

The Right and Wrong Ways to Sell a Public Forum

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ABSTRACT: Certain government-owned properties are quintessentially public for free-speech purposes. Municipalities across the country, however, are selling streets, sidewalks, and parks to private actors without consulting the citizens who benefit from the property. Selling a public forum provides a municipality with more money for projects that benefit citizens. On the other hand, privatizing small sections of streets, sidewalks, and parks could lead to a confusing patchwork of public and private property that would leave citizens unsure of their free-speech rights. This Note highlights some issues that prevent a municipality from privatizing a forum. Additionally, this Note theorizes that the sale of public forums would have greater legitimacy if citizens were to decide the issue directly through referendums. If, in hindsight, a sale was a poor decision, eminent-domain powers would provide an avenue to regain the property. Municipalities, private entities, and citizens could all benefit from a properly executed sale of a public forum.

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I. INTRODUCTION

Many different factors determine whether a court considers particular land public or private for the purposes of First Amendment rights. This distinction is critical in deciding what conduct a government can prohibit on the land. In a recent dispute in Silver Spring, Maryland, Montgomery County, this very issue arose. During the summer of 2007, Chip Py, an amateur photographer, was on a street in downtown Silver Spring, Maryland, taking pictures of recently renovated buildings.¹ Private security guards employed by the building management company told Py that he was on private property and was not allowed to take pictures without the company's consent.² Py felt the company's actions violated his First Amendment rights.³ The management company argued that by leasing the street from the City of Silver Spring as part of a development agreement, the street was privatized and was no longer a public forum, and therefore Py should not receive the heightened protection that courts grant when speech occurs in a public forum.⁴ After learning that Py had contacted the Montgomery County Executive and was organizing a protest scheduled for the Fourth of July, the management company released a new policy allowing photography.⁵ Had a court construed the lease as transforming the property into a private forum, the management company would have been free to exclude Py. In contrast, the management company complied with the conclusion of the Montgomery County Attorney's Office that the lease did not change the forum status, and the street remained a public forum.⁶

This incident illustrates the conflicting interests of private actors regulating property and citizens exercising their free-speech rights. One way to resolve such a conflict is to have citizens vote on the matter. Most likely, if citizens would have had the opportunity to vote on the issue in a referendum, they still would have approved the lease and the outcome would have been the same regarding Chip Py's photography. A referendum,

1. Kelly Brewington, *Photographs Spur Debate on First Amendment*, BALT. SUN, June 29, 2007, at 1B.

2. *Id.*; see also Marc Fisher, *Public or Private Space? Line Blurs in Silver Spring*, WASH. POST, June 21, 2007, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/20/AR2007062002354.html> (stating that "the guard sent Py to the management office of . . . the developer that built the new downtown" and that the guard told him that it "may look like a public street, [but] it is actually treated as private property").

3. Brewington, *supra* note 1, at 1B.

4. Memorandum from Nowelle A. Ghahhari, Assistant County Attorney, Office of the County Attorney for Montgomery County, Md., to Isiah Leggett, County Executive, Office of the County Attorney for Montgomery County, Md. 4 (July 30, 2007) [hereinafter Ghahhari Memorandum], available at http://www.washingtonpost.com/wp-srv/metro/daily/073007/073007_PrinceGeorges.pdf.

5. Brewington, *supra* note 1, at 1B.

6. *Id.*; see Ghahhari Memorandum, *supra* note 4, at 8 (explaining the government's conclusion).

however, would have put more citizens on notice of what was happening in their town and would have further legitimized development in their city.

Regardless of whether a transaction involves a referendum, the Supreme Court's First Amendment jurisprudence ultimately determines whether the property is considered public or private. The Supreme Court has held that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."⁷ The Court balances these citizen rights against permissible municipality action. Although citizens have strong free-speech rights in public forums such as streets, sidewalks, and parks, a municipality can sell these forums without consulting the citizens entitled to their use.⁸

This Note presents situations where courts have voided sales of public forums.⁹ Although selling a public forum is not a new development and has many advantages and disadvantages,¹⁰ making the sale contingent on a referendum would further legitimize the sale, prevent future litigation, and ensure that a majority of the people favor the sale.¹¹ Additionally, if selling a forum was a mistake, eminent-domain powers provide a suitable method for converting the forum from private back to public.¹²

A forum analysis begins with the understanding that courts determine a forum's free-speech status. Whether courts classify a forum as public or private is extremely important in determining what conduct a government

7. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *see also, e.g., Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("[The] fact that messages conveyed by communications [on sidewalks] may be offensive to their recipients does not deprive them of constitutional protection."); *United States v. Grace*, 461 U.S. 171, 177 (1983) (noting that on a street, sidewalk, or park "the government's ability to permissibly restrict expressive conduct is very limited"); *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972) ("Access to the 'streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising First Amendment rights cannot constitutionally be denied broadly" (quoting *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968))); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (noting the "settled principle" that "a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions"); *Kunz v. New York*, 340 U.S. 290, 294 (1951) (prohibiting administrative "discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places").

8. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1252 (10th Cir. 2005) (noting that a section of a main street in downtown Salt Lake City was a public forum until the City sold it to a private actor without consulting the citizens who used the property).

9. *See infra* Part III (noting obstacles to privatization by sale).

10. *See infra* Parts II.B–C (examining privatization advantages and disadvantages).

11. *See infra* Part V (discussing the benefits of requiring referendums).

12. *See infra* Part VI (analyzing eminent-domain powers in this regard).

can prohibit within the forum.¹³ Courts can classify government-owned property as public, limited (or designated) public, or nonpublic.¹⁴ If the property is designated as private, the owner has wide latitude to prohibit free speech.¹⁵ In rare situations, however, if the privately owned property functions as a state actor, courts will deem it a public forum.¹⁶

When courts classify a forum as public or private, they balance different factors, which can lead to uncertain results.¹⁷ If a private entity wants its newly acquired property to be treated as a private forum, physical changes that distinguish the forum from the surrounding area may help it gain that distinction.¹⁸ The forum's history, such as whether it was previously open to the public, is also important in determining its current status.¹⁹ Thus, to some private actors' dismay, merely holding title to the property does not definitively create a private forum.²⁰ Courts have already addressed these issues regarding various kinds of property;²¹ however, in the future, courts

13. *Utah Gospel Mission*, 425 F.3d at 1254–56; see *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 944–47 (9th Cir. 2001) (discussing a Las Vegas sidewalk).

14. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (stating that for a limited or designated public forum, “[t]he State may be justified ‘in reserving [its forum] for certain groups or for the discussion of certain topics’” (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995))); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (stating that for a nonpublic forum, “challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view”); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (“[A] content-based restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny.” (emphasis added)).

15. See *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (stating, in regard to private property and free speech, that “no such protection or redress is provided by the Constitution itself”).

16. See generally *Marsh v. Alabama*, 326 U.S. 501 (1946) (finding that a state cannot impose criminal punishment on a person for distributing religious literature on the sidewalk of a company-owned town contrary to the regulations of the town’s management, where the town and its shopping district are freely accessible to and freely used by the public).

17. See generally *Utah Gospel Mission*, 425 F.3d 1249 (finding that a former public street that was purchased by a church and developed into a plaza was not a public forum and, thus, restrictions on speech in the forum did not violate the First Amendment); *Venetian Casino*, 257 F.3d 937 (holding that a replacement sidewalk was a public forum subject to First Amendment protection).

18. See *Utah Gospel Mission*, 425 F.3d at 1256 (stating that physical characteristics that invite the public to the property determine whether it is a public forum).

19. *Venetian Casino*, 257 F.3d at 944.

20. See *Marsh*, 326 U.S. at 511 (holding that a privately owned town “cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations”).

21. E.g., *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (bus and train terminals); *Marsh*, 326 U.S. at 511 (a company-owned town); *Utah Gospel Mission*, 425 F.3d at 1259–62 (a public square sold to a church); *Venetian Casino*, 257 F.3d at 948 (a privately owned sidewalk); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 494–95 (7th Cir. 2000) (a privately owned section of a park); *Chi. Acorn v. Metro. Pier Exposition Auth.*, 150 F.3d 695, 702 (7th Cir. 1998) (sidewalks on a pier); *Jackson v. City of Markham*, 773

will likely face more First Amendment challenges regarding property sold, or merely leased, to private entities.²² This Note focuses on whether a municipality selling a public forum creates a private forum by action of the sale and whether such a sale should be subject to a referendum.²³

II. BACKGROUND

The privatization of public property has always been a contentious issue in America and will likely not dissipate in the future.²⁴ From towns created by large employers to gated communities run by homeowners' organizations, ambiguities have long existed regarding what First Amendment rights people have on certain properties that courts could consider private or public.²⁵ Although there are many advantages and disadvantages of privately owned streets, sidewalks, and parks,²⁶ municipalities must tread a fine line between respecting the rights of the private landowner and upholding the First Amendment rights of the public.²⁷ This balance sometimes tips in favor of the public when the private landowner is considered a state actor²⁸ or when a state constitution provides additional rights not found in the U.S. Constitution.

