

Public Space or Private Profit? ‘Streateries’ and the Need to Reclaim the Public Realm in the Post-Pandemic City

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The pandemic brought with it the entrenchment of a massively transformed cityscape. From car-free streets to widespread private dining in parking spots, what began as a series of temporary municipal authorizations have since transitioned into permanent programs. For some, these urban changes are unalloyed goods—who doesn’t want to drink al fresco at 3pm on a sunny day on the corner of Prince and Broadway? Yet, debates on sidewalk cafés and the transformation of our city streets have not fully grappled with the privatization problem, or the legal contours of this new property rights regime.

This Note seeks to take up that task. By tying together sociological theory and traditional property law, this Note argues that pandemic-era ‘streateries’ improperly privatize our once-public streets and sidewalks. ‘Streateries’ differ in kind from prior commercial uses of our sidewalks and pose unique normative issues, ranging from inclusivity, political speech, and threats to the community-building function of public space. The Note uses its core privatization argument to offer a novel prescriptive approach for cities looking to pass permanent legislation for outdoor dining. The prescriptive approach involves the “publicization” of dining structures, which would ensure that restaurants incorporate offsetting public benefits—whether through flexible public uses or the aesthetic enhancement of dining structures—to balance out the privatization of our city streets.

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Introduction	782
I. What Happened: The Rise of the Sheds	784
A. Regulatory Comparison	787
1. San Francisco	787
2. Paris.....	789
3. New York City	790
B. Public Reception: Boom or Bust?	793
II. The Value and Character of Public Spaces	796
A. A Sociological Definition.....	796
B. The Public-Trust Doctrine: The Law of Streets and Sidewalks	799
C. Evaluating Privatization Claims	801
III. The Privatization Critique: Problems & Concerns with Street Dining	802
A. Street Dining Differs in Kind from Prior Commercial Uses of the Street	804
1. Distinguishing Traditional Sidewalk Cafés	804
2. Distinguishing Street Vending & Food Trucks.....	812
B. Street Dining is Normatively Problematic	816
1. Privatization Breeds Inequality & Exclusion	816
2. Privatization Diminishes Community and Intersubjectivity.....	819
3. Privatization Reduces Democratic Engagement	821
4. Street Vitality	823
IV. Implications & Prescriptions	826
A. Space Sharing & Public-Use Requirements	826
B. Pricing the Curb & Earmarking Funds.....	828
C. Beautification & Expanding Visibility.....	830
Conclusion.....	831

“Who are the streets for in the post-pandemic era? Are they truly for the people, or just for diners willing to pay \$30 for cacio e pepe?”¹

“Public spaces will persist in the post-COVID world, but public space for whom?”²

Introduction

Over the last half-decade, American municipalities have increasingly sought out private aid in the production and management of urban public spaces.³ Cities have handed over management of their downtowns to privately funded Business Improvement Districts (BIDs).⁴ Other municipalities have required private property owners to open their lobbies and atriums for public use, in exchange for expanded development rights.⁵ In fact, privatization has, over the last few decades, become more the norm than the exception in municipal policy.⁶ The twenty-first-century U.S. city has caved to the private market in ways that would have been “unimaginable” to its twentieth-century predecessor.⁷

Today, a new privatization problem has emerged since the COVID-19 pandemic. After thousands of businesses shuttered due to the emergency public-health conditions in the spring of 2020, cities worldwide—from San Francisco to Milan—authorized private restaurants to operate in parking spots and on greater portions of the sidewalk than ever before.⁸ For a sense of the magnitude of this urban change, New York City gave up 8,550 parking spots between March 2020 and May 2021,⁹ and Paris has removed 140,000 of its on-street parking spaces for non-car use since the pandemic began.¹⁰ While these authorizations were initially temporary, cities

1. Tim Donnelly, *Do Protesters Seek More Say over Open Restaurants—Or Do They Just Want Parking?*, STREETS BLOG NYC (June 29, 2021, 12:15 AM EDT), <https://nyc.streetsblog.org/2021/06/29/donnelly-streeteries-story> [<https://perma.cc/6FUZ-XGR8>].

2. Jordi Honey-Rosés et al., *The Impact of COVID-19 on Public Space: An Early Review of the Emerging Questions—Design, Perceptions and Inequities*, 5, 12 CITIES & HEALTH S263, S274 (2021).

3. See Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 420-22 (1999).

4. *Id.*

5. See Sarah Schindler, *The “Publicization” of Private Space*, 103 IOWA L. REV. 1093, 1095-96 (2018) [hereinafter Schindler, *The “Publicization” of Private Space*].

