmarked historic building can later on be changed by the private owner. See *Teachers Ins. & Annuity Ass'n v. City of New York*, 623 N.E.2d 526, 530 (N.Y. 1993).

or the nature preserve.<sup>88</sup> It still, however, controls, to some degree, those spaces' uses, and, at least allegedly, derives a benefit from the fact that certain uses (namely, development) are prohibited there. Hence, these, too, are public rights in a space.

### *B. Different Publics*

Public rights in property thus differ in strength: from the all-encompassing fee interests, through the more partial easements, to the most limited negative easements or regulations. Regardless of its location on this strength continuum, a given public right, like any other right, must be filled with specific content. Fee ownership can translate into many different modes of developing the owned land; an easement, such as a right of way, can be employed in different fashions (for example, travel by pedestrians versus by cars) and for different purposes (for example, for ingress and egress purposes alone versus for recreational purposes); a negative easement or regulation restricting another's use of her land can bar (or not bar) different activities. Furthermore, even once initially defined, the manner of employment of any of the rights need not be constant—it might be allowed to change over time. The desired pattern of development of the land held under a fee interest can perhaps shift (say from open space to residential development); the easement's uses or purposes can expand (say adding cars to pedestrians and recreation to ingress and egress); a negative easement or regulation restricting the development of a lot can be adjusted or lifted (in exchange for consideration or to allow a development desirable to both parties). After a right has been recognized and protected from outsiders, that is, the law must still determine the modes and goals of its exercise, and the ability to alter these later on.

For private rights this challenge—of filling a right with specific contents—is normally not particularly taxing. It is for the right's owner to set the agenda for its use—subject to agreements with others and to any other existing legal restrictions.<sup>89</sup> The right-holder is a specific person (real or legal) and it is for her—subject to the law—to choose what to do with her right, once that right is recognized.<sup>90</sup> For public rights, however, this move is more complicated. Decisions respecting the use of a right are to be made

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88. E.g., Nicholas Caros, Note, *Interior Landmarks Preservation and Public Access*, 116 COLUM. L. REV. 1773, 1796–97 (2016) (explaining that the New York City historic preservation ordinance does not allow the commission, probably, to force owners to permit the public's entry into protected interiors).

89. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 287 (2008) (explaining the role of the owner as setting an agenda subject to obligations such as a covenant).

90. *Id.* at 289–90 (arguing that private ownership is the power to set an agenda for a resource).



by the right's holder, and the holder of the right in these cases is the public. But who or what exactly is "the public"?

"Publics are queer creatures. You cannot point to them, count them, or look them in the eye."<sup>91</sup> The problem is particularly daunting from a legal perspective, as no legal category plainly corresponds to the term "public." So, in the case of each and every one of the public rights just described—public fee ownership, public easement, public restriction—what is the "public"? Identifying the holder of the "public" right over a space, the "public" that can then determine the right's mode of employment, is not a straightforward task. Works in cultural studies and the social sciences attest to its difficulty. Some scholars view the definition of the public as the result of a political or class struggle.<sup>92</sup> Others present it as the collective product of negotiation and coordination.<sup>93</sup> Still other scholars insist on the recognition of a counterpublic—a subculture requiring its own public spaces.<sup>94</sup> Certain commentators thus conclude that there simply is no general idea of the public: the public is whatever people in a particular place and context think it is.<sup>95</sup>

The law, perhaps unsurprisingly, concurs: it does not assume a unitary and fixed concept of a public. It does not even engage the task of identifying the public directly. The law only touches upon the task indirectly when setting the ways in which the public rights described in the preceding section are acquired. In those situations, the law simply cannot avoid the task. Doctrines governing the creation of a right must identify the act necessary for the right's creation; in the process, they also have to identify the actor responsible for the creation. Accordingly, the doctrines regulating the acquisition of a *public* right inescapably discern a *public*—the specific actor creating that right. Therefore, through a review of these doctrines we can ascertain the different publics the law currently recognizes.

Public rights can be acquired in four different ways: by governmental act, through a market conveyance, following the passage of time, and automatically. Each of these modes operates through specific legal doctrines which can generate public rights of different strength stripes (fee, easement, restriction), though not necessarily of all strength stripes (for example, the passage of time cannot result, in American law, in a restriction).<sup>96</sup> Each also,

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91. MICHAEL WARNER, *PUBLICS AND COUNTERPUBLICS* 7 (2002).

92. DAVID HARVEY, *REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION* 67–68 (2012).

93. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 58–102 (1990).

94. WARNER, *supra* note 91, at 56–57.

95. *Id.* at 11.

96. SINGER, *supra* note 22, at 205–06.

as shall be seen now as the four will be reviewed in turn, imagines a different “public.”

The first, and perhaps most intuitive, way through which the public acquires property is through an act of the government—the entity that is the public’s organized form.<sup>97</sup> American law endows government with two powers that enable it to generate public property rights: eminent domain and the police power. The eminent domain power allows the government to take, for a public use, property from a private owner in exchange for just compensation.<sup>98</sup> The power can thus be used to acquire public fee interests or public easements.<sup>99</sup> The police power authorizes the government to regulate the uses of land without compensating the affected owner.<sup>100</sup> Through the police power the government can thus place public restrictions, such as historic preservation ordinances, on private land.<sup>101</sup>

Both these powers are wholly governmental: the government exercises the eminent domain and police powers and acquires any resultant rights. The Supreme Court has repeatedly stated that the determination whether to turn to the eminent domain power is the government’s alone to make.<sup>102</sup> Thus a court will not second-guess the government’s decision to acquire property through eminent domain.<sup>103</sup> Plaintiffs arguing that the government’s decision is wrong-headed, or that the specific taking will not serve a truly public goal (for example, when used for economic development) will normally fail.<sup>104</sup> Similarly, individual petitioners cannot force the government to take property to create a road they deem desirable.<sup>105</sup> The rule is even clearer with respect to the police power: the constitutional nondelegation doctrine bars governments from transferring to

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97. Abraham Bell & Gideon Parchomovsky, Essay, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1426 (2006).

98. U.S. CONST. amend. V.

99. For examples of the use of the eminent domain power to acquire a fee interest in a park, see *W. Chi. Park Comm’rs v. W. Union Tel. Co.*, 103 Ill. 33 (1882); *Crystal Lake Park Dist. v. Consumers Co.*, 145 N.E. 215 (Ill. 1924); *Wright v. Walcott*, 131 N.E. 291 (Mass. 1921); *Cty. Court of St. Louis v. Griswold*, 58 Mo. 175 (1874); *Brooklyn Park Comm’rs v. Armstrong*, 45 N.Y. 234 (1871). For examples of a taking of land for highways, see 3 HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY* § 924 (3d ed. 1939); VT. STAT. ANN. tit. 19, § 712 (2017) (empowering towns to take property for laying highways). For examples of taking of an easement, see *City of Rockland v. Johnson*, 267 A.2d 382 (Me. 1970); *Hartford v. Gilmanton*, 146 A.2d 851, 853 (N.H. 1958).

100. See, e.g., Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REG. 91, 103 (2011).

101. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978).

102. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954).

103. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 243 (1984) (“[O]ur cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”).

104. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

105. 3 TIFFANY, *supra* note 99, § 924.

others the police power.<sup>106</sup> Government may not permit other entities to create or enforce public restrictions.<sup>107</sup> Consequently, the “public,” for purposes of acquiring public rights through government power (eminent domain or police power), is, perhaps unsurprisingly, the government.

That is not necessarily the case where other doctrines generating public rights are concerned. The second manner of creating a public right is through a market conveyance. Eminent domain and the police power are doctrines that may force an owner to part ways with a right for the benefit of the public, but an owner can also choose to do so of her own volition. She can convey a property right to the public as a gift or in the course of an exchange. Gifts of a fee or easement right to the public<sup>108</sup> are regulated through the doctrine of dedication.<sup>109</sup> A dedication is a donation of an owner's property to the public's use.<sup>110</sup> It thus consists of an offer by the owner and an acceptance by the public.<sup>111</sup>

Since a dedication is grounded in the offer an owner makes, its contours are defined in that offer.<sup>112</sup> The granting owner defines the right created: she sets the uses to which the gifted public right will be put, and she might add

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106. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

107. N. Am. Commercial Co. v. United States, 171 U.S. 110, 137 (1898) (“[G]overnmental powers cannot be contracted away . . .”).

108. At its inception the dedication doctrine only allowed for the grant of easements to the public for use of highways and bridges. The first case mentioning the term dedication is *Lade v. Shepherd*, (1732) 2 Str. 1004, 93 Eng. Rep. 997 (KB). American courts expanded the doctrine, applying it to squares and parks: the first such application was in *Pomeroy v. Mills*, 3 Vt. 279 (1830); see also EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES 208 (4th ed. 1885) (declaring that result can be assumed to form part of the country's common law). American courts thus enabled the dedication not only of easements, but also of fee interests. As the Supreme Court explained, “[i]f this is the doctrine of the law applicable to highways, it must apply with equal force, and in all its parts, to all dedications of land to public uses.” *President, Recorder & Trs. of Cincinnati v. Lessee of White*, 31 U.S. 431, 437–38 (1832).

109. A special doctrine is necessary since the law makes it impossible for an owner to convey property rights to the public through a normal conveyance. For a conveyance of land to be valid, the law requires that it detail both the identity of the land's current owner and the identity of that to whom ownership is transferred: identifiable grantors and grantees. See, e.g., *Durbin v. Bennett*, 31 F. Supp. 24, 26 (E.D. Ill. 1939) (omission of grantee invalidates transaction under Illinois law); *Henniges v. Paschke*, 84 N.W. 350, 351 (N.D. 1900); *Brugman v. Charlson*, 171 N.W. 882 (N.D. 1919); *State v. McGee*, 204 N.W. 408, 409 (Iowa 1925). Since, by definition, the public is not an identifiable person or entity, a conveyance to “the public,” or to the residents of an area, is invalid. *Hunt v. Tolles*, 52 A. 1042, 1045 (Vt. 1902); *City of Ardmore v. Knight*, 270 P.2d 325, 327–28 (Okla. 1954). Hence the law required the special doctrine of dedication.

110. *City of Fairfield v. Jemison*, 218 So. 2d 273, 275 (Ala. 1969).

111. *Miller v. Fowle*, 206 P.2d 1106, 1106, 1108 (Cal. Ct. App. 1949) (“Dedication is a matter of contract requiring an offer and an acceptance.”).

112. *Lambright v. Trahan*, 322 S.W.3d 424, 431 (Tex. App. 2010).

restrictions and conditions.<sup>113</sup> Courts hold that the grantor's intent controls, and thus the terms of the dedication will be strictly construed.<sup>114</sup> If, for example, an owner dedicates land for use as a street alone, the local government may not convert that area to another use;<sup>115</sup> if that granting owner specifies that railcars may not use the street, a rail may not be added;<sup>116</sup> if the dedicating owner orders that the land serve as a park, the construction of a fire house will be enjoined;<sup>117</sup> if she instructs that the donated public facility be freely accessed, fees—even if necessary—cannot be charged.<sup>118</sup>

To complete a dedication, the offer the owner makes must be accepted. The recipient of a dedication is the public at large<sup>119</sup>—rather than any individual<sup>120</sup> or entity,<sup>121</sup> such as the government.<sup>122</sup> But the government accepts the offer on the public's behalf,<sup>123</sup> and can thus, like the offering

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113. *Lynchburg Traction & Light Co. v. City of Lynchburg*, 128 S.E. 606, 609 (Va. 1925) (“Dedication of a highway is a mere gift to the public, and the donor may annex thereto any restriction or condition he pleases, not inconsistent with or repugnant to the gift. Otherwise, there would be no gift. The donee cannot dictate the terms of the gift. He can accept or not, as he pleases. If he accepts unconditionally, he thereby agrees to perform the conditions annexed to the gift.”).

114. *Lander v. Vill. of S. Orange*, 279 A.2d 633, 637 (N.J. 1971).

115. *Dunnick v. Stockgrowers Bank of Marmouth*, 215 N.W.2d 93, 97 (Neb. 1974) (Newton, J., concurring).

116. *Lynchburg Traction & Light Co.*, 128 S.E. at 610. Similarly, if the corporation developing a seaside resort dedicated land to public use as open space so as not to block residences' ocean view, the government that accepted the dedication on those terms could not later on propose structures on that land. *Poole v. Comm'rs of Rehoboth*, 80 A. 683 (Del. Ch. 1911); see also *Attorney Gen. v. Vineyard Grove Co.*, 64 N.E. 75 (Mass. 1902).

117. *Quinn v. Dougherty*, 30 F.2d 749, 752 (D.C. Cir. 1929) (holding that where land and a view of the sea from a certain bluff above land have been acquired by the public by dedication, the local government cannot license structures on land beneath bluff that obstruct the view); *Hill v. Borough of Belmar*, 127 A. 789 (N.J. 1925).

118. *Lander*, 279 A.2d at 639.

119. In this manner a dedication differs from other conveyances (grants and typical gifts): the law normally requires that a recipient in a conveyance be identified. *Magnolia Mem'l Gardens, Inc. v. Denton*, 317 So. 2d 38, 42 (Miss. 1975).

120. *Roma Dev. Corp. v. Jones*, 115 N.Y.S.2d 189, 192 (N.Y. Sup. Ct. 1952).

121. *Cent. Veterans' Ass'n of Stamford v. City of Stamford*, 101 A.2d 281, 283–84 (Conn. 1953). An exception recognized by American courts is that a particular religious group or church could be the recipient of a dedication. See, e.g., *Comm'rs of Wyandotte Co. v. First Presbyterian Church*, 1 P. 109 (Kan. 1883).

122. *Lander*, 279 A.2d 633 (explaining that the government cannot be the recipient of a dedication).

123. The dedication may be accepted through a formal act of the relevant authority, say through a municipal ordinance. *McBroom v. Jackson Cty.*, 154 So. 3d 827, 836 (Miss. 2014). Acceptance can also be expressed through the less formal governmental act of simply assuming jurisdiction over the space—for example, possessing or maintaining it—or “some [other] act which unequivocally shows an intent to assume jurisdiction over the thing dedicated.” *De Castello v. City of Cedar Rapids*, 153 N.W. 353, 355 (Iowa 1915).

owner, define the dedicated rights in the deed accepting the dedication.<sup>124</sup>

The same is true when public rights are created through more straightforward private conveyances: a private gift to the government (rather than to the public at large as in a dedication) or a deal with the government.<sup>125</sup> The parties to the transaction—the granting individual and the grantee government—create the right: they define the right the public acquires and its contours.<sup>126</sup> Conservation easements are a useful example. An owner grants a conservation easement to the government or to a designated charitable organization in exchange for a federal tax benefit.<sup>127</sup> The terms of the conservation easement created—the specific developments it bars—are defined in the state statute permitting such easements' creation and in the federal tax code providing the consideration for the grant of a conservation easement.<sup>128</sup> The transfer of a conservation easement typifies the inevitable dynamics of any transaction: the parties to the transaction prescribe its terms. Thus, under the laws regulating the acquisition of public rights through market transfers—a dedication or a typical conveyance—the “public” is both the government and, often to a still greater extent, the original private owner initiating the transfer.<sup>129</sup>

The third mode of creating public rights—the passage of time—introduces yet another notion of the “public.” Market conveyances, like those just reviewed, are the archetypical manner in which property rights are transferred in our property law system. But the system also recognizes transfers resulting not from such agreements of the parties involved, but from the passage of time.<sup>130</sup> Through adverse possession, an individual or

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124. See, e.g., *Miller v. Fowle*, 206 P.2d 1106, 1107–08 (Cal. Ct. App. 1949) (the developer of a subdivision that straddled the boundary between the cities of Oakland and Berkeley offered to dedicate a street therein, and while the offer was accepted by Oakland, it was rejected by Berkeley).