A. PRIVATE STREETS, SIDEWALKS, AND PARKS: COMPANY TOWNS AND GATED COMMUNITIES

Private streets, sidewalks, and parks have existed for decades in various forms, notably in privately owned company towns.²⁹ In company towns, "[t]he companies hired private police forces, banned literature and speech that challenged company dictates, and evicted employees who failed to be

F. Supp. 105, 109 (N.D. Ill. 1991) (a privately owned sidewalk and shoulder of a highway); *Thomason v. Jernigan*, 770 F. Supp. 1195, 1201–02 (E.D. Mich. 1991) (a privately owned cul-de-sac in front of an abortion clinic); *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 65 (D. Mass. 1990) (a marketplace); *Brock v. Watergate Mobile Home Park Ass'n*, 502 So.2d 1380, 1381 (Fla. Dist. Ct. App. 1987) (a mobile-home park).

22. See *supra* notes 2–6 and accompanying text (discussing property sold or leased to private entities).

23. See *infra* Part V (discussing the impact of selling public forums).

24. See *infra* Part II.A (describing company towns).

25. See *infra* Part II.A (noting these ambiguities).

26. See *infra* Part II.B (describing the economic advantages of privatization).

27. See *infra* Part II.C (explaining the First Amendment issues that arise when a municipality transfers land to a private actor).

28. See *infra* Part II.D (explaining the state-actor requirement); *infra* Part II.E (describing additional protections provided by state constitutions).

29. LAWRENCE SOLEY, *CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES* 25 (2002) (“[B]ecause the housing, land, retail outlets, and even roads were owned by the companies, these towns constituted private property over which the companies exercised total control.”). Most company towns, approximately 2500 in total, were built between 1830 and 1930. *Id.* at 26.

compliant.”³⁰ Providing services traditionally administered by the government—such as building and road maintenance, fire protection, and health services—insulated company towns from some government regulation.³¹ New Deal legislation and Supreme Court rulings in the 1930s and 1940s, however, put an end to company towns.³²

Today, private streets and sidewalks are pervasive in common-interest communities (“gated communities”), such as condominiums, cooperatives, gated communities, and planned communities, where members of the community are contractually bound by covenants, conditions, and restrictions.³³ Currently, one out of eight Americans lives in a gated community; some of these gated communities restrict activity on their streets that would be legal on a public street, including political protest and literature distribution.³⁴ Further, some gated communities “exercise authority over a network of streets, parking lots, open space, and recreational facilities” and “provide services such as street cleaning, trash collection, maintenance of open space, and security.”³⁵ However, courts are split regarding whether these organizations are state actors or private entities.³⁶ If courts consider a gated community to be a state actor, the First Amendment applies and the gated community must permit many activities.³⁷ Conversely, if courts consider a gated community not to be a state actor, the forum remains private and the government gives the owner wide latitude to regulate speech in the gated community.³⁸ Thus, the state-actor requirement is one of the many pitfalls that will prevent courts from

30. *Id.* at 25–26.

31. *Id.* at 26.

32. *Id.* (noting that the Wagner Act made it difficult to prevent union organization and that *Marsh v. Alabama* extended free speech into company towns).

33. See Adrienne Iwamoto Suarez, *Covenants, Conditions, and Restrictions . . . On Free Speech? First Amendment Rights in Common-Interest Communities*, 40 REAL PROP. PROB. & TR. J. 739, 740 (2006) (noting that “while communities take the form of condominiums, cooperatives, master planned communities, or gated communities, community residents are contractually bound by covenants, conditions, and restrictions . . . on the use of their property”).

34. *Id.* at 740.

35. Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 467 (1998).

36. Compare *Brock v. Watergate Mobile Home Park Ass’n, Inc.*, 502 So.2d 1380, 1382 (Fla. Dist. Ct. App. 1987) (“[A] homeowner’s association lacks the municipal character of a company town.”), with *Pitt v. Pine Valley Golf Club*, 695 F. Supp. 778, 782–83 (D.N.J. 1988) (finding that a private club that owned all of a community’s land performed acts comparable to municipal zoning and was therefore a state actor).

37. See *Pitt*, 695 F. Supp. at 782–83 (noting that a private club was a state actor subject to the First Amendment).

38. See *Brock*, 502 So.2d at 1381 (noting that a homeowner’s association was not a state actor and was not subject to the First Amendment).

classifying privately owned land as a private forum instead of a public forum.³⁹

B. THE ADVANTAGES OF PRIVATIZATION

There are strong long-term and short-term incentives for a municipality to privatize streets, sidewalks, and parks. By selling one of these properties to a private actor, a municipality would initially reap the benefit of the sale price, which could reach into the millions of dollars.⁴⁰ Furthermore, privatized property could relieve the municipality of maintaining the space because the new private owner assumes duties such as cleaning, repairs, and security.⁴¹

If the municipality is concerned with giving up too much control over these traditional public forums, the sales contract could include provisions that would allow the forum to remain public while allowing the municipality to reap the benefits of the sale. For instance, a municipality could reap the monetary benefits of the sale but prevent the property from becoming a private forum by retaining maintenance responsibilities.⁴² If a municipality wanted to create a private forum while maintaining some property interests, it could retain certain future interests, such as a right of reversion, that do not trigger free-speech protections.⁴³ A municipality could also sell the forum and keep the property as a public forum by retaining a constitutionally cognizable property interest, which is an interest owned by the government that is sufficient to trigger the protections of the Constitution, namely the First Amendment.⁴⁴ A contract could also include provisions prohibiting the private actor from making physical changes to the

39. See *Marsh v. Alabama*, 326 U.S. 501, 511 (1946) (noting that citizens in a privately owned town still have the right to First Amendment free-speech protections); see also John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 603–11 (2005) (noting the public forum's relationship to the state-actor requirement).

40. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1252–53 (10th Cir. 2005). Salt Lake City sold a plaza for \$8.124 million while retaining an easement and later sold the easement for \$0.5 million and a promise to build a \$5 million recreation center in a low-income neighborhood. *Id.*

41. See *id.* at 1255 (noting that after the sale, the property was “not operated or maintained by the City”).

42. See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) (noting that mailboxes on private property are not private property because the U.S. Postal Service regulates them).

43. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1130–31 (10th Cir. 2002) (noting that an easement is a constitutionally cognizable interest but a right of reverter is not because of the uncertainty as to whether or not it will ever vest).

44. See *id.* (noting that easements can be significant property interests subject to the First Amendment). The Tenth Circuit has also held that a right of reentry is not constitutionally cognizable. *Utah Gospel Mission*, 425 F.3d at 1256–57 (noting that a municipality retaining a right of reentry, if a plaza was properly maintained, was not a constitutionally cognizable property interest).

property, such that it would remain a state actor subject to First Amendment protections.⁴⁵ A municipality is likely in a position of greater bargaining power to dictate the terms of a lease or sale, so there is little concern of a private actor cajoling a city into an unfavorable contract.⁴⁶

C. THE DISADVANTAGES OF PRIVATIZATION

Municipalities have much to gain by privatizing traditionally public forums. However, these actions raise serious free-speech issues. As urban sprawl continues and people have less face-to-face interaction, there is a greater concern for protecting traditionally public forums because they allow people to express views with no barriers to entry.⁴⁷

Although over the past few decades, other modes of communication have provided more avenues for free speech, these modes still have significant access and content barriers and are not adequate substitutes for traditional public forums such as streets, sidewalks, and parks.⁴⁸ For instance, television and radio facilitate free speech but have extensive access and content restrictions.⁴⁹ Today, the Internet provides a medium that has few barriers to entry and minimal censorship, but it requires a potential information recipient to seek out the information (just as television and radio do) as opposed to having the information actively presented in a park, street, or sidewalk.

Additionally, newly privatized streets are different from streets in company towns and gated communities that have always been private, such that there is less confusion regarding the property's private status in company towns and gated communities. Physical barriers informing a

45. Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas, 257 F.3d 937, 942 (9th Cir. 2001) (noting that a privately owned sidewalk that was integrated with public sidewalks remained a public forum).

46. The municipality would have a monopoly to sell parks and sidewalks, whereas there could be many private actors bidding for the property.

