PUBLIC STREETS, PRIVATE SECURITY: WHY THE PRIVATE SECTOR IS BETTER ABLE TO ENSURE URBAN SECURITY AND THE LIVABILITY OF CITIES.

by

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TABLE OF CONTENTS

INTRODUCTION............................................................................................................................3

I. WALL STREET PARKING GARAGE CORP. V. NEW YORK STOCK EXCHANGE, INC............................................................8

II. POLITICAL, ECONOMIC, AND SOCIAL BENEFITS OF PRIVATE CONTROL OF PUBLICLY-OWNED SPACE...............13
   a. Political Benefits...........................................................................................................13
   b. Economic Benefits.................................................................................................16
   c. Social Benefits........................................................................................................18

III. DISADVANTAGES OF PRIVATE CONTROL OF PUBLICLY-OWNED SPACE......................................................23
   a. Political Disadvantage...........................................................................................23
   b. Economic Disadvantages.....................................................................................23
   c. Social Disadvantages...........................................................................................25

IV. THE LAW OF PRIVATE CONTROL OF PUBLICLY-OWNED SPACE..........................................................25
    a. Where No Express Delegation Has Been Made.................................................27
       i. Applicability of Constitutional Constraints..................................................34
    b. Where Express Delegation Has Been Made......................................................39
       i. Applicability of Constitutional Constraints..................................................40

V. PROPOSALS..................................................................................................................42

CONCLUSION..................................................................................................................................47

APPENDIX A: MAP OF LOWER MANHATTAN’S FINANCIAL DISTRICT..............................................50

APPENDIX B: TABLE OF STATE STATUTES RELATING TO CLOSURE OF PUBLIC STREETS........51

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INTRODUCTION

Over the past few years, legal scholars and political scientists have written dozens of articles lamenting and applauding the increase in the privatization of governmental functions. But within that body of work, little attention has been paid to the privatization of one particularly important governmental function – the policing of city streets and sidewalks. Before attempting to remedy this dearth of scholarship, this Paper provides three hypothetical scenarios to illustrate the issues involved.

At the Mall of America in Bloomington, Minnesota, private security guards patrol the mall to maintain order and deter shoplifters. These security officers can deny entry to prospective patrons, eject patrons, and even conduct searches of patrons’ bags. They answer only to the owners and operators of the Mall of America, a privately-held corporation listed on the New York Stock Exchange.

In Raleigh, North Carolina, private security guards employed by Central Parking Inc., and operating under the local name “Park Raleigh,” patrol city owned parking lots and public streets lined with metered parking. These guards can ticket vehicles that are illegally parked or whose drivers have failed to pay the meter. They can ask drivers to leave a space if they are standing or loitering. These officers answer only to the Central Parking corporation who is in turn bound by the terms of the contract it signed with the city of Raleigh.

In Manhattan’s Financial District, an eight square block area around the New York Stock Exchange has been closed to traffic for five years. Sand-laden pick-up trucks block the

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streets at the outlying intersections of this secure zone. Drivers of vehicles wishing to enter these otherwise public streets must stop at checkpoints, be subjected to a search, and be granted permission to enter the secure zone. This secure zone is controlled, not by the New York Police Department ("NYPD") but by employees of the New York Stock Exchange ("NYSE"). The checkpoints are operated and the searches conducted by the stock exchange security guards. These security guards answer only to the management of the New York Stock Exchange, a publicly-held corporation listed on, well, the New York Stock Exchange.

The single most important distinction between these three scenarios is the degree of legality of the measures taken by the private security officials. In the first scenario, the one dealing with mall security guards, courts have routinely found that ejection and searches are permissible and are not subject to Fourth, Fifth, and Sixth Amendment restrictions.\(^4\) In such situations, courts consistently note the fact that malls are private property and thus the mall’s security guards are not like city police.\(^5\) In the second scenario, there is less certainty regarding the legality of the action, but most courts have upheld private policing of public


\(^5\) See David Sklansky, The Private Police, 46 U.C.L.A. L. REV. 1165, 11184 n.84 (detailing the various state statutes that grant private security guards the power to conduct brief investigatory detentions). See also Hudgens v. N.L.R.B., 424 U.S. 507 (1976) (holding that malls the first amendment did not protect expressive rights in shopping centers). But note that states can require a greater degree of tolerance of speech by mall owners. See Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (holding that state constitutional rules allowing individuals to enter a shopping mall and gather petitions did not violate the property owners' First and Fifth Amendment rights under the U.S. Constitution).
Despite their discomfort with private security guards policing public property, courts allow it because the security guards only monitor the area and have no power to detain or search citizens from this public property (at least no more so than an ordinary citizen could). Furthermore, these private security firms are paid by the city and must adhere to their contractual obligations, thereby ensuring some degree of accountability.

It is the third scenario which is of the most dubious legality and is the focus of this Paper. Here you have private security personnel patrolling and cordoning off public streets, conducting searches on public land, and potentially denying entry to the secure zone. They have not been given an express delegation of authority by the NYPD. Nor are they being paid by the city. They are paid by the New York Stock Exchange (“NYSE”), and, presumably, accountable to the NYSE alone.

By now, it should have occurred to the reader that each of these hypotheticals is based on an actual scenario. The Mall of America does maintain an extensive security force, the City of Raleigh has contracted with a company named Central Parking, Inc. to regulate public parking in the city, and the NYSE did control the streets around Wall Street for several years after September 11, 2001. The issues raised in the first two scenarios are expertly addressed by several authors, but the third scenario, the control of publicly owned space by private security, is a topic that has not been adequately addressed at all. This became clear when the actual case came before the New York State Supreme Court in 2004 in *Wall Street Parking*

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9 See Joh, supra note 2, at 50-59; Sklansky, *supra* note 5, at 1250.
Garage Corp. v. New York Stock Exchange, Inc.\textsuperscript{10} and both plaintiff and defendant struggled to cite any significant legal authority on the issue. Today, it is very doubtful whether private security personnel controlling access to, conducting searches on, or ejecting individuals from public streets and land is lawful. Most courts have not had the opportunity to address the issue, and the few courts that have had occasion to address the issue have almost uniformly agreed that such private control is illegal.\textsuperscript{11} This legal uncertainty may prove equally if not more risky than definitive illegality.\textsuperscript{12}

Regardless of its legality, however, such private policing of public space occurs. It occurs because private control of public property offers significant benefits to both private land owners and the public at large. Since the attacks on the World Trade Center in September 2001, concerns about security in America’s cities have increased significantly. Attempts to address these concerns have stretched police resources thin and exposed the limits of what federal and state officials can do to protect the public. Often when public resources are inadequate to protect the public, private entities have stepped in, often at a lower cost to the public and with better results.\textsuperscript{13} Private entities may have a greater incentive to provide for protection of their own employees, visitors, and facilities, and may be better suited to provide for that protection, having a superior knowledge of those employees, visitors, and facilities than do public police. For these reasons, and dozens more, private control over public spaces may be necessary and even desirable. A solution is needed to enable cities to obtain real security in the best and most efficient way possible within the confines of the law.

\begin{itemize}
\item \textsuperscript{10}3 Misc.3d 1014, 779 N.Y.S.2d 745 (2004).
\item \textsuperscript{11}See infra Part IV.A.
\item \textsuperscript{12}Not knowing whether one’s own action is legal leaves the actor constantly wondering or worrying about the potential for trouble, whereas knowing for sure that a particular course of action is illegal at least allows the actor to either avoid that course of action in the first place and rest easy or to continue that course and structure his or her behavior to prepare for potential punishment or successfully avoid that punishment.
\item \textsuperscript{13}See Sklansky, supra note 5, at 1180 (noting the expense of public police patrols).
\end{itemize}
Therefore, if cities wish to secure the benefits of private security and private maintenance, they must either lobby for new statutory laws or find favorable common law to achieve this goal.

The Paper begins, in Part I, with a more detailed discussion of the events leading up to Wall Street Parking Garage Corp. v. New York Stock Exchange, Inc., events that provide an excellent basis for understanding the larger issues discussed later in this Paper. Part II consists of a discussion of the economic, social, and political benefits that result from private entities exercising control over public spaces for the purpose of ensuring security. Part III acknowledges several criticisms and disadvantages of private control of publicly owned space, though ultimately, the Paper finds the benefits significantly more compelling. Part IV examines the legal constraints on such private action and concludes that non-delegated control is illegal under existing law while expressly delegated control probably is legal. Part IV also includes a discussion of the effect of such delegation on constitutional criminal procedure rights. Part V proposes as a solution new legislation that will enable private actors to exercise control over public streets, plazas, sidewalks, and other publicly-owned urban spaces and achieve the economic, political, and social benefits that such private security promises. The Paper ultimately proposes the creation of city ordinances that will allow private entities to

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15 To avoid confusion, it is important to note a preliminary distinction: the difference between privately-owned public space and privately-controlled publicly-owned space. The best example of privately-owned public space is the shopping mall. Shopping malls, both the land and the structures, are generally owned by corporations or partnerships of investors. While they are open to the public, and often patrolled by police, the owners, be they corporations or individuals, have the right to deny any individual access to the property, to eject any individual, and to maintain some order. See cases cited supra note 4.

While there is no single, definitive example of private control over public spaces, three pieces of real estate that have recently garnered a significant amount of media attention and serve as excellent [case studies] for the purposes of this Paper are detailed in the paragraphs that follow. This Paper uses public property and publicly-owned property interchangeably. Privately-owned public property is referred to as quasi-public property.
control public spaces legally and thereby provide significant benefits to the public and private sector alike.

PART I: WALL STREET PARKING GARAGE CORP. v. NEW YORK STOCK EXCHANGE, INC.

As noted above, the NYSE secure zone scenario is based on an actual dispute. Shortly after the September 11th attacks on the World Trade Center and the Pentagon, federal officials and state and municipal police departments around the nation began worrying about and planning for the possibility of additional terrorist attacks on other potential targets. These targets consisted of landmarks and national treasures like the Statue of Liberty, the Lincoln Memorial, and the Empire State Building, key components of the nation’s transportation infrastructure like bridges and tunnels, and facilities housing the nation’s financial resources like the New York Stock Exchange, the Federal Reserve, and the major private banks. The New York Stock Exchange, so close to the initial target that was the World Trade Center, was of particular concern. The layout of downtown Manhattan, with its narrow streets and narrow sidewalks bringing building facades and vehicular traffic into close proximity, made the Exchange, in the eyes of the police, a very vulnerable target. Ignoring for the time being any threats to the Exchange that might come from the air, as did the previous threats, city officials immediately began planning to buffer the facility from possible truck bombs by closing the streets immediately surrounding the Exchange. The NYPD closed the intersections of Wall Street and Broadway, Nassau Street and Pine Street, Wall Street and

William Street, William Street and Exchange Place, Broad Street and Beaver Street, Beaver Street and New Street, and Broadway and Exchange Place.\(^{20}\) This created a secure zone around the NYSE.\(^{21}\) The NYPD initially blocked these intersections with jersey barriers, protective concrete barriers used as road dividers and as a means of preventing access to prohibited areas,\(^{22}\) which were later replaced by weighted pickup trucks and cement planters designed “to deter improvised vehicle bomb attacks in New York City's financial center.”\(^{23}\) If you could keep trucks away from the New York Stock Exchange, the thinking went, you could prevent at least, large scale attacks from the ground. After some time, the NYPD physically transferred operation of the secure zone checkpoints to the NYSE.\(^{24}\) But this transfer of operation was not official. The NYPD simply left and the NYSE security team replaced them at the checkpoints. No formal paper authorization occurred.\(^{25}\)

But while the police were busy preparing for attacks by terrorists on major landmarks, they were not prepared for a legal challenge in the courts by Joseph Vassallo, a local businessman. Vassallo was the owner and operator of the Wall Street Parking Garage located


\(^{21}\) Id.