125. Government enjoys the power held by all market participants to purchase property. *United States v. Fox*, 94 U.S. 315, 315–16 (1876) (explaining that “the power of acquiring property for public purposes in any part of the country, by all the usual methods known to the law, is an essential attribute” of a government’s sovereignty); see also VT. STAT. ANN. tit. 19, § 26 (2017) (empowering government to buy land for highways). Thus it can also accept a gift from a landowner. *City of Norfolk v. Meredith*, 132 S.E.2d 431, 434–35 (Va. 1963).

126. See, e.g., *People ex rel. Bd. of Park Comm’rs v. Common Council of Detroit*, 28 Mich. 228, 240 (1873) (discussing the municipal acquisition of lands for one of Detroit’s important parks); *Holt v. City Council of Somerville*, 127 Mass. 408, 410 (1879) (same).

127. 26 C.F.R. § 1.170A-14(c) (2018) (qualifying the donation of a conservation easement as tax deductible); see also Janet L. Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL. AFF. L. REV. 105 (1983).

128. See 4 POWELL, *supra* note 85, § 34A.03.

129. In a dedication, the intent of the grantor might enjoy an elevated status as compared to the intent of the government. Unlike when public rights are acquired through eminent domain or purchase, in the dedication context the terms will be construed against the governmental grantee. *Lander v. Vill. of S. Orange*, 279 A.2d 633, 637 (N.J. 1971).

130. SINGER, *supra* note 22, at 140.

entity can lose her fee ownership rights in a piece of land to another individual or entity who has been possessing the land for a statutorily-set number of years.<sup>131</sup> As any other entity, the government can gain in this manner the property that its agents have possessed for a lengthy time.<sup>132</sup> For example, if a municipal office building encroaches on neighboring privately owned land, the government can obtain fee title to that land through adverse possession.<sup>133</sup>

The passage of time can also, however, generate public rights of a different sort—and with a different notion of the public. Although courts have traditionally held that only identifiable actors can resort to an adverse possession claim,<sup>134</sup> the common law has allowed the general public—the quintessential unidentifiable actor—to acquire certain rights through the passage of time by relying on doctrines other than adverse possession.<sup>135</sup> The most notable doctrines employed for this purpose have been implied dedication, which generates fee interests in the public, and prescriptive easement, which generates public easement rights.<sup>136</sup>

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131. *Id.*

132. 10 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 28.15 (3d ed. 1999) (“A municipality, like an individual, may acquire title to land by adverse possession, where the elements necessary for the establishment of such a right are present, and where the adverse possession may be deemed to be the official act of the municipal corporation.” (footnotes omitted)).

133. *See, e.g.,* *Levering v. City of Tarpon Springs*, 92 So. 2d 638, 638 (Fla. 1957) (municipal waterworks mistakenly constructed partially on private land); *Johnson v. City of Mt. Pleasant*, 713 S.W.2d 659, 664 (Tenn. Ct. App. 1985) (same); *Morgan v. Cherokee Cty. Bd. of Educ.*, 58 So. 2d 134, 135 (Ala. 1952) (school building); *Roche v. Town of Fairfield*, 442 A.2d 911, 917 (Conn. 1982) (allowing for adverse possession of a beach, because it was not just a use by the unorganized public, but by the organized city that maintained the beach, placed life-guards there, etc.). Courts have held that the government acquisition of private property through adverse possession does not constitute an unconstitutional taking. *City of Des Plaines v. Redella*, 847 N.E.2d 732, 737 (Ill. App. Ct. 2006); *Stickney v. City of Saco*, 770 A.2d 592, 603 (Me. 2001); *Weidner v. State*, 860 P.2d 1205, 1209 (Alaska 1993). The one outlier is *Pascoag Reservoir & Dam v. Rhode Island*, 217 F. Supp. 2d 206, 227 (D.R.I. 2002), *aff’d on other grounds*, 337 F.3d 87 (1st Cir. 2003).

134. *Roche*, 442 A.2d at 916 (“[T]he unorganized public cannot acquire rights by prescription.”); 3 TIFFANY, *supra* note 99, § 1193 (“The public cannot, strictly speaking, acquire rights by prescription.”). The traditional reasoning is that possession by the general public—unlike possession by an identifiable government unit—can never meet certain elements required for a successful adverse possession claim, such as hostility and exclusivity. Hostile possession implies that the owner could have sued the possessor in trespass seeking her removal. But the “public” is an indeterminate entity and thus cannot be sued. JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 4:39 (2019); Note, *Dedication of Land to the Public*, 14 HARV. L. REV. 59, 65 (1900).

135. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. f (AM. LAW. INST. 2000).

136. The doctrine of custom, recognized in a very small number of states, performs a similar function in a less formal manner. The leading case recognizing a public right to use private property based on custom is *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969). The court found that the public had used the dry-sand area of a beach above the high-water mark “according to an unbroken custom running back in time as long as the land has been inhabited.” *Id.* at 676–77. The case’s impact has been limited. Another Oregon court refused to expand the theory to areas above the dry-sand. *State*

The theories animating these two doctrines diverge. The doctrine of prescriptive easements is grounded in the notion that over time a non-permissive use of land (such as passage over it) matures into a right.<sup>137</sup> Implied dedication, for its part, is grounded in the notion that an owner can express her desire to award rights to the public, through dedication, not only by making an explicit offer as discussed above, but also implicitly, for example by acquiescing to repeated public use of her property.<sup>138</sup>

Still, in most states the two doctrines have, over time, come to be applied in a similar, if not wholly identical, manner.<sup>139</sup> The most recent Restatement thus recommends discarding the implied dedication doctrine in this regard, and sole reliance on the prescriptive easement doctrine.<sup>140</sup> Clearly, the doctrines now focus on the same one element. In current law, the key element allowing the public to acquire a right through either of the two doctrines is proof that members of the public have been using a private owner's land in a distinct manner for a long period of time.<sup>141</sup> Once such a pattern of consistent use by the general public is established, the public is awarded the permanent right to continue that specific use.<sup>142</sup>

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Highway Comm'n v. Bauman, 517 P.2d 1202 (Or. App. 1974). Only four other jurisdictions adopted expressly some version of the custom theory in beach access and use cases. *United States v. St. Thomas Beach Resorts*, 386 F. Supp. 769 (D.V.I. 1974); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974); *Cty. of Hawaii v. Sotomura*, 517 P.2d 57 (Haw. 1973); *In re Application of Ashford*, 440 P.2d 76 (Haw. 1968); *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App. 1979). The Texas Supreme Court has more recently disapproved of the doctrine. *Severance v. Patterson*, 370 S.W.3d 705, 728 (Tex. 2012). Other states explicitly rejected it. *Smith v. Bruce*, 244 S.E.2d 559 (Ga. 1978); *Dep't of Nat. Res. v. Mayor of Ocean City*, 332 A.2d 630 (Md. 1975).

137. Originally, English courts based adverse possession and prescriptive easements on a fiction of a "lost grant." But American law—as English law—has mostly abandoned the theory. 7 JAMES L. BROSS ET AL., *THOMPSON ON REAL PROPERTY* § 60.03(b)(6)(ii) (David A. Thomas ed., 2d ed. 2006); see, e.g., *Elmer v. Rodgers*, 214 A.2d 750, 752 (N.H. 1965) (rejecting the "lost grant" theory of prescription, and finding that the true policy behind prescription is the "stabilization of long continued property uses," similar to the policy underlying adverse possession); see also *Hunt Land Holding Co. v. Schramm*, 121 So. 2d 697, 700 (Fla. Dist. Ct. App. 1960).

138. *City of Norfolk v. Meredith*, 132 S.E.2d 431, 434 (Va. 1963) (finding that intent to dedicate land "may be implied from [the landowner's] actions and the long use of his land by the public").

139. Clay Alger, *Use Interrupted: The Complicated Evolution of Utah's Highway Dedication Doctrine*, 2008 UTAH L. REV. 1613, 1621.

140. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. f.

141. For examples of continued public use serving to establish dedication, see *Stecklein v. City of Cascade*, 693 N.W.2d 335, 339 (Iowa 2005); *Hollywood, Inc. v. Zinkil*, 403 So. 2d 528, 535 (Fla. Dist. Ct. App. 1981); UTAH CODE ANN. § 72-5-104(2)(a) (West 2020) ("A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of 10 years."). For examples of such use generating a public right of way through prescriptive easement, see *Thorsteinson v. Largaud*, 284 P. 92, 93 (Wash. 1930); *Dutton v. Slayton*, 593 P.2d 1071, 1072 (N.M. 1979); *Zakutansky v. Kanzler*, 634 N.E.2d 75, 81 (Ind. Ct. App. 1994); *State ex rel. Game, Forestation & Parks Comm'n v. Hull*, 97 N.W.2d 535, 535 (Neb. 1959).

142. See, e.g., COLO. REV. STAT. ANN. § 43-2-201(1)(c) (West 2019) ("The following are declared to be public highways: . . . All roads over private lands that have been used adversely without interruption

In other words, through its past use the general public dictates the creation of a permanent public right and its contours. The public's use defines, for example, the line and width of a road acquired through continued use.<sup>143</sup> It similarly sets the purposes for which the right gained over a space can be put: if the public, for example, is found to have established a right over a beach through a long-practice of fishing there, the resultant permanent right is restricted to fishing, and would not include camping or driving.<sup>144</sup> As these examples illustrate, under the doctrines governing the acquisition of public rights through the passage of time, the "public" creating rights is the public at large.

A fourth, and final, mechanism for creating public rights exists—and it has its own definition of the "public." The three mechanisms reviewed so far are all ways in which private property becomes subjected to public rights. Governmental act, market conveyance, and the passage of time are manners through which private property is wholly or partially transformed into public property. But the common law also recognizes a group of properties that need not be transformed into public: properties that are automatically public.<sup>145</sup> This unique result is achieved through the public trust doctrine.<sup>146</sup> Lands that the doctrine covers must remain public and cannot be transferred to private parties.<sup>147</sup> They are held by the government—but only as a trustee.<sup>148</sup> The beneficiary of the interest in the land, and thus its true owner, is the public at large.<sup>149</sup> Consequently, the government (unlike a typical property owner) cannot freely convey assets it holds under the public trust doctrine.<sup>150</sup> Since it holds them "in trust in

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or objection on the part of the owners of such lands for twenty consecutive years . . ."); *Dunnick v. Stockgrowers Bank of Marmouth*, 215 N.W.2d 93, 97 (Neb. 1974) ("[T]he nature of public rights in a highway acquired by prescriptive use should be equated with those flowing from an implied dedication of the land as a road or highway.").

143. 4 TIFFANY, *supra* note 99, § 1211. The public's original use, for example, determines whether the side ditches are included in the public right of way. *Bd. of Sup'rs of Tazewell Cty. v. Norfolk & W. Ry. Co.*, 91 S.E. 124, 128–29 (Va. 1916).

144. Margit Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669, 689–91 (1983).

145. Perhaps a better term is "inherently public" which was coined in an important work by Carol Rose, who uses it in a slightly broader way. Rose, *supra* note 34, at 713.

146. At least one state allows for property to be deemed automatically public through another doctrine. In Minnesota, a public cartway is automatically created to serve landlocked lands under certain conditions. MINN. STAT. § 164.08, subdiv. 2 (2014).

147. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892).

148. Joseph L. Sax, *Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England*, 78 CALIF. L. REV. 1543, 1558 (1990) ("[P]ublic trust properties reflect profoundly important traditions, sharing both the notion of inalienable rights inhering in the community as a collectivity, and the concept of owner as trustee . . .").

149. *Rung v. Shoneberger*, 2 Watts 23, 25–26 (Pa. 1833) (explaining that government's ownership of square is "qualified"; city is "trustee" for the public's "use").

150. *State v. Cleveland & Pittsburgh R.R. Co.*, 113 N.E. 677, 682 (Ohio 1916).



perpetuity for the free and unimpeded use of the general public,”<sup>151</sup> it can only transfer these properties in a manner that promotes the trust’s goals.<sup>152</sup>

The two decisions relevant to the acquisition of public trust properties—what properties are subject to the doctrine and when can such properties be transferred away from the public—are dictated by the common law.<sup>153</sup> English courts first developed the public trust doctrine and applied it to tidal waters and the land they submerge.<sup>154</sup> Starting in the nineteenth century many American courts, interpreting the common law, expanded the doctrine to any navigable waters.<sup>155</sup> More recently, some courts have also deemed varying portions of the beach fronting such waters to be public trust properties.<sup>156</sup> One court broadened the doctrine to cover water even when used as a resource,<sup>157</sup> and at least one other appeared willing to recognize a park as subject to the public trust.<sup>158</sup> Starting in the 1970s, commentators have called for even further expansion of the common law doctrine to cover other spaces: for example environmental resources,<sup>159</sup> or publicly enjoyed views.<sup>160</sup> Different courts have thus applied the doctrine to different spaces, and some advocates are urging courts to apply it to still other spaces.

A similar diversity of attitudes characterizes judicial decisions respecting the occasions when land recognized as subject to the public trust can be transferred away to private uses. Thus, for example, one court found that land subject to the public trust could be developed as a football stadium

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151. Hope M. Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change*, 95 NEB. L. REV. 649, 674 (2017).

152. Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things that Go Bump in the Night*, 85 IOWA L. REV. 849, 888–98 (2000).

153. *See* Union Square Park Cmty. Coal., Inc. v. N.Y.C. Dep’t of Parks & Recreation, 8 N.E.3d 797, 801 (N.Y. 2014) (explaining that under the public trust doctrine, “it is for the courts to determine what is and is not a park purpose”); Kearney & Merrill, *supra* note 34, at 1523–24.

154. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 635–38 (1986).

155. Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 828 (2004).

156. SINGER, *supra* note 22, at 88–89.

157. *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 724 (Cal. 1983) (en banc). More recently, a lower California court applied the doctrine to groundwater as well. *Env’tl. Law Found. v. State Water Res. Control Bd.*, No. 34-2010-80000583, 2014 WL 8843074, at \*7 (Cal. Super. Ct. July 15, 2014). The Hawaii Constitution explicitly subjects water resources to the doctrine, HAW. CONST. art. XI, §§ 1, 7, and courts have recognized a broad rule of standing allowing citizens to sue, *‘O Haleakala v. Bd. of Land & Nat. Res.*, 317 P.3d 27, 46 (Haw. 2013).