47. See Suarez, *supra* note 33, at 743–44 (noting that citizens living in a common-interest community “often unwittingly give up their right to speak within the community and their right to hear and evaluate the speech of others inside and outside of the community”); Jennifer Niles Coffin, Note, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 U. MICH. J.L. REFORM 615, 615 (2000) (noting “the cultural evolution in which our public spaces have become private fortresses, ‘protected’ from political speech in the interests of providing ‘safe’ and unmolested shopping experiences for consumers”); Josh Mulligan, Note, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of PruneYard*, 13 CORNELL J.L. & PUB. POL’Y 533, 534 (2004) (noting that more Americans live within “common interest communities, enclosed shopping malls, private parks, and office complexes” where “individuals may not engage in speech activities unless the owner permits it”).

48. See KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 130–32 (4th ed. 2003) (describing the legal, technical, financial, and character qualifications necessary to receive a broadcast license).

49. *Id.* Furthermore, “material broadcast over the air is not afforded the same First Amendment protection as printed matter.” *Id.* at 46.

person that the property is private typically distinguish gated communities from other areas. In contrast, a patchwork of privatized sections of a city is confusing because citizens cannot be certain if they are within a public or private forum, thus increasing uncertainty regarding the protection that the First Amendment gives the public in these areas. A city that sells sections of its transportation grid could create even more problems when administering services, such as street cleaning, because municipal employees would be required to learn whether property is publicly or privately maintained.

In the long run, many of the benefits of selling a forum may be quite insignificant in comparison to the free-speech rights lost as a result of the sale. The sale price may seem large, but compared to the annual budget of a city, it may be just a drop in the bucket. For example, in 2004, Salt Lake City sold a small section of a street to the Church of Latter Day Saints for \$8.124 million, while retaining a public-access easement over the property, which was later sold for \$5.375 million.⁵⁰ However, the 2004–2005 annual budget for Salt Lake City was \$664.5 million.⁵¹ In exchange for this one-time payment of less than one percent of its annual budget, the City allowed a private owner to regulate free speech within the forum indefinitely. In such a situation, the benefits likely do not outweigh the costs.

D. THE STATE-ACTOR REQUIREMENT

If property is privately owned, such as a gated community, shopping mall, or park, a court could still consider it public for free-speech purposes. Generally, property owners can restrict free-speech activity on their property, but there are a limited number of circumstances where private property will be considered like public property and free speech will be protected within the private property.⁵² The First Amendment of the U.S. Constitution allows citizens on private property to engage in a variety of activities—including political protest and religious-literature distribution—only in a small number of instances.⁵³

50. Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1252, 1256 (10th Cir. 2005).

51. Jill Remington Love, *Introductory Letter to Salt Lake City Residents*, in SALT LAKE CITY COUNCIL, FY 2005 CAPITAL AND OPERATING BUDGET 11, 11 (2005), available at <http://www.ci.slc.ut.us/finance/2005budget/pdfs/messages.pdf> (stating that the city budget for the 2004–2005 year was \$664,449,000).

52. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80 (1980) (allowing free speech in a shopping mall under the state constitution); Marsh v. Alabama, 326 U.S. 501, 516–17 (1946) (classifying privately owned streets and sidewalks in a company town as public forums, allowing distribution of religious materials); Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas, 257 F.3d 937, 948 (9th Cir. 2001) (classifying a sidewalk on private property as a public forum).

53. See Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporating the First Amendment into the Fourteenth Amendment, which prevents state actors from violating a citizen's right to due process). See generally Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (protecting the

In *Marsh v. Alabama*, the U.S. Supreme Court upheld a citizen's First Amendment right to distribute religious literature on a street owned by a private corporation in a company-owned town.⁵⁴ The private corporation owned the residential buildings, street, sewer system, and business district.⁵⁵ The corporation posted signs that read, "This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted."⁵⁶ The private company warned Marsh not to distribute literature, refused to grant her a distribution permit, and later arrested her for trespassing.⁵⁷

In overturning Marsh's conviction, the Supreme Court held that neither a state nor a municipality can completely bar the distribution of literature containing religious or political ideas on its streets, sidewalks, or public places or "make the right to distribute dependent on a flat license tax or permit to be issued by an official who could deny it at will."⁵⁸ The Court rejected the company's argument that it had a right to regulate the town in the same way a homeowner has "the right . . . to regulate the conduct of his guests,"⁵⁹ and explained that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."⁶⁰

More recently, courts dealing with cases similar to *Marsh* have decided whether government properties—such as streets, sidewalks, and parks—sold or leased to private individuals are private or public forums. Following in the footsteps of *Marsh*, the Court in *Evans v. Newton* held that a privately owned

freedom of speech on public property); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (protecting the distribution of literature on public property).

54. *Marsh*, 326 U.S. at 503–04; see also *PruneYard*, 447 U.S. at 80 (holding that a state constitution can classify a shopping mall as a public forum). The Court initially did not recognize a right to free speech on public property. *Davis v. Massachusetts*, 167 U.S. 43, 43 (1897). Later, the Court did recognize a right to free speech on public property. *Hague*, 307 U.S. at 515–16.

55. *Marsh*, 326 U.S. at 502. The Court noted that had a municipal corporation owned the town and arrested the plaintiff for violating a municipal ordinance, overturning the conviction would have been easy. *Id.* at 504. A "municipal corporation" is a "city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state's local affairs." BLACK'S LAW DICTIONARY 1042 (8th ed. 2004).

56. *Marsh*, 326 U.S. at 503.

57. *Id.* at 503–04.

58. *Id.* at 504.

59. *Id.* at 506 ("Ownership does not always mean absolute dominion.").

60. *Id.* "[O]wners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation." *Id.* However, "[c]onstitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" *Byars v. United States*, 273 U.S. 28, 32 (1927) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

park performed a public function and therefore the owner could not enforce race-based restrictions.⁶¹ Even though a private actor held title to the park, the Court treated the property as a “public institution subject to the command of the Fourteenth Amendment.”⁶² Because the government was intimately entangled in the operation of the park, the Court considered the park and its owners to be state actors.⁶³ However, the Court later limited the reach of *Evans* when it held that *Evans* involved “extraordinary circumstances” where the city was involved in the daily care and maintenance of a park.⁶⁴

Even more recently, courts have determined whether private property is truly private or whether it has characteristics rendering it more like public property subject to First Amendment restrictions—with somewhat inconsistent results.⁶⁵ In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, a shopping mall employed nonunion workers and placed signs on its building “prohibiting trespassing or soliciting by anyone other than its employees on its porch or parking lot.”⁶⁶ A labor union began a peaceful picketing demonstration in the parking lot, prompting the shopping-mall owners to request injunctive relief to remove the picketers from trespassing on their private property.⁶⁷ After finding that the shopping mall was the “functional equivalent” of the company town in *Marsh*, the Court held the privately owned shopping mall to the same standard as public property and refused to grant injunctive relief.⁶⁸

The Court later retreated from this decision and allowed privately owned shopping malls to regulate speech, reasoning that a mall does not dedicate itself to First Amendment public use.⁶⁹ In *Lloyd Corp. v. Tanner*, a shopping mall employed twelve security guards who had the authority of police within the shopping mall, wore uniforms similar to the police, and

61. *Evans v. Newton*, 382 U.S. 296, 302 (1966). However, the Supreme Court has struck down racial classifications, citing the Civil Rights Act and the Commerce Clause. *See Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (noting that restaurants’ refusal of service to minorities adversely affected interstate commerce and was prohibited by the public-accommodation provisions of the Civil Rights Act).

62. *Evans*, 382 U.S. at 302.

63. *Id.* at 301.

64. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 n.8 (1978).

65. *Compare Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319 (1968) (holding that a shopping mall is a public forum), *with Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (holding that a shopping mall is a private forum).

66. *Logan Valley*, 391 U.S. at 311.

67. *Id.* at 311–12.

68. *Id.* at 317–19 (noting “striking” similarities between the shopping mall and company town in *Marsh*). The Court conceded that the shopping mall did not provide municipal services like the company town in *Marsh*. *Id.* at 318. Additionally, while finding the shopping mall subject to First Amendment restrictions, the Court conceded that the private mall owners could regulate free speech to the same extent as states and municipalities could. *Id.* at 319–20.