6. Max Schanzenbach & Nadav Shoked, *Reclaiming Fiduciary Law for the City*, 70 STAN. L. REV. 565, 570 (2018).

7. *Id.*

8. See *infra* Section I.A.

9. David Meyer & Kevin Sheehan, *NYC Gave Up 8,550 Parking Spots for Al Fresco Dining Amid COVID*, N.Y. POST (May 23, 2021, 9:16 PM ET), <https://nypost.com/2021/05/23/nyc-gave-up-8550-parking-spots-for-outdoor-dining-amid-covid> [<https://perma.cc/W9FC-WLJV>].

10. See Natalie Marchant, *Paris Halves Street Parking and Asks Residents What They Want to Do With the Space*, WORLD ECON. F. (Dec. 7, 2020), <https://www.weforum.org/agenda/2020/12/paris-parking-spaces-greenery-cities> [<https://perma.cc/FG8M-H8X6>].

have started to permanently codify these changes into regulation, moving “from the pandemic stage to the endemic stage.”¹¹

Some commentators have lauded the reclamation of space from cars for people.¹² Yet others have deplored this urban change, arguing that it has improperly privatized our public sphere.¹³ As one op-ed writer wrote, outdoor dining is “a land grab that privatizes public space for one business industry, commercial landlords, and the customers who can afford the \$20 burger and \$15 cocktail.”¹⁴

Although lawmakers continue to weigh these competing interests as they pass new permanent legislation, few legal scholars have analyzed the legal issues arising out of the property rights regime now governing the restaurant industry. Professor Sarah B. Schindler has offered one legal analysis of COVID-19 public-space reclamation projects.¹⁵ Schindler outlines five major concerns with these projects, including environmental, privatization, disability access, and the lack of public participation in the programs’ direction.¹⁶ Schindler’s core thesis is that these urban projects “disproportionately harm already underrepresented members of the community and raise equity issues,” which requires redress before cities move forward with permanent programs.¹⁷

While Schindler’s piece has initiated a broader conversation, it does not address the new outdoor dining structures—otherwise known as ‘streateries’—at length, nor does it address the full contours of the privatization concern with streateries. This Note seeks to bridge that gap and offer the first sustained, scholarly analysis of the privatization problem with ‘streateries’. Our once plainly public streets and sidewalks have now been occupied by thousands of private restaurants, which have newfound rights to exclude and to regulate access to once-public space. Has outdoor dining changed the legal status of our streets? Does street dining *privatize* our public space—legally, or sociologically—and, if so, what are the implications? How can property principles of accession and public trust help guide our regulatory regime moving forward?

By bringing doctrinal property law into conversation with sociology and urban theory, this Note argues that outdoor dining has privatized our public sphere. Street dining, in the form taken since 2020, differs in meaningful ways from prior commercial uses of public space. And these

11. See Sarah Schindler, *Making the Temporary Permanent: Public Space in a Post-pandemic World*, 132 YALE L.J. F. 376, 377 (2022) [hereinafter Schindler, *Making the Temporary Permanent*].

12. See *infra* notes 80-85 and accompanying text.

13. Donnelly, *supra* note 1; see also *infra* notes 92-94 and accompanying text.

14. Diem Boyd, *City Council, Vote No on the Open Restaurants Text Amendments!*, BOWERY BOOGIE (Feb. 24, 2022), <https://boweryboogie.com/2022/02/city-council-vote-no-on-the-open-restaurants-text-amendments-op-ed> [<https://perma.cc/4SLMNSXC>].

15. See Schindler, *Making the Temporary Permanent*, *supra* note 11.

16. *Id.* at 390-403.

17. *Id.* at 376.

differences are *normatively problematic*: private dining on thousands of miles of city streets and sidewalks undermines the diversity, accessibility, and democratic function of urban public spaces. Due to dining sheds' enclosedness, prohibitive expense, large size, and permanence, outdoor dining harms the values associated with public space without providing the offsetting public benefits of comparable municipal programs. This privatization, in turn, calls for a 'publicization' remedy: opening parking spots up to bidding and reinvesting the fees into better public-space programs; enabling space-sharing between merchants; and placing greater emphasis on the beautification of these structures.

The Note proceeds as follows. Part I begins with a descriptive account of the regulatory approach cities have taken to accommodate this urban transformation. That Part looks at San Francisco, Paris, and New York City, which represent part of the enormous range of municipal approaches to outdoor dining. Part II is the theoretical backbone of the Note. It explains the sociological significance of public space, as well as its legal treatment under the public-trust doctrine. Part II sets the stage for the Note's evaluation of the new street-dining phenomenon. Part III—the heart of the piece—argues that dining sheds differ in both *kind* and *degree* from prior commercial uses of our streets, and that this difference presents a normative threat to our public sphere. Street dining has privatized once-public streets and sidewalks, without providing the offsetting benefits of other exclusionary municipal programs.