158. *See Paepcke v. Pub. Bldg. Comm’n of Chi.*, 263 N.E.2d 11 (Ill. 1970).

159. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970).

160. Hope Babcock, *Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep?*, 42 ECOLOGY L.Q. 1 (2015).

servicing an NFL team,<sup>161</sup> while another found that that same kind of land could not be developed as a private university campus.<sup>162</sup> In light of such decisions, commentators note that the public trust doctrine lacks any discernable standards despite its pretenses at objectivity.<sup>163</sup> At the end of the day it confers almost full control on courts.<sup>164</sup> Courts, at their own discretion, decide what properties become public under the public trust doctrine and which of those must always remain public. This compelling realist insight notwithstanding, the public trust doctrine still imagines the public interest in certain properties as defined by a set of specific common law strictures.<sup>165</sup> Since such supposed strictures, in a common law system, are judge-made, some level of inconsistency, and even mistake, might be inevitable. Still the “public” responsible for the acquisition of public rights through the public trust doctrine is a set of common law dictates—as filtered by judges.

Each of the four different modes of creating public rights—governmental act, market conveyance, passage of time, and properties that are automatically public—thus identifies a different actor as the right’s creator. They thereby suggest to us the different options that might stand for the “public” in a public right: the government, a specific private actor, the public at large, or common law strictures. The law imagines a varied number of publics for the diverse public rights—fee, easement, restriction—it recognizes. But which of these publics should be chosen in a given case to hold the public right at issue after its creation? What logic should be guiding the law in making the choice among the different legal publics? Those are the questions I turn to next.

## II. WHO SHOULD THE PUBLIC BE

Part I’s description of the law of public spaces established that aside from determining what types of rights the public can hold—a relatively straightforward task as those rights track recognizable private property law categories—the law must also determine who the “public” holding those rights is. That assignment is more challenging. The different entities capable

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161. *Friends of the Parks v. Chi. Park Dist.*, 786 N.E.2d 161, 170 (Ill. 2003) (explaining that although the private NFL team will benefit from using a stadium, the public will enjoy it as well and thus the public trust doctrine is not violated).

162. *Lake Mich. Fed’n v. U.S. Army Corps of Eng’rs*, 742 F. Supp. 441, 445 (N.D. Ill. 1990) (explaining that although the public will benefit from certain elements of the project, such as a beach, the primary beneficiary will be the university that will enlarge its campus).

163. *Kearney & Merrill*, *supra* note 34, at 1523–24.

164. *Id.*

165. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980).

of standing for the “public” can, as was established, be discerned through an examination of the disparate doctrines governing the creation of public property rights. But those doctrines do not necessarily dictate who the “public” holding the public rights—once they are created—should be. The doctrines reviewed tell us who the “public” holding a public right might be, not who it should be in a given public space. Disputes like those surrounding the Presidential Center or the electric scooters mentioned in the Introduction involve spaces where the public rights have already been created. Indeed, in these and most similar cases, the public right at issue was created a long time ago.<sup>166</sup> The right’s ancient source does not represent a particularly useful factor in settling a contemporary dispute over who should hold the right and set its uses.

At the same time, the normative themes animating the doctrines for public rights’ original acquisition can instruct us on the relevant considerations that should be taken into account when settling current disputes over existing public rights. This Part thus first isolates the normative considerations animating the laws governing the creation of public spaces as just reviewed, and then relies on those normative considerations to develop a principled test for determining who the “public” that controls the use of an existing public right should be.

#### *A. The Law of Public Spaces’ Normative Theme*

The central doctrines that constitute our law of public spaces as surveyed in Part I appear wholly disparate: covering different spaces, generating different rights, mandating different modes of acquisition, and identifying different publics. Still, despite all these differences, it is perhaps not particularly surprising that certain common themes, or concerns, can be detected pervading all of them; after all, the doctrines share a subject matter—public spaces. The most salient of these normative themes, this Section will argue, is the notion that certain spaces subject to public rights—but not other spaces similarly subject to public rights—have a specific use that is inescapable and innate to them.

The public trust doctrine, with which the preceding Part concluded its exploration into the American law of public spaces, is a convenient starting point for an exploration into the normative principles animating that body of law. The legal determination that some spaces are automatically public, and also, consequently, must at all times be put to a given, and unchanging,

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166. Jackson Park, the site of the presidential library, was created as a public space in 1869. *See supra* note 2. Sidewalks in America were created as public spaces in the late nineteenth century. *See infra* note 285 and accompanying text.

use, is a glaring exception to the general pattern of our legal system. Almost everywhere else, that system is deeply committed to the free flow of assets.<sup>167</sup> The public trust doctrine materializes as a strikingly unique mechanism, put in place specifically to serve the public's rights.<sup>168</sup> The rationales behind such a radical doctrine thus inevitably shed light on the allegedly vital principles the law aims to achieve by creating public rights.

The public trust doctrine's dramatic choice to single out certain properties as necessarily public has been ascribed to several factors. Some commentators view the doctrine as expressing the notion that certain properties—navigable waters, for example—are particularly important and thus cannot be put to a private use.<sup>169</sup> A nuanced version of this argument explains that these properties are so intrinsically vital for a citizen's well-being that, by its very nature, a free society mandates their availability to each and every citizen.<sup>170</sup> Other writers opine that the doctrine gives voice to a healthy skepticism respecting governmental actions that shift certain properties from one use to another.<sup>171</sup> Another scholar notes that the doctrine identifies spaces that are “most valuable when used by indefinite and unlimited numbers” of people, especially those spaces necessary for commerce, an activity bringing forth infinite returns to expanding participation.<sup>172</sup>

One core thread runs through all these different accounts. If certain properties are of particular importance, if they are necessary for a free society, if governmental decisions to reallocate them are prone to be dubious, if they are put to their most beneficial use when shared, it is only because those properties have a core, innate, and almost natural use to which they must be dedicated. Otherwise, any claim that they have a uniquely important function would be incoherent.

This core assumption that aids, as suggested here, in explaining the public trust doctrine's normative underpinnings is apparent when reviewing the doctrine's historical development. Judges originally focused the doctrine on waterways since they viewed these as subject to a specific, innate—indeed, literally natural—use: navigation and fishing.<sup>173</sup> Bodies of water were naturally created, and humans put them to those specific uses inherent to their nature. Thus, courts could intuitively—and plausibly—

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167. Kearney & Merrill, *supra* note 155, at 800 (“The public trust doctrine[ is] a jarring exception of uncertain dimensions . . .”).

168. *Id.*

169. Sax, *supra* note 159, at 484–85.

170. *Martin v. Waddell's Lessee*, 41 U.S. 367, 414 (1842).

171. Sax, *supra* note 159, at 490.

172. Rose, *supra* note 34, at 774.

173. *See supra* notes 144–145.

hold that these spaces were never intended to be put to any other use. Courts could then proceed to conclude that government was barred not only from turning these spaces private, but also from interfering in any other way with their “natural” uses.<sup>174</sup>

For this same reason, modern courts have been reluctant to expand the number of properties covered by the public trust doctrine to spaces that, unlike navigable waters, might not have a limited and clear natural use,<sup>175</sup> or to expand the uses of properties protected by the doctrine to include recreation, which unlike fishing and navigation, might not so easily be deemed a natural or innate use of navigable waters.<sup>176</sup> At the heart of the public trust doctrine, therefore, is the principle that the uses which are made of certain specific public properties must be related to certain natural uses that are peculiar to those properties.<sup>177</sup>

This logic is, as noted, perhaps easiest to grasp in the context of the public trust doctrine because the uses of space that the doctrine targets could always be imagined as dictated literally by nature. But the idea’s pertinence does not hinge on a given public space’s being a natural resource. The rationale that certain properties have specific inherent public uses can, and does, similarly set the contours of public rights created by the other acquisition doctrines reviewed in Part I, doctrines that are not limited in their application to natural resources.

Dedication law provides an illustration. As seen, the individual granting the space to the public defines the dedication’s terms: the rights granted to the public, their breadth, and goals.<sup>178</sup> If the dedicator remains silent, however, courts have held that the public gains the right to use the dedicated property to the full extent to which that type of property would be commonly used.<sup>179</sup> The natural, or intrinsic, use of the dedicated public space thus serves as a default.

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174. See *supra* notes 144–145.

175. See *supra* notes 144–145.

176. See SINGER, *supra* note 22, at 89 (discussing most courts’ decision to not include recreation among the public uses that must be allowed under the doctrine).

177. Sax, *supra* note 159, at 477.

178. See *supra* notes 109–116 and accompanying text.

179. *Harvey v. Bell*, 732 S.W.2d 138, 141 (Ark. 1987) (holding that since owner dedicated sewage line to the public she cannot object to a neighbor’s hookup to that line as that is the natural use of such dedicated property); 26 C.J.S. *Dedication* § 77 (1956) (“Unless there are reservations, the general public . . . has the right to use dedicated property to the full extent to which such easements are commonly used.”); *Biglin v. Town of W. Orange*, 217 A.2d 135, 138 (N.J. 1966) (holding that a pool can be built on land dedicated as a recreational field since pools are normally understood as fully consistent with recreational uses).

It does still more. The dedicated space's intrinsic use can even void a condition in a dedication that patently contradicts that intrinsic use.<sup>180</sup> Courts have insisted that while the dedicator can make reservations to her dedication—limiting future public uses or keeping in herself certain use rights over the dedicated space—these reservations must not prohibit specific public uses commonly understood as inevitable in that space.<sup>181</sup> If they do, the reservations are held void as contradicting the purpose of the dedication.<sup>182</sup> The condition cannot be “inconsistent with or repugnant to the gift.”<sup>183</sup> Thus, for example, courts have repeatedly clarified that a dedication of a highway cannot contain a limitation on the public's right to travel there or on current or future functions—such as lighting or drainage—that are assumed to form an inherent and inevitable outgrowth of that intrinsic use.<sup>184</sup>

The guiding principle that certain public properties—but not other public properties—have a natural or intrinsic use is also responsible for the basic architecture of the rules for acquiring public rights through the passage of time. As Part I noted, the common law did not allow the public at large to acquire fee interests through the passage of time (via adverse possession) but did allow for the acquisition of easements in such a manner (via prescription). The difference was generated by the doctrines' diverging attitudes towards an exclusivity requirement. A successful adverse possession claim requires exclusive possession by the claimant—a requirement that the general public, which by definition is non-exclusive,

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180. *Lynchburg Traction & Light Co. v. City of Lynchburg*, 128 S.E. 606, 609 (Va. 1925) (“[T]he donor may annex [to a dedication of a highway] any restriction or condition he pleases, *not inconsistent with or repugnant to the gift.*” (emphasis added)).

181. 4 TIFFANY, *supra* note 99, § 1111 (“But the dedication of property for the purpose of a highway carries the right to public travel and also to the use for all present and future agencies commonly adopted by public authority for the benefit of the people, such as sewer, water, gas, lighting, and telephone systems, and a condition in a deed of dedication prohibiting such uses or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void as against public policy or as inconsistent with the grant; and this is also true of a condition against any grant of a right or franchise to use the street for street railway purposes.” (footnote omitted)).

182. *Vill. of Grosse Pointe Shores v. Ayres*, 235 N.W. 829, 832 (Mich. 1931) (“A condition in a deed of dedication prohibiting the uses above stated or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void, as against public policy or as inconsistent with the grant.”); *City of Camdenton v. Sho-Me Power Corp.*, 237 S.W.2d 94, 98–99 (Mo. 1951) (holding that a city could not abide by a reservation to a dedication of a street preserving in the grantors the right to locate, build, maintain, and operate sewer, telephone, light and power lines, water mains, outlets, and connections for them along, through, or under certain roads).

183. *Lynchburg Traction & Light Co.*, 128 S.E. at 609.

184. *Timberlake Plantation Co. v. Cty. of Lexington*, 431 S.E.2d 573, 575 (S.C. 1993); *Ayres*, 235 N.W. at 832; *Kuehn v. Vill. of Mahtomedi*, 292 N.W. 187, 191 (Minn. 1940).

cannot satisfy.<sup>185</sup> Conversely, in the common law, a successful prescriptive easement claim generally need not meet the exclusivity requirement.<sup>186</sup>

The seemingly technical distinction in doctrinal requirements was actually grounded in the distinct nature of the rights. The logic generating the exclusivity requirement in one doctrine but not the other is that a fee interest, given its nature, cannot be shared, while a right of way, given its nature, can. To illustrate: two strangers cannot easily live in the same house but they can easily drive on the same road.<sup>187</sup>

The difference in the nature of the pertinent spaces is responsible for the doctrinal distinction. That distinction then produces clear and important consequences for the realm of public rights' acquisition. Thus, for example, highways are perceived as naturally suitable for passage by the public, and hence the law deems them—but not other spaces—as potential targets for public rights' acquisition through the passage of time.<sup>188</sup>

The law's emphasis on the notion that certain public rights have specific uses that are inherent to them, discerned in the acquisition doctrines reviewed so far in this Section, has also impacted the law governing the other mode of acquiring public rights: government action. The Supreme Court's eminent domain jurisprudence, allowing the government to condemn property for diverse uses, has always been justified by the claim that the property the government takes has no one specific, inescapable, public use.<sup>189</sup> Thus, the government is free, according to existing doctrine, to employ confiscated property for economic development purposes—not just for traditional public uses—and to collaborate in so doing with private entities.<sup>190</sup> Had the Court ever been persuaded that the public rights the Constitution imagined as created via eminent domain must have specific, innate uses, it would have had to step in to define the specific and limited public uses to which government must employ confiscated properties.<sup>191</sup> Yet the Court has explicitly, and consistently, refused to do so.<sup>192</sup>

The conviction that some public spaces do not have only one particular use that is inherent to them, and that therefore government enjoys freedom to delineate the uses of those public spaces, has impacted another field of constitutional law. Courts have heavily relied on this idea when issuing First

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185. SINGER, *supra* note 22, at 148. At a minimum exclusivity requires excluding the title owner, but since the owner is a member of the public a use by the public does not exclude her.

186. *Id.* at 204.

187. *Id.*

188. 4 TIFFANY, *supra* note 99, § 1211.

189. *See supra* notes 101–105 and accompanying text.

190. *Berman v. Parker*, 348 U.S. 26, 33–34 (1954).

191. *Kelo v. City of New London*, 545 U.S. 469, 514 (2005) (Thomas, J., dissenting).

192. *See supra* notes 101–105 and accompanying text.