69. *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976); *Lloyd Corp.*, 407 U.S. at 569.

were licensed to carry guns.⁷⁰ Signs posted throughout the mall informed the public that the shopping mall was private property.⁷¹ The dispute arose when the mall owners barred Vietnam War protesters from distributing handbills within the mall.⁷² In holding that the mall was a private forum, the Court noted that the mall was not as pervasive as the company town in *Marsh* and that property does not lose “its private character merely because the public is generally invited to use it for designated purposes.”⁷³ The Court distinguished this case from *Logan Valley*, noting that *Logan Valley* involved a labor dispute related to the mall, whereas this case involved Vietnam War protests that were unrelated to the business function of the mall.⁷⁴

In *Hudgens v. NLRB*, the Court overruled *Logan Valley*, holding that shopping malls are not subject to the protections of the First Amendment.⁷⁵ *Hudgens* concerned a labor union peacefully picketing a store that was only accessible from inside the mall and that was involved in a labor strike at the time.⁷⁶ The Court expressly overruled *Logan Valley* and held that a privately owned shopping mall was private property and therefore not subject to the First Amendment.⁷⁷ This decision marked an important change in the Court’s position because the mall owner’s right to prohibit political speech trumped the First Amendment rights of the protestors.⁷⁸ As a result of this case, the Supreme Court now recognizes that shopping malls are private forums under the U.S. Constitution, which has led many state courts to interpret more broadly their state constitutions to provide additional rights.

E. PRIVATE PROPERTY TREATED AS PUBLIC PROPERTY
UNDER STATE CONSTITUTIONS

The above cases show that private actors have some power to trump First Amendment protections, but many courts—both federal and state—have interpreted state constitutions to give more protection than the U.S. Constitution, keeping private-property owners from restricting free speech within certain properties.⁷⁹ For example, when applying the California

70. *Lloyd Corp.*, 407 U.S. at 554.

71. *Id.* at 554–55. The signs read: “NOTICE—Areas In Lloyd Center Used By The Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd.” *Id.*

72. *Id.* at 556.

73. *Id.* at 569.

74. *Id.* at 564.

75. *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976).

76. *Id.* at 509.

77. *Id.* at 518–22.

78. *Id.*

79. See generally Brady C. Williamson & James A. Friedman, *State Constitutions: The Shopping Mall Cases*, 1998 WIS. L. REV. 883 (discussing how a majority of states have interpreted state constitutions to extend free-speech rights to private property such as shopping malls).

Constitution in *PruneYard Shopping Center v. Robins*, the Supreme Court found a shopping mall to be a public forum subject to free-speech protections.⁸⁰ In the case, students set up a table in the main courtyard of a shopping mall to peacefully provide information and request signatures regarding a U.N. Resolution.⁸¹ Although the students complied with the guards' requests that they leave, they later filed suit alleging state and federal constitutional-rights violations.⁸²

The Supreme Court found no violation of the students' First Amendment rights under the U.S. Constitution; it did, however, find a violation under California's Constitution.⁸³ The shopping mall argued that granting the students access to its private property violated its First and Fifth Amendment rights, which include the right to exclude others and their speech.⁸⁴ Although the Court did note that "one of the essential sticks in the bundle of property rights is the right to exclude others," it rejected the Fifth Amendment claim because "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense."⁸⁵ As to the mall's First Amendment claim, the Court rejected that argument because the mall was open to the public and the views expressed by those passing out pamphlets would not be attributed to the owner.⁸⁶

Thus, in *PruneYard*, the Supreme Court invited courts to interpret state constitutions to extend free-speech rights on private property at the expense of property owners.⁸⁷ Some states—including New Jersey, Colorado, Oregon, Massachusetts, Washington, and Pennsylvania—have accepted this invitation and provided free-speech protections in shopping malls and private universities.⁸⁸ Much like *PruneYard*, "virtually all court opinions in

80. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80 (1980).

81. *Id.* at 77.

82. *Id.* at 77–78.

83. *Id.* at 83. The relevant part of the California Constitution provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. 1, § 2.

84. *PruneYard*, 447 U.S. at 82.

85. *Id.* (noting also that it is "clear that *PruneYard* may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions").

86. *Id.* at 87 (suggesting that a sign disavowing any connection with the message could further disclaim sponsorship).

87. *See Williamson & Friedman, supra* note 79, at 886 (noting that in *PruneYard* the Supreme Court extended free-speech protection to private property that the U.S. Constitution does not protect).

88. *Id.* at 887 (noting several cases that extend free speech on private property). *See infra* notes 90–94 and accompanying text (discussing state supreme court cases); *see also* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 5.09[2] (4th ed. 2006) ("[A] minority of state courts have interpreted state guarantees of free

this area caution that the proposed speech activities must be nondisruptive of the purpose to which the property is put.”⁸⁹ For example, in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*,⁹⁰ the New Jersey Supreme Court held that “a coalition of anti-war groups protesting the deployment of U.S. troops in the Persian Gulf had the right, pursuant to the New Jersey Constitution, to ‘leaflet’ at two shopping malls.”⁹¹ When determining whether free-speech protection applied to private property, the New Jersey Supreme Court looked to the following factors: “(1) the nature, purposes, and primary use of such private property, generally, its ‘normal’ use, (2) the extent and nature of the public’s invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.”⁹²

Similarly, in *Bock v. Westminster Mall Co.*, a group protesting U.S. foreign policy was allowed to distribute pamphlets in a shopping mall because the Colorado Supreme Court found that the mall functioned as a public place.⁹³ The mall contained a police substation, was patrolled by police officers, was located across the street from city hall, and the city had purchased street and drainage improvements from the mall owners.⁹⁴

In contrast, the Judicial Court of Massachusetts and Supreme Courts of Pennsylvania and Washington “all initially extended constitutional protection for speech on private property, only to retreat or reverse course in later decisions.”⁹⁵ In *Batchelder v. Allied Stores International, Inc.*, the Supreme Judicial Court of Massachusetts held that the state constitution’s free-election provision allowed candidates to circulate petitions at shopping malls without requiring the shopping mall to be a state actor.⁹⁶ However, the same court later upheld trespassing convictions of demonstrators who handed out leaflets in the outdoor courtyard of a privately owned laboratory that provided research for the state.⁹⁷ Similarly, the Washington Supreme Court held that the Washington Constitution does not require state action,⁹⁸

speech to require owners of large retail establishments, generally open to the public, to permit political and expressive activities on their premises.”).

89. FRIESEN, *supra* note 88, § 5.09[2].

90. N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757 (N.J. 1994).

91. Williamson & Friedman, *supra* note 79, at 887.

92. *J.M.B. Realty*, 650 A.2d at 771.

93. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 63 (Colo. 1991).

94. *Id.*

95. Williamson & Friedman, *supra* note 79, at 890.

96. *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590, 595 (Mass. 1983).

97. Williamson & Friedman, *supra* note 79, at 891; *see Commonwealth v. Hood*, 452 N.E.2d 188, 190 (Mass. 1983) (noting that there was a state-actor requirement for other parts of the Massachusetts Constitution).

98. Williamson & Friedman, *supra* note 79, at 891; *see Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108, 117 (Wash. 1981) (upholding free speech in a shopping mall).

only to later reverse this decision and hold that “the free speech provision of the state constitution now does not afford a political organization the right to solicit contributions and distribute literature at a mall.”⁹⁹ Finally, the Pennsylvania Supreme Court initially allowed an anti-war group to distribute leaflets on a private college campus by not requiring state action in the state’s free-speech and assembly protections.¹⁰⁰ Only five years later, the court reversed itself and denied a group access to a shopping mall to collect signatures for an election.¹⁰¹

While some states have granted free-speech rights on private property, the majority of states—including Iowa, Arizona, Connecticut, Georgia, Hawaii, Michigan, New York, North Carolina, Ohio, South Carolina, Texas, and Wisconsin—have not extended free-speech rights to private property.¹⁰² For example, in *S.O.C., Inc. v. Mirage Casino-Hotel*, the Nevada Supreme Court declined to interpret the Nevada Constitution as providing free-speech protections on a privately owned sidewalk burdened with a pedestrian easement.¹⁰³ Similarly, Hawaii declined to extend free-speech rights to individuals on private property because the Hawaii Constitution only states that “[n]o law shall be enacted . . . abridging the freedom of speech,” language that would not prevent discriminatory private conduct.¹⁰⁴

In the minority of states that have extended free-speech rights to shopping malls, it seems unlikely that a court would bar free speech, like distributing literature, in a forum such as a privately owned street, sidewalk, or park distinguishable from the surrounding area. Arguably, a court following the minority approach would have reached a different result in *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, which involved an “ecclesiastical park” that the Ninth Circuit considered a private forum.¹⁰⁵ Thus, under the minority approach, the attempt to entirely privatize a street, sidewalk, or park would be impossible due to state-constitutional

99. Williamson & Friedman, *supra* note 79, at 891; see *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 780 P.2d 1282, 1291 (Wash. 1989) (holding that the constitutional free-speech provision does not protect individuals from actions by other private individuals).

100. *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981); Williamson & Friedman, *supra* note 79, at 892.

101. Williamson & Friedman, *supra* note 79, at 892 (citing *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1336 (Pa. 1986)).