Part IV closes with a set of prescriptive recommendations to remedy the privatization diagnosis. Municipal regulations should seek to 'publicize' dining structures, ensuring they offer larger benefits to the public realm in compensation for their private aspects. Cities should: (a) open parking spaces up for bidding, thereby decoupling ownership from proximity and reducing the accession-like inequalities resulting from street dining; (b) enable space-sharing between businesses and the larger public to distribute the benefits of these street transformations more widely; and (c) cities should improve the aesthetics of dining structures to enhance the secondary enjoyment of passersby. By adopting these changes, cities can better guarantee the right of all urban inhabitants to collectively enjoy the wealth, culture, and assets of our city streets.

I. What Happened: The Rise of the Sheds

The built environment and public health have always been deeply intertwined. From cholera to tuberculosis, to the "social diseases" of blight and crime, epidemics and the municipal strategies to eradicate them

frequently leave permanent marks on our physical environment.¹⁸ COVID-19 was no exception. In order to adapt to life with COVID-19, in March 2020, architects and city planners closed off blocks for pedestrian-only access, repurposed parking spaces for restaurants and other businesses, added bike lanes, pavement, and even opened otherwise exclusively private spaces—such as golf courses—to temporary public usage.¹⁹

Barcelona, for example, created 29 kilometers of cycling lanes, added 12 additional kilometers of pavement, and eliminated 1,300 parking spaces between March 2020 and November 2020.²⁰ Paris has removed 140,000 of its on-street parking spaces for green space and leisure in that same period.²¹ In May of 2020, London unveiled an ambitious “London Streetspace” program that involved widening sidewalks and adding additional cycling lanes.²² And New York City—perhaps one of the most frequently discussed examples of post-pandemic urban change—added 83 miles of open streets and reclaimed over 10,000 parking spots for business use.²³

One marked transformation consistent across all these cities has been the dramatic expansion of street cafés. When indoor dining was shuttered by executive orders in March 2020, municipalities enacted a variety of emergency efforts to save failing restaurants.²⁴ These measures included

18. See generally SARA JENSEN CARR, *THE TOPOGRAPHY OF WELLNESS: HOW HEALTH AND DISEASE SHAPED THE AMERICAN LANDSCAPE* (2021) (considering how epidemics like cholera, tuberculosis, and obesity transform urban landscapes).

19. See Schindler, *Making the Temporary Permanent*, *supra* note 11, at 378-86; see also Nicholas J. Stevens, Silvia G. Tavares & Paul M. Salmon, *The Adaptive Capacity of Public Space Under COVID-19: Exploring Urban Design Interventions Through a Sociotechnical Systems Approach*, 333 *HUM. FACTORS MFG. & SERV. INDUS.* 345-46 (2021) (“[G]olf courses in inner city locations in Australia [were] made available to the community as public open spaces [during COVID restrictions].”).

20. See Stephen Burgen, *Barcelona Launches 10-Year Plan to Reclaim City Streets from Cars*, *THE GUARDIAN* (Nov. 11, 2020, 11:50 EST), <https://www.theguardian.com/world/2020/nov/11/barcelona-launches-10-year-plan-to-reclaim-city-streets-from-cars> [<https://perma.cc/K5ES-MKW9>].

21. See Natalie Marchant, *Paris Halves Street Parking and Asks Residents What They Want to Do with the Space*, *WORLD ECON. F.* (Dec. 7, 2020), <https://www.weforum.org/agenda/2020/12/paris-parking-spaces-greenery-cities> [<https://perma.cc/4CUN-E2YD>].

22. See Press Release, *Mayor’s Bold New Streetspace Plan Will Overhaul London’s Streets*, *MAYOR OF LONDON LONDONASSEMBLY* (May 6, 2020), <https://www.london.gov.uk/press-releases/mayoral/mayors-bold-plan-will-overhaul-capitals-streets> [<https://perma.cc/KB63-4PKJ>].

23. See Matthew Chayes, *NYC Outdoor Dining Is Here to Stay, But City to Tear Down Abandoned Sheds, Mayor Adams Says*, *NEWSDAY* (Aug. 18, 2022), <https://www.newsday.com/news/new-york/nyc-outdoor-dining-is-here-to-stay-but-city-to-tear-down-abandoned-sheds-mayor-adams-says> [<https://perma.cc/88P8-FLK9>]; Winnie Hu, *How New York City Lost 63 Miles of Pedestrian-Friendly ‘Open Streets,’* *N.Y. TIMES* (Aug. 11, 2022), <https://www.nytimes.com/2022/08/11/nyregion/open-streets-nyc.html> [<https://perma.cc/48L2-KG9J>]. Over time, New York City has decreased its open streets to about 20 miles. Hu, *supra* note 23.