Amendment rulings.<sup>193</sup> While the Supreme Court's jurisprudence setting the government's power to limit freedom of speech rights in public spaces is famously muddled—generating closely contested decisions and a seemingly endless stream of disputes in the lower courts<sup>194</sup>—one clear animating notion can be found pervading it. The Court has been rather consistent in its statements to the effect that a public space must always be kept open to speech only if it is the type of space whose natural character invites and accommodates free public expression.<sup>195</sup>

In accordance, the Court has held that only some government-owned properties are to be recognized as “quintessential public forums” which must be open to any member of the public seeking to exercise her free expression rights.<sup>196</sup> Other public properties are not subject to such constitutional regulation. Different approaches have been suggested to ascertain whether a given public space is, in its very nature, a public forum, and thus inherently susceptible to free speech: the place's traditional use,<sup>197</sup> its objective character,<sup>198</sup> its physical similarity to places dedicated to a certain use,<sup>199</sup> public expectations,<sup>200</sup> and more. But in one way or another, the notion that certain public places are naturally or inherently accommodating for a specific activity—here, speech—while others are not, has guided decisions in the field.<sup>201</sup> It has led courts to distinguish, for example, highway rest-stops,<sup>202</sup> airport terminals,<sup>203</sup> and public transit vehicles,<sup>204</sup> from sidewalks. The latter are spaces where speech is a natural activity and hence must be allowed under the Constitution, whereas the former, so courts hold, are not. Courts further hold that once a public space, such as the sidewalk, has such a natural function, the government cannot

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193. For an overview of key rulings, their background, and reasoning, see Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

194. Gey, *supra* note 36, at 1555 (“The . . . public forum doctrine may not be the most fractured area in modern constitutional law, but it comes close.”).

195. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650–51 (1981) (explaining that each public space will be judged in accordance with its “special attributes,” especially the “nature and function of the particular forum involved”).

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

197. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

198. *United States v. Kokinda*, 497 U.S. 720, 737–38 (1990) (Kennedy, J., concurring).

199. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 698–99 (Kennedy, J., concurring).

200. See Edward J. Neveril, “Objective” Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery, 90 NW. U. L. REV. 1185, 1212 (1996).

201. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (“The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place . . .”).

202. *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1195–96 (11th Cir. 1991).

203. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 672.

204. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 306 (1974) (Douglas, J., concurring in the judgment).



take away that function by simply passing a law purporting to render that space closed or to transfer it to a private entity.<sup>205</sup>

First Amendment jurisprudence, which, as noted at Part I's outset, is perhaps the most salient legal battlefield for the struggle to define and govern public spaces, thus illustrates the degree to which the normative principle whereby some—but not other—public spaces have one specific use that is innate, defined, and inevitable, permeates the law of public spaces.

### *B. Picking the Public in Light of the Law's Normative Theme*

The concerns the doctrines that are responsible for public rights' creation give voice to inevitably embody the core normative priorities of the law of public spaces. These concerns should thus inform the legal approach determining who holds public rights in those spaces once they are created, and, accordingly, how disputes surrounding these rights are to be settled. These normative concerns should, that is, dictate the answer to the question this Article poses: who should "the public" be in any given public space?

The key principle the preceding Section discerned among the concerns molding the doctrines that regulate the acquisition of public rights was that some public spaces, but not others, have a specific, innate public use. That insight will accordingly now be translated into an operative test that can identify, in a given case, the public that is to be adjudged the holder of an existing public right.

The typical dispute over the uses of a public space materializes, as seen in the Introduction, when a new use of the space is launched. A court that must then resolve a challenge to a government policy respecting that new or changed use (a policy introducing the use, allowing it, or banning it) should employ a two-step test. The first step of the proposed test is rather straightforward, given the preceding normative discussion: a court must ascertain whether the given public space has one specific use that is inherent to it. As the Supreme Court's holdings in the eminent domain cases clarify, no grounds can be found to interfere with a government's decision respecting a specific public property if that specific property does not have a natural, or innate, use.<sup>206</sup>

Unless such a use can be identified, why should political processes be upended? In the absence of an objective metric that an innate use can provide for assessing the government's decision, the democratically elected

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205. *Hicks v. Commonwealth*, 548 S.E.2d 249, 254 (Va. Ct. App. 2001), *aff'd in part*, 563 S.E.2d 674 (Va. 2002), *rev'd sub nom. Virginia v. Hicks*, 539 U.S. 113 (2003).

206. *See supra* notes 189–194 and accompanying text.

government's judgment should not be second-guessed.<sup>207</sup> If no independent criterion exists, neither the courts, nor the public at large, nor any individual, can be assumed to hold better insight into the optimal use of the public right than that which the local government has. The government is the public's elected representative and thus enjoys democratic legitimacy that the other entities lack.<sup>208</sup> For this reason it should be the default decision-maker for the public. This is, after all, the general attitude of American constitutional law: courts only substantively assess the decisions of a democratically elected government if there is some clear, predetermined standard those decisions could be said to breach.<sup>209</sup>

This constitutional theory is already embedded in the law of public spaces. As seen earlier, the law only interferes with the government's freedom of action when creating public rights—insisting that some such rights are held by the government in trust and must remain public, or that a certain condition appended to a dedication the government accepts be ignored—if the relevant right is such that it must be put, given its nature and character, to a specific use.<sup>210</sup>

The same should apply when the law considers the management of a public right once it is created. In determining the uses of public assets the government should not be replaced in its typical role as the public's representative when the asset at-hand cannot be said to have some specific innate use from which no rational deviation is imaginable. If the public right has no specific use to which it must be put, the “public” holding and managing it should, that is, be the democratically elected local government.

If, on the other hand, the relevant public space does have one specific use that is natural, inherent, or innate to it, limits on the local government's decision-making powers can be justified—and a court has objective grounds for interfering. The court is in possession of a benchmark against which to evaluate the government's decision: the court should protect the space's inherent use. Specifically, it must, in such cases, decide how much leeway to grant the government in interpreting the innate use, or in adjusting that

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207. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005) (criticizing and overruling an older test for assessing a governmental taking that required judicial approval of the goals of a property's regulation, because it “would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies”).

208. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980).

209. Under traditional living constitution notions, the court should interfere in specific cases identified as involving the failure of the political process. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Under originalism, a court must intervene when a statute contradicts a specific clause of the Constitution, as understood by the drafters. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

210. *See supra* notes 173–177, 180–184 and accompanying text.

use to new conditions. This second step of the legal analysis (relevant only in cases where a natural use can be identified for the space) should, like the first step, be designed in light of the overall normative concern animating this field of law. That concern—with the specific intrinsic uses associated with certain public rights—can generate at least three factors relevant for determining the expanse of the government's discretion in managing properties that have one specific public use that is intrinsic to them.

One inevitable factor is the breadth of the specific innate use of the contested public right. Not all uses (innate or not) are created equal. Some are rather narrow (say, fishing) while others are wide or somewhat opaque (say, recreation). The latter inevitably can be subject to more than one reasonable interpretation (recreation may or may not include camping, for example). The more flexible and open to contending readings the specific use that is intrinsic to the public space, the more hesitant the court should be before intervening. As noted, the space's inherent use serves as the basis for judicial intervention in the management of the underlying public right. Hence if that use is rather unclear, the court lacks clear grounds for aggressively intervening in the democratic process. This suggested approach is an outgrowth of American law's general attitude. Cases where there is more than one legitimate public decision to be made are the quintessential instances where a court accords a realm of reasonableness within which a democratically elected government can act freely.<sup>211</sup> Conversely, courts are much more willing to step in, and assess the wisdom of the government's action, when the applicable legal order leaves little room for multiple readings.<sup>212</sup> Accordingly, in disputes over public spaces, courts should employ common law strictures to embody the public in interpreting the relevant public right's intrinsic or natural use when that use is narrow and well-defined.

The second factor for this stage of the analysis has to do with costs. A court should be willing to expand the discretion allowed the government in interpreting a public space's seemingly inevitable use when the government actually pays the price of sustaining the public space. Public spaces are not costless. Like any other space, they must be maintained and at times repaired.<sup>213</sup> The maintenance and repair costs of certain public spaces can be rather substantial. Furthermore, the costs of maintaining some public

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211. The famous case announcing this approach is *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 393 (1937).

212. An example is found in the treatment of government action in torts law. Government often enjoys tort immunity when its acts involve an element of discretion and choice, *United States v. Gaubert*, 499 U.S. 315, 322 (1991), but not when it or its employees have "no rightful option but to adhere to [a] directive." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

213. Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 441 (2014).

spaces can fall squarely and almost fully on the government alone.<sup>214</sup> The legal doctrines reviewed in Part I acknowledge, and account for, this fact. For example, the law of dedication mandates that a government accept—or agree to the acceptance of—a dedication.<sup>215</sup> Courts added this requirement due to the worry that individual dedicators or specific members of the public desiring to accept a dedication will saddle the government with the costs of maintaining a space that serves them—but not the rest of the public.<sup>216</sup> They will in this fashion offload on the public the costs of maintaining a space that while technically public, is of particular private benefit to them alone.<sup>217</sup> This concern is born of the overall theme this Part detected throughout the law of public spaces: not all public spaces have an inherent use beneficial to all public members.

The concern respecting the government's need to carry a space's maintenance costs is present when a new use of the public right in that space, or a suggestion to reinterpret its existing intrinsic uses, is introduced. New uses of the space might increase the costs of maintaining the public space. Therefore, if the government is destined to bear the brunt of those costs it should be afforded more of a say in determining whether the new uses are to be allowed. As the entity actually footing the bill for the public right, it should be considered the relevant "public" for that right and hold more power over it.

Conversely, if the government does little to finance the maintenance of a public space that has an inherent use, its position should not be prioritized. If the public space is of the sort that requires little by way of maintenance, the public at large, rather than the government, might be the right entity to

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214. Steven Siegel, *The Promise of a Public Commons in New Communities in the United States: Toward a Qualified Constitutional Right of a Subdivision Developer to Dedicate Streets and Parks to a Municipality as a Means to Challenge Local Government Policies Requiring Privatization of New Subdivisions and as a Means to Ensure Public Streets and Parks in New Communities*, 29 J. LAND USE & ENVTL. L. 277, 294–95 (2014).

215. The requirement is either created expressly in statutes or by operation of the common law. *See, e.g.*, *Brumbaugh v. Cty. of Imperial*, 184 Cal. Rptr. 11 (Ct. App. 1982); *City of Louisville v. Louisville Scrap Material Co.*, 932 S.W.2d 352 (Ky. 1996); *Broussard v. Jablecki*, 792 S.W.2d 535 (Tex. App. 1990); *City of Easton v. Koch*, 31 A.2d 747 (Pa. Super. Ct. 1943); *Bd. of Cty. Comm'rs v. Lavington*, 14 P.2d 493 (Colo. 1932).

216. *See, e.g.*, *Bradford v. Nature Conservancy*, 294 S.E.2d 866, 874 (Va. 1982).

217. For similar reasons, the New York courts added the same requirement when interpreting statutes allowing the creation of public roads through prescription. Despite the relevant law only requiring continued use, the courts demand that the road has been "kept in repair or taken in charge" by the local government. *In re Marchand v. N.Y. State Dep't of Envtl. Conservation*, 973 N.E.2d 1270, 1271 (N.Y. 2012).

hold decision-making powers over the space.<sup>218</sup> The “public” for such public spaces should thus be the public at large. Similarly, if the public space is of the sort that is mostly maintained by specific individuals—adjoining owners (as might sometimes be the case with beach properties) or the original dedicator (as when a dedicator commits not only land to the public but also funds for its maintenance)—those individuals might be the best situated to make determinations respecting the public space’s management.<sup>219</sup> For such public spaces, specific individuals might be the most appropriate “public” deemed the holder of the public right.<sup>220</sup>

Another, third and final, factor should affect the choice of a “public” for a public right that has a specific use innate to it. An inevitable consideration demarcating the latitude awarded a government in its handling of public resources is that government’s trustworthiness. A dose of skepticism towards the government’s asserted good intentions—the suspicion that in a given case it is not acting to promote the public good, but rather the good of a specific, well-positioned private group—permeates much of the law of public spaces.<sup>221</sup> Many courts have interpreted the public trust doctrine in this vein.<sup>222</sup> They have been much more willing to fall back on the public trust doctrine in circumstances where the risk of government corruption in the handling of the relevant public assets is elevated.<sup>223</sup> Similarly, in its most recent eminent domain decision, the Supreme Court stressed that any use of that governmental power to acquire property must be thoroughly scrutinized to verify that the government is not covertly acting on behalf of some private or corporate interest.<sup>224</sup> Government must therefore, the Court insisted,

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218. See 11A MCQUILLIN, *supra* note 132, § 33.45 (discussing the opposite scenario, where “the place offered to be dedicated may be one which, because of location or other reasons, would be a burden rather than a benefit to the municipality, or else the benefits would be slight in comparison to the burden. In such a case, the imposition of liability on the municipality without its consent is apparently unjust”).

219. See *Grabnic v. Dorskocil*, No. 2002-P-0116, 2005 Ohio App. LEXIS 2703, at \*15 (Ct. App. June 10, 2005) (noting that dedication of a driveway would not “make[] sense,” in view of the fact that the driveway “would be a dead end road leading up to a single street address” and “would be nothing more than a private drive maintained at the municipality’s expense”).

220. This suggestion is in line with claims whereby effective regulation of public spaces is assured when those individuals—neighboring owners—who are most affected by it are the only ones granted the power to enforce restrictions on its use. See *Kearney & Merrill*, *supra* note 34, at 1524.

221. *E.g.*, *Sax*, *supra* note 159, at 560 (arguing that the function which courts perform in such cases is to promote equality of political power for a disorganized and diffuse majority by remanding appropriate cases to the legislature).

222. *Robbins v. Dep’t of Pub. Works*, 244 N.E.2d 577, 580 (Mass. 1969) (interpreting the doctrine as a tool to assure that decisions respecting resources reflect the general will, rather than the interests of a few).

223. *Sax*, *supra* note 159, at 491 (explaining that the model courts appear to have embraced requires that a court look skeptically at programs which infringe upon broad public uses in favor of narrower ones).

224. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).

show that the governmental taking of property is done in the context of a broader public plan.<sup>225</sup> Otherwise, the Court instructed, a reviewing court should suspect that the confiscation is a mere transfer of an asset from one private party to another private party—with only the pretext of a public interest.<sup>226</sup>

This suspicion of the government's motives reflects the core normative theme of public spaces law reviewed throughout this Part. The more inescapable the public use of a certain space, the more government ought to be mistrusted if it attempts to transfer that space to a private user.<sup>227</sup> If the current use of the public property is (allegedly) inescapable, a heightened burden of proof should be placed on the government trying to, in essence, escape that use. An identification of an asset with an inherent use conveys a notion of permanence, while elected officials, even if not corrupt, sometimes only consider short-term returns. The court, which, unlike elected officials, has a long time horizon, can assure stability and adherence to a supposedly stable intrinsic use.<sup>228</sup>

Misgivings about the government's motivations should, therefore, inform courts' identification of the holder of powers over a public space that has certain intrinsic uses. In cases of particular risk of dubious governmental behavior, courts should refrain from identifying the government as the public's representative. Specifically, if there are distinct private beneficiaries to a governmental decision respecting a given public space, a court should be willing to meaningfully review the government's decision and interject on behalf of the public at large. Situations in which abutting owners stand to derive a disproportionate benefit from a public space (or from a specific activity allowed or disallowed therein) serve as examples. So do cases where private infrastructure, serving a specific corporate entity and not the general public, is allowed on the public space free of charge. In such and similar circumstances, courts should mistrust the government. To protect the public's specific natural use of the space, they should define the "public" holding the relevant public rights in these cases as the public at large.