\(^{22}\) The American Heritage Dictionary of the English Language (4\(^{th}\) ed. 2000). The name “jersey barrier” derives from the fact that these concrete dividers were originally developed to divide multiple lanes on highways in the State of New Jersey. The barriers prevented vehicles from crossing over the median into oncoming lanes of traffic. See U.S. Dep’t of Transportation Federal Highway Administration website, at http://www.tfhrc.gov/pubrds/marapr00/concrete.htm (last visited April 10, 2006).

\(^{23}\) Wall Street Parking Garage, 3 Misc.3d at 1017, 779 N.Y.S.2d at 748.

\(^{24}\) Id. at 1022, 779 N.Y.S.2d at 752 (“At some point thereafter, and it is unclear as to when this happened, the control of the security posts at each of the blocked intersections were transferred to NYSE security.”).

\(^{25}\) Id. (“The NYSE has yet to provide this court with any evidence of an agreement giving them the authority to maintain the security perimeter and/or conduct the searches that their private security force conducts daily.”). The transcript from the hearing for a preliminary injunction demonstrates just how dubious this transfer was. Counsel for the NYSE, Douglas W. Henkin, attempted to explain the situation to Judge Tolub: "What has happened is not that the N.Y.S.E. has closed off those streets… but the N.Y.S.E. has manned those closures at the behest of the N.Y.P.D., following their initial closures by the N.Y.P.D." Judge Tolub asked, "So, you have an official request from the N.Y.P.D. asking you to man those posts?" To which Mr. Henkin replied, "You mean in writing? No." Id.
on Exchange Place, between William and Broad Streets, right in the middle of the secure zone. All of Vassallo’s patrons, the hundreds of Wall Street investment bankers, analysts, secretaries, and other professionals who parked in his garage, were suddenly forced to stop at NYSE security checkpoints, consent to searches, and then proceed to the garage. Whether it was their objection to the searches themselves or their impatience with waiting in traffic lines to undergo the searches and risk being late for work, many of Vassallo’s patrons stopped parking in his garage after the barricades went up. Prior to September 11, 2001, an average of 150 to 160 cars parked in Vassallo’s garage per day. After September 11th and the erection of the barricades, the garage’s business dropped off significantly. In 2003 an average of 68 cars parked in the garage per day. And the numbers continued to drop. Though based only on estimates by Vassallo, between February 1 and February 20, 2004, an average of 65 patrons parked in the garage per day. From February 21 to March 2, 2004, an average of 38 patrons parked in the garage per day. And on March 3, 2004, only 25 vehicles parked in the Wall Street Parking Garage. After voicing his complaints, Vassallo did what most would do: he sued. And he won. Judge Tolub of the New York State Supreme Court held that NYSE’s operation of security checkpoints on the public streets surrounding the Exchange was unauthorized and therefore illegal. Accordingly, he found the continued operation of such checkpoints to constitute a public nuisance, and ordered the NYSE to abandon its barricades. Though Vassallo’s victory was short lived—the Appellate Courts would

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26 The address for the garage is 45 Wall Street, but the garage occupies the rear of that building, fronting only Exchange Place.
27 Wall Street Parking Garage, 3 Misc.3d at 1017, 779 N.Y.S.2d at 749.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id. at 1022, 779 N.Y.S.2d at 752.
33 Id. at 1023, 779 N.Y.S.2d at 753.
eventually reverse Tolub’s ruling on other grounds—the suit between Vassallo and the New York Stock Exchange exposed an issue the law has yet to address adequately: the private control of publicly-owned spaces.

Nor are the issues raised by the NYSE case unique to the Wall Street setting. The installation of bollards\textsuperscript{34} and cement planters at the edge of sidewalks by commercial property owners and managers has increased significantly over the last ten years\textsuperscript{35} and serves as another prevalent example of private actors exercising control over public spaces to ensure the security of their employees, visitors, and facilities.

In August 2004, the Departments of Homeland Security and Justice issued a security crackdown after receiving information that several high profile financial buildings might be at risk of a terrorist attack. Almost a year later, the Department of Justice announced that it had arrested several men and charged them with conspiracy to use unconventional weapons in the United States and with providing material support to terrorists.\textsuperscript{36} When these men were arrested, they possessed a video camera containing footage of several high profile properties such as the Citicorp Center in New York, the International Monetary Fund and the World Bank in Washington, D.C., and the Prudential Financial Center in Newark, New Jersey.\textsuperscript{37}

\textsuperscript{34} A bollard is a wood or metal post or pole set in the ground at set intervals to close a road or path to vehicles of a certain width. Merriam Webster’s Collegiate Dictionary at 129 (10\textsuperscript{th} ed. 1999). In cities, bollards are installed at the outer perimeter of sidewalks to prevent bomb-laden vans, for instance, from either piercing the façade of the building or getting close enough to cause significant damage. Architecture of Security, NPR, at http://www.npr.org/programs/watc/features/2002/jan/security/020126.security.html. Generally, for a truck bomb to cause enough damage to the infrastructure of the building to make it collapse, the truck must either be inside the building or close to it. The bollards keep the truck far enough away to prevent total collapse, even if the resulting explosion causes damage to the façade and immediate interior.

\textsuperscript{35} See Patricia Leigh Brown, Ideas & Trends; Designs for a Land of Bombs and Guns, THE NEW YORK TIMES, May 28, 1995, D5 (“Barricades and bollards have become the newest accessory on this country's psychic frontier. But to many architects and designers who specialize in security planning, their presence merely confirms an evolving design esthetic that has changed everything from courthouses to parking garages.”); Louis Uchitelle and John Markoff, Terrorbusters Inc., THE NEW YORK TIMES, Oct. 17, 2004, C1.

\textsuperscript{36} Tony Pugh, Terror Warning Names U.S. Financial Centers Alert Raised at 'Iconic' Buildings, THE CHARLOTTE OBSERVER (Knight Ridder), Aug. 2, 2004, 1A.

\textsuperscript{37} Id.
Around the same time, a 35-year-old Pakistani man named Kamran Shaikh was apprehended by federal authorities while videotaping a North Carolina skyline. Though then-Homeland Security Secretary Tom Ridge eventually said that there was nothing to tie Shaikh to terrorist organizations, his arrest quickly garnered the attention of elected officials and property owners in the cities and buildings Shaikh videotaped. When he was arrested, Shaikh was taking pictures of the 60-story Bank of America headquarters in downtown Charlotte. Authorities also noted that videotapes in Shaikh’s possession showed buildings and transit systems in a number of southern cities, including Austin, Houston, Dallas, New Orleans, and Atlanta.

Within months, bollards were installed (or planned) at each of these above sites to keep explosive-laden trucks a safe distance away from the buildings. Though bollards would have been powerless to prevent the attacks of September 11th, recent surveillance by alleged terrorist operatives like the men discussed above indicates that terrorists might plan to use truck bombs to destroy future target buildings, a threat that bollards might mitigate.

As these examples demonstrate, private control of public spaces is often necessary to ensure security. But it may also be desirable. The following section discusses in further detail the political, social, and economic benefits that emerge from private control of publicly-owned space.

39 Id.
PART II: POLITICAL, ECONOMIC, & SOCIAL BENEFITS OF PRIVATE CONTROLLED OF PUBLICLY-OWNED SPACES

A significant number of benefits result when private entities exercise control over public spaces. These benefits can be divided into three categories: political benefits, economic benefits, and social benefits.

A. Political Benefits

There are several political benefits that result from private control of public space. First, security, today, is a political necessity. Americans do not want to live in fear, and after 9/11, that is precisely what began to happen. Americans fear that their cities will begin to resemble their Israeli counterparts; they fear having to wonder, every time they enter a Starbucks or a Ben & Jerry’s, whether a fellow patron’s overcoat might conceal a bomb. It is simply good politics to protect the public or, at least, give the perception of protecting the public. The more people providing security, the safer Americans will feel and the happier they will be. If private security or a mix of private and public security better protects people, elected officials are likely to let private security do its job. After all, it is these same public elected officials who are likely to receive and take most of the credit for this elevated level of security. And let us not forget that if private actors are willing to provide security in addition to that provided by the city, state, and federal governments, the level of actual, not just perceived, security will increase. This is perhaps the most important factor to consider.

Second, private control over public spaces spreads the responsibility for the protection of and care for these spaces. When security failures occur, they too can be spread over public
elected officials and the private sector, thus buffering elected officials from the full brunt of the public’s ire.

Allowing private organizations to provide for their own security might also be a way for elected officials to help these organizations reduce their liability. The potential liability of employers for failing to provide a safe and secure environment leads private actors to seek a greater role in providing that security outside their borders. There have been several recent cases in which employers were held liable for injuries sustained by their employees in the office or outside the office on the company’s property.\textsuperscript{42} Cases such as these, where the foreseeability of the battery or murder of an employee is questionable, have been criticized by several legal scholars,\textsuperscript{43} but it takes no stretch of the imagination to envision courts holding employers liable for injuries to their employees incurred during a terrorist attack. Imagine for a second a truck, filled with explosives, driving into the lobby of a commercial office building in downtown Chicago. Two-hundred and ninety people are killed when the bomb explodes. The families of the victims sue the owners and managers of the building for wrongful death and negligence. At the civil trial, the plaintiffs put on evidence that the owners and managers of the building could have installed bollards or jersey barriers at the edge of the sidewalks or petitioned the city to close the surrounding streets to vehicular traffic, as the New York Stock Exchange did after September 11\textsuperscript{th}. The jury, finding that these remedies to be readily available and that the choice not to pursue these reasonable security measures rose to the level

\textsuperscript{42} Vaughn v. Granite City Steel, 217 Ill. App.3d 47; 576 N.E.2d 774 (5th Dist. 1991) (affirming a jury’s finding that employer was negligent when an employee was murdered in the employer’s parking lot); Martin v. McDonald's Corp., 213 Ill. App.3d 487; 572 N.E.2d 1073 (1st Dist. 1991) (affirming a jury’s finding that employer McDonald’s was liable for wrongful death and negligence where employees were killed in a robbery in a McDonald’s restaurant); Rowe v. State Bank of Lombard, 125 Ill.2d 203; 531 N.E.2d 1358 (1988) (Where several employees were attack and killed, the court held that a landowner assumes a duty to protect its employees and patrons when it voluntarily undertakes to provide security measures and can then be found liable for negligently if it inadequately protects those employees and patrons.).

\textsuperscript{43} See, e.g., Kyle Riley, Employer TROs Are All the Rage: A New Approach to Workplace Violence, 4 Nev. L.J. 1, 7 (noting the difficulty employers have preventing some types of crimes against their employees and patrons).
of negligence, finds the property owners liable for the deaths, lost income, and emotion
distress resulting from the attack. Private property owners must make every reasonable effort
to secure their property in order to avoid liability. And because it is often necessary to secure
the surrounding public space such as streets and sidewalks in order to effectively secure the
interior of private office buildings, only by allowing securing that surrounding public space
can the corporation avoid liability. If corporations can be held liable for injuries and deaths
resulting from such attacks, they will want to be able to help secure their space and may lobby
for it if it is not forthcoming.

Fourth, as odd as it sounds, private police may prove more accountable to the users of
their space than the public police. One author summarizes this argument best:

Unlike public police forces, private guard companies have to answer to the discipline
of the market. [A] privately employed police officer inevitably “recognizes the
importance of establishing positive relationships with the consumers of the service and
develops innovative approaches to community problems,” whereas “the public police
are paid through the compilation of public taxes and are, therefore, answerable to
every business and citizen in the city but are not accountable to them.”

Thus, private policing of public spaces can be viewed as a reaction to the “excessive
independence and insularity” of modern city police forces—“an answer to the common
complaint ‘that a police force should be responsive to those policed, while autonomous
professionals . . . have a notorious tendency to believe that they know what is 'really' best for
the clients, and therefore what the client 'ought' to want.” We do not argue that private
police are more politically accountable to the city as a whole, but to the residents, retailers,
corporate residents, and visitors of the neighborhood or district in which they operate.