24. See, e.g., Emma Maev O’Connell, Eulàlia Gomez-Escoda & Álvaro Clua Uceda, *Outdoor Terraces in Barcelona and Milan: Configuration of New Spaces for Social Interaction*, 14 *SUSTAINABILITY* 1, 1 (2022); News Release, *Mayor London Breed Announces Legislation to Make Shared Spaces Program Permanent in San Francisco*, *OFF. OF THE MAYOR* (Mar. 12, 2021),

allowing dining in former curbside parking spaces and more areas of the sidewalk,²⁵ waiving fees for licenses,²⁶ simplifying application processes,²⁷ and amending zoning laws which formerly restricted outdoor dining to set areas in the city.²⁸ For a sense of the extent of this urban change, since May 2020, “the number of terraces in Barcelona and Milan has increased by 23% and 50%, respectively,” compared to a year before.²⁹ And in New York City, COVID-inspired outdoor-dining expansions have taken over approximately 8,550 parking spaces (out of around three million) as of 2021.³⁰ While sidewalk cafés existed in most major cities before the pandemic, their expansion into the street and parking spaces—plus their proliferation in sheer number—has been unprecedented.

Although these measures were initially enabled through emergency orders, relaxed dining regulations have now been codified, or are in the process of being permanently codified, in San Francisco,³¹ Barcelona,³²

<https://sfmayor.org/article/mayor-london-breed-announces-legislation-make-shared-spaces-program-permanent-san-francisco> [<https://perma.cc/X3AG-JUNK>].

25. See Schindler, *Making the Temporary Permanent*, *supra* note 11, at 382 (“[A]s many restaurants were forced to close indoor dining rooms during the early days of the pandemic . . . many cities expanded where outdoor café seating was permitted, including allowing dining on larger areas of sidewalks, in closed-off streets, in former curbside parking spaces, and in parking lots.”).

26. See, e.g., Jenn Harris, ‘Sucker Punch’ Proposal Could Doom Outdoor Dining, L.A. TIMES (Feb. 7, 2023, 9:50 AM PT), <https://www.latimes.com/food/story/2023-02-07/outdoor-dining-la-city-al-fresco-patio-ordinance> [<https://perma.cc/U5TB-HZLJ>] (describing how in Los Angeles, the outdoor dining program “bypassed the usual paperwork, bureaucracy, fees and months of approval that accompany the city permitting process”); Hayden Manseau, *Shared Spaces: A Crisis-Driven Experiment that Could Permanently Change SF’s Urban Landscape*, MISSION LOC. (Sept. 22, 2020), <https://missionlocal.org/2020/09/the-shared-spaces-program-a-crisis-driven-experiment-that-could-permanently-change-san-franciscos-urban-landscape> [<https://perma.cc/79SU-V4MJ>] (describing San Francisco’s former “prohibitively expensive” permit fee scheme for sidewalk cafés, prior to the pandemic’s onset).

27. See Manseau, *supra* note 26 (describing how San Francisco’s “infamously onerous” permit system became “user-friendly”); Benjamin Chadwick, *How COVID-19 Has Reshaped the Streets of Paris*, FABRIC OF PARIS (July 25, 2020), <https://fabricofparis.com/2020/07/25/urbanism-in-a-pandemic-covid.html> [<https://perma.cc/4M84-YPND>].

28. See, e.g., Zoning Open Restaurants Text Amendment, City Council Res. 53 (N.Y. 2022) (passed) (enactment pending).

29. O’Connell, Gomez-Escoda & Clua Uceda, *supra* note 24, at 1.

30. See Meyer & Sheehan, *supra* note 9.

31. See *Making the Shared Spaces Program Permanent*, SF.GOV, <https://sf.gov/information/making-shared-spaces-program-permanent> [<https://perma.cc/6DHD-DVMR>]; Becky Duffett, *It’s Official: Parklets Are Here to Stay in San Francisco*, EATER S.F. (July 14, 2021, 11:03 AM PDT), <https://sf.eater.com/2021/7/14/22577370/restaurant-parklets-permanent-san-francisco> [<https://perma.cc/6R8S-NFUZ>].

32. See *Over 400 Covid-Era Outdoor Seating Areas in Bars and Restaurants Regularized in Barcelona*, CATALAN NEWS (Nov. 10, 2022, 7:24 PM), <https://www.catalannews.com/business/item/over-400-covid-era-outdoor-seating-areas-in-bars-and-restaurants-regularized-in-barcelona> [<https://perma.cc/7BJD-S2T7>].