102. Williamson & Friedman, *supra* note 79, at 893–94; see also FRIESEN, *supra* note 88, § 5.09[2] (“The great majority of state supreme courts, like the United States Supreme Court, require the presence of ‘state action’ in order to trigger constitutional rights and duties.”).

103. See *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 250–51 (Nev. 2001) (“[T]he majority of courts having virtually identical state constitutional language to the Nevada Constitution have interpreted the free speech provisions of their constitutions as coextensive to, but no greater than, that of the First Amendment to the United States Constitution.”).

104. *Estes v. Kapiolani Women's & Children's Med. Ctr.*, 787 P.2d 216, 218 (Haw. 1990).

105. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1128 n.10 (10th Cir. 2002) (“[A] religious park is the purpose of the surrounding plaza property.”).

protections. The minority approach would force even the company town in *Marsh* to accommodate free speech, regardless of its status as a state actor.

In sum, the majority of states have not extended free-speech protection to private property such as malls, so it seems possible that a private entity could buy a street, sidewalk, or park, operate it as such, and not be forced to allow free speech. Thus, any attempt to create an entirely private street, sidewalk, or park would likely be impossible under the minority approach, but possible under the majority approach.

III. OBSTACLES THAT PREVENT PRIVATIZATION BY SALE

Privatizing a forum is not an easy task. Case law reflects many pitfalls that prevent a municipality and private actor from converting a public space into a private space. First, in order for a public forum to be converted into a private forum by sale, title must pass from the public entity to the private entity in compliance with state law.¹⁰⁶ Second, a municipality may retain some future interest, but a present interest, such as an easement, may prevent the forum from becoming private.¹⁰⁷ Third, courts give little weight to the government's intent to create a private forum—as evidenced by language in the contract. This Part proceeds by discussing each of these issues and looking at one way in which courts have differentiated public from private forums.

A. FRAUDULENT TRANSFERS

In order for the sale of a forum to be valid, it must comply with state law.¹⁰⁸ In *Summun v. Duchesne City*, the Tenth Circuit dealt with this problem when the City of Duchesne sold a small section of a park that contained a monument of the Ten Commandments.¹⁰⁹ The court found this action was mere pretext to remove the religious object from the public forum, as evidenced by the terms of the sale: the City sold the property to the Lions Club for “\$10 and ‘other consideration.’”¹¹⁰ The court found that since there was no legal basis for the sale, the property still belonged to the government and remained a public forum.¹¹¹ Similarly, the Seventh Circuit in *Freedom from Religion Foundation, Inc. v. City of Marshfield* addressed whether the sale of a section of a park containing a statue of Jesus was valid.¹¹² The

106. *Summun v. Duchesne City*, 482 F.3d 1263, 1272 (10th Cir. 2007).

107. *First Unitarian Church*, 308 F.3d at 1122.

108. *Summun*, 482 F.3d at 1271–73 (noting that state law required a municipality to sell property “in good faith and for an adequate consideration”).

109. *Id.* at 1266.

110. *Id.* at 1273 (noting that the same person represented both sides of the deal in his capacity as mayor of Duchesne City and as president of the local chapter of the Lions Club).

111. *Id.* at 1273.

112. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000) (applying Wisconsin contract law to uphold a real-estate transfer).

City sold the 1.5-acre property for \$3.30 per square foot, the highest price per square foot the City had ever received.¹¹³ Following the sale, the City separated the electrical services of the property from the park's street-lighting system.¹¹⁴ The sale included a covenant that limited the land use to public purposes, but this did not invalidate the sale under state law.¹¹⁵ The court stated that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion," but the court still "look[s] to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased."¹¹⁶ On these facts, the court found that the "sale validly extinguished any government endorsement of religion."¹¹⁷

It would be difficult for courts to look beyond pretext and bad faith in evaluating these sales contracts. To look for a fair market value in some transactions would be difficult because there may not be a "market" for the property. For instance, in the sale of a tiny section of sidewalk adjoining a business, there would most likely only be one potential buyer and one potential seller: the municipality and the adjoining property owner. No other buyer would be interested in buying the small section of a sidewalk, nor would the city have good reason for selling it to such a party. Furthermore, these sales are rare, so it would be difficult to find other comparable transactions to determine appropriate prices. Conversely, in the sale of a park, there could be many potential buyers. An urban-renewal project that involves the sale of several city blocks could involve many development companies bidding for the property. By selling only some property interests, such as easements, a municipality could attract more bidders and thus negotiate a higher price, but it would also run the risk of retaining some rights that trigger constitutional protections that would lower the property value by forcing private owners to accommodate protesters.

B. TRANSFER OF ALL CONSTITUTIONALLY COGNIZABLE PROPERTY INTERESTS

The Tenth Circuit has held that an easement retained by a municipality is a constitutionally cognizable property interest that prevents a forum from being privatized.¹¹⁸ Thus, in order to maintain First Amendment protections, a municipality could sell a forum and ensure that the property remains a public forum by retaining a constitutionally cognizable property

113. *Id.* The court also noted that the bidding process complied with all Wisconsin statutory requirements for the sale of public land. *Id.*

114. *Id.*

115. *Id.* at 492.

116. *Id.* at 491.

117. *Marshfield*, 203 F.3d at 492.

118. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002).

interest.¹¹⁹ In *First Unitarian Church*, Salt Lake City sold a public street to the Church of Latter Day Saints (“LDS Church”).¹²⁰ The terms of the sale passed title to the LDS Church, but the City retained a public easement while at the same time expressly stating that the sale would not “create or constitute a public forum.”¹²¹ The contract also included a laundry list of activities that the LDS Church could prohibit, including distributing literature, assembling, and loitering.¹²² Notably, the contract contained a “Habitual Violator” provision that allowed the LDS Church to exclude anyone who had previously engaged in prohibited activity on the property.¹²³

The court began by holding that the government easement was a constitutionally cognizable property interest that was subject to First Amendment challenges, because “[g]overnment condemnations of easements are takings under the Fifth Amendment and entitle the grantor to compensation.”¹²⁴ However, the court noted that not all easements are subject to the Constitution.¹²⁵ Whether an easement is constitutionally cognizable will depend on its characteristics, the practical considerations of applying forum principles, and the particular context of the case.¹²⁶

The same property generated more litigation in *Utah Gospel Mission v. Salt Lake City Corp.*, after the Tenth Circuit, in *First Unitarian Church*, held that the property remained a public forum due to the easement.¹²⁷

119. *See id.* (noting that easements are a significant property interest subject to the First Amendment). The Tenth Circuit has also held that a right of reentry is not constitutionally cognizable. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1256–57 (10th Cir. 2005) (stating that a municipality retaining a right of reentry to ensure that the buyer properly maintained the plaza did not create a constitutionally cognizable property interest).

120. *First Unitarian Church*, 308 F.3d at 1117.

121. *Id.* at 1118 (noting the contract stated that the City “reserves an easement over and across the surface of the Property for pedestrian access and passage only”).

122. *Id.* The contract read:

Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace.

Id.

123. *Id.* at 1118–19.

124. *Id.* at 1122 (noting that “forum analysis does not require that the government have a possessory interest in or title to the underlying land” and that “easements to which government is party are subject to the Constitution”).

125. *First Unitarian Church*, 308 F.3d at 1124.

126. *Id.*

127. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1249–50 (10th Cir. 2005).

Following a very heated, public, and politically sensitive battle, the City sold the easement to the LDS Church for an amount far above the market value.¹²⁸ The district court noted that the fair market value of the easement was \$0.5 million, and the LDS Church bought it for \$5.375 million in cash and land.¹²⁹ After finding the sale valid, the court next addressed whether the City's right of reentry was sufficient to trigger constitutional protection.¹³⁰ Under the sales contract, the LDS Church had to maintain the property as a "'landscaped space' and refrain from any construction which would block the view corridor."¹³¹ The court found this to be a "limited" right of reentry, because it did not prevent the LDS Church from erecting fences, gates, or closing the plaza altogether by putting up signs forbidding public entry.¹³² Rejecting the plaintiff's argument, the Tenth Circuit stated that "precedent dictates that a similar future interest, the possibility of reverter, is not a present estate" and that "the right of reentry is not a constitutionally cognizable property interest."¹³³ Thus, the court held that the forum was private because the government had no constitutionally cognizable ownership in, or control over, the forum.¹³⁴

In *S.O.C., Inc. v. Mirage Casino-Hotel*, however, the Supreme Court of Nevada held that an easement reserving pedestrian access did not implicate the First Amendment.¹³⁵ The case involved the relocation of a sidewalk onto the Mirage's private property and a conveyance of a pedestrian easement to the county.¹³⁶ The issue arose when the Mirage sought to enjoin S.O.C. from using the sidewalk to distribute sexually explicit flyers for its erotic-services business.¹³⁷ The court noted that "the mere existence of the

128. See *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1209–15 (D. Utah 2004), *aff'd*, 425 F.3d 1249 (10th Cir. 2005) (describing a long, public, and politically sensitive fight over the status of the forum).