In sum, this Section's analysis suggests that in light of the normative theme reigning over the law of public spaces, a two-step test is necessary for ascertaining who the public holding a given public right should be. A

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225. A similar requirement is sometimes applied when government agencies make decisions respecting public trust assets. *E.g.*, *State v. Pub. Serv. Comm'n*, 81 N.W.2d 71 (Wis. 1957).

226. *Kelo*, 545 U.S. at 478.

227. Sax, *supra* note 159, at 565.

228. On the courts' long time horizon, see, for example, Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1047 (2006).

court should commence by determining whether the given public right has one use that is inherent, natural, or intrinsic to it. If it does not, the democratically elected local government should be deemed the “public.” If the right does have a natural use, the court should proceed to the next step, where it should consider three factors. First, the breadth of the space’s intrinsic use: the narrower that use, the more willing the court should be to reject the identification of the government with the “public” and to resort to common law strictures in determining the public space’s uses. Second, the identity of the entity bearing the costs of maintaining the public right: if those costs are substantial then either the government or individual owners—whichever of the two shoulders those costs—should have a strong claim to be the public holding the public right. Third, the degree of faith in government decision-making: if low, then the public at large should be adjudged the public holding the public right.

A final clarifying comment respecting the test developed in this Part of the Article is in order before we turn to actually applying it. The test heavily relies—almost solely relies—on the notion that certain uses of public spaces are innate or natural. As noted earlier, this notion does not assume that certain uses are dictated by “nature.” The identification of a use as intrinsic, inherent, or innate is itself intrinsically, inherently, and innately social and cultural. A use is inescapable only given a specific set of social or legal precepts that govern at a given time or place. Thus nothing bars an innate use from changing over time, and from some individuals contesting the alleged innateness (or indeed, incontestability) of that use. Still, even with these caveats, many times a use perceived by society as innate to a space, one that the vast majority of observers view as uncontested, can be identified—as the examples the next Part discusses show. Such common perceptions, although there is nothing natural to them, should be given legal weight.

### III. WHO SHOULD THE PUBLIC BE: EXAMPLES

The test just suggested for identifying the “public” in a given public space is in line with the normative concerns of the existing laws of public spaces. But is it also effective in solving real world legal problems? This final Part of the Article aims to show that it is. The Part uses the framework developed in Part II to analyze the two disputes reviewed in the Introduction, respecting the Obama Presidential Center and the electric scooters. Through that exercise, it also clarifies more generally the legal

standing of two of the most important public spaces we have: parks and sidewalks.

### A. *The Public in Parks*

The park is a quintessential public space, and the public's right in most parks is of the fee type.<sup>229</sup> The public owns the park.<sup>230</sup> But who is that "public" owning the park? As noted earlier, that is precisely the question the federal court must decide as it contemplates the dispute surrounding the Obama Presidential Center. In contending that the Center cannot be built on publicly owned parkland, the plaintiffs argue that the "public" controlling the land and determining what uses can be made of the rights therein is not the city—which has approved the project—but rather the strictures of the common law.<sup>231</sup>

To settle such a dispute—to identify the "public" relevant here: the city or a set of common law rules—we must first ask, in light of the framework developed in Part II, whether the contested public space has one specific use that is inherent to it. This Section will review, in order, first the ever-changing societal views respecting the role of parks, then the character of the debates that typically engulf the choice of park functions, and finally judicial decisions dealing with parks. Based on all of these it will conclude that the answer to that question is no. Hence the democratically elected local government should be deemed the public holding the public rights in the park.

The history of parks in America illustrates just how diverse societal views respecting the role and potential uses of parks have always been. The modern idea of the park emerged in the nineteenth century. Before, to the extent open spaces that were not privately owned existed in the midst of human settlements, such spaces consisted of grazing areas open to all.<sup>232</sup> Perhaps the most famous example for this kind of park space is the Boston

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229. Sarah Schindler, *The "Publicization" of Private Space*, 103 IOWA L. REV. 1093, 1095 (2018) ("The mention of urban public space might bring to mind a variety of images: a grand public park like San Francisco's Golden Gate Park . . .").

230. Of course, private parks also exist, but these are of no concern to this Article. The degree of government involvement with such parks might be relevant in other contexts. *See, e.g.*, *Evans v. Newton*, 382 U.S. 296, 301 (1966) (holding that the existence of a segregated park that benefitted from city involvement was unconstitutional under the Fourteenth Amendment because the mere transfer of title from public to private hands did not instantly erase an established tradition of government involvement in the property).

231. *See supra* notes 4–10 and accompanying text (discussing the plaintiff's claim) and notes 145–164 and accompanying text (discussing the public trust doctrine on which that claim is based).

232. ROY ROSENZWEIG & ELIZABETH BLACKMAR, *THE PARK AND THE PEOPLE: A HISTORY OF CENTRAL PARK* 4 (1992).



Common—the “first public park in the United States”—which was used by locals as a cows’ pasture for two hundred years starting with colonization in the 1630s.<sup>233</sup>

Thereafter the nature of that park and others changed. In the mid-nineteenth century, as industrialization, mass immigration, and urbanization began changing the American landscape, many artists, policy-makers, and reformers were harkening back to the old rural days.<sup>234</sup> They thus introduced the concept of the city park as an antidote to the era’s urban realities.<sup>235</sup> The park they imagined was an attempt to recreate a pastoral idyll. Hence, it was to be used for quiet contemplation of nature.<sup>236</sup> New York City’s Central Park, designed by Olmsted and Vaux in 1858, embodied that idea: the park contained meadows and winding paths, natural components such as rocks and trees (none of them indigenous), and was intentionally rendered inhospitable to active pursuits.<sup>237</sup>

Soon enough though, by the turn of the twentieth century, that notion of the park—as a locus for passive appreciation of nature—was losing steam.<sup>238</sup> In the Progressive Era, social reformers and planners, drawing on the new academic fields of sociology, psychology, and anthropology, and on advances in the health studies,<sup>239</sup> began arguing that parks should provide urban dwellers with opportunities to exercise and engage in sporting activities.<sup>240</sup> The proliferation of playgrounds, the addition of baseball diamonds, swimming-pools, and other such amenities to major parks—including to Central Park as reimaged by the uber-planner Robert Moses—reflected these new ideas respecting the optimal uses of parks.<sup>241</sup>

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233. BOS. LANDMARKS COMM’N, BOSTON COMMON: BOSTON LANDMARKS COMMISSION STUDY REPORT 17 (1977), [https://www.cityofboston.gov/images\\_documents/Boston\\_Common\\_Study\\_Report\\_4\\_tcm3-32547.pdf](https://www.cityofboston.gov/images_documents/Boston_Common_Study_Report_4_tcm3-32547.pdf) [<https://perma.cc/4FCU-SRCT>]; NAT’L PARK SERV., BOSTON COMMON, [https://www.nps.gov/nr/travel/massachusetts\\_conservation/boston\\_common.html](https://www.nps.gov/nr/travel/massachusetts_conservation/boston_common.html) [<https://perma.cc/3QR9-R4S9>] (“[Boston Common is c]onsidered the oldest public park in the United States . . .”).

234. LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* 3–4 (35th Anniversary ed. 2000) (exploring the contrasting images of industry and nature in nineteenth-century American literature and arguing that cultural concerns over the decline of wilderness led to the proliferation of the idea that technology is an intrusion into a pristine yet vanishing nature).

235. Geoffrey Blodgett, *Frederick Law Olmsted: Landscape Architecture as Conservative Reform*, 62 J. AM. HIST. 869, 878 (1976).

236. Galen Cranz, *Changing Roles of Urban Parks*, 22 LANDSCAPE 9, 9, 11 (1978).

237. ROSENZWEIG & BLACKMAR, *supra* note 232, at 131 (explaining that the design of Central Park rested on a “belief in the moral superiority of a natural aesthetic”).

238. *Id.* at 374.

239. On the rise of the social sciences and their effects, see THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 15–30 (1973).

240. Cranz, *supra* note 236, at 12–15.

241. ROSENZWEIG & BLACKMAR, *supra* note 232, at 392–95.

Later still, as the postwar decades were marred by suburbanization, racial and economic segregation, and social alienation, scholars began advocating for the role of parks as spaces for interaction between strangers—interaction between people of different backgrounds.<sup>242</sup> In the past two decades, similar emphasis has been put on parks' capacity to allow varied constituencies to experience art.<sup>243</sup>

Summarizing some of these observations, one prominent history of the park movement in the United States offers a useful typology identifying at least four distinct eras, each with its own view of the public park's role. When the modern park emerged in 1850 it was first imagined as the “pleasure ground.”<sup>244</sup> Then in 1900 a shift occurred to the “reform park” idea which ruled through 1930,<sup>245</sup> when it was displaced by the “recreation facility” view.<sup>246</sup> By 1965 the “open-space system” came to dominate American parks.<sup>247</sup>

The many sharply distinct visions for parks that kept (and keep)<sup>248</sup> replacing each other in quick succession throughout American history refute the notion that parks have only one use that is intrinsic to their nature.<sup>249</sup> The idea is further belied by the public controversies that have materialized over the years respecting parks' uses. Should alcohol be consumed in a park?<sup>250</sup> Should vehicles enter?<sup>251</sup> Should recreational facilities be

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242. See, e.g., Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 92–93 (1998).

243. See, e.g., Asmara M. Tekle, *Rectifying These Mean Streets: Percent-for-Art Ordinances, Street Furniture, and the New Streetscape*, 104 KY. L.J. 409, 410–11 (2016).

244. GALLEN CRANZ, *THE POLITICS OF PARK DESIGN: A HISTORY OF URBAN PARKS IN AMERICA* 3 (1982).

245. *Id.* at 61.

246. *Id.* at 101.

247. *Id.* at 135.

248. The author of the typology of park visions has more recently claimed that starting in the 1990s a fifth model of the park began emerging: the “sustainable park.” Unlike the previous models whose concerns were mostly social, this notion of the park is geared toward addressing ecological problems. Galen Cranz & Michael Boland, *Defining the Sustainable Park: A Fifth Model for Urban Parks*, 23 LANDSCAPE J. 102, 102 (2004).

249. A similar illustration is provided by the complicated history of the National Park System. As commentators have noted, even the original congressional act creating the system defined for it multiple—and conflicting—goals and uses. Much debate has, for example, surrounded the choice between the two goals of conservation and enjoyment. See, e.g., Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 851, 855–57 (2009).

250. See, e.g., ROSENZWEIG & BLACKMAR, *supra* note 232, at 254–56 (discussing such a debate in Central Park).

251. Jeffery C. Mays, *Central Park's Scenic Drives Will Soon Be Car-Free*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/nyregion/central-park-car-ban.html> [<https://perma.cc/AL7-2WRZ>] (discussing the gradual closing of many of Central Park's drives).

constructed?<sup>252</sup> Should food establishments be made available?<sup>253</sup> Should political and ethnic groups erect monuments commemorating their heroes?<sup>254</sup> Should music festivals take over for a weekend?<sup>255</sup> Should a portion of the park be converted into a dog-friendly park?<sup>256</sup> These questions illustrate not only the range of uses to which parks might be put, but also, and perhaps more importantly, the absence of any objective metric that can be used to pick among such potential uses. As one designer notes, the “uncertainty about the meaning of parks”<sup>257</sup> entails the reality that “in contemporary practice the word ‘park’ [is] applie[d] to an almost indiscriminate range of properties.”<sup>258</sup> The potential questions respecting the proper uses of this wide range of properties are political, economic, or social in nature. They form precisely the type of questions that are for the relevant community to settle through the political process.<sup>259</sup>

And indeed, when courts have been forced to intervene in social disputes over park uses, they have largely refused to set any sort of clear-cut legal benchmark for what is a park use. Courts have had to contend with the problem of defining park uses in cases where a specific statute or a specific act of dedication created a park and mandated that that park only be put to “park uses.” When a city attempted to introduce a new use into the park, a

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252. Allison Wrabel, *Amenities for Future Park Debated*, DAILY PROGRESS (Oct. 19, 2017), [https://www.dailyprogress.com/amenities-for-future-park-debated/article\\_df38181d-26fe-5fb0-a3c7-bbfc3fa1cc20.html](https://www.dailyprogress.com/amenities-for-future-park-debated/article_df38181d-26fe-5fb0-a3c7-bbfc3fa1cc20.html) [<https://perma.cc/2ZDR-MLPC>] (discussing a local debate over construction of Scout center in an Albemarle County, Virginia park).

253. See, e.g., Lisa W. Foderaro, *Debate Over Park Eateries Is Older than Aged Wine*, N.Y. TIMES (Mar. 8, 2014), <https://www.nytimes.com/2014/03/08/nyregion/debate-over-park-eateries-is-older-than-aged-wine.html> [<https://perma.cc/29M3-PQ9J>] (discussing the debate over a proposed restaurant in New York City's Union Square Park in light of earlier such debates).

254. See, e.g., ROSENZWEIG & BLACKMAR, *supra* note 232, at 328–32 (discussing the competition between groups over placing monuments and statues in Central Park); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 471–72 (2009). The Court cites an example from New York City, where following the controversy generated in 1876 when the city rejected the proposed placement of a donated monument to honor Daniel Webster, the city adopted rules governing the acceptance of artwork for permanent placement in city parks. The Court also notes that across the country, “municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals.” *Id.* at 471–72 (quoting Brief of Amicus Curiae International Municipal Lawyers Association in Support of Petitioners at 21, *Pleasant Grove City*, 555 U.S. 460 (No. 07-665)).

255. See, e.g., Leonor Vivanco, *Alderman: I Don't Support Riot Fest's Return to Humboldt Park*, CHI. TRIB. (Apr. 30, 2015, 12:50 PM), <https://www.chicagotribune.com/news/redeye-humboldt-park-riot-fest-damage-20150429-story.html> [<https://perma.cc/D6BP-GH32>] (discussing the debate over the use of a city park for a three-day music festival).

256. Justin Laurence, *Lakeview's Luxurious Dog Park Plan Thrills Pet Owners, but Older Neighbors Say No Way*, BLOCK CLUB CHI. (Dec. 9, 2019, 9:22 AM), [https://blockclubchicago.org/2019/12/09/lakeviews-luxurious-dog-park-plan-thrills-pet-owners-but-older-neighbors-say-no-way/?mc\\_cid=3f99552a57&mc\\_eid=2b20f93100](https://blockclubchicago.org/2019/12/09/lakeviews-luxurious-dog-park-plan-thrills-pet-owners-but-older-neighbors-say-no-way/?mc_cid=3f99552a57&mc_eid=2b20f93100) [<https://perma.cc/P2ZN-BBVB>].

257. CRANZ, *supra* note 244, at viii.

258. *Id.* at ix.

259. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 208.

court had to decide whether that new use qualified as “a park use.” In such circumstances, courts have almost universally interpreted the phrases “park use” or “park purpose” broadly to encompass practically any use.