New York,³³ Philadelphia,³⁴ Oakland,³⁵ Cincinnati,³⁶ and Paris,³⁷ among other cities.³⁸ According to the National Restaurant Association, “[m]ore than half of full-service restaurants in the United States now serve outside.”³⁹

A. Regulatory Comparison

To take a closer look at emerging permanent programs, this Section zooms in on three outdoor dining programs in major cities: San Francisco, Paris, and New York City. The main takeaway from this comparative analysis is that American cities have permitted construction of more permanent, “house-like” structures on streets, compared to European cities which have placed greater emphasis on open booths and movable furniture. In addition, some cities have required offsetting public-use requirements for private dining booths, as a concession for the space’s privatization, whereas others have allowed exclusive private use of the space.

1. San Francisco

San Francisco’s approach to COVID-era outdoor dining was based on the city’s innovative “parklet” program which began a decade earlier, in 2010. The parklet program recruited “sponsors” to help transform parking

33. See *Open Restaurants*, N.Y.C. DEP’T OF TRANSP. <https://www1.nyc.gov/html/dot/html/pedestrians/openrestaurants.shtml> [<https://perma.cc/C4WB-3ZWQ>] [hereinafter *N.Y.C. Open Restaurants Program*]; Emma G. Fitzsimmons, *New York City Will Make Outdoor Dining Permanent, With Caveats*, N.Y. TIMES (Aug. 3, 2023), <https://www.nytimes.com/2023/08/03/nyregion/outdoor-dining-nyc.html> [<https://perma.cc/5QYL-HJXB>].

34. See Aaron Moselle, *Philly Council Passes Bill to Legalize ‘Streeteries’ Permanently in Some Areas*, WHYY PBS (Dec. 2, 2021), <https://whyy.org/articles/philly-council-passes-bill-to-legalize-streeteries-permanently-in-some-areas> [<https://perma.cc/K8C5-NQAX>].

35. See Oakland, Cal., Ordinance No. 13682 (Mar. 15, 2022).

36. See Brian Planalp & Mike Schell, *Downtown/OTR Patio Seating to Become Permanent ‘Streeteries’*, FOX19 (Dec. 4, 2020), <https://www.fox19.com/2020/12/04/downtownotr-patio-seating-become-permanent-streeteries> [<https://perma.cc/EU4N-5XG7>].

37. See *Covid Terraces Become Permanent Summer Fixtures in Paris*, FRANCE24 (July 6, 2021), <https://www.france24.com/en/france/20210607-covid-terraces-become-permanent-summer-fixtures-in-paris> [<https://perma.cc/W2NE-AY27>]; Cameron Jenkins, *Paris to Allow Coronavirus-Era Outdoor Dining to Become Permanent*, THE HILL (June 16, 2021), <https://thehill.com/policy/international/europe/558705-paris-to-allow-covid-era-outdoor-dining-to-become-permanent> [<https://perma.cc/3VVP-8W49>].

38. See generally Katharine Lusk, Songhyun Park, Katherine L. Einstein, David M. Glick, Maxwell Palmer & Stacy Fox, *Urban Parks and the Public Realm: Equity & Access in Post-COVID Cities*, B.U. INITIATIVE ON CITIES (2020), https://www.bu.edu/ioc/files/2021/03/2020MSOM_Parks-Report_highres.pdf [<https://perma.cc/B2HX-WCQQ>] (reporting that in a 2020 survey of U.S. mayors, 92% responded that they had approved streeteries during the pandemic, and 34% said they intended to make them permanent).

39. Jon Marcus, *Pull Up a Chair: Outdoor Dining Isn’t Going Anywhere*, BOSTON GLOBE (Aug. 25, 2022, 12:00 PM), <https://www.bostonglobe.com/2022/08/25/lifestyle/pull-up-chair-outdoor-dining-isnt-going-anywhere> [<https://perma.cc/FY4V-2C99>].

spots into public seating, landscaping, or bike parking.⁴⁰ These parklets were intended to be open to any passing pedestrian, free of charge, and no single restaurant or establishment could limit access to parklets to paying patrons.⁴¹ Retail was therefore flat-out prohibited in parklets, as well as “private dining and table service.”⁴² Furthermore, the space was to be “free of logos or advertising”⁴³ and sponsors were asked to maximize free public programming rather than “for-profit activities or revenue generation.”⁴⁴ The idea of these measures was to create a truly vibrant, alternative public space. By 2020, San Francisco had built about seventy parklets around the city.⁴⁵

The parklet model was the foundation for San Francisco’s rapid expansion of outdoor dining in March 2020. On March 4, 2020, Governor Gavin Newsom declared a state of emergency in California in response to the spreading coronavirus. On June 9, 2020, Mayor London Breed created the temporary Pandemic “Shared Spaces” Program, allowing restaurants and businesses to occupy, free of charge, the public sidewalk and parking lane fronting their premises for dining.⁴⁶ One year later, in July of 2021, the San Francisco Board of Supervisors unanimously passed legislation to make its Shared Spaces program permanent.⁴⁷