129. *Id.* at 1214.

130. *Id.* at 1232.

131. *Id.*

132. *Id.*

133. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1256–57 (10th Cir. 2005). "[T]he right of reverter does not require that the Plaza be used only for a particular purpose, grant the public a right of access, give the City the right to control expressive activities on the Plaza, or prohibit the LDS Church from erecting fences or closing the Plaza altogether." *Id.* at 1257. A future interest is a "property interest in which the privilege of possession or of other enjoyment is future and not present." BLACK'S LAW DICTIONARY 699 (8th ed. 2004).

134. *Utah Gospel Mission*, 425 F.3d at 1262 (holding that "[n]othing indicates that the exchange allowed the City to exercise significant control over the property, that there was a grossly disproportionate exchange of value from the City's perspective, that no consideration was received, or that the City continued to maintain the property").

135. *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 245 (Nev. 2001).

136. *Id.* at 245–46 (noting that Clark County received a "'perpetual pedestrian easement over, under, and across' the sidewalk property" that is a "'pedestrian easement for the west right-of-way of Las Vegas Boulevard'" (quoting the conveyance contract)).

137. *Id.*

easement does not implicate the protections of the First Amendment.”¹³⁸ The court noted that the “restatement suggests that where sidewalks on private property are intended to facilitate pedestrian travel, activities unrelated to travel exceed the use of such property and subject the trespasser to liability.”¹³⁹ Since the parties had limited the easement to pedestrian travel, the court concluded that “the easement, by its express language, is limited to pedestrian uses of the sidewalk to travel from point A to point B” and “does not contemplate use by commercial businesses seeking to advance their own economic gains.”¹⁴⁰ In looking to the language of the easement, the court considered whether the parties intended to create a private forum, but did not find their intent dispositive.

C. GOVERNMENT INTENT WILL NOT CONTROL THE ANALYSIS

When selling property, a municipality may clearly state in the contract that it does not intend to create a public forum and that the sale creates a private forum not subject to free-speech challenges.¹⁴¹ However, courts give very little weight to this intent, reasoning that “the government cannot simply declare the First Amendment status of property regardless of its nature and its public use.”¹⁴²

In *First Unitarian Church*, the Tenth Circuit did not find the City’s intent to create a private forum controlling and instead noted that for “property that is or has traditionally been open to the public, objective characteristics are more important and can override express government intent to limit speech.”¹⁴³ The sales contract expressly reserved the right of the LDS Church to regulate speech as if it was private property.¹⁴⁴ However, this intent was inconsistent with the constitutionally cognizable easement for public access that the City retained.¹⁴⁵ The court held that the City

138. *Id.* at 246 (responding to S.O.C.’s assertion that the First Amendment protected its activities and noting that an “easement alone was insufficient to convert private property to a public forum”).

139. *Id.* at 247 (noting that a sidewalk on private property open to the public is a “highway”); see RESTATEMENT (SECOND) OF TORTS § 192 (1965) (“A traveler is privileged to enter that part of the land in the possession of another upon which there is a public highway, in so far as his presence there is in the reasonable use of the highway.”).

140. *S.O.C., Inc.*, 23 P.3d at 247 (“[T]he existence of the easement alone, without more, does not transform private property into a public forum for constitutional scrutiny.”).

141. See *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1254–55 (10th Cir. 2005) (noting that the contract explicitly declined to create a public forum for free speech).

142. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002).

143. *Id.* (“[T]raditional public fora are open for expressive activity *regardless of the government intent.*” (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (emphasis added))).

144. *Id.* at 1118–19 (stating that the easement shall not be “deemed to create or constitute a public forum”).

145. *Id.* (finding that the easement reserved the right of “pedestrian access and passage”).

“attempted to change the forum’s status without bearing the attendant costs, by retaining the pedestrian easement but eliminating the speech previously permitted on the same property. In effect, the City wanted to have its cake and eat it too.”¹⁴⁶

Consistent with *Utah Gospel Mission*, the court in *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas* held that a sidewalk on private property that was open to the public was still a public forum, despite the contract referring to the sidewalk as “private.”¹⁴⁷ The Venetian requested that the street be widened for traffic purposes and agreed to relocate the public sidewalk on its private property.¹⁴⁸ Clark County and the Venetian entered into an agreement which stated that the new sidewalk was “private” but was for “the purpose of providing unobstructed pedestrian access.”¹⁴⁹ The contract also stated that the Venetian was responsible for all cleaning and maintenance of the sidewalk.¹⁵⁰ The dispute arose when a labor union held a protest on the disputed sidewalk, and the police refused to assist the Venetian in disbursing the crowd.¹⁵¹ Shortly thereafter, the Venetian filed suit seeking a declaratory judgment that the sidewalk was not a public forum.¹⁵²

In looking at the sales contract, the court gave little weight to the contract’s reference to the new sidewalk as “private” and instead looked to the use of the property.¹⁵³ The court noted that “simply declaring an entity to be private ‘does not alter its characteristics so as to make it something other than what it actually is.’”¹⁵⁴ Again, the court gave little weight to the express intentions of the government to create a private forum.¹⁵⁵ The court did consider the intent of the parties, though it was never dispositive, when looking to subsequent changes made to the property, such as new features that distinguished the transferred property from the surrounding public property.

146. *Id.* at 1131.

147. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 948 (9th Cir. 2001).

148. *Id.* at 939–40.

149. *Id.* at 942. The agreement also required the private sidewalk to conform to the Americans with Disabilities Act and obligated the Venetian to clean the sidewalk “to protect pedestrians and the traveling public.” *Id.* at 942 n.5. The parties also agreed “that should the sidewalk be removed, altered, or abandoned, the Venetian would dedicate the necessary right-of-way and construct a sidewalk at least equal to the State standards at the time of the restoration.” *Id.* at 943.

150. *Id.* at 942.

151. *Id.* at 941.

152. *Venetian Casino*, 257 F.3d at 941.

153. *Id.* at 947.

154. *Id.* (quoting *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 393 (1995)).

155. *Id.*

D. DIFFERENTIATING PHYSICAL CHANGES AND PUBLIC ACCESS

When determining whether a sale transforms a public forum into a private forum, one important factor that courts look to is whether the private entity can distinguish its property from the surrounding public property.¹⁵⁶ Courts have resolved cases involving the sale of traditionally public forums to private actors by determining whether the physical changes to the property exclude the public.¹⁵⁷

In *United Church of Christ v. Gateway Economic Development Corp.*, the Sixth Circuit held that a privately owned sports arena's sidewalk was a public forum.¹⁵⁸ Thus, the court allowed the United Church of Christ to protest on a privately owned sidewalk that encircled the Gateway Sports Complex, which the court considered a state actor.¹⁵⁹ In analyzing the status of the sidewalk, the court noted that the sidewalk "blends into the urban grid, borders the road, and looks just like any public sidewalk."¹⁶⁰ In addition, the Gateway sidewalk was "made of the same materials and share[d] the same design" as the surrounding public sidewalks.¹⁶¹ Although part of the sidewalk was distinguished by fifteen-foot-long planter boxes containing trees, the court found this insufficient to distinguish the private property from the public property.¹⁶² Furthermore, the sidewalk was a thoroughfare that led around—not into—the stadium and contributed to the downtown transportation grid that was open to the public.¹⁶³

The Tenth Circuit in *Utah Gospel Mission* addressed the state-actor requirement in its forum analysis.¹⁶⁴ The court noted that in *First Unitarian Church*, the easement—not the surrounding plaza property—was a public forum, but the LDS Church had also purchased the City's easement.¹⁶⁵ The court began its analysis by distinguishing the case at hand from the public-

156. See *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1254–55 (10th Cir. 2005) (noting the need to physically distinguish private property from the surrounding public property).

157. *Id.*

158. *United Church of Christ v. Gateway Econ. Dev. Corp.*, 383 F.3d 449, 455 (6th Cir. 2004).

159. *Id.* at 451–52 (noting that the Cleveland Indians and Cleveland Cavaliers both play home games in the Gateway Sports Complex). The court found that the sidewalk "looks and feels like a typical public sidewalk." *Id.*

160. *Id.* at 452.

161. *Id.*

162. *Id.*

163. *United Church of Christ*, 383 F.3d at 452.

164. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1250 (10th Cir. 2005). This case is distinguishable from *First Unitarian Church* because Salt Lake City sold the easement that was subject to the First Amendment free-speech protections. *Id.* at 1256.