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44 The most effective way to prevent a bomb-laden truck from bringing down a 60-story office building is to
extend the perimeter outward. The truck bomb can cause significant structural damage even if it never enters the
lobby of that building. See NYPD report on the proposed structural changes to the Freedom Tower.
45 See Sklansky, supra note 5, at 1189-90.
46 Sklansky, supra note 5, at 1189-90 (citing James J. Vardalis, Privatization of Public Police: Houston, Texas,
3 SECURITY J. 210, 211 (1992)).
47 Id.
Whereas the public police answer to many masters, some with conflicting messages, private police prove more accountable to the practical needs of their constituency.

Finally, there may be some political benefit for providing the public with more public arcades and plazas. Though closed streets may draw the driving public’s ire, in some areas where traffic is already minimal, such as downtown and midtown Manhattan, Quincy Market in Boston, or around the White House in Washington, the closure of streets might lead to the proliferation of outdoor cafes and increase the livability of an area of the city. Elected officials will be credited for these additions, even if surrounding property owners are the ones facilitating the change. But these businesses may only support these closures if they are sure that these public spaces will be secure. And if they city cannot fund the security, the private sector might.

B. Economic Benefits

The economic benefits of allowing private actors to control public space are significant. First, private control over public spaces spreads the costs of protection and care for these spaces. Allowing private actors to control plazas, squares, streets, sidewalks, and other similar spaces enables more of it. When city coffers are stretched thin, the number of parks, plazas, and pedestrian-only streets the city can fund is limited. Allowing private entities to operate and maintain these spaces ensures more of them. Even where city funds are available, allowing private land owners to provide security allows the city to employ the resources that would have been expended on policing elsewhere.
Second, as with privatization of any governmental agency or function, private policing of publicly-owned space offers a greater degree of efficiency and flexibility. Private police forces are “free from civil service rules, reporting requirements, and other rules imposed on government agencies.” They are free from unions and from “bureaucratic traditions.”

Sometimes private land owners are better able to create effective security or effective aesthetics. For instance, private land owners know the area better, its uses, and its layout. Their architects, engineers, and security personnel work in the area far more than their public counterparts. They know how many people are there at what times of day. As Jane Jacobs writes in *The Death and Life of Great American Cities*, the safest streets are those with a network of neighbors not excellent policing. This is true of streets in commercial areas as well. A network of business owners has as much incentive as a network of homeowners to ensure the security in and around their property and businesses. As a result, private landowners will pay what is necessary, but only what is necessary, to protect the value of land and life. Thus there is less waste in private policing. A private corporation may pay its security guards more than a typical police officer if that makes a difference in the quality of the service, if it makes their buildings safer. Or that corporation may pay for a larger number of security guards. But it will not pay both higher salaries and employ more guards than necessary because the counterbalance to security interests is cost. The public sector often does not work as efficiently. Graft, corruption, and lobbying by local police unions, may result in a greater number of police in a given area than is necessary.

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49 Sklansky, *supra* note 5, at 1189.
50 Id.
notes, “Private companies are thought more accountable than government because they answer to their particular customers instead of to the general public.”\textsuperscript{53} With public policing, the security service is often not tailored to the neighborhood or businesses being protected and money is wasted.\textsuperscript{54}

Finally, the privatization of public space may be highly profitable to real estate developers and retail business.\textsuperscript{55} Private developers and businesses are free to decorate and configure these spaces in the most appealing way possible. If a restaurant controls a portion of a public plaza, it can set up café tables to lure patrons. It takes no market study to show that there is a demand for outdoor dining in warm weather. In its report on public squares, the Project for Public Spaces notes that, based on what the communities they work with tell them, “people today are crying out for these kinds of lively gathering places. Everyday citizens recognize the value of places where civic life flourishes and where different cultures can mix, places that heal social isolation--even if most public leaders are slow to understand.”\textsuperscript{56} But it is likely that these private interests will only use the space if it is secure, and if need be, they may be more than willing to secure it themselves.

C. Social Benefits

There are significant social benefits afforded by the private control over public space. First, consider the psychological importance of security. In his now-famous article, \textit{A Theory of Human Motivation}, Abraham Maslow described a pyramid of needs.\textsuperscript{57} What has come to

\begin{footnotes}
\item[53] Sklansky, \textit{supra} note 5, at 1191.
\item[54] \textit{Id.} at 1180-81.
\item[55] Kressel, \textit{supra} note 48.
\item[57] See Abraham H. Maslow, \textit{A Theory of Human Motivation}, \textit{Psychological Review} 50, 370-396 (1943) (discussing his pyramid of needs).
\end{footnotes}
be one of the most accepted theories of psychology, Maslow’s pyramid has five levels of
needs: physiological, safety, love/belonging, esteem, actualization. Each subsequent level
cannot be obtained until the lower levels are achieved; the higher levels must rest on strong
foundations. According to Maslow, security, feeling safe, is one of the most basic needs of
human beings. Safety and security rank above all other desires, and physical safety above
most other forms of safety. If residents and employees do not feel safe living and working in
cities, they will not function correctly. Or they will leave. Knowing that private entities are
also taking an active part in their security, seeing the physical manifestations of this security,
may make for happier, more productive individuals.

Second, allowing private land owners to control the surrounding public space
reaffirms the values associated with individual land ownership. “Private policing,” David
Sklansky writes, “can easily be understood as the natural product of three paradigmatically
private functions. The first is self-defense, widely viewed as an inherent right, particularly in
America…. The second is economic exchange, the ‘free market’…. The third is the use and
enjoyment of property generally thought to include the right of owners to place conditions on
those invited onto their property.” One could argue, then, allowing major land owners in
dense urban centers to take an active role in their own security is necessary for them to fully
enjoy the rights of ownership of that land.

Third, private policing empowers those it protects. Sklansky argues that this
empowerment has two separate effects on the land owners. First, it reaffirms the notion that
“every citizen should take responsibility for his or her own protection” and that depending on

58 Id.
59 Id.
60 Sklansky, supra note 5, at 1188-89.
the government for complete protection is “enfeebling.” The second is that “arranging for private policing generally entails a more or less voluntary association of residents or business owners that, in the process of providing joint security, also builds social capital.” While this second effect may be logically applied to the social capital built in forming and operating neighborhood watch groups, it is also easily applied to the social capital build as employer and employees work to ensure security in and around the building, or the social capital created as businesses work together to ensure a safe zone around their properties. Consider the social benefits that might have resulted had the NYSE and the Wall Street Parking Garage and all the other businesses within the secure zone met and discussed the best means of ensuring that the streets within were safe from dangerous individuals and vehicles. While this social capital was never realized because of the unilateral path chosen by NYSE, it certainly would not have resulted if the NYPD had continued to operate the cordons. Private control of public places offers, though does not ensure, the private land owners abutting the property a chance to empower themselves and build lasting social capital.

Finally, consider the aesthetic benefits that private control over public space allows. Open spaces such as public plazas and closed streets are inviting to people; in a nation increasingly cut off from human interaction by the automobile and technology, newly designed public spaces provide a much-needed opportunity for people to mix. More public gathering spaces are better.  

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61 Sklansky, supra note 5, at 1190.
62 Id.
63 This Paper recognizes, however, that pedestrian plazas and arcades are best suited to dense, mass transit-oriented cities like New York, Chicago, Boston, and San Francisco (or to college towns where most of the residents do not have cars). The pedestrianization of downtown streets in cities still enamored with the automobile, like Raleigh, North Carolina, has proven difficult. This Paper posits, however, that our nation’s densest cities are its most important ones. As such, they are also the more likely targets of terrorist and the most in need of innovative solutions to security problems liked increased pedestrian arcades and plazas.
The United States suffers from a severe lack of public plazas, a notable deficit for nation that has, for good or for ill, earned the label of empire. One of the defining characteristics of all the great empires that came before the U.S. was a commitment to and a successful implementation of public plazas and squares, great areas that allowed the masses to be inspired and to mix. From the German Platz to the Roman Piazza, from the French Place to the British Square, every major civilization or nation that developed great urban centers had a significant number of plazas for the enjoyment of urban dwellers. It can be argued that the creation of thriving public squares was a prerequisite for being considered a great nation or civilization. And these spaces were for more than mere enjoyment. They helped businesses to thrive; outdoor cafes and shops would attract more patrons if they were located in a plaza where they might not only draw in longtime patrons but the occasional stroller or those visiting adjacent cafes and shops.  

Because most U.S. cities experienced their greatest periods of development after the invention of the automobile, many of these cities, when faced with the choice of creating public pedestrian-focused plazas closed to automobiles or thru-streets designed to alleviate traffic congestion, chose the latter. Even some cities, or sections of cities, that had matured before the advent of the automobile, cities that had thriving public plazas, completely changed the nature of these plazas by allowing roads and streets to cross the open plane of space. Washington Square in New York is a fine example. Though the city maintained almost all of the open space constituting the square, and the park continued to serve many of the needs

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64 See Benjamin Fried, A New Kind of Market Economics, Project for Public Spaces, available at http://www.pps.org/markets/info/markets_articles/markets_economic_development (last visited April 10, 2006) (“Whereas a big box retail development relies on cheap prices (and low-wage labor) to draw customers, a market must offer a public space experience and mix of products tailored to the people it serves in order to be economically competitive.”).

served by the European plazas and squares, the existence of roads for motor vehicle traffic within the area bounded by structures changed the nature of the space in one very important way. The square was now isolated from the surrounding buildings, effectively severing the tie between the surrounding buildings and the open space. The cafes or restaurants housed in the perimeter buildings abutted streets with motor vehicles speeding by at perhaps thirty-five miles per hour. The ability of patrons to walk from the fountains, lawns, and chess tables in the park to the stores, restaurants, and cafes was drastically reduced due to both psychological and physical constraints. Even if one did not mind the de minimis inconvenience of having to cross a small street, the psychological barrier remained. The park did not seem as accessible. The stream of cars violated the intimacy of the space and cut off the businesses from patrons.

There is some indication that the public square is gaining newfound importance in American life. As urbanist Fred Kent notes, “[T]here's new excitement about reinventing the square as a key asset for 21st century cities. With historical roots in cultures all over the world, squares are being rediscovered as a powerful means of transforming communities.”

Increasing control over these public fora by the private sector, particularly in times of shrinking governmental budgets driven by lower taxes, may make public squares more viable than they have been in our nation’s immediate past. And the more advocates for public gathering spaces there are, the more spaces we will have. Support for public space from business and corporate America may be exactly what is needed for the square to make a comeback.

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PART III: DISADVANTAGES OF PRIVATE CONTROL OVER PUBLICLY-OWNED SPACE

Just as there are political, economic, and social benefits obtained from the private control of publicly-owned space, there are also political, economic, and social disadvantages as well.

A. Political Disadvantages

It is important to acknowledge the extensive body of literature arguing that the private control of public space is fundamentally undemocratic. Private control over public spaces reduces the accountability of elected officials and allows the views of the general public to be disregarded. David Sklansky, for example, argues that “[t]hose who come into contact with private [security] guards but do not help to pay for them may not welcome the fact that such guards are accountable exclusively to their customers.” If private guards abuse their power, elected officials are less likely to be blamed for the abuse or the lack of oversight that allowed the abuse. And those responsible for the security need not listen to the views of the public at large. This police function, traditionally within the province of the politically elected government, is influenced then only by the market. Those individuals not a part of the market no longer have input. Their views become irrelevant.

B. Economic Disadvantages

There are some economic concerns that arise when private entities control publicly-owned land. Taking on de facto security responsibilities might increase corporations or

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67 See generally MARGARET KOHN, BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE 2-3 (2004); 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 155 (Michael Sorkin, ed.) (1992) (“The universal consequence of the crusade to secure the city is the destruction of ally truly democratic urban space.”).

68 Sklansky, supra note 5, at 1191.
private land owners’ liability for injuries occurring on adjacent publicly-owned land. This is the flip-side of the property owner liability issue discussed above. Once businesses begin to take responsibility for protecting their employees by securing adjoining public parcels, out of fear of being held liable for inaction, they effect a damning admission: that such attacks are foreseeable and that security measures are available. Thus, by attempting to better secure their premises to avoid liability, they risk greater liability if the security measures they do provide prove inadequate.