A few examples illustrate. The Pennsylvania court approved the construction, in a park, of a little league baseball field,<sup>260</sup> of a golf course,<sup>261</sup> and of an auditorium for entertainment events charging admission fees;<sup>262</sup> the New Jersey court a clubhouse and concessions for tennis, bicycling, and boating;<sup>263</sup> the California court a library<sup>264</sup> and a parking garage;<sup>265</sup> the Illinois court a pool;<sup>266</sup> and the U.S. Court of Appeals for the Ninth Circuit the leasing of floating homes and lakefront cottages.<sup>267</sup> The New York court, sanctioning the opening of a private restaurant in a space dedicated to park uses alone, explicitly eschewed the use of any standard—even a “flexible standard”—for determining what uses count as park uses.<sup>268</sup> While, the court explained, in light of a specific state statute, “it is for the courts to determine what is and is not a park purpose . . . the [relevant local government body] enjoys broad discretion to choose among alternative valid park purposes.”<sup>269</sup> That court also explained elsewhere that since a park’s potential uses are so plentiful, a “mere difference of opinion” as to “proper and appropriate utilization” will never suffice to overturn the government’s decision.<sup>270</sup> The New Jersey court simply concluded that parks are a broad category that “may be thought of as a combination of open space, facilities for physical activities and accommodations for other recreation and entertainment[,] and playgrounds” and hence courts are willing “to approve a wide variety of uses as within [a park’s] dedicated purpose.”<sup>271</sup> This conclusion clearly reflects the general attitude among courts. Courts have consistently refused to pinpoint one specific use as the inevitable park use.

Throughout American urban history, societal and professional visions for the design and uses of parks have been subject to constant change; the disputes over proper park uses have always been unamenable to objective,

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260. *Shields v. City of Philadelphia*, 176 A.2d 697 (Pa. 1962).

261. *Cohen v. Samuel*, 80 A.2d 732 (Pa. 1951).

262. *Bernstein v. City of Pittsburgh*, 77 A.2d 452 (Pa. 1951).

263. *Hill v. Borough of Collingswood*, 88 A.2d 506 (N.J. 1952).

264. *Spires v. City of L.A.*, 87 P. 1026 (Cal. 1906).

265. *Save Our Heritage Org. v. City of San Diego*, 187 Cal. Rptr. 3d 754 (Ct. App. 2015).

266. *Nichols v. City of Rock Island*, 121 N.E.2d 799 (Ill. 1954).

267. *Idaho v. Hodel*, 814 F.2d 1288 (9th Cir. 1987).

268. *Union Square Park Cmty. Coal., Inc. v. N.Y.C. Dep’t of Parks & Recreation*, 8 N.E.3d 797, 801 (N.Y. 2014).

269. *Id.*

270. *795 Fifth Ave. Corp. v. City of New York*, 205 N.E.2d 850, 851 (N.Y. 1965).

271. *Lander v. Vill. of S. Orange*, 279 A.2d 633, 638 (N.J. 1971).

as opposed to policy-driven, sorting; and courts have repeatedly refused to identify any set of preordained and mandatory park uses. The “strictest” definition of a park that the law can provide is “a piece of ground inclosed for purposes of pleasure, exercise, amusement or ornament.”<sup>272</sup> A place whose functions are so open-ended cannot be said to have a single innate or intrinsic use. “The functions that parks have aimed to fulfill are not natural or inevitable.”<sup>273</sup> Thus, the democratically elected government should be allowed to pick among the wide array of uses that might be made of a park. Such a government can accordingly opt to have a Presidential Center there, and that choice cannot be impeded on any principled grounds. In light of the test this Article developed, in that specific case and in the case of parks in general, the relevant “public” holding the public rights should be the local government.<sup>274</sup>

### *B. The Public on the Sidewalk*

Alongside the case of the Presidential Center, the Introduction presented a second example of a new use launched into an existing public space: electric scooters on sidewalks. Like the park, and perhaps even more so, the sidewalk is a central and well-established public space. Sidewalks are among the most commonplace public spaces.<sup>275</sup> The public often holds a fee

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272. *Perrin v. N.Y. Cent. R.R. Co.*, 36 N.Y. 120, 124 (1867).

273. CRANZ, *supra* note 257, at 239.

274. Throughout this discussion, I assumed that the relevant government making decisions respecting the park is the local, rather than state, government. That assumption is grounded in the common practices of American states. Thus, for example, the Chicago Park District is authorized, under statute, to control Jackson Park. *See supra* note 2. Furthermore, the state legislature has specifically empowered it to erect and operate a presidential center. 70 ILL. COMP. STAT. ANN. 1290/1 (West 2017). Nonetheless, since in American law the local government is a creature of the state, *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907), the state can, by statute, preempt any local decision. Under very specific circumstances, decisions respecting parks might be shielded from such intervention. In some states, local governments might enjoy home rule immunity shielding decisions about their parks from state intervention, if these decisions are found to be “purely local.” *See generally* Nadav Shoked, *Cities Taxing New Sins: The Judicial Embrace of Local Excise Taxation*, 79 OHIO ST. L.J. 801, 822–23 (2018). Additionally, certain decisions respecting some city parks might be deemed proprietary, rather than governmental, and such decisions are similarly protected. *See Bd. of Comm’rs v. Lucas*, 93 U.S. 108, 115 (1876). Arguably, there are good reasons to prefer city, over state, action in this specific field—given how “local” a park is. But both these doctrinal and normative questions are beyond the scope of this Article. The question here was whether the government—any government—should hold the power over the public space. The choice was not between governments, but between government, the public at large, individual owners, or the court. For these purposes, the specific identity of the democratically elected government matters little.

275. WILFRED OWEN, *THE ACCESSIBLE CITY* 95 (1972) (“The space devoted to streets usually represents the largest portion of publicly owned urban land.”).

interest in them, and if not, an easement.<sup>276</sup> Because it is such a prevalent space, disputes surrounding the management of public rights on the sidewalk are prone to arise, especially when new uses are introduced, as with the electric scooters. In such instances, the power of the government to regulate—or itself introduce—those new uses is challenged. These disputes thus press in stark fashion the question of who is the “public” holding the public rights on sidewalks. Part II suggested that this question be answered through a two-pronged test. As will be seen now, unlike with parks, the task of identifying the public holding the public rights in sidewalks involves both steps of the analysis—since sidewalks, unlike parks, do have an intrinsic use.

Sidewalks are a space that most people would intuitively associate with at least one innate, indeed inevitable, use: pedestrian movement. One example for this common intuition was provided very recently. Residents of a major city began complaining that delivery companies block passage on the sidewalk when using it to sort packages, the numbers of which have been soaring given the proliferation of online shopping.<sup>277</sup> But this association of the sidewalk with pedestrian movement is anything but new. It has characterized sidewalks throughout their existence. As will be seen now, that association can easily be discerned in the sidewalk’s history, is apparent in the elements of the law of public spaces reviewed in Part I pertinent to the sidewalk, and finally has manifested itself in recent federal court decisions.

The first comprehensive law authorizing the paving of sidewalks throughout a city was passed by the British Parliament in 1766.<sup>278</sup> The London Paving and Lighting Act<sup>279</sup> was a response to the disorder of the then-existing system, where each owner was responsible for the paving and

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276. See, e.g., *Paige v. Schenectady Ry. Co.*, 70 N.E. 213, 215 (N.Y. 1904) (comparing Dutch law, under which the public acquired a fee to the road, to English law, under which an easement was acquired).

277. See Matthew Haag & Winnie Hu, *1.5 Million Packages a Day: The Internet Brings Chaos to N.Y. Streets*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/27/nyregion/nyc-amazon-delivery.html> [<https://perma.cc/7L4A-P8C7>].

278. The first sidewalks appeared around 2000 to 1900 BC in Central Anatolia. Some ancient Greek and Roman cities also had sidewalks. SPIRO KOSTOF, *THE CITY ASSEMBLED: THE ELEMENTS OF URBAN FORM THROUGH HISTORY* 191, 209 (1992). With the fall of Rome, however, sidewalks disappeared and in the Middle Ages pedestrians did not have a separate space on the street. ANASTASIA LOUKAITOU-SIDERIS & RENIA EHRENFEUCHT, *SIDEWALKS: CONFLICT AND NEGOTIATION OVER PUBLIC SPACE* 15 (2009). It was not until the mid-nineteenth century that sidewalks were reintroduced in continental Europe. LARRY R. FORD, *THE SPACES BETWEEN BUILDINGS* 155 (2000).

279. London Paving and Lighting Act 1766, 6 Geo. 3 c. 26.

maintenance of the portion of the street fronting his property.<sup>280</sup> The result was different paving materials and patterns along the same sidewalk and no separation between the sidewalk and the road where horses and horse-drawn vehicles traversed.<sup>281</sup> Consequently, movement on the sidewalk was challenging—and indeed dangerous—for pedestrians.<sup>282</sup> The Paving Act's goal was to remedy the situation: to facilitate pedestrian movement by assuring uniformity.<sup>283</sup> The Act thus authorized the City of London to create footways throughout the city's streets, to pave them with Purbeck stone (the thoroughfare in the middle was generally cobblestone), and to raise them above the street level with curbs.<sup>284</sup> A century later, and across the ocean, when American municipalities began providing sidewalks in the late nineteenth century, they entertained the same motivation: "one use, walking for transportation, became the primary purpose for which the sidewalks were constructed. . . . [T]he pedestrian became the public for whom the sidewalks were being provided."<sup>285</sup>

The common law as it developed ever since these original English and American paving acts has similarly subscribed to the idea that sidewalks are devoted to free pedestrian movement.<sup>286</sup> As noted in Part II, land dedicated for a sidewalk cannot be made subject to a reservation by the dedicant—despite the latter's normal freedom of contract—that would limit public passage.<sup>287</sup> Such a limitation is deemed inconsistent with the purpose of the dedication or against public policy.<sup>288</sup> A limit on pedestrian movement on the sidewalk, the common law thus believes, goes against the nature of the sidewalk as a public space.<sup>289</sup> Another reflection of this idea is found in the law of prescriptive easements: such easements are created through

280. The first step towards reform was made four years earlier in the Westminster Paving Act of 1762, which created a commission with responsibility for the street. Westminster Paving Act 1762, 2 Geo. 3. c. 21.

281. JERRY WHITE, *LONDON IN THE EIGHTEENTH CENTURY: A GREAT AND MONSTROUS THING* (2013).

282. JERRY WHITE, *CITY RIVALRIES AND THE MODERNISATION OF EIGHTEENTH-CENTURY LONDON, 1720–1770*, at 10 (2011).

283. *Id.* at 20.

284. The Act largely achieved this goal. A guidebook from 1820 praises the new mode of paving delivering "great benefit" since before the streets were "extremely inconvenient to passangers." SAMUEL LEIGH, *LEIGH'S NEW PICTURE OF LONDON* 90 (4th ed. 1820).

285. LOUKAITOU-SIDERIS & EHRENFUCHT, *supra* note 278, at 17.

286. *See also* NICHOLAS BLOMLEY, *RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW* 3 (2011) (arguing that the sidewalk is now understood by courts and other government actors through a "pedestrianism" prism and thus "[t]he role of the authorities, using law as needed, is to . . . ensure that the primary function of the sidewalk is sustained: that being the orderly movement of pedestrians from point a to point b").

287. *See supra* notes 170–172 and accompanying text.

288. *Vill. of Grosse Pointe Shores v. Ayres*, 235 N.W. 829, 832 (Mich. 1931).

289. *Elizabeth City v. Banks*, 64 S.E. 189 (N.C. 1909).

continued public passage on a space, as noted, and can terminate if the public ceases to pass through the space.<sup>290</sup> The law assumes that the public easement has one core use—public movement—and once that use disappears, the easement might be adjudged abandoned with it.<sup>291</sup>

The common law's deep commitment to this position, revealed in both the dedication and prescriptive easement doctrines, whereby sidewalks are meant for walking, affected other elements of the law as well, including trespass. Courts would hold that a person who stopped on the sidewalk in front of a man's house and addressed that man abusively was committing trespass—although the speaker stayed on the public sidewalk. Such a person was held to be diverging from the natural use of the pertinent public space—walking through it.<sup>292</sup> Courts similarly authorized any person who was seeking to use a given road for passage to remove obstructions others had placed there.<sup>293</sup>

The common law's devotion to the view of sidewalks as inherently and inescapably dedicated to walking might now even form part of American constitutional law. Federal courts have always held that this inherent role of the sidewalk could justify the placement of limits on constitutional rights. Thus courts have consistently ruled that the sidewalk's natural function of facilitating pedestrian movement could justify time, place, and manner restrictions on the exercise of otherwise constitutionally protected rights of protest.<sup>294</sup> Similarly, the D.C. Circuit Court of Appeals held in 2019 that an 1892 statute pronouncing it illegal to “crowd, obstruct, or incommode” the sidewalk was not unconstitutionally vague, despite the clearly opaque standards it established, given the prohibition's purpose, which easily aligned with the “common sense” goal of protecting the “prerogative[]” of the public to “walk” on the sidewalk.<sup>295</sup>

At least one federal court has been willing to go further still, and endow the function of the sidewalk as a space for walking with the imprimatur of a constitutional right. In a recent decision, the U.S. Sixth Circuit Court of Appeals struck down Memphis's policy of preventing all persons from walking on the sidewalks of Beale Street—the city's main entertainment

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290. 3 TIFFANY, *supra* note 99, § 930.

291. Normally, abandonment also requires a subjective intent to vacate the right, but prolonged nonuse can serve as evidence for such intent. Some courts hold that an easement acquired by prescription can be lost by nonuse alone—an intent to abandon need not be shown. *See, e.g.,* *People v. Ocean Shore R.R.*, 196 P.2d 570, 579 (Cal. 1948).

292. *Adams v. Rivers*, 11 Barb. 390 (N.Y. Gen. Term 1851).

293. *Inhabitants of Arundel v. M'Culloch*, 10 Mass. (10 Tyng) 70 (1813).

294. *See Pomictier v. Luzerne Cty. Convention Ctr. Auth.*, 939 F.3d 534, 544 (3d Cir. 2019).

295. *Agnew v. Gov't of the D.C.*, 920 F.3d 49, 58 (D.C. Cir. 2019) (quoting Act of July 29, 1892, ch. 320, 27 Stat. 322, 323).



district—on weekends starting at about 3:00 a.m.<sup>296</sup> The court regarded the policy as interfering with the right to travel locally that is protected under the Due Process Clause of the Fourteenth Amendment.<sup>297</sup> For the court, blocking people from passing through the sidewalk contradicted the sidewalk's role and the most basic rights individuals must enjoy in that public space. This special nature of the sidewalk as a distinct public space with an innate use served the court to distinguish the litigated dispute from earlier cases where governments were allowed to block access to specific neighborhoods or regulate the uses of roads.<sup>298</sup>

Whether or not other courts follow the Sixth Circuit's holding, and irrespective of its doctrinal merits, the decision expresses an idea detectable throughout the legal treatment of the sidewalk ever since its modern rebirth: the sidewalk is a public space that has an intrinsic use.<sup>299</sup> Thus, in accordance with the test this Article offers, the public holding the rights over the sidewalk, and freely deciding how to employ those rights, cannot by default simply be the local government (otherwise, the government would always be authorized to close the sidewalk to pedestrian movement). To figure out who, if not necessarily the government, that public should be, we must turn to consider the three factors identified in Part II as necessary for the second stage of the analysis: the breadth of the contested public space's natural use, the identity of the entity bearing the costs of maintaining it, and the degree of faith in government decision-making respecting the specific space.