The permanent Shared Spaces program, which gradually phased in throughout 2023, added “retail” to permitted activities and struck the prohibition on private dining that had existed under the 2010 parklet program.⁴⁸ In compensation for this private use, the Shared Spaces program

40. See *SF Parklet: Perkins+Will Innovation Incubator - Phase 1*, NAT’L ASS’N OF CITY TRANSP. OFFS. 6 https://nacto.org/wp-content/uploads/2015/04/sf_parklet_perkins.pdf [<https://perma.cc/6TXS-A79F>]; *Case Study: San Francisco Parklet Program*, NAT’L ASS’N OF CITY TRANSP. OFFS. <https://nacto.org/case-study/san-francisco-parklet-program> [<https://perma.cc/DBR6-AZ4K>] [hereinafter *Case Study*].

41. See *What is a Parklet*, ARCHATRAK, <https://www.archatrak.com/what-is-a-parklet> [<https://perma.cc/6FAL-HHS3>] (“[Parklets] were originally not intended to be associated with a specific retail outlet or to provide exclusive space for restaurant patrons, even if they were located directly outside such outlets, but were meant to be available for use by any and all passing pedestrians.”); Alison Sant, *From One Parking Spot to 100 Public Parks: The History of San Francisco’s Street Transformation*, FAST CO. (Mar. 11, 2022), <https://www.fastcompany.com/90730521/from-one-parking-spot-to-100-public-parks-the-history-of-san-franciscos-street-transformation> [<https://perma.cc/ZAQ3-V4D9>].

42. S.F. Cal., Ordinance 224-16, at 24, 33 (Nov. 15, 2016).

43. *Id.* at 4.

44. *Case Study*, *supra* note 40.

45. See John Bela, *Pandemic-Era Street Spaces: Parklets, Patios, and the Future of the Public Realm*, ARCHDAILY (Sept. 29, 2021), <https://www.archdaily.com/968977/pandemic-era-street-spaces-parklets-patios-and-the-future-of-the-public-realm> [<https://perma.cc/FAA6-VHU6>]; Sant, *supra* note 41.

46. See S.F., Cal., Ordinance 99-21 (July 20, 2021); CITY & CNTY. OF S.F., SHARED SPACES MANUAL 2 (2022), https://sf.gov/sites/default/files/2022-12/Shared%20Spaces%20Manual_1.pdf [<https://perma.cc/M2VM-W579>] [hereinafter SF Shared Spaces Regulation].

47. Press Release, *Board of Supervisors Unanimously Approves Permanent Shared Spaces Legislation Introduced by Mayor London Breed*, OFF. OF THE MAYOR, CITY & CNTY. OF S.F., (July 13, 2021), <https://sfmayor.org/article/board-supervisors-unanimously-approves-permanent-shared-spaces-legislation-introduced-mayor> [<https://perma.cc/Q57K-VGXW>].

48. See SF Shared Spaces Regulation, *supra* note 46, at 8-9, 38.

imposed a public-use requirement on outdoor dining booths: all businesses operating in parking spots must install “one public bench or other seating arrangement for every 20 linear feet” of space that is made available to “persons who are not patrons of the business” during business hours.⁴⁹ In addition, after business hours, San Francisco requires that dining sheds be converted into public space fully “open to the public.”⁵⁰

San Francisco’s sidewalk café legislation is unique because of its offsetting public-use requirements, which compensate for the private give-away of public property to businesses. Despite laudable intentions, however, it is not yet clear that San Francisco’s hybrid public/private model for dining has been successful. One survey found that people generally view dining spaces as private, even when technically open to the public after hours, and that individuals tend not to appropriate the space for their personal use even when allowed.⁵¹ Nonetheless, San Francisco exemplifies one creative regulatory option for how to balance the competing private and public values at stake in our city streets.