With regard to the policing of adjacent public space, private organizations also risk criminal liability for violation of individuals’ constitutional rights under 18 U.S.C. § 242 if their agents improperly search, seize, detain, or compel incriminating statements.

Private policing also leads to various externalities. First, there is a free-rider problem. when the NYSE pays to maintain the secure zone, the J.P. Morgan headquarters is protected from terrorist attacks as well without Morgan paying a cent. J.P. Morgan has no incentive to take part in funding this security and obtains a significant benefit with zero cost. Second, private policing effectively helps some by harming others. As Sklansky notes, “policing protects some people by interfering with other people, and there is no obvious way to require those who are protected to pay for the burdens imposed on those they are protected from.” Thus the NYSE benefits from its searches but does not compensate those searched for their time and good will. In the end, “[a]ll of these externalities can be anticipated to warp private expenditures for police protection away from what economists would consider socially

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69 See notes 42-44 and accompanying text.
71 Sklansky, supra note 5, at 1192.
72 Id. at 1192-1193.
efficient. One might expect the private sector to overfund crime control strategies with large negative externalities....”\textsuperscript{73}

C. Social Disadvantages

There are social disadvantages to privatizing policing of public space. Many urbanists might be alarmed at the potential for discrimination private control of public space allows. Private control of public space enables those in control “to exclude ‘undesirables’—the homeless, the downmarket, the non-shoppers—from places of investment and privilege intended to attract up-scale suburbanites, the urban elite, and tourists with disposable income.”\textsuperscript{74} While the exclusion of “non-shoppers” is of little consequence, the exclusion of the homeless and “the downmarket”—and the identity of those making the determination of who is downmarket—should be of great concern. At worst, private policing might permit arbitrary discrimination. At the least, if this paradigm spread, it might effectively turn cities into theme parks for the affluent.

\textbf{PART IV: THE LAW OF PRIVATE CONTROL OF PUBLICLY-OWNED SPACE}

The economic, political, and social benefits of private control of public spaces notwithstanding, there is considerable doubt over whether or not such private control is lawful. While the power of state and federal government officials to search, seize, or restrict access to public property is indisputable, the power of private actors to do so is far less certain. This section discusses the powers of a private actor, be it an individual or corporation, to exercise control over public property in both the absence of delegated

\textsuperscript{73} \textit{Id.} at 1193.
\textsuperscript{74} Kressel, \textit{supra} note 48.
authority and when such control is delegated by municipal, state, or federal government. Legal authority and the source of that authority depend on the circumstances. Here we seek to determine two separate questions: Is the actual exercise of control over these streets permissible, and if so, what constitutional constraints apply?

Over the past several decades, private policing has been on the rise. By private police, this Paper refers specifically to private security personnel, individuals who carry out many of the same duties as public police, such as conducting searches, detaining individuals, investigating crimes, and securing special boundaries, but are paid by and accountable to the corporations or landowners for whom the work. Little has been written about the laws pertaining to private police. As Elizabeth Joh, professor of law at the University of California at Davis, points out, few empirical studies of private police conduct exist, and “legal scholars—especially those who study the public police—have paid them hardly any attention.” More importantly, state courts and legislatures have also neglected the private police, developing few rules or regulations to govern private police. At the federal level, “[t]here exist hardly any…statutes directed specifically toward private police conduct,” and both the Supreme Court and the lower federal courts have held that federal constitutional restraints placed on public police do not apply to the private police. Thus, the Fourth Amendment constraints on searches and seizures and other rules of constitutional criminal procedure derived from the Fifth and Sixth Amendments generally do not apply. This dearth of scholarship and case law provides this author with a unique opportunity to analyze the little

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75 See Joh, supra note 2, at 50-59; Sklansky, supra note 5, at 1167.
76 Joh, supra note 2, at 49.
77 Id.
78 Id.
79 Id.
law that does exist and recommend new legal rules and rationales for evaluating the private control of publicly-owned space.

A. Where No Express Delegation Has Been Made

When neither the city nor an agency (the police department) has expressly delegated its police powers over a particular parcel of land to a private security force, any actions taken by that security force to control access to the public property or to search individuals on that property is illegal.

In New York City, for example, it is illegal for private citizens to close a public street to either pedestrian or vehicular traffic without a permit.⁸⁰ Though there was some uncertainty as to this position in the early days of the city’s history — in the beginning of the nineteenth century, “it was by no means clear whether the power to map out the rapidly growing city belonged to the municipal governing body, the Common Council, or to private landowners”⁸¹ — in 1807 the city appealed to the state to settle the issue, and the state appointed a commission with “the ‘exclusive power to lay out streets, roads and public squares,’ and to ‘shut up’ streets already built by private parties.”⁸² Today, the State Law of New York gives cities within the state the power to “lay out, establish, construct, maintain, operate, alter and discontinue streets.”⁸³ Accordingly, New York City makes provision for such street closures in two separate sections of the city’s administrative code: § 5-432 which deals with the permanent closing of public streets and § 19-107 which deals with the temporary closing of public streets. Each of these provisions is discussed in greater detail in this section.

⁸² Id.
Section 5-432 of the New York City Code reads as follows:

The city may authorize the closing or discontinuance of the surface, subsurface or air space over such streets therein, in whole or in part, upon the determination that (1) such closing or discontinuance will further the health, safety, pedestrian or vehicular circulation, housing, economic development or general welfare of the city and (2) in the case of a partial closing or discontinuance of the subsurface or air space over such streets, will not substantially interfere with pedestrian or vehicular use of such streets.”

Unlike § 19-107, discussed infra, § 5-432 does not allow the city to issue permits to private parties to close a street. Only the city can permanently close a public street. The city can close a street at the request of a public entity for the achievement of a public benefit, but the actual process for closing the street must be undertaken by the city itself. For instance, for a city street to be closed, the New York City Board of Estimate must pass a resolution providing for the institution of proceedings for the closing or discontinuance of [a] street. The city must compensate any owners of adjacent property who are affected or damaged by the closing and any owners of title to land that is actually a part of the street that is closed. According to § 5-432, then, no private entity like the NYSE can permanently close a city street.

Additionally, even if the city itself authorizes the closing of a city street, § 5-432 requires that the city do so for a public purpose. As §5-432 notes, a public purpose might be to protect the health or safety of pedestrians, to encourage economic development, or to further the “welfare of the city,” but closing a street to further the interests of one large and

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85 Id.
86 § 5-433.
87 § 5-432. For example, it is not uncommon for private individuals to own the land on which a city street runs. In such instances, the city likely owns an easement on that private property for that street. If a street on private land is closed, the owner of that land must also be compensated. Often the city will attempt to buy the fee title for the land on which the street runs. See § 5-433(2).
influential property owner does not qualify as a public purpose.\footnote{See, e.g., City of N.Y. v. Aviation Distributors, Inc., 84 N.Y.S.2d 84 (1948) (“land consisting of street area under the viaduct running around Grand Central Terminal did not cease to be a public street so as to allow City to grant a permit for its private use”); Stahl Soap Corp. v. City of N.Y., 4 A.D.2d 957, 167 N.Y.S.2d 717 (1957), aff’d 5 N.Y.2d 200, 182 N.Y.S.2d 808, 156 N.E.2d 443 (1959) (Where a brewery company owned all the land on both sides of a public street for one block, city’s agreement to close the street so that the brewery might use the street for the parking of its vehicles was unlawful. The closure was not intended to serve a public necessity or “for the preservation of the regularity and uniformity of the streets.”).} Closing the streets around Wall Street in a way that disproportionately benefits one land owner, NYSE, is not a public necessity or sufficiently tailored to bettering the welfare or safety of the city.

Section 19-107 of the New York City Code provides for the temporary closure of city streets.\footnote{N.Y.C. Code § 19-107 (2000).} Section 19-107 \[says\] that a city street can only be temporarily closed by the Commissioner of the Department of Transportation and even then only in certain circumstances.\footnote{Id.} The commissioner himself may order a street to be temporarily closed “when…travel therein is deemed to be dangerous to life [as a result of construction],” when the police, fire, or Office of Emergency Management advises that such a closure is necessary to protect life or safety, or for another necessary “public purpose.”\footnote{Id.} Or the commissioner may issue a permit to have a street temporarily closed for these same reasons.\footnote{Id.}

“Public purpose” under § 19-107 specifically has not yet been interpreted by the courts,\footnote{Id.} but one can reasonably assume it means the same thing it means under § 5-432. Accordingly, the case law interpreting public purpose under § 5-432 should control.\footnote{Id.}

The temporary closure of streets is not without provision for maintaining accountability either. When the Commissioner of Transportation does close or issue a permit to close a city street, if the closure will last for more than five days, he must inform the local community board and the city council member in whose district the street is located, provide
reasons for the closure, and estimate the date that the street will reopen.\textsuperscript{95} The code allows for longer closures, but with greater duration comes additional requirements. If a public street is fully closed for more than one hundred eighty consecutive days, the commissioner must issue a “community reassessment, impact, and amelioration statement (CRIA).”\textsuperscript{96} The CRIA must be approved by the commissioner of Transportation or the government entity requesting the permit and initiating the street closure.\textsuperscript{97} The CRIA statement must contain the following:

(a) the objectives of the closure and the reasons why the continued street closure is necessary to attain those objectives, which in the case of a closure initiated by a local law enforcement agency for security reasons shall be satisfied by a statement from the local law enforcement agency that the street has been closed and will remain closed for security reasons; (b) identification of the least expensive alternative means of attaining those objectives and the costs of such alternatives, or a statement and explanation as to the unavailability of such alternatives, which in the case of a closure initiated by a local law enforcement agency for security reasons shall be satisfied by a statement from the law enforcement agency that there are no alternative means available; (c) how the continued street closure will impact access and traffic flow to and within the surrounding community, including but not limited to, access to emergency vehicles, residences, businesses, facilities, paratransit transportation and school bus services; and (d) any recommendations to mitigate adverse impact and increase access to and within the area.\textsuperscript{98}

When the closure is made by permit, the commissioner must hold “at least one public forum, publicized in advance, in any affected community at which the community may register its input concerning any potential adverse impacts of the street closure, including but not limited to concerns regarding timeliness of emergency vehicle response and traffic congestion resulting in a potential increase in noise and any other adverse conditions caused by the closure.”\textsuperscript{99} And when the closure is executed for security reasons, the police

\begin{footnotes}
\footnote{\textsuperscript{95} § 19-107(ii).}
\footnote{\textsuperscript{96} § 19-107(iii).}
\footnote{\textsuperscript{97} Id.}
\footnote{\textsuperscript{98} Id.}
\footnote{\textsuperscript{99} Id.}
\end{footnotes}
department must hold the public forum.\textsuperscript{100} Thus, even where closure is temporary, it requires the city to remain accountable and keep the public informed.

These provisions of the N.Y. Code were the guiding authority in Judge Tolub’s decision in \textit{Wall Street Parking Garage Corp. v. New York Stock Exchange, Inc.}\textsuperscript{101} On March 12, 2004, Judge Walter Tolub held that a private organization could not shut down public streets or conduct searches of private persons on those streets without official authorization (or perhaps even with such authorization), that under § 5-432 only the city could authorize such closures, that the city had not authorized the closure of these streets appropriately, and that the operation of these checkpoints by the NYSE security personnel was unlawful.\textsuperscript{102} NYSE was certainly not permitted to control these public spaces without some official grant of authority from the NYPD or the city government. Tolub noted that “[t]here is no question that under New York law, the New York City Police Department has the authority to temporarily shut down public streets when it deems that there is a necessity for their closure, and that those closures may become permanent. However, this court questions whether the NYPD may delegate the maintenance and control of those blockades to a private security force without formally delegating some kind of police authority, or even if that authority may be delegated at all.”