The first factor is the breadth, or flexibility, of the public space's intrinsic use. Although the natural use of the sidewalk—pedestrian movement—is, as noted, clear, it is a rather broad use, one allowing for multiple variations. No unequivocal definition of an interference with that use can be devised, and thus many uses can be added to the sidewalk without undermining the sidewalk's natural use.<sup>300</sup> Consider the example of Memphis's Beale Street. As noted, the Sixth Circuit held that blocking pedestrians from entering the sidewalk there was an interference with the sidewalk's natural use.<sup>301</sup> At the same time, Memphis has special rules for the use of Beale Street's sidewalks

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296. *Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016).

297. The court of appeals recognized that right earlier in the case of *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002).

298. *Cole*, 839 F.3d at 537.

299. In a recent decision, the Second Circuit found that since the sidewalk's central function is to facilitate pedestrian movement, a local law regulating street vendors should be interpreted as meant to limit interference with pedestrian movement, and that that goal is a legitimate one. *Crescenzi v. City of New York*, 939 F.3d 511 (2d Cir. 2019).

300. *See also* *Brown v. Louisiana*, 383 U.S. 131, 157 (1966) (arguing that unlike a public building, the public street is inevitably the locus of many activities and does not require a special regime).

301. *Cole*, 839 F.3d at 537.

which have been allowed to stand. The city barricades the sidewalk thereby allowing only movement by foot;<sup>302</sup> it specifically prohibits panhandling;<sup>303</sup> it empowers a local association to designate spaces on that sidewalk where the peddling of goods is allowed;<sup>304</sup> and it permits vendors to sell, and patrons to carry, alcoholic beverages on that sidewalk.<sup>305</sup> The permission granted to these uses reflects the reality whereby not all, or even most, uses immediately and inevitably interfere with the public sidewalk's natural use—pedestrian movement.<sup>306</sup> Indeed, had the opposite been true, bicycles, slow walkers, runners, groups or couples, public art or furniture, and side vegetation as well, should have all been forbidden from entering the sidewalk.<sup>307</sup>

These examples illustrate the fact that individuals clearly do not perceive the sidewalk as dedicated for only one single use from which no deviation is allowed. If the law insisted on ordaining that it must so be, it would defeat those expectations. It would promote a normatively undesirable regime defeating the diverse “valued shared ends” members of society assign to the sidewalk. The law would deactivate the diverse and legitimate civil rights claims made to the sidewalk.<sup>308</sup>

The Supreme Court's First Amendment jurisprudence concurs. The Court has always insisted that the sidewalk is the quintessential public forum for exercise of free speech rights precisely because expressive activities there do not inherently interfere with the space's otherwise natural use—pedestrian movement.<sup>309</sup> That is not the case with respect to other public spaces with a natural use.<sup>310</sup> The sidewalk and its natural use—pedestrian movement—are thus held to be distinctly different in this regard from, for example, the road or highway and their natural use—vehicle movement.<sup>311</sup> Almost all diverging activities interfere with the highway's

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302. *Id.* at 533.

303. MEMPHIS, TENN., MUNICIPAL CODE § 6-56-3 (2006).

304. *Id.* § 6-56-5.

305. *Id.* §§ 7-4-15(C)(4), 7-8-23.

306. *Allen v. City of Boston*, 34 N.E. 519, 519 (Mass. 1893) (explaining that “the owner of the land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public”).

307. *See, e.g.,* MEMPHIS, TENN., MUNICIPAL CODE § 11-24-10 (2010) (allowing for riding a bike on the sidewalk); *id.* § 11-24-11 (allowing for the parking of a bike on the sidewalk).

308. BLOMLEY, *supra* note 286, at 28, 109.

309. *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939).

310. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981); *Brown v. Louisiana*, 383 U.S. 131, 157 (1966).

311. *Cox v. Louisiana*, 379 U.S. 536, 554–55 (1965) (“Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement.”).

natural use, as their introduction could block, or greatly obstruct, vehicle movement.<sup>312</sup> That is simply untrue with respect to pedestrian movement on the sidewalk.<sup>313</sup> The sidewalk can—and in American law, thankfully does—suffer other activities that do not necessarily inhibit its intrinsic use as a space for walking.

Apart from being antithetical to a ban on walking<sup>314</sup>—and thus accounting for the Sixth Circuit's decision—the natural use of sidewalks does not generate a precise and unambiguous list of prohibitions on sidewalk uses.<sup>315</sup> Thus, courts cannot rely on a set of common law strictures to monopolize all decision-making powers respecting such uses. Since the natural use of the sidewalk is broad and receptive of multiple interpretations, the democratically elected government cannot be said to flat-out lack the power to regulate the sidewalk.

This conclusion that the first factor precipitates, need not imply, however, that the government is the only entity that should enjoy the power to determine what additional uses—beyond pedestrian passage—are acceptable on the sidewalk. The remaining two factors of the test Part II developed may indicate that other publics could be conceived as holding the public rights on the sidewalk alongside the government. Indeed, they might intimate that the role of those publics should even trump, in certain circumstances, that of the government.

The second factor Part II suggested is the identity of the actor bearing the costs of maintaining the public space. This factor weighs against recognizing the local government as the sole “public” holding the public right to the sidewalk. Local governments cover little of the expense of maintaining sidewalks. They may mandate the laying of sidewalks, but ever since the inception of these mandates in the nineteenth century, abutting owners funded the actual construction of sidewalks.<sup>316</sup> As the New York Court of Appeals put it in one early case, “It is not expected, and cannot be required, that the [city] shall itself forthwith employ laborers to clean all the walks, and so accomplish the object by a slow and expensive process, when

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312. See, e.g., *City of Evanston v. City of Chicago*, 664 N.E.2d 291, 299 (Ill. App. Ct. 1996) (mandating removal of guardrail median installed by defendant city in center of street marking boundary between the two cities).

313. *Hartford v. Gilmanton*, 146 A.2d 851, 853 (N.H. 1958) (explaining that land subject to public easement can be put to many uses not inconsistent with public pedestrian passage).

314. *Swinson v. Cutter Realty Co.*, 156 S.E. 545 (N.C. 1931).

315. See, e.g., *McCarthy v. City of Syracuse*, 46 N.Y. 194, 199 (1871) (explaining that owner could excavate underneath the sidewalk, since the only prohibition generated by the public right to the sidewalk was against direct interference with the right of way).

316. LOUKAITOU-SIDERIS & EHRENFUCHT, *supra* note 285, at 18–19.

the result may be effected more swifty [sic] and easily by imposing that duty upon the citizens.”<sup>317</sup>

Still today, Memphis, for example, outsources all the costs of constructing and maintaining sidewalks to private parties. In new streets, the builder of the lot must construct a sidewalk where the lot fronts the street in accordance with the city’s specifications.<sup>318</sup> Owners must then repair, maintain, and clean existing sidewalks abutting their property.<sup>319</sup> Other cities similarly provide that it is “the duty of the owner of any property fronting on a public street to keep the sidewalk in front thereof in good repair and condition.”<sup>320</sup> Cities routinely require the abutting owner or occupant to remove snow and ice from the sidewalk.<sup>321</sup> Furthermore, many cities now allow area businesses to form micro-local associations—such as business improvement districts—to better maintain the sidewalks fronting their businesses and otherwise improve them.<sup>322</sup> Such associations collect special taxes from area businesses to, for example, expand sidewalk sanitation services, fix broken sidewalks, and place public furniture or art on the sidewalk.<sup>323</sup> Private individuals do not just participate in the maintenance of sidewalks in these formal, legally-mandated, ways. Ethnographers have found that such maintenance and even policing work is sometimes performed by street vendors and even panhandlers occupying the sidewalk.<sup>324</sup>

The government normally still carries some of the sidewalk’s maintenance costs due to its role as supervisor of the abutting owners or businesses. It might be held liable for injuries pedestrians sustain on a sidewalk when it failed to enforce a maintenance ordinance on those owners.<sup>325</sup> The local government’s supervisory power might also subject it to federal and state statutory duties to render the sidewalk accessible to persons with disabilities.<sup>326</sup> But since the government is responsible for only some of the costs of maintaining the sidewalk, there is no reason to deem the local government—and only the local government—the “public” in this public space, to the exclusion of other publics. The individual owners who

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317. Taylor v. City of Yonkers, 11 N.E. 642, 642 (N.Y. 1887).

318. MEMPHIS, TENN., MUNICIPAL CODE § 12-28-2 (2012).

319. *Id.* § 12-28-5.

320. S.F., CAL., ADMIN. CODE § 1.52 (2010).

321. CHI., ILL., MUNICIPAL CODE § 10-8-180 (2015).

322. Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999).

323. *Id.* at 394–95.

324. MITCHELL DUNEIER, *SIDEWALK* 231–52 (1999).

325. 3 CHESTER JAMES ANTIEAU, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 37.05 (Sandra M. Stevenson ed., 2d ed. 2019).

326. Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002).

maintain the sidewalk abutting their homes or businesses might also be reasonably considered the relevant “public.”<sup>327</sup> Alternatively, since all members of the public end up participating in the maintenance of the sidewalk—as each maintains the sidewalk area closest to where they reside—perhaps the public at large is the best “public” to be designated the holder of public rights in the sidewalk.

The third and final factor of the test Part II suggested for discerning the public in spaces with an innate use might aid in distributing the relative roles between these two publics—individual owners and the public at large—and the local government, which the first factor identified as another relevant public on the sidewalk. The final factor focuses on the likelihood of governmental disinterested decision-making respecting the public space that has one specific intrinsic use.

Decisions to transact in public rights to sidewalks might raise concerns about the government’s motivations—though only in certain situations. Whenever the government transacts in public assets or rights, some uneasiness respecting the decision arises.<sup>328</sup> Risks of incompetence or corruption are inevitably present.<sup>329</sup> These risks might be heightened when the public asset traded is the sidewalk. Sidewalks and streets might be valuable properties to some private actors. Such actors might enjoy disproportionate economic or political powers, and, therefore, the transfer of rights to them might appear suspicious. As scholars explain, these risks are alleviated in situations where government transactions are routine and governed by standard procedures.<sup>330</sup> Thus, in cases where the local government has specific rules for the grant of the relevant right in the sidewalk,<sup>331</sup> and a schedule of fees,<sup>332</sup> little reason exists to question the democratically elected government’s judgement. Such cases are those involving, for example, licensing the placement of publicity signs<sup>333</sup> or café

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327. The abutting owner’s duties towards the sidewalk are not limitless. Perhaps most important, as a general rule, she is not, solely by reason of being an abutter, liable for injuries suffered there—unless a statute or ordinance explicitly holds her so. The mere presence of an ordinance mandating construction or maintenance of the sidewalk does not suffice. See C. P. Jhong, Annotation, *Liability of Abutting Owner or Occupant for Condition of Sidewalk*, 88 A.L.R.2d 331 (1963).

328. Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 571–72 (2018).

329. *Id.* at 567–68.

330. *Id.* at 632–33.

331. See, e.g., CHI., ILL., MUNICIPAL CODE § 10-28-015 (2016) (detailing the procedure for application and issuance of permit to use sidewalk).

332. *Id.* § 10-28-017 (2010) (detailing the fees for different uses of sidewalk).

333. *Id.* § 10-28-064 (2015).

tables,<sup>334</sup> allowing temporary closures for special events,<sup>335</sup> or issuing rights for an overhanging canopy.<sup>336</sup>

Conversely, cases of one-off governmental deals, extraordinary transactions with an identified, and strong, market player, are generally conceived as meriting a closer review.<sup>337</sup> The government should be treated with some distrust when it sells rights on the sidewalk that are more expansive than the ordinary licenses just described. The most troubling cases are probably those involving deals in which the government sells the rights to above- or below-ground utility lines.<sup>338</sup> Similar suspicions are justified when portions of the sidewalk are permanently vacated for the benefit of some adjacent business or development.<sup>339</sup> Cases of this persuasion are much likelier to materialize in a city's center, or in commercial areas, where the sidewalk is a valuable economic resource.

In such cases the government should not be automatically assumed to be the public right's custodian. Rather, a court should intervene to secure the public at large's rights in the space's natural uses. For that purpose, any such extraordinary deal should be scrutinized to assess the quality of the government's decision-making process—so as to verify that the interests of the public at large were the guiding standard—and to assure that the consideration paid is fair.<sup>340</sup>

Governmental misuse of public rights in sidewalks is sometimes, but not always, a possibility. In most mundane dealings with these spaces, the democratically elected government can be trusted, and thus there is no need to replace it in its role as the public holding the rights in these public spaces. However, in extraordinary deals, especially those involving sidewalks in commercial areas, the public at large should be the primary public designated the public right's holder.

At this concluding point, with the analysis of the two-step test for identifying the public in sidewalks complete, the problem of the electric

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334. *Id.* § 10-28-805 (2018).

335. *Id.* § 10-8-335 (2018).

336. *Id.* § 10-28-240 (2010).

337. Schanzenbach & Shoked, *supra* note 328, at 630.

338. *See* *Cammers v. Marion Cablevision*, 354 N.E.2d 353, 356 (Ill. 1976) (explaining why the case of a utility using the underground of a sidewalk does not benefit the public at large, but rather that utility and its customers).

339. *See, e.g., Swinson v. Cutter Realty Co.*, 156 S.E. 545 (N.C. 1931); *Chapman v. City of Lincoln*, 121 N.W. 596 (Neb. 1909); *Schopp v. City of St. Louis*, 22 S.W. 898 (Mo. 1893). A recent example from Chicago involved the city's deal with the Chicago Cubs whereby the city vacated certain sidewalks as the team renovated Wrigley Field. *See* Carrie Muskat, *Cubs, City Complete Deal for Wrigley Renovations*, MLB.COM (Apr. 15, 2013, 2:30 PM), [http://wap.mlb.com/chc/news/article/2013041544830862/?locale=en\\_US](http://wap.mlb.com/chc/news/article/2013041544830862/?locale=en_US) [<https://perma.cc/TVL6-FGXY>].

340. Schanzenbach & Shoked, *supra* note 328, at 629–31.

scooters can be revisited. Since sidewalks have a use traditionally deemed natural—pedestrian passage—the government should not automatically be deemed the “public” holding the public rights over them. Since that natural use is open to distinct interpretations though, the court should not employ a set of common law strictures to replace the democratically elected government in the role of the “public”—as long as the government is not flat out banning pedestrian passage.