2. Paris

European cities, such as Barcelona and Paris, have had expansive sidewalk cafés long before the United States, beginning in the late nineteenth century.⁵² Paris, especially, has always been known for its vibrant outdoor café culture.⁵³ But like many cities prior to the pandemic, Paris only allowed café dining on sidewalks.⁵⁴ In March of 2020, to address the financial challenges facing the restaurant industry, Mayor Anne Hidalgo eased terrace regulations and allowed restaurants to extend their terraces into the street and into parking spaces, free of charge.⁵⁵ By July of 2021, Mayor Anne Hidalgo announced that pandemic-era dining expansions would become permanent fixtures of the capital.⁵⁶

49. See *Public Works Order No. 205516: Public Works Regulation for Sidewalk and Parking Lane Occupancy Under the San Francisco Shared Spaces Program*, S.F. PUB. WORKS 7, <https://sfpublicworks.org/sites/default/files/Order205516.pdf> [<https://perma.cc/H2WA-NRC8>] [hereinafter S.F. Public Works Order]; see also SF Shared Spaces Regulation, *supra* note 46, at 8 (“Fixed Commercial Parklets and Movable Commercial Parklets shall provide alternate public seating, which is accessible to persons who are not patrons of the business for any period when the Curbside Shared Space is being activated for commercial use.”).

50. S.F. Public Works Order, *supra* note 49, at 7.

51. See Bela, *supra* note 45.

52. See O’Connell, Gomez-Escoda & Clua Uceda, *supra* note 24, at 5-6.

53. See RAY OLDENBURG, *THE GREAT GOOD PLACE: CAFÉS, COFFEE SHOPS, COMMUNITY CENTERS, BEAUTY PARLORS, GENERAL STORES, BARS, HANGOUTS AND HOW THEY GET YOU THROUGH THE DAY*, at xv (1989) (“Thus, its profusion of sidewalk cafés seems to be Paris”).

54. Chadwick, *supra* note 27.

55. *Id.*

56. See *Covid Terraces Become Permanent Summer Fixtures in Paris*, *supra* note 37; Jenkins, *supra* note 37.

Paris's permanent dining ordinance, issued in July 2021, is distinct from most American cities—and many European ones too—in three main ways. First, Paris's program is seasonal, not year-round; businesses can claim up to three parking spaces in front of their premises from April 1 to October 31, but must “complete[ly] disassembl[e]” the terrace during winter months.⁵⁷ Second, Paris's permanent regulation allows record stores, florists, book stores, and other “cultural businesses” to apply for terraces, too, not just restaurants, though it remains to be seen how many non-dining establishments take up this offer.⁵⁸ Lastly, Paris imposes more aesthetic regulations on dining structures than most other cities. Merchants are prohibited from installing “roofs” or “walls,” must use “light, easily and quickly removable [tables, chairs, light flooring, [and] umbrellas,” and enclosures cannot exceed 4.3 feet in height.⁵⁹ Regulations further provide that enclosures must consist of “perforated barriers to maintain transparency” and must be free of any signs or advertising that associate the space with the restaurant.⁶⁰ The city's guidance also strongly encourages the use of “sober color[s] [for barriers] in order to integrate harmoniously into the landscape.”⁶¹

The impact of these unique requirements is that Parisian café terraces tend to be more airy, temporary, and less conspicuously “commercial” than American dining booths.⁶² Even with Paris's aesthetic regulations, however, Parisians have still complained, like many urbanites, that dining sheds have “trashed” their city streets and have decreased the aesthetic appeal of their public sphere.⁶³ This aesthetic critique of dining booths is further taken up, and then redressed, in Parts IV and V.

3. New York City

New York City's pandemic-era approach to private dining has been the most ‘private’ of the three cities studied. Prior to 2020, New York City cafés, bars, and restaurants had to undergo a lengthy review process to

57. *Une Réforme des Etalages et Terrasses à Paris*, VILLE DE PARIS 7 (2021), <https://cdn.paris.fr/paris/2021/06/09/99ab49c815fda65d425dbcc359f63c9e.pdf> [<https://perma.cc/CYV8-SFL3>] [hereinafter Paris Guidance].

58. *Id.* at 3; see also Jenkins, *supra* note 37.

59. Paris Guidance, *supra* note 57, at 8-14; see *Prolongation des Terrasses Ephémères: La Charte des Engagements*, VILLE DE PARIS, <https://cdn.paris.fr/paris/2020/09/30/2a4ed2d3227f189494adbce923b86cba.pdf> [<https://perma.cc/ZDY7-A93B>] [hereinafter Paris Merchant Charter]; *Covid Terraces Become Permanent Summer Fixtures in Paris*, *supra* note 37 (“Roofs, tarps, reception tents, wooden pallets and advertising will be prohibited.”).

60. See Paris Guidance, *supra* note 57, at 14.

61. *Id.* at 15.

62. This is only a trend, however. Some Parisian merchants still do build more “hut” or “tent-like” structures with closed sides. See Benjamin Chadwick, @bchadwickfrance, TWITTER (Oct. 10, 2020, 1:26 PM), <https://mobile.twitter.com/bchadwickfrance/status/1314980700391604224> [<https://perma.cc/4MSF-QUCB>] (collecting photographs of various Parisian café structures since the start of the pandemic).