And New York City is not alone. Every state in the Union has a statute or regulation pertaining to street closures.\textsuperscript{103} Most states have statutes granting city or municipal

\textsuperscript{100} \textit{Id.}

\textsuperscript{101} 3 Misc.3d 1014, 779 N.Y.S.2d 745 (2004).

\textsuperscript{102} \textit{Id.} at 1022-23, 779 N.Y.S.2d at 753. The injunction against the NYSE was ultimately lifted, though for other reasons. The appellate court found that the plaintiff was unable to show any damage/harm/injuries and reversed the order. But the appellate court did not disagree with Judge’s Tolub’s holding that NYSE could not shut down the streets without some formal grant of authority from the NYPD. \textit{Wall Street Garage Parking Corp. v. New York Stock Exchange, Inc.}, 10 A.D.3d 223, 227, 781 N.Y.S.2d 324, 326 (2004).

\textsuperscript{103} \textit{See} Appendix B (providing a tabular depiction of each of these statutes).
governments the power to close streets within their jurisdictions.  

In these states, the cities typically forbid private actors from closing streets. Many of the nation’s twenty largest cities has a city law or regulation prohibiting the permanent private obstruction of streets similar to § 5-432 and § 19-107. In some states, statutes grant general powers to local governments, and the courts, interpreting these statutes, have found the closure or vacation of streets to be within these grants of powers.  

A handful of states give the power to close streets, whether in a county or a city, to the courts or the administrative agencies such as the Departments of Highways.


105 See LA. REV. STAT. ANN. § 33-361 (2005); Op.La. Atty.Gen.1946-48, p. 462 (“The governing authority of a municipality is authorized to close and vacate a portion of a street where it is no longer needed for public purposes.”); MICH. CONST. art. 7, § 31 (“The legislature shall not vacate or alter any road, street, alley or public place under the jurisdiction of any county, township, city or village.”); Cooper v. City of Detroit (1880) 4 N.W. 262, 42 Mich. 584 (holding that under art 7, § 31, the rights of the public in city streets may be extinguished by legislation in Home Rule Cities).

106 17 DEL. CODE § 1301 (2006) (“The Superior Court shall have jurisdiction to vacate public roads, bridges and all other rights-of-way, including, but not limited to, alleys, pathways, walkways and the like, whether within the jurisdiction of the Department, the county in which it is located, municipalities, towns, any governmental authority or the general public, including areas not within the jurisdiction of a governmental authority, but for which the general public or specific members of the public have acquired an interest.”); HI. REV. STAT. § 265A-1 (2004) (“The...councils or...governing bodies of the...political subdivisions of the State shall have the general supervision, charge, and control of, and the duty to maintain and repair, all county highways, bikeways, and sidewalks and...the councils or other governing bodies may make all regulations needful for the public convenience and safety in all cases where permission has been or may be granted to maintain...other structures across, under, over, and upon all county highways. [T]he counties by ordinance may take over, or receive by
Where city ordinances explicitly forbid private actors from closing or interfering with the operation of public streets, the penal codes generally lay out the penalties to be assessed. In New York City, for instance, one who closes or interferes with the operation of a public street is guilty of violating N.Y. Penal Law § 240.45. Where city ordinances merely grant the power to close streets to city governments without explicitly forbidding private closure, the relevant common law comes into play. The most notable prohibition of private control over public streets is the common law of nuisance. As the attorneys for the Wall Street Parking Garage argued before Judge Tolub, a private corporation appropriating a public street for private use constitutes a public nuisance.\(^\text{107}\) A public nuisance “consists of conduct or omissions which offend, interfere with, or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place, or endanger or injure the property, health, safety, or comfort of a considerable number of persons.”\(^\text{108}\) A number of courts have held that blocking or obstructing public streets interferes with the public’s right of access and enjoyment and is thus a public nuisance.\(^\text{109}\) At least one court has held that an occupation of a public street that merely


\(^\text{108}\) Id. (citing 5th Avenue Chocolatiere, Ltd. V. 540 Acquisition Co., L.L.C., 272 A.D.2d 23, 30, 712 N.Y.S.2d 8, 14 (1st Dep’t 2000), rev’d on other grounds, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280, 727 N.Y.S.2d 49 (2001). See also, N.Y. JUR.2D NUISIBLES § 5 (defining a public nuisance as “conduct or [an] omission which offends, interferes with, or causes damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place, or endanger or injure the property, health, safety, or comfort of a considerable number of persons.”). Note that this is different from a private nuisance in that a public nuisance causes damage to “the public in the exercise of rights common to all.” See Copart Indus., Inc. v. Consol. Edison Co., 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 172, (1977); Preble v. Song Mtn., Inc., 62 Misc. 2d 353, 361, 308 N.Y.S.2d 1001, 1010 (Sup. Ct., Cortland Cty 1970).

\(^\text{109}\) See, e.g., Callanan v. Gilman, 107 N.Y. 360, 365 (1887) (noting that “an extensive and continuous use of the sidewalk cannot be justified”); Bleichfeld v. Friedenthal, 49 Misc.2d 584, 584, 268 N.Y.S.2d 192, 193 (Sup. Ct.
inconveniences the public is a *per se* public nuisance.\textsuperscript{110} Furthermore, the fact that the police department looks the other way when a private corporation closes a street does not make for an express authorization of such a closure; \textsuperscript{111} omission is not the same as the affirmative act of authorization. \textsuperscript{112} And this interpretation of nuisance law is not limited to New York. Courts in nearly every state have found private entities that obstruct public streets to be liable for creating a public nuisance.\textsuperscript{113}

i. Applicability of Constitutional Constraints

In answering the second question, whether the constitutional criminal procedure constraints apply where no express authorization or delegation to close streets has been made, it would seem logical that they would. If private security guards conduct illegal searches, the fruit of those searches would be inadmissible.\textsuperscript{114} Unfortunately, logic fails us, and the issue is not as clear cut as it would seem. We begin with the state actor doctrine.

\textsuperscript{110} See *Flynn v. Taylor*, 127 N.Y. 596, 600-01, 28 N.E. 418, 419 (1891).

\textsuperscript{111} See *Broad Exchange*, 117 Misc. at 90, 191 N.Y.S. at 538-39 ("[A]lthough the exchange’s illegal use of the street appeared to be sanctioned by the police department’s inactivity, the police should have performed their duty and halted a flagrant public nuisance.").

\textsuperscript{112} *Id.*

\textsuperscript{113} See generally 58 AM. JUR.2D NUISANCES \textsection 34, 38-41 (citing cases from a variety of jurisdictions holding that the obstruction of public streets constitutes a public nuisance).

\textsuperscript{114} See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that evidence seized in violation of a suspect's Fourth Amendment rights, through unreasonable searches and seizures, is inadmissible at the suspect's criminal trial); *Miranda v. Arizona*, 384 U.S. 436, 478 (1966) (holding that evidence obtained as a result of information gathered from an improperly obtained confession was inadmissible).
The state action doctrine “provides the analytical tools that permit a close review of private police action.”\textsuperscript{115} The Court has identified the following three guiding factors to consider in applying the state action doctrine:

In determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: \textbullet{} the extent to which the actor relies on governmental assistance and benefits, \textbullet{} whether the actor is performing a traditional governmental function, and \textbullet{} whether the injury caused is aggravated in a unique way by the incidents of governmental authority.\textsuperscript{116}

Several commentators have argued convincingly that courts applying this doctrine rigorously would have to conclude that private police action is state action and thus subject at the very least to Fourth, Fifth, and Sixth Amendment constitutional criminal procedure rules.\textsuperscript{117}

And yet most courts have refused to apply the state action analysis so stringently to private police. Courts have given only “superficial review” to the state action doctrine where private policing is concerned.\textsuperscript{118} Courts focus almost exclusively on whether the state has vested private personnel with an official title.”\textsuperscript{119} In \textit{Burdeau v. McDowell},\textsuperscript{120} the U.S. Supreme Court refused to find a violation of a defendant’s Fourth & Fifth Amendment rights where the government obtained incriminating documents the defendant’s employer had wrongfully removed from the defendant’s office.\textsuperscript{121} The Court held with regard to the Fourth Amendment that it “gives protection against unlawful searches and seizures…appl[icable

\textsuperscript{115} Joh, \textit{supra} note 2, at 94-95.


\textsuperscript{117} See Sklansky, \textit{supra} note 5, at 1250 (“[J]udging the private police by any of these three factors would classify them as state actors.... Much...scholarship takes the view that the state action doctrine, if carefully applied, would qualify private police as state actors.”).

\textsuperscript{118} Joh, \textit{supra} note 2, at 95.


\textsuperscript{120} 256 U.S. 465 (1921).

\textsuperscript{121} Id. at 466.
only] to governmental action.”\textsuperscript{122} The Court held that there could be “no invasion of the security afforded by the Fourth Amendment...[because] whatever wrong was done was the act of individuals in taking the property of another.”\textsuperscript{123} It was not the same as the state taking the property. Nor did the Court find a violation of the defendant’s Fifth Amendment right against self-incrimination. The Court wrote: “We see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken [the documents], should prevent them from being held for use in prosecuting an offense when the documents are of an incriminating character.”\textsuperscript{124}

In \textit{Flagg Bros., Inc. v. Brooks}\textsuperscript{125} the Supreme Court laid out a two prong analysis for determining what was state action in the context of private actions taken in compliance of state law.\textsuperscript{126} The Court asked whether the private actor was (a) permitted or compelled to act,\textsuperscript{127} and whether (b) the action was an exclusive state function.\textsuperscript{128} In \textit{Flagg}, the statute permitted, though did not compel, the execution of a lien. The Court held that the execution of that lien was not an exclusive state function.\textsuperscript{129} Furthermore, the Court in \textit{Flagg} intentionally stopped short of saying whether policing is an exclusive state function. “We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [as education, fire and police protection, and tax collection] and thereby avoid the strictures of the Fourteenth Amendment.”\textsuperscript{130} The Court went on to note that “this Court has never considered the private exercise of traditional police

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 475.
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.} at 476.
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} 436 U.S. 149 (1978).
\item \textsuperscript{127} \textit{Id.} at 166.
\item \textsuperscript{128} \textit{Id.} at 163 n.11.
\item \textsuperscript{129} \textit{Id.} at 157-58.
\item \textsuperscript{129} \textit{Id.} at 162.
\item \textsuperscript{130} \textit{Id.} at 163–64.
\end{itemize}
\end{footnotesize}
functions. *Griffin* thus sheds no light on the constitutional status of private police forces, and we express no opinion here.”

The Supreme Court has, on occasion, found private security personnel to be state actors, but the facts of these cases were not like the ones in *Wall Street Parking Garage*. In *Williams v. U.S.*, the Court held that a private investigator was a state actor for the purposes of a federal criminal statute imposing fines on public officials for violating another person’s constitutional rights. The Court found that J.G. Williams violated 18 U.S.C. § 242 when he took suspected thieves to a shack on the company’s premises and tortured them with rubber hoses, pistols, clubs, etc. until they confessed. But the Court held that Williams could be prosecuted under 18 U.S.C. § 242 because he was licensed by the city of Miami, took an oath, and was supervised in his interrogation by a city police officer. Certainly this is a situation far different from an unsupervised NYSE security officer who possesses no such license and who took no such oath.

The Court held likewise in *Griffin v. Maryland*, where it found an amusement park security officer to be a state actor for the purposes of the equal protection clause of the Fourteenth Amendment. The Court held that because the security guard (a) had been deputized by the county sheriff, (b) wore a deputy sheriff’s badge, and (c) identified himself as a deputy sheriff, he was a state actor and therefore able to violate the equal protection clause by discriminating against African-American patrons of the park. “If an individual is possessed of state authority and purports to act under that authority, his action is state action.

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131 *Id.* at 164 n.14.
133 *Id.* at 99-100.
134 *Id.* at 98.
135 *Id.* at 100.
137 *Id.* at 135.
138 *Id.*
It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action that he took was not authorized by state law.\textsuperscript{139} Again, because the NYSE officers were not officially deputized, did not wear badges, and did not hold themselves out as deputies, courts will be far less likely to find them to be state actors under \textit{Griffin}.