165. *Id.*

function doctrine found in *Marsh* and *Evans*.¹⁶⁶ In *Marsh*, the private streets appeared to be public, whereas the LDS Church clearly differentiated its property from the surrounding public property.¹⁶⁷ In *Evans*, the city maintained a park that was privately owned and had racially restrictive covenants, whereas the LDS Church solely maintained its property.¹⁶⁸ Thus, the court held that the LDS Church was not a state actor.¹⁶⁹

After determining that the LDS Church was not a state actor, the court then considered whether the property was, “by its nature,” still a public forum.¹⁷⁰ In this case, physical changes accompanied the transfer of title: the LDS Church added large planters, waterfalls, stone signs at the entrances, and resurfaced the property with a material that was different from surrounding sidewalks.¹⁷¹ The court noted that opening private property to the public did not make it a public forum¹⁷² and that the government “always retains authority to close a public forum[] by selling the property.”¹⁷³ The court concluded that the physical changes made the property a private forum.¹⁷⁴

In *Venetian Casino*, the Ninth Circuit looked to the traditional use of the original sidewalk and not to the use of the replacement sidewalk on the private property.¹⁷⁵ The court also noted that public forums are distinguishable not by who holds title, but by whether the public has a right of access and whether physical changes inform pedestrians that they are entering a private forum.¹⁷⁶ Noting this distinction, the Ninth Circuit in *Venetian Casino* found that the previous sidewalk on public property had been a public forum and that the new sidewalk, which was integrated with

166. *Id.* at 1255 (citing *Evans v. Newton*, 382 U.S. 296, 302 (1966); *Marsh v. Alabama*, 326 U.S. 501, 508 (1946)).

167. *Id.*

168. *Utah Gospel Mission*, 425 F.3d at 1255.

169. *Id.*

170. *Id.*

171. *Id.* at 1252. Additionally, the property’s stated purpose was no longer that of a street but an “ecclesiastical park.” *Id.*

172. *Id.* at 1255 (citing *Hudgens v. NLRB*, 424 U.S. 507, 519–21 (1976) (barring labor-union protestors from picketing inside a private shopping center); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (barring the distribution of handbills in a shopping mall)).

173. *Utah Gospel Mission*, 425 F.3d at 1255. (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699 (1992) (designating an airport as a limited public forum and barring the distribution of religious materials inside the terminals)).

174. *Id.* 1256.

175. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 944 (9th Cir. 2001).

176. *Id.* at 945. The court noted that “the State of Nevada possesses a property interest in a portion of the Venetian’s land, the purpose of which is to guarantee unrestricted public passage along Las Vegas Boulevard.” *Id.* at 946.

the surrounding public sidewalks, was open to the public.¹⁷⁷ The court acknowledged that although the unique paving and landscaping distinguished the Venetian sidewalk, the sidewalk did not have “barriers or other physical boundaries to indicate . . . a different legal status than the public sidewalks to which it is seamlessly connected.”¹⁷⁸ Thus, the court held that Venetian’s sidewalk was a public forum.¹⁷⁹

As these cases make clear, the private actor has substantial control in changing the status of the forum from public to private by making physical changes. These changes merely need to delineate the property from the surrounding property and restrict, but not necessarily bar, public access to be considered private. Thus, integrating private property with surrounding public property might prevent a private owner from excluding the public. Furthermore, when a municipality sells property to a private entity, it must be clear that the private entity has the right to distinguish the property such that a reasonable observer would recognize its private nature. Similarly, if the contract included a provision prohibiting the private entity from physically changing the property, the entire purpose of the sale could be defeated, leading to future litigation.

IV. *VIRGINIA V. HICKS* AND THE CRIME-PREVENTION RATIONALE

In *Virginia v. Hicks*, the U.S. Supreme Court unanimously held that a municipal corporation could “privatize” a street to keep certain people out and to hinder certain constitutionally protected activities.¹⁸⁰ The streets in question were within a low-income housing development plagued by crime, and, in an effort to curb the problem, the City of Richmond, Virginia deeded the streets to the Richmond Redevelopment and Housing Authority (“RRHA”).¹⁸¹ Signs on every apartment building and at every one-hundred-foot interval along the street informed the public that the property was

177. *Id.*; see also, e.g., *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 494–95 (7th Cir. 2000) (holding that a privately owned section of a public park containing a Jesus statue was a public forum because the historic use of the park was public, the private section still appeared to be public, and the sale was intended to continue public use); *Thomason v. Jernigan*, 770 F. Supp. 1195, 1200–01 (E.D. Mich. 1991) (declaring that a privately owned cul-de-sac in front of an abortion clinic was a public forum—regardless of a city council vote to vacate the public right-of-way over the property—because the property blended with the surrounding street and sidewalks and had historically been a public forum); *Jackson v. City of Markham*, 773 F. Supp. 105, 109 (N.D. Ill. 1991) (classifying as a public forum a privately owned sidewalk and shoulder of a highway located within the public right-of-way that had traditionally been a public forum); *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 75–76 (D. Mass. 1990) (classifying as a public forum a marketplace that was traditionally used for public assembly, dedicated to public use, and indistinguishable from the surrounding public streets and sidewalks).

178. *Venetian Casino*, 257 F.3d at 945.

179. *Id.* at 948.

180. *Virginia v. Hicks*, 539 U.S. 113, 115, 124 (2003).

181. *Id.* at 115–16.

private.¹⁸² RRHA policy required a warning before banning a person from the streets and required permission from the RRHA director before a person could distribute flyers on the sidewalks.¹⁸³ A unanimous Court upheld this policy as facially valid.¹⁸⁴

Although *Hicks* involved government-owned property, it helps to explain how property owners can privatize streets that were previously public forums.¹⁸⁵ In *Hicks*, the streets had no barriers, only signs describing the property as “private.”¹⁸⁶ By using a similar crime-prevention rationale, the government can more easily privatize a quintessentially public forum, because, unlike *First Unitarian Church* and *Venetian Casino*, the RRHA property was marked only by signs and not by barriers. Furthermore, as in *Hicks*, an owner of a privately owned public forum could attempt to privatize the property by posting signs to regulate the property as a private forum.

V. THE REFERENDUM: A DEMOCRATIC PUBLIC-FORUM SALE

Many of the above cases dealt with municipalities that sold public forums and the resulting lawsuits of angry citizens.¹⁸⁷ A referendum before the sale could avoid these situations by preventing costly litigation, allowing citizens to have a voice in their public forums, and conferring greater legitimacy on the sale.¹⁸⁸

A referendum is a vote by citizens on a specific issue, which is intended “to give the people enlarged legislative and constitutional powers.”¹⁸⁹ In the

182. *Id.* The signs read “NO TRESPASSING[.] PRIVATE PROPERTY[.] YOU ARE NOW ENTERING PRIVATE PROPERTY AND STREETS OWNED BY RRHA. UNAUTHORIZED PERSONS WILL BE SUBJECT TO ARREST AND PROSECUTION. UNAUTHORIZED VEHICLES WILL BE TOWED AT OWNERS [sic] EXPENSE.” *Id.* at 116 (first two alterations in original).

183. *Id.* at 121.

184. *Id.* at 124 (“[T]he Virginia Supreme Court should not have used the . . . overbreadth [doctrine] to invalidate the entire RRHA trespass policy.”).

185. *Hicks*, 539 U.S. at 115 (noting that privatizing streets can “combat rampant crime and drug dealing”).

186. *Id.* at 116.

187. See *Sumnum v. Duchesne City*, 482 F.3d 1263, 1273 (10th Cir. 2007) (challenging a public-forum sale regarding property that contained a religious statue); *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1252 (10th Cir. 2005) (challenging the sale of a public-forum easement); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1117 (10th Cir. 2002) (challenging the sale of a public-forum plaza).

188. See 82 C.J.S. *Statutes* § 110 (1999) (noting that “[t]he right to initiative and referendum derives from the State Constitution” and is “not a federal constitutional right”).