Thus, courts should not strike down governmental measures to regulate electric scooters: the operators’ claim that the government lacks the power to regulate sidewalks is untenable.<sup>341</sup> Cities themselves should also refrain from making this assumption—which some of them have made—that they lack the power to ban the scooters.<sup>342</sup>

Several cities appear to have realized that they do hold the relevant power, and have taken action to limit scooter companies. Cities allegedly act to protect pedestrians, and the disparate regulatory means they adopt highlight again the many distinct ways in which the sidewalks’ innate use—walking—can be defined and protected. Nashville, for example, limits the time and areas where the scooters can be operated.<sup>343</sup> Indianapolis charges the companies a fee and bans the use of scooters on the sidewalk—and their parking on sidewalk ramps.<sup>344</sup> In a scooter law adopted by the legislature—but recently vetoed by the Governor—the state of New York attempted to generally prohibit scooters from using the sidewalk, delegating the power to permit such use (and to regulate operators in general) to individual local governments.<sup>345</sup> And finally, most American cities that allow scooters to operate within their boundaries limit the number of licenses accorded each operator and adjust it based on the operator’s performance and public complaints.<sup>346</sup>

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341. For this claim and the surrounding dispute, see *supra* note 16.

342. James Briggs, *Indianapolis Sets New Rules on Electric Scooters – Including Fees and Fines*, INDIANAPOLIS STAR (July 16, 2018, 10:14 PM), <https://www.indystar.com/story/money/2018/07/16/indianapolis-sets-new-rules-electric-scooters/782630002/> [<https://perma.cc/65J3-XMEX>].

343. Yihyun Jeong, *Metro Council Rejects Electric Scooter Ban in Nashville*, TENNESSEAN (Aug. 20, 2019, 10:19 PM), <https://www.tennessean.com/story/news/2019/08/20/nashville-rejects-ban-electric-scooters-metro-council-vote/2062869001/> [<https://perma.cc/MRZ6-TX5S>].

344. Briggs, *supra* note 342.

345. S.B. 5294, 2019-2020 Gen. Assemb., Reg. Sess. § 1242(5)(b) (N.Y. 2019). The borough of Manhattan though, is the one local government in the state—in this case, a county—not allowed to authorize a scooter rental service.

346. See, e.g., CITY OF CHI., CITY OF CHICAGO REQUIREMENTS FOR SCOOTER SHARING EMERGING BUSINESS PERMIT PILOT PROGRAM (June 7, 2019), [https://www.chicago.gov/content/dam/city/depts/cdot/Misc/EScooters/EScootersPilotProgramTerms\\_06-07-19.pdf](https://www.chicago.gov/content/dam/city/depts/cdot/Misc/EScooters/EScootersPilotProgramTerms_06-07-19.pdf) [<https://perma.cc/KR3G-TTVA>] (Chicago); Madeleine Pauker, *Bird to Pull 250 Scooters Out of Santa Monica as Lyft and Jump Enlarge Fleets*, SANTA MONICA DAILY PRESS (July 17, 2019, 9:07 AM), <https://www.smdp.com/bird-t>

Yet despite this justified propensity to regulate the scooters, cities sometimes still appear somewhat unsure about the actual source of their power to enact the regulations controlling the scooter providers' use of the sidewalk. When Milwaukee attempted to regulate the scooters, it argued that the Wisconsin vehicle registration requirement statute covered scooters and thus prevented their operation on its streets (since they were not registered). The scooter operator sued, contending that this was a convoluted interpretation of the statute.<sup>347</sup> The state legislature concurred: it amended the vehicle registration law to clarify that scooters are not subject to it. But concurrently the legislature also explicitly empowered cities to approve the operation of the companies and to designate spaces where scooters' use is prohibited.<sup>348</sup>

The authority of local governments, in Wisconsin and elsewhere, to act to regulate scooters on the sidewalks should not, as the analysis above showed, have been questioned. Special efforts to find some existing statute to which, in some creative way, local governments' authority to act in this realm can be tied, are probably unnecessary.

Still, though unquestionably desirable given this Article's test, the local government's discretion in acting on the sidewalk might justifiably be constricted at times—and private actors or the public at large deemed the “public” holding the relevant public rights there—since, as seen, the government does not foot most of the bill for maintaining sidewalks. Similarly, and as also seen earlier in this Section, when entering certain transactions on the sidewalk the government's judgment might be tainted. Thus, if local governments reach deals with electric scooter operators, allowing them to freely park scooters on the sidewalk, a court should review those deals' terms to safeguard the public at large's interests, especially if the consideration the operators pay appears particularly inadequate or the process particularly fraught. So far, the deals American cities have struck

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o-pull-250-scooters-out-of-santa-monica-as-lyft-and-jump-enlarge-fleets/177509 [https://perma.cc/G2G2-BEVB] (Santa Monica). Milwaukee, following multiple complaints that scooters were using the sidewalks—in violation of city ordinance—even halted the whole program. Alana Watson, *Milwaukee City Officials Halt Scooter Pilot Program*, WIS. PUB. RADIO (Aug. 2, 2019, 4:20 PM), <https://www.wpr.org/milwaukee-city-officials-halt-scooter-pilot-program> [https://perma.cc/KA4U-9HWE]. It has since been reinstated with new caps on the scooters' number to ensure compliance with the sidewalk regulation. Marisa Peryer, *Milwaukee Expected to Approve Two More E-Scooter Companies, Bird and Spin*, MILWAUKEE J. SENTINEL (Aug. 10, 2019, 11:18 AM), <https://www.jsonline.com/story/news/local/milwaukee/2019/08/10/two-more-e-scooter-operators-bird-and-spin-poised-hit-streets/1975406001/> [https://perma.cc/ES5D-6KP7].

347. Molly Dill, *City Of Milwaukee Settles Bird Electric Scooter Lawsuit*, BIZTIMES (May 9, 2019, 12:00 AM), <https://biztimes.com/city-of-milwaukee-settles-bird-electric-scooter-lawsuit/> [https://perma.cc/3925-KKMC].

348. S.B. 152, 104th Leg., Reg. Sess. § 90 (Wis. 2019) (enacted).



with scooter operators have been rather stringent in their conditions—these were mostly pilot programs—so concerns have not been raised; indeed, complaints have mostly been lodged by the unsatisfied operators, rather than by public members.<sup>349</sup> An example for such a deal that appears to clearly favor the public can be found in Indianapolis, where the fees the city charges from the scooter operators are dedicated to enforcement of the recently enacted scooter rules—rather than to the city's enrichment.<sup>350</sup>

But the possibility that concerns respecting cities' favorable treatment of the providers will materialize in the future should not be disregarded.<sup>351</sup> Such concerns might lead to a need to designate the public at large the relevant public for the public space. A claim recently brought against the city of San Diego might indicate the validity of such concerns. Plaintiffs argue that by not regulating the scooters on San Diego's sidewalks the city neglected its duty and is thus liable for injuries pedestrians, hit by scooters, have endured.<sup>352</sup> The claim might have credence given the analysis provided here. Since the sidewalk does have an intrinsic use, and since the government might at times be suspect of dubious behavior respecting the sidewalk's use—especially when major corporate players, such as the scooter providers, are involved—its discretion to act, or not act, should be limited. For while many times the local government can be deemed the

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349. See, e.g., CITY OF SANTA MONICA, SHARED MOBILITY DEVICE PILOT PROGRAM ADMINISTRATIVE REGULATIONS (Sept. 25, 2018), [https://www.smgov.net/uploadedFiles/Departments/PCD/Transportation/SM-AdminGuidelines\\_9-25-2018.pdf](https://www.smgov.net/uploadedFiles/Departments/PCD/Transportation/SM-AdminGuidelines_9-25-2018.pdf) [<https://perma.cc/RNG3-CPFL>]; Charlie Wojciechowski, *Dockless E-Scooters Hit Streets of Chicago*, NBC5CHICAGO (Dec. 12, 2018), <https://www.nbcchicago.com/news/local/Dockless-Electric-Scooters-Join-Chicagos-Transportation-System---502636421.html> [<https://perma.cc/4LGN-ERMA>] (reporting that Chicago is conducting a pilot electric scooter program on the South Side, allowing scooters to operate on the streets during certain summer festivals to evaluate where the new technology could go next); Ethan May & Crystal Hill, *After More than 20 Injuries in September, Scooter Rule Enforcement Begins in Indianapolis*, INDIANAPOLIS STAR (Oct. 5, 2018, 9:18 AM), <https://www.indystar.com/story/news/2018/10/05/bird-lime-scooters-indianapolis-safety-enforcement-spotlight/1419495002/> [<https://perma.cc/N8FY-E4C6>]; DENVER DEP'T OF TRANSP. & INFRASTRUCTURE, TRANSIT AMENITY PROGRAM — DOCKLESS MOBILITY VEHICLE PILOT PERMIT PROGRAM (Nov. 2019), <https://www.denvergov.org/content/denvergov/en/transportation-infrastructure/programs-services/dockless-mobility.html> [<https://perma.cc/D6JF-55QV>]; see also NAT'L ASS'N OF CITY TRANSP. OFFICIALS, NACTO POLICY 2018: GUIDELINES FOR THE REGULATION AND MANAGEMENT OF SHARED ACTIVE TRANSPORTATION (July 2018), <https://nacto.org/wp-content/uploads/2018/07/NACTO-Shared-Active-Transportation-Guidelines.pdf> [<https://perma.cc/M7QZ-PAND>] (suggesting a set of best practices for cities).

350. Briggs, *supra* note 342.

351. Indeed, in a very recent complaint, plaintiffs in San Diego have accused the city of striking an agreement with the scooter operators that commercializes the sidewalk for private profit and ignores the city's duty to keep the sidewalk accessible to people with disabilities. Complaint, *Montoya v. City of San Diego*, No. 3:19-cv-00054 (S.D. Cal. Jan. 9, 2019).

352. David Garrick, *San Diego Preparing Defense Against Four Scooter Injury Lawsuits*, SAN DIEGO UNION-TRIB. (Mar. 28, 2019, 4:19 PM), <https://www.sandiegouniontribune.com/news/politics/story/2019-03-28/san-diego-preparing-defense-against-four-scooter-injury-lawsuits> [<https://perma.cc/9YFQ-PUCN>].

appropriate “public” holding and controlling the public rights on the sidewalk, there are easily imaginable circumstances where that should not be the case.

#### CONCLUSION

As this Article is being edited, the case of the Obama Presidential Center, which launched its discussion, continues its march through the litigation process. In February 2019 the federal court for the District of Northern Illinois issued its decision on the motion to dismiss the lawsuit against the Obama Presidential Center.<sup>353</sup> In that preliminary order ostensibly dealing with the plaintiffs’ standing alone,<sup>354</sup> the court adopted the complaint’s premise. The court established the plaintiffs’ standing to sue based on a public trust theory.<sup>355</sup> It ruled that the public trust doctrine covers Jackson Park and hence the public interest in the park is held by the public at large, not the government.<sup>356</sup> Consequently, whenever the government proposes a change to the park it interferes with the individual interests of each and every resident of Chicago. Accordingly, any local taxpayer enjoys standing to challenge such a governmental proposal.<sup>357</sup>

That preliminary decision encapsulated both the descriptive and the normative insights of this Article. The formal doctrinal issue at hand was standing, yet the court in fact proceeded to ascertain who the public holding the public interest in the park was. The court thus explicitly acknowledged the descriptive fact about the law that this Article promoted: settling disputes over public rights is not an exercise in identifying public spaces, but an exercise in identifying publics.

In undertaking this exercise, however, the court forwent a principled normative approach. With little doctrinal grounding, and with no policy analysis, it went ahead and characterized the public holding rights in the park as the public at large.<sup>358</sup> It did not consider this move’s ramifications or logic, or courts’ ability to act upon it.

This Article showed that this need not be the case. A consistent and rational approach, drawing on the history, structure, and normative

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353. *Protect Our Parks, Inc. v. Chi. Park Dist.*, 368 F. Supp. 3d 1184 (N.D. Ill. 2019).

354. *Id.* at 1191.

355. *Id.* at 1193–95.

356. *Id.*

357. *Id.*

358. The court merely cited one case as authority: *Friends of the Parks v. Chicago Park District*, 160 F. Supp. 3d 1060 (N.D. Ill. 2016). That, however, was a lower court ruling in a preliminary stage of a litigation that never proceeded. That ruling supplied no doctrinal backing for its conclusion—other than an obiter in *Paepcke v. Public Building Commission*, 263 N.E.2d 11, 18 (Ill. 1970). No other American authority supports the court’s conclusion. *See supra* notes 153–160 and accompanying text.

rationales of the law of public spaces, can be applied to disputes over public spaces. If applied to the case of the Obama Presidential Center, that approach would have generated a result that is the opposite of the one the court reached in its procedural holding: one that would have viewed the government as the only relevant public in all cases involving parks.<sup>359</sup> Under the analysis suggested here, the government's decision could not have been challenged to begin with.

Granted, an unprincipled identification of the public in a public space, such as the one made by the district court in its procedural decision, might not inevitably lead to a misguided substantive resolution of a given dispute. Entertaining a challenge that should never have been heard does not always conclude with that challenge's acceptance. Thus, in its later summary judgement order on the merits, the court did approve the Presidential Center.<sup>360</sup> But an unprincipled identification of the public will, inevitably, always open the door for an arbitrary, and pernicious, form of legal analysis. The district court thus only reached its substantive decision after insisting on establishing clear statutory intent to allow buildings in the park.<sup>361</sup> It only acceded to a relatively deferential standard of judicial review under the public trust doctrine because the relevant park was not submerged at the time of Illinois statehood.<sup>362</sup> These findings sit on flimsy doctrinal foundations, and their normative justification is flimsier still. Most troublingly, they set a dangerous precedent for future cases where a federal court could mindlessly intervene in governmental decisions respecting parks' management. Hopefully, the federal court of appeals, now hearing the case, will not endorse these findings.<sup>363</sup>

Irrespective of the eventual fate of the Obama Center, that case represents only one—albeit exceptionally prominent—example. Many other cases about public spaces exist, and still many others will exist in the future. If these cases, which collectively mold the public spaces that

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359. *See supra* Part III.A.

360. *Protect Our Parks, Inc. v. Chi. Park Dist.*, 385 F. Supp. 3d 662, 692 (N.D. Ill. 2019).

361. *Id.* at 678.

362. *Id.* The court held that land currently submerged under water is subject to the most demanding review, that land that was previously—at or after the time of statehood—submerged is subject to an intermediary level of review, and parkland that was not submerged, such as Jackson Park, to a lax standard of review. The latter, according to the court, involves solely verification of sufficient legislative intent. If this test implies complete deference to the legislature, it could be interpreted as expressing the position this Article promotes, at least with respect to some parklands. *See id.* at 676–78.

363. An appeal has been filed with the Seventh Circuit Court of Appeals. *See* Opening Brief of Plaintiffs-Appellants, *Protect Our Parks, Inc. v. Chi. Park Dist.*, No. 19-2308 (7th Cir. Oct. 25, 2019); Oral Argument, *Protect Our Parks, Inc.*, No. 19-2308 (7th Cir. May 21, 2020), [http://media.ca7.uscourts.gov/sound/external/mn.19-2308.19-2308\\_05\\_21\\_2020.mp3](http://media.ca7.uscourts.gov/sound/external/mn.19-2308.19-2308_05_21_2020.mp3).

surround us all, are to be treated in a coherent and informed manner, more attention must be paid to the concerns this Article raised.