These NYSE security guards, if not deemed state actors, will be subject only to the usual tort remedies of trespass and false imprisonment, the same as if John Q. Citizen had conducted the search. Unless private security guards are deputized or explicitly empowered to act as police, the Fourth, Fifth, and Sixth Amendment criminal procedure protections do not apply. This leads to the absurd conclusion that while private policing or closure of public streets is impermissible and such officials may be enjoined from conducting any future searches, anything seized by these private security officials in prior searches is freely admissible in a court of law.

There is an argument to be made, of course, that courts are likely to distinguish the private police officers in \textit{Williams} and \textit{Griffin} from those private security guards not expressly deputized or empowered by the city but whose actions take place on publicly-owned land based on that last crucial element: action on public land. When the policing takes place on public land, that extra element changes the analysis and leads to the likely conclusion that courts will apply the state actor doctrine by implication for Fourth, Fifth, and Sixth Amendment purposes. Furthermore, the fact that the NYPD worked alongside the NYSE officials, even if only for a short time, may lead courts to view this case as one of “joint action.” As Elizabeth Joh explains:

\textsuperscript{139} \textit{Id.}
When public police openly and directly control what private police do, courts have found little trouble finding state action, and therefore the applicability of constitutional criminal procedure law. The same is true when courts determine that there has been a ‘joint endeavor’ between public and private, as when a private investigator working for an insurance company searches a burned home with the local public police, or when private credit card fraud investigators work together with public police officers.” 140

In the case of the NYSE security checkpoints, based on the fact that the NYPD and NYSE officials worked side by side for a period of time before the NYPD relinquished total control to NYSE, the fact that NYPD implicitly authorized NYSE officials to continue to maintain the secure zone themselves, and the fact that the action took place on public land, courts might find such action to constitute state action. Courts would then be expected to apply the federal rules of constitutional criminal procedure. Still, since none of the courts discussed above have dealt with private actors on publicly-owned streets or land, and since the NYSE officials were not explicitly authorized to act, we cannot predict with any degree of certainty that courts will make this leap. It is instead more likely that they will view non-deputized NYSE officials operating without formal authorization as private actors subject only to common law tort remedies. Evidence obtained by these NYSE officials would be admissible in court.

B. Where Express Delegation Has Been Made

Where public officials or police have expressly delegated the power to control and police public space to private security guards, courts are likely to find this delegation and subsequent actions by private security on public land permissible. The reasoning is straightforward. As discussed in Part IV.A of this Paper, express delegation is necessary to make the actual policing legal. Judge Tolub held that private security officials have no power

140 Joh, supra note 2, at 116 (citations omitted).
to police public streets.\textsuperscript{141} Only through a public grant of power can private police act legally on public land. And express authorization removes concerns usually present with private policing by making private security forces, like the NYSE officials, state actors and thus bound by the Fourth, Fifth, and Sixth amendments’ strictures of criminal procedure.

Of course, not all courts will allow even the express delegation of public police powers on public land. Judge Tolub, for example, expressed doubt about whether such private policing of public land would be permissible even with express delegation from the city.\textsuperscript{142} “[T]his court questions whether the NYPD may delegate the maintenance and control of those blockades to a private security force without formally delegating some kind of police authority, or even if that authority may be delegated at all.”\textsuperscript{143} It is therefore important to recognize that even with such a grant of authority, the legality of private control of public spaces by private actors is uncertain.

\textbf{ii. Applicability of Constitutional Constraints}

As for the second question, whether constitutional criminal procedure constraints apply, the answer should be yes. If private security is expressly authorized to police publicly-owned land, courts should have no difficulty finding these private security officers to be state actors for the purpose of applying constitutional criminal procedure protection. As discussed \textit{supra}, the state action doctrine contains three guiding factors.\textsuperscript{144} To determine whether a particular action or course of conduct is governmental in character, the actor must “rel[y] on governmental assistance and benefits, … perform[] a traditional governmental function, and…the injury caused [must be] aggravated in a unique way by the incidents of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{See supra} notes 115-16 and accompanying text.
\end{itemize}
\end{footnotesize}
Each of these elements is satisfied when private police control public space with the express authorization of the city government. There is little doubt that the expressly authorized policing of city streets is a traditional public function.

But even here, what seems like a logical outcome is not unassailable. There is some indication that constitutional criminal procedure rules may not apply even with express delegation. In *Flagg Bros. v. Brooks*, even state delegation of power to private entities did not make those private entities state actors. The court discussed the difference between a statute that permits a private actor to act and one that compels that actor to act. In the latter, the court is likely to find the actor to be a state actor and thus able to violate constitutional rights under the Fourth, Fifth, Sixth, and Fourteenth amendments. But in the former, the fact that a statute merely permits a person to act to curtail another’s liberties does not make that actor a state actor. If a delegation of authority from the NYPD to the NYSE only permitted the NYSE officers to police the area, but did not compel it, it is conceivable that a court might not find the NYSE officials’ actions to constitute state action under *Flagg*.

The court in *Flagg Bros.* also held that in order for a private entity to be considered a state actor, they had to be doing an exclusive state function. The Court in *Flagg Bros.* refused to define the universe of exclusive state functions, and interestingly for us, refused to say if policing was exclusive state function. “We express no view as to the extent, if any, to which a city of State might be free to delegate to private parties the performance of such functions [as education, fire and police protection, and tax collection] and thereby avoid the

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147 *Id.* at 164-66.
148 *Id.*
149 *Id.*
150 *Id.* at 163-64.
strictures of the Fourteenth Amendment."\textsuperscript{151} The Court went on to note that “this Court has never considered the private exercise of traditional police functions. \textit{Griffin} thus sheds no light on the constitutional status of private police forces, and we express no opinion here.”\textsuperscript{152}

Once again, the element of public land may serve to distinguish \textit{Flagg} from the NYSE case; the fact that the alleged violation of rights occurred on public land in \textit{Wall Street Parking Garage} serves to distinguish the case from the facts in \textit{Flagg}. And in a case where the delegation of authority is clear and express, the facts weigh even heavier on the side of an affirmative finding of state action. Therefore, based on the express nature of the delegation and where the action took place, we can say with relative certainty that when police power is officially delegated to private actors, constitutional criminal procedural constraints will apply. Evidence seized will not be admissible in court.

\textbf{PART V: PROPOSALS}

As discussed in Section III, there are political, economic, and social reasons why the private control of public space such as streets and sidewalks is both necessary and desirable. To obtain these benefits, however, this private action must be legally permissible and must respect the legal rights of a city’s citizens. The following proposals attempt to provide a comprehensive solution.

First, if, as is the case in most states,\textsuperscript{153} state law grants cities the power to close streets, those cities should allow public streets to be closed, vacated, or abandoned only through enactment of a city ordinance. The impact on public life that results from the closure

\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at 164 n.14. \textit{But see id.} (Stevens, J., dissenting) (“For instance, it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action.”) (citations omitted); Sklansky, \textit{supra} note 5, at 1189 (noting that the very first police in the United States were private constables and that a tradition of public policing, as we know it today did not become the norm until late in the Nineteenth Century).
\textsuperscript{153} \textit{See supra} notes 103-06.
of a city street is significant enough to require the highest level of urban political scrutiny. A bill passed by the city council should be required. If, due to the volume of business coming before the city council, the council is unable to afford attention to every proposal for street closure, the council can certainly delegate the review of street closure proposals to a city agency such as the Department of City Planning or the Department of Transportation. Review at this level of government still assures a meaningful degree of public input. After receiving a recommendation from the reviewing agency, the city council can simply vote in favor of or against the recommendation. This saves the council time while avoiding the type of illegal street closure that occurred around Wall Street in 2001.

Second, cities should also enact ordinances that grant their police departments the power to deputize private property owners for the express purpose of policing closed or cordoned city streets. Once the city council has passed an ordinance closing a particular street or group of streets, the police department can either police that area itself or delegate its power to do so by deputizing private property owners. Such an ordinance would require the police department to complete an order of deputization in order to delegate its police power to a private organizations or citizens. Such an order would explicitly list the names of individuals empowered to act on the police department’s behalf and would list the specific powers of such deputies, thereby assuring some greater degree of accountability. Such an ordinance might even streamline the process by which private individuals are deputized if those individuals are licensed security personnel, as were the NYSE security personnel. A proposed ordinance might allow private security personnel to (a) deny access to public space, (b) erect safety mechanisms such as bollards, cameras, and temporary jersey barriers, (c) eject visitors, and (d) search these individuals. With respect to the power to search individuals on
or wishing to enter public space, the delegation ordinance would permit private security personnel to conduct minimal searches. These searches would be similar to *Terry* stop searches.\textsuperscript{154} They would be non-invasive, consisting of the search of packages, bags, bulky clothing, and vehicles only. The searches would last only so long as needed to ensure that the individual does not have a dangerous weapon.

Some state’s statutory schemes already allow similar set-ups. For example, in Nebraska, city councils can lease their public streets to private businesses, and these businesses can then close the streets and sidewalks for the sale of services or goods or “for the placement of nonpermanent sidewalk cafes, tables, chairs, benches….”\textsuperscript{155} The enactment of a delegation ordinance would allow those leasing the public space to police the area but within defined parameters of acceptable behavior.

Third, the express delegation ordinance must explicitly state that deputized security personnel are state actors and subject to the full spectrum of constitutional criminal procedure constraints. Therefore, the fruits of searches that would violate the Fourth Amendment prohibitions of unreasonable search and seizure if conducted by public police would be equally inadmissible in courts of law as evidence against the individual searched. Incriminating statements made to these private police officials would be inadmissible under the Fifth Amendment.

\textsuperscript{154} A *Terry* stop consists of a brief "stop and frisk" of a person by a law enforcement officer based on that officer’s reasonable suspicion. It derives its name from *Terry v. Ohio*, in which the Court held that “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.” 392 U.S. 1, 30 (1968).

\textsuperscript{155} NEB. REV. STAT. § 19-4301(1). See also ALASKA STAT. § 29.35.060 (allowing the city council to “grant franchises, including exclusive franchise privileges, to a person, corporation, organization, or utility…and may permit the use of streets and other public places by the franchise holder under regulations prescribed by ordinance.”)
Some law enforcement officials will balk at this second proposal, the applicability of constitutional criminal procedural strictures. They will chafe at the way this hampers the prosecution of would-be terrorists caught in the act. But such a compromise is a necessary concession to make if the overarching goal of this power is to have effect: the prevention of property destruction and loss of life. The primary goal of allowing private security officials to control public space is to prevent terrorism and other attacks on the public from occurring in U.S. cities. Being able to prosecute those who attempt to commit these acts, though important, is a secondary goal. Both these goals are evaluated with an eye towards the need to respect the constitutional rights of the public we are trying to protect. The proper balance to be struck then, at least according to this author, is to allow such delegation of search and seizure powers, because the protection of life is tantamount to all else, but to rule evidence improperly obtained in such searches inadmissible in courts of law. The ability to stop a would-be terrorist at a checkpoint, search her vehicle, and deny her access to her target will trump nearly all else, but the protection of constitutional rights against improper search and seizure and compelled self-incrimination will trump the ability to admit evidence that may be necessary to prosecute that would-be terrorist.

Finally, even when the power to control access to and conduct searches on publicly-owned land is not expressly delegated by police departments or a city, as was the case in Wall Street Parking Garage, courts must find private police controlling access to and conducting searches on that land to be subject to constitutional criminal procedure. Courts should apply the Flagg test, but find specifically that the private policing of publicly-owned land is state action. Though the Flagg court did not consider whether policing was an exclusive state
function, any policing on publicly-owned land should be deemed an exclusively public
function and held to the highest level of scrutiny.