189. *Id.* (“Reasonable legislation may be enacted to facilitate the operation of initiative and referendum constitutional provisions[] and should receive a liberal construction.”); see also PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* 1 (1998) (“Many see the initiative as the very essence of democracy, an opportunity for citizens to participate directly in making the laws under which they live. . . . [T]he initiative is vital to a well-functioning democracy.”). *But see id.* at 2 (noting that others

nineteenth and early twentieth centuries, America used referendums “with respect to the sale or lease of property which [was] vested in, or [was] commonly held . . . in a corporate political capacity.”¹⁹⁰ In doing so, the community was introduced into the legal process as “a brake upon the local councils and boards which are too prone inconsiderately to dispose of valuable holdings.”¹⁹¹ School lands were particularly valued properties, such that they could not be sold without a special vote in Illinois, Arkansas, Louisiana, and Tennessee.¹⁹² The community’s assent to a sale could be acquired in two ways: the petition or the referendum.¹⁹³ In Illinois and Arkansas, municipalities circulated a petition for citizen signatures.¹⁹⁴ A referendum would consist of a vote on a simple ballot containing two options: “sale” or “no sale.”¹⁹⁵ Governments still use referendums regarding public-land issues, but these referendums are mainly centered on zoning and tax decisions.¹⁹⁶

In some of the cases discussed above, citizens who benefited from the property as a public forum had no voice in the transaction and possibly did not even know that the property was for sale until it was too late to voice their opposition.¹⁹⁷ If there had been a referendum, the litigation may not have even taken place, or if it had, the case would have been more easily resolved by showing that the citizens had endorsed the sale through a referendum. Thus, a statute requiring a referendum for the sale of land in some situations would be beneficial. Requiring a vote on every public-to-private land transfer, however, would be cumbersome and unnecessary. This Note suggests that local governments use the following language for a land-transfer referendum statute: “if there is a reasonable belief that a majority of the citizens in this jurisdiction would oppose selling a public forum, there should be a referendum on the subject.” This reasonableness standard would prevent frivolous referendums, but would still require a municipality

argue that “societal problems have become much too complicated for the black and white kind of solutions they believe possible through use of the initiative process”).

190. ELLIS PAXSON OBERHOLTZER, *THE REFERENDUM IN AMERICA* 283 (Da Capo Press, 2d ed. 1971) (1912) (noting that the people chose to be taxed in order to acquire the property and therefore should later “decide whether it shall be sold or otherwise alienated by the community”).

191. *Id.* at 283–84. Oberholtzer notes that school lands (a limited-public forum and a nonpublic forum) were “[m]ore jealously guarded” than other properties. *Id.* at 284.

192. *Id.* (noting that school property “shall in no wise be sold without the consent of the inhabitants of such township or district to be obtained in such manner as the legislatures of said States shall by law direct” (quoting Act of Feb. 15, 1843, ch. 33, 5 Stat. 600 (1843))).

193. *Id.*

194. *Id.*

195. OBERHOLTZER, *supra* note 190, at 284 (noting that Indiana, Ohio, Alabama, and Louisiana used such referendums).

196. See Stanley H. Friedelbaum, *Initiative and Referendum: The Trials of Direct Democracy*, 70 ALB. L. REV. 1003, 1027–32 (2007) (noting recent cases regarding tax and zoning issues).

197. See cases cited *supra* note 187 (involving sales of public forums).

to put a transaction to a vote if there was a plausible belief that the majority of the community opposed the sale.

VI. EMINENT DOMAIN: PRIVATE FORUM TO PUBLIC FORUM

Even if a private actor acquired a public forum and effectively privatized it, a municipality could still exercise its eminent-domain power, essentially voiding the sale and returning the property to the government.¹⁹⁸ In order for a state to exercise its eminent-domain power, there must be a “public interest” in doing so.¹⁹⁹ The Supreme Court has construed public use very broadly, such that it is “coterminous with the scope of a sovereign’s police powers.”²⁰⁰ The Court has applied mere rational-basis scrutiny “in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”²⁰¹ Such federal deference allows a state to argue many justifications for taking back the property.²⁰² For instance, under its police powers, the state could declare that the private actor was not providing adequate security (safety), was not keeping the forum clean (health), or was adversely affecting free speech in the community (morals).

Taking back a privatized forum, however, would almost certainly be a case of first impression and could cause problems on the state level. First, one would need to convince the government that it should make the forum public again. Then, the government would need to justify the public use, which could be prevented by state law. The U.S. Constitution only provides a floor—not a ceiling—for taking property, and some states have imposed additional limitations.²⁰³

Furthermore, eminent-domain power allows a municipality to take an easement only for pedestrian access and does not require taking a fee-simple title.²⁰⁴ Courts have held that a pedestrian easement is constitutionally

198. The Fifth Amendment, which states that private property shall not be “taken for public use, without just compensation,” confers eminent-domain powers on the federal government. U.S. CONST. amend. V. The Fifth Amendment “is made applicable to the States by the Fourteenth Amendment.” *Kelo v. City of New London*, 545 U.S. 469, 472 n.1 (2005) (citing *Chi. B. & Q. R. Co. v. City of Chi.*, 166 U.S. 226 (1897)).

199. *Kelo*, 545 U.S. at 479 (“The Court long ago rejected any literal requirement that condemned property be put into use for the general public.” (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984))).

200. *Midkiff*, 467 U.S. at 240.

201. *Kelo*, 545 U.S. at 483.

202. See *Olmstead v. Camp*, 33 Conn. 532, 551 (1866), cited in *Kelo v. City of New London*, 843 A.2d 500, 523 (Conn. 2004) (“The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society.”).

203. *Kelo*, 545 U.S. at 489 (citing *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *Redevelopment Agency of Chula Vista v. Rados Bros.*, 115 Cal. Rptr. 2d 234 (Cal. Ct. App. 2002)).

204. See NICHOLS ON EMINENT DOMAIN §§ 5.07[2][a]–[h], at 5-353 to -372 (3d ed. 2006) (explaining the taking of easements). “The purpose of an easement is to permit an individual, individuals, the public, or other specified parties the right to use the land of another for a

cognizable.²⁰⁵ Thus, by only taking an easement, a municipality can return the property to a public forum and keep the money from the rest of the sale.

VII. CONCLUSION

There are many good reasons for a municipality to sell a public forum. Ideally, a sale involves a quid pro quo between the municipality and citizens; the municipality sells the public forum and spends the money on projects that benefit citizens in other ways, such as funding schools or creating another public forum in a new location.²⁰⁶ Additionally, this sale relieves a municipality of its obligation to maintain the public forum, thus leaving more money for other projects.²⁰⁷ Even if in hindsight the transaction was a poor decision, the government could transform the now-private forum back into a public forum via eminent domain.²⁰⁸

To successfully complete the sale, however, a municipality must comply with state sales law, the U.S. Constitution, and the applicable state constitution. If a municipality intends to create a private forum with the transaction, it should advise the new private owner that it must distinguish the property from the surrounding public property and divest all municipality property interests that trigger free-speech protections.²⁰⁹ Otherwise, more problems could arise when the private owner discovers it must still accommodate free speech on the forum.²¹⁰

Privatizing a public forum also has a dark side. Free speech within the forum could be extremely valuable to the public such that a one-time payment from the sale contract would not offset the drawbacks of eliminating free speech within the forum indefinitely. Furthermore, excessive privatization could create a confusing checkerboard of public and

specific purpose.” *Id.* § 5.07[2][a], at 5-353. Easements “are created expressly, implied, established by prescriptive use, or acquired by custom, public trust, estoppel, or condemnation.” *Id.* § 5.07[2][b], at 5-355.

205. *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1254–55 (10th Cir. 2005); NICHOLS, *supra* note 204, § 5.07[2][b], at 5-355 (“A private easement in real estate is property in the constitutional sense.”).

206. *Utah Gospel Mission*, 425 F.3d at 1256 (noting that Salt Lake City sold a public forum for millions of dollars and a promise that the buyer would build a recreation center in a low-income neighborhood).

207. *See id.* (noting that the city was relieved of maintaining the plaza after the sale).

208. *See Kelo*, 545 U.S. at 481 (noting that the “public use” required for the state to condemn property is defined very broadly and courts are deferential to decisions made by the states).

209. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1122–23 (10th Cir. 2002) (noting that a pedestrian easement held by a municipality prevents a public forum from becoming private).

210. *Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 946 (9th Cir. 2001) (noting that the private buyer thought that, despite having a public easement, it could still exclude some members of the public).

private space that would leave citizens guessing whether they have free-speech protections at any given moment.

Each transaction would be fact specific and citizens would have to weigh the advantages and disadvantages of the sale. This balancing act is exactly what a referendum would accomplish. A referendum on public-land sales would allow the people to voice their opinions on matters that are extremely important to American democracy. If a majority or other designated approval requirement approves the sale, the municipality acts with greater legitimacy. With the public's approval, there would be a smaller chance that citizens would bring lawsuits alleging an improper sale. Although holding a referendum could delay a sale, it also could prevent future litigation and other disputes. Furthermore, by exercising its eminent-domain powers, a municipality could undo the transaction by taking back the property and justly compensating the private actor. Selling a public forum to a private entity is risky business, but if a municipality proceeds with caution and holds a referendum to get the support of the community, the municipality, the private buyer, and the community stand to benefit greatly.