For those whose concerns are not alleviated by the applicability of the Fourth, Fifth,
and Sixth Amendments, for those who will no doubt rail at the ability of private security to
abuse their powers by removing individuals who they merely “don’t like,” there is comfort. It
is unlikely that private security personnel will use their powers to harass or commit arbitrary
discrimination on a large scale. Practical application, the demands of time and resources, will
prevent the average user from being thrown out of the square for arbitrary reasons. Arbitrary
discrimination is certainly possible, but the cost of security and the propensity for these
individuals towards apathy speaks against abuse.

The desirability of these proposals can be best understood if applied in hindsight to the
facts of Wall Street Parking Garage. Had these proposals been law in New York State and
City before 2001, the NYPD would not have been able to close the streets surrounding the
stock exchange on its own. It would have had to ask the New York City Council to enact an
ordinance closing the streets to thru traffic. There is no reason to think the City Council
would not have done so with all due haste in the wake of the September 11th attacks. It would
have been a formality, but an important one in terms of public accountability.

Had these proposals been law in New York before 2001, the NYPD would not have been
able to simply hand over the operation of the barricades to NYSE security officials. The
NYPD would have had to obtain lists of NYSE security officials, conduct some meaningful
background checks on those individuals, and provide those individuals with some information
regarding the scope of their powers as deputies. Then the NYPD would have had to complete
the paperwork to make the deputization official. Criticism that such a hurdle is meaningless
is misplaced. Even the simple requirement that the NYPD fill out paperwork to make legal what they did de facto serves to remind those members of the NYPD responsible and the deputized security personnel that they are serving the public and entrusted with the public’s confidence and well being. This simple reminder might be enough to shape the actions of the private actors at least. If nothing else, the formality, the official nature of the act might give the private security officials pause to consider the legal ramifications of their actions, e.g. can I be sued if I trample on someone’s constitutional rights?

Furthermore, had these proposals been law in New York before 2001, there would have been no doubt about the NYPD’s power to delegate such police power at all. The ordinance allowing for such delegation would have removed all doubt in Judge Tolub’s mind as to whether the city could delegate its police power over streets and replaced such doubt with assurances that the power was limited and delineated explicitly.

Lastly, had these proposals been law in New York before 2001, there would be far less doubt over the status of the deputized security personnel as state actors. Any evidence seized by these individuals or any statements and admissions made during these searches would be admissible in courts of law as required by the Fourth, Fifth, and Sixth Amendments. If the deputies acted in bad faith or without the necessary degree of suspicion or cause, the evidence or admission would not be admissible.

CONCLUSION

Five years after the attacks of September 11th, we are in a far better position to assess our immediate reactions to that days’ events. In part, September 11th made us more aware of the need to secure our nations’ landmarks. A history of good fortune and a lack of
imagination on our part created a false sense of security. September 11th made us realize how important securing our nation’s great cities is to our national security and how important the closure of public streets can be to achieving this urban security. We had always known that closing streets around our great public gathering spots offered some social and economic benefits. The creation of public gathering spots allowed the public to intermingle, to eat, drink, and socialize, in an outdoor setting in dense urban centers. Until September 11th, 2001, however, these interests were outweighed by the interests in maintaining the flow of traffic and keeping public expenditures low. Only when the added issue of security was added to the mix did the closure of city streets become feasible. In the end, it took a calamity the size of 9/11 to move us ahead in achieving the political, economic, and social benefits that come when we close public spaces off to motor vehicles and allow them to be privately controlled. But that calamity moved us so quickly and blindly towards these benefits that we failed to take the time to do it right. We began to ride roughshod over important societal values and procedures integral to our national character. What’s more, achieving these political, economic, and social benefits of private control of public spaces was not incompatible with these other societal values espoused in our constitutional principles and procedures. We simply did not pause to consider how we might obtain the benefits while respecting the law. This Paper has offered a multi-part proposal in an attempt to achieve the goals of national security, great “place making,” and economy yet in a way that respects the political and constitutional rights and duties that exist in tandem. If followed, our cities can be full of public spaces, closed to motor vehicles and secured from terrorist threats, maintained by private individuals working for the public and private benefit, and yet respectful of the constitutional rights of the citizens of those great cities.
In the 1990s, despite decades of assertions to the contrary, Mayor Rudolph Giuliani proved that the nation’s largest city was not in fact ungovernable. Neither is that city, or any other city, unsecureable or unlivable. It simply takes patience, ambition, and creativity to secure these cities and make them livable, but it may require the involvement of the private sector to do this effectively.
APPENDIX A: Map of Lower Manhattan’s Financial District
### APPENDIX B: Table of State Statutes

<table>
<thead>
<tr>
<th>State</th>
<th>Code Section</th>
<th>Textual Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Alabama</td>
<td>Ala. Code § 23-4-1                                                                 “Streets, alleys and other highways, or portions thereof, may be closed and vacated upon the application of the municipality in which they are situated and, where not situated in a municipality, upon the application of the county in which they are situated in the manner provided for in this article.”</td>
</tr>
<tr>
<td>2</td>
<td>Alaska</td>
<td>AK Stat. § 29.40.140                                                                 “The platting authority shall consider the alteration or replat petition at a hearing and make its decision on the merits of the proposal. Vacation of a city street may not be made without the consent of the [city] council.”</td>
</tr>
<tr>
<td>3</td>
<td>Arizona</td>
<td>Ariz. Rev. Stat. § 9-276                                                                 “[C]ities and their governing bodies may… regulate the use, …vacate, alter,…or otherwise improve streets, alleys, avenues, sidewalks, parks, public grounds and off-street parking sites.”</td>
</tr>
<tr>
<td>4</td>
<td>Arkansas</td>
<td>Ark. Code. Ann. § 14-54-601                                                                 “Municipal corporations shall have power to…[w]ith regard to streets, alleys, public grounds…and marketplaces, lay off, open, widen, straighten, and establish them, straighten, and establish them.”</td>
</tr>
<tr>
<td>5</td>
<td>California</td>
<td>Cal. Str. &amp; H. Code § 1920-21                                                                 “When the governing body of a city by resolution or ordinance removes a street from public use, or closes it to vehicular or pedestrian traffic, such resolution or ordinance may set forth such minimum maintenance requirements.”</td>
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<tr>
<td>6</td>
<td>Colorado</td>
<td>Colo. Rev. Stat. Ann. § 31-15-702                                                                 “The governing body of each municipality has the power…[t]o lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, parks, and public grounds and vacate the same.”</td>
</tr>
<tr>
<td>7</td>
<td>Connecticut</td>
<td>Conn. Gen. Stat. Ann. § 7-148                                                                 (&quot;A municipality may, by ordinance, “alter…streets, alleys, boulevards,…sidewalks,…public walks” and may “[grant to abutting property owners a limited property or leasehold interest in abutting streets and sidewalks for the purpose of encouraging and supporting private commercial development.”)</td>
</tr>
<tr>
<td>8</td>
<td>D.C.</td>
<td>D.C. Code § 9-203                                                                 “Mayor may close all or part of any street or alley which is determined by the Council to be unnecessary for street or alley purposes, upon approval of a proposed resolution submitted by the mayor to the council for its review.”</td>
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<td></td>
<td>§ 9-202.04</td>
<td>“Public hearing required.”</td>
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</table>
| 9          | Delaware                       | 17 Del. Code § 1301                                                                 (“The Superior Court shall have jurisdiction to vacate public roads, bridges and all other rights-of-way, including, but not limited to, alleys, pathways, walkways
<table>
<thead>
<tr>
<th>State</th>
<th>Code</th>
<th>Section</th>
<th>Relevant Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida</td>
<td>Fla. Stat. Ann. § 336.09</td>
<td>“City commissioners may, upon request of state agency or federal government or petition of any person, close any existing public street.”</td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>Ga. Code Ann. § 36-34-3, § 32-7-2</td>
<td>“In addition to the other powers it may have, any municipal corporation shall have the power, in the interest of the health and general welfare, to…close, or extend public streets, alleys, sidewalks, parks….”</td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>Hi. Rev. Stat. Ann. § 265A-1</td>
<td>(“The…councils or…governing bodies of the…political subdivisions of the State shall have the general supervision, charge, and control of, and the duty to maintain and repair, all county highways, bikeways, and sidewalks and…the councils or other governing bodies may make all regulations needful for the public convenience and safety in all cases where permission has been or may be granted to maintain…other structures across, under, over, and upon all county highways. [T]he counties by ordinance may take over, or receive by dedication or otherwise, any private street or way or may improve, grade, repair, or do any construction work upon private streets, ways, pavement, water lines, street lighting systems, or sewer repairs.”)</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>Idaho Code § 50-311</td>
<td>“Cities are empowered to: create, open, widen or extend any street, avenue, alley or lane, annul, vacate or discontinue the same whenever deemed expedient for the public good.”</td>
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</tr>
<tr>
<td>Illinois</td>
<td>65 Ill. Comp. Stat. Ann. § 5/11-91-1</td>
<td>“Whenever the corporate authorities of any municipality, whether incorporated by special act or under any general law, determine that the public interest will be subserved by vacating any street or alley, or part thereof, within their jurisdiction in any incorporated area, they may vacate that street or alley, or part thereof, by an ordinance.”</td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>In. Code § 36-7-3-12(a)-(e)</td>
<td>“Persons who…own or are interested in any lots or parts of lots; and…want to vacate all or part of a public way or public place in or contiguous to those lots or….”</td>
<td></td>
</tr>
</tbody>
</table>
— 53 —

<p>| 16 | Iowa | Iowa Code Ann. § 354.23 | “A city or a county may vacate part of an official plat that had been conveyed to the city or county or dedicated to the public which is deemed by the governing body to be of no benefit to the public.” |
| 16 | Iowa | Iowa Code Ann. § 364.12 | “A city shall keep all public grounds, streets, sidewalks,…alleys,…public ways,…squares, open…and free from nuisance, with the following exceptions: [p]ublic ways and grounds may be temporarily closed by resolution. Following notice…public ways and grounds may be vacated by ordinance.” |
| 17 | Kansas | Kansas Stat. Ann. § 12-504 | “Whenever the governing body of the city in which any of the following are located or…the owner or owners of the lands adjoining on both sides of any street…desires to have the same vacated…the governing body of such city or the city planning commission shall give public notice of the same.” |
| 18 | Kentucky | Ky. Rev. Stat. Ann. § 82.405(1) | “If a legislative body of a city determines that a public way located within the city should be closed in whole or in part…the legislative body may proceed to close the public way or portion thereof.” |
| 19 | Louisiana | La. Rev. Stat. Ann. § 48:512 | “No person shall close, obstruct, or change any legal road, public road, or street…and being a parish or municipal road, except upon order of the governing authority of the parish for a parish road…or upon order of the governing authority of the municipality for a municipal road.” |</p>
<table>
<thead>
<tr>
<th>Number</th>
<th>State</th>
<th>Statute/Law</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>La</td>
<td>Rev. Stat. Ann § 33-361</td>
<td>“A municipality is…authorized to exercise any power and perform any function necessary, requisite, or proper for the management of its affairs not denied by law.”</td>
<td></td>
</tr>
<tr>
<td>Op.La.</td>
<td>Atty.Gen.1946-48, p. 462</td>
<td>“The governing authority of a municipality is authorized to close and vacate a portion of a street where it is no longer needed for public purposes.”</td>
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<tr>
<td>Maine</td>
<td>30A Maine Rev. Stat. Ann. § 5118</td>
<td>“For the purpose of aiding and cooperating in…an urban renewal project, the municipality…may…close, vacate…streets, roads, sidewalks, ways or other places….”</td>
<td></td>
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<tr>
<td>Massachusetts</td>
<td>Mass. Gen. Laws Ann. 82, § 21</td>
<td>“[A] town or city council of a city may lay out, relocate or alter town ways, for the use of the town or city…or they…may discontinue a town way or a private way.”</td>
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<td>Maryland</td>
<td>Md. Code, art. 23A, § 2(b)(24)</td>
<td>“The legislative body of every incorporated municipality…shall have the following express ordinance-making powers…to sell…and to convey…any real or leasehold property belonging to the municipality when such legislative body determines that the same is no longer needed for any public use.”</td>
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<tr>
<td>Michigan</td>
<td>Mich. Const. art. 7, § 29</td>
<td>“Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.”</td>
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<td></td>
<td>Mich. Const. art. 7, § 31</td>
<td>“The legislature shall not vacate or alter any road, street, alley or public place under the jurisdiction of any county, township, city or village.”</td>
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<td></td>
<td>Cooper v. City of Detroit (1880) 4 N.W. 262, 42 Mich. 584</td>
<td>Holding that under art 7, § 31, the rights of the public in city streets may be extinguished by legislation in Home Rule Cities.</td>
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<td></td>
<td>Mich. Comp. Laws. Ann. §67.12</td>
<td>With respect to villages, “[t]he council may…alter, close, vacate, or abandon a highway, street, lane, alley, sidewalk…if the council considers it to be a public improvement, or necessary for the public convenience.”</td>
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<td>Mich. Comp. Laws Ann. §102.3</td>
<td>With respect to Fourth Class Cities, “when the council shall deem it advisable to vacate, discontinue or abolish any street, alley or public ground, or any part thereof, they shall by resolution so declare….”</td>
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<tr>
<td>Minnesota</td>
<td>Minn. Stat. Ann. § 412.851</td>
<td>“The [city] council may by resolution vacate any street, alley, public grounds, public way, or any part thereof, on its own motion or on petition of a majority of the owners of land abutting on the street, alley, public grounds, public way, or part thereof to be vacated. No vacation shall be made unless it appears in the interest of the public to do so after a hearing preceded by two weeks' published and posted notice.”</td>
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<td>25</td>
<td>Mississippi</td>
<td>Ms. Code Ann. § 21-37-7</td>
<td>“The governing authorities of municipalities shall have the power to close and vacate any street or alley, or any portion thereof.”</td>
</tr>
<tr>
<td>26</td>
<td>Missouri</td>
<td>Mo. Stat. Ann. § 82.190</td>
<td>“A constitutional charter] city shall have exclusive control over its public highways, streets, avenues, alleys and public places, and shall have exclusive power, by ordinance, to vacate or abandon any public highway, street, avenue, alley or public place, or part thereof, any law of this state to the contrary notwithstanding.”</td>
</tr>
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<td>27</td>
<td>Montana</td>
<td>Montana Stat. Ann. § 7-14-4114</td>
<td>“The [city] council may discontinue a street or alley or any part of a street or alley in a city or town, if it can be done without detriment to the public interest, upon…a petition in writing of all owners of lots on the street or alley; or…approval by a majority vote of the council.”</td>
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<td>29</td>
<td>Nevada</td>
<td>Nev. Rev. Stat. § 278:480</td>
<td>“[A]ny abutting owner or local government desiring the vacation or abandonment of any street or easement owned by a city or a county…shall file a petition in writing with the planning commission or the governing body having jurisdiction. The governing body may establish by ordinance a procedure by which…a vacation or abandonment of a street or an easement may be approved. [I]f, upon public hearing, the governing body…is satisfied that the public will not be materially injured by the proposed vacation, it shall order the street or easement vacated.”</td>
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<tr>
<td>No.</td>
<td>State</td>
<td>Statute Information</td>
<td>Description</td>
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<td>30</td>
<td>New Hampshire</td>
<td>N.H. Rev. Stat. Ann. § 674:11</td>
<td>“The local legislative body is authorized and empowered, whenever and as often as it may deem it advisable or necessary for the public interest…to widen, extend, relocate, narrow, vacate, abandon, or close existing streets or parks, and to indicate the acceptance of, change of use, acquisition of land for, or sale or lease of any street or other public way, ground, place, property, or structure.”</td>
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<td>32</td>
<td>New Mexico</td>
<td>N.M. Stat. Ann. 1978, § 3-49-1</td>
<td>“A municipality may lay out, establish, open, vacate, alter, repair, widen, extend, grade, pave or otherwise improve streets, including, but not necessarily limited to median and divider strips, parkways and boulevards; alleys, avenues, sidewalks, curbs, gutters and public grounds….”</td>
</tr>
<tr>
<td>33</td>
<td>North Carolina</td>
<td>N.C. Gen. Stat. Ann. § 160A-299</td>
<td>“When a city proposes to permanently close any street or public alley, the council shall first adopt a resolution declaring its intent to close the street or alley and calling a public hearing on the question. If it appears to the satisfaction of the council after the hearing that closing the street or alley is not contrary to the public interest, and that no individual owning property in the vicinity of the street or alley or in the subdivision in which it is located would thereby be deprived of reasonable means of ingress and egress to his property, the council may adopt an order closing the street or alley.”</td>
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<td>34</td>
<td>North Dakota</td>
<td>N.D. Cent. Code § 40-05-01(8)</td>
<td>“The governing body of a municipality shall have the power…[t]o…alter, vacate,…or otherwise improve and regulate the use of streets, alleys, avenues, sidewalks, crossings, and public grounds…to regulate or prevent any practice having a tendency to annoy persons frequenting the same; and to prevent and regulate obstructions and encroachments upon the same.”</td>
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<td>35</td>
<td>Ohio</td>
<td>Ohio Rev. Code Ann. § 723.05</td>
<td>“The legislative authority of a municipal corporation may… by ordinance and without petition therefor, vacate or narrow such street or alley or any part thereof…[w]hen, in the opinion of the legislative authority, there is good cause for vacating or narrowing a street or alley, or any part thereof, and that such vacation or narrowing will not be detrimental to the general interest….”</td>
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<td>§ 723.04</td>
<td>Granting city governments same power to vacate on petition of interested members of the public.</td>
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<td>36</td>
<td>Oklahoma</td>
<td>11 Okla. Stat. Ann. §42-110</td>
<td>“The municipal governing body by ordinance may close to the public use any public way or easement within the municipality whenever deemed necessary or</td>
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<tr>
<td>State</td>
<td>Reference</td>
<td>Description</td>
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<tr>
<td>Oregon</td>
<td>Ore. Rev. Stat. Ann. § 271.130</td>
<td>“The city governing body may initiate vacation proceedings and make such vacation without a petition or consent of property owners.”</td>
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<td></td>
<td>§ 271.080</td>
<td>Granting city governing body power to vacate streets on petition of interested members of the public.</td>
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<tr>
<td>Pennsylvania</td>
<td>53 Penn. Stat. § 1672</td>
<td>“Every municipal corporation shall have power…to vacate streets or alleys, or parts thereof, upon the petition of a majority in number and interest of owners of property abutting on the line of the proposed improvements…. Every municipal corporation shall have power, whenever the councils or authorities thereof shall deem it necessary…to vacate streets or alleys, or parts thereof, without any petition of property owners.”</td>
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<td>Rhode Island</td>
<td>R.I. Stat. Ann. § 45-23.1-2</td>
<td>“A city or town council is authorized and empowered to make, from time to time, additions to or modifications of the official map by placing on it the exterior lines of planned new streets or street extensions, widenings, narrowings, or vacations.”</td>
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<tr>
<td>South Carolina</td>
<td>S.C. Code 1976 § 5-27-150</td>
<td>“The city council of any city containing more than five thousand inhabitants may open new streets, close, widen, or alter streets in the city when, in its judgment, it may be necessary for the improvement of the city.”</td>
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<td>South Dakota</td>
<td>S.D. Cod. Laws § 9-45-1</td>
<td>“Every municipality shall have power to…vacate [or] alter…roads, streets, alleys, sidewalks, and public grounds.”</td>
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</tr>
<tr>
<td>Tennessee</td>
<td>Tenn. Code Ann. § 6-2-201(15)</td>
<td>“Every municipality incorporated under this charter may...vacate [or] alter...public highways, streets, boulevards, parkways, sidewalks, alleys, parks, public grounds...and squares, regulate their use within the corporate limits, assess fees for the use of or impact upon such property and facilities, and take and appropriate property....”</td>
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<td></td>
<td>§ 6-19-101</td>
<td>“Every city incorporated under chapters 18-22 of this title may… vacate [or] alter…public highways, streets, boulevards, parkways, sidewalks, alleys, parks, public grounds, and squares…and regulate the use thereof within the corporate limits....”</td>
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</tr>
<tr>
<td>Texas</td>
<td>Tex. Code. Ann., Transportation Code § 311.007</td>
<td>“A home-rule municipality may vacate, abandon, or close a street or alley.”</td>
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<td></td>
<td>§ 311.008</td>
<td>“The governing body of a general-law municipality by ordinance may vacate, abandon, or close a street or alley of the municipality if a petition signed by all...”</td>
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- 57 -
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<thead>
<tr>
<th>No.</th>
<th>State</th>
<th>Code Reference</th>
<th>Text</th>
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<tr>
<td>44</td>
<td>Utah</td>
<td>Utah Code Ann. 1953 § 10-8-8</td>
<td>“A municipal legislative body may alter,…narrow,…or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks,…for the parking of vehicles off streets, public grounds, and pedestrian malls and may vacate the same or parts thereof, as provided in this title.”</td>
</tr>
<tr>
<td>45</td>
<td>Virginia</td>
<td>Va. Code § 15.2-2006</td>
<td>“Public rights-of-way in localities may be altered or vacated on motion of such governing bodies or on application of any person after notice of intention to do so has been published.”</td>
</tr>
<tr>
<td>46</td>
<td>Vermont</td>
<td>19 Vt. Stat. Ann. § 301</td>
<td>“Town highways shall be under the general supervision and control of the selectmen of the town where the roads are located.”</td>
</tr>
<tr>
<td>47</td>
<td>Washington</td>
<td>Wash. Rev. Code Ann. § 35.79.010</td>
<td>“The owners of an interest in any real estate abutting upon any street or alley who may desire to vacate the street or alley, or any part thereof, may petition the legislative authority to make vacation…or the legislative authority may itself initiate by resolution such vacation procedure.”</td>
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<td>§ 35.79.030</td>
<td>“If the legislative authority determines to grant said petition or any part thereof, such city or town shall be authorized and have authority by ordinance to vacate such street, or alley, or any part thereof….”</td>
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<td></td>
<td>§ 35.22.280</td>
<td>“Any city of the first class shall have power…[t]o lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds, and to regulate and control the use thereof, and to vacate the same.”</td>
</tr>
<tr>
<td>48</td>
<td>West Virginia</td>
<td>W.Va. Code § 8-12-5</td>
<td>“[E]very municipality and the governing body thereof shall have plenary power and authority therein by ordinance or resolution, as the case may require, and by appropriate action based thereon…[t]o lay off, establish, construct, open, alter,…vacate, discontinue and close, streets, avenues, roads, alleys, ways, sidewalks, drains and gutters, for the use of the public….”</td>
</tr>
<tr>
<td>49</td>
<td>Wisconsin</td>
<td>Wisc. Stat. Ann. § 62.22</td>
<td>“The governing body of any city…may sell and convey property…real or personal, within or outside the city, for parks, recreation, water systems, sewage or waste disposal, airports or approaches thereto, cemeteries, vehicle parking areas, and for any other public purpose.”</td>
</tr>
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|     |        | § 66.1003(2) | “The common council of any city,…village or town…may discontinue all or part of a public way upon the written petition of the owners of all the frontage of the
<table>
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<th>Section</th>
<th>Wyoming Statute</th>
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<tbody>
<tr>
<td>§ 66.1003(4)</td>
<td>“[P]roceedings covered by this section may be initiated by the common council or village or town board by the introduction of a resolution declaring that since the public interest requires it, a public way or an unpaved alley is vacated and discontinued.”</td>
</tr>
</tbody>
</table>

The governing bodies of all cities and towns may… [t]ake all necessary action to plan, construct or otherwise improve, modify, repair, maintain and regulate the use of streets, including the regulation of any structures thereunder, alleys, any bridges, parks, public grounds, cemeteries and sidewalks.”