63. *Covid Terraces Become Permanent Summer Fixtures in Paris*, *supra* note 37.

obtain outdoor seating, with multiple city agencies involved in permit approval.⁶⁴ Outdoor seating was not permitted on the street or on the curbside, and had to be stationed “immediately adjacent” to the business property.⁶⁵ In total, New York’s pre-pandemic outdoor dining program had about 1,000 permit holders, a fraction of the city’s approximately 24,000 restaurants.⁶⁶

With the onset of the pandemic, Mayor Bill de Blasio suspended various sections of the city’s administrative and municipal code, allowing restaurants to occupy parking spaces for seating and service, waiving fees for terrace licenses, and halting zoning regulations which had prohibited sidewalk cafés in specified neighborhoods.⁶⁷ These deregulatory measures contributed to quickly and dramatically multiplying the presence of restaurants on New York City public streets.

New York’s approach to regulating its dining structures has, up until recently, been marked by more deregulation, than regulation at all. Executive Order No. 126 suspended an array of code requirements but did not impose any affirmative ones. The most guidance New York offered between 2020 through 2023 was a brief list of requirements on the Department of Transportation’s website.⁶⁸ The list delineated the basic height and size requirements for outdoor terraces, recommended materials, and required that tables and chairs be removed upon business closure.⁶⁹

Due to New York’s initial deregulatory approach, New York’s dining scene currently hosts everything from “simple chair-table-umbrella

64. See Anna Lucente Sterling, *Sheds May Get the Boot Under City’s Proposed Outdoor Dining Plan*, NY1 (Feb. 8, 2022), <https://www.ny1.com/nyc/all-boroughs/news/2022/02/08/sheds-may-get-the-boot-under-city-s-outdoor-dining-plan> [https://perma.cc/D39W-DRG6]; Ralph Spielman, *Debate Surrounds the Future of Outdoor Dining as City Council Ponders Fate of New Regs*, OUR TOWN (Feb. 12, 2023), <https://www.ourtownny.com/news/debate-surrounds-the-future-of-outdoor-dining-as-city-council-ponders-fate-of-new-regs-XL2397415> [https://perma.cc/YY8W-EBJ3].

65. N.Y.C. Admin. Code § 20-224(a) (2023).

66. See Dominic T. Sonkowsky & Mitchell L. Moss, *Open Restaurants in New York*, NYU WAGNER 4 (Dec. 2022), <https://wagner.nyu.edu/files/faculty/publications/Open%20Restaurants%20in%20New%20York.pdf> [https://perma.cc/PE9T-FAP9]; Gloria Dawson, *For New York Outdoor Cafes, Getting a License Is No Breeze*, WALL ST. J. (June 10, 2014), <https://www.wsj.com/articles/for-new-york-cafes-getting-a-sidewalk-license-is-no-breeze-1402447341> [https://perma.cc/S5U2-N3AW].

67. See Emergency Exec. Order No. 126, *Open Restaurants Program and the Expansion of Outdoor Seating in Phase 2*, OFF. OF THE MAYOR, CITY OF N.Y. (June 18, 2020), <https://www.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-126.pdf> [https://perma.cc/7MSZ-UWWA] [hereinafter N.Y. Exec. Order No. 126]. Mayor Bill de Blasio issued this order following Governor Cuomo’s Executive Order No. 202.38, issued on June 6, 2020, which allowed restaurants to resume outdoor services following total business closures. See Exec. Order No. 202.38, *Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency*, STATE OF N.Y. (June 6, 2020), <https://www.governor.ny.gov/sites/default/files/atoms/files/EO-202.38-final.pdf> [https://perma.cc/74NV-J4RN].

68. See N.Y.C. *Open Restaurants Program*, *supra* note 33.

69. *Id.*

combos to bubbles, boxcars, pagodas, faux RVs, and literal houses.”⁷⁰ Indeed, the prevalence of “literal houses” on New York City streets is part of what distinguishes the city from others. New York’s booths are more house and hut-like than anywhere else, are freely covered with restaurant logos and advertising, and have little offsetting public-use requirements, making it the most ‘private’ of all the street takeovers. In addition, the rise of these structures has correlated with complaints of increased rodents, trash, and nuisances from the city’s residents.⁷¹

In August of 2022, on the heels of a court victory protecting the Open Restaurants program,⁷² Mayor Eric Adams announced that although abandoned or decrepit dining sheds would be destroyed, outdoor dining was “here to stay.”⁷³ Following months of deliberation on the City’s permanent program, in August 2023, the New York City Council passed legislation No. 31-C—the permanent plan for New York City’s outdoor dining. Under the permanent plan, New York City has reinstated fees for outdoor dining, extended licenses to a term of four years, and mandated removal of roadway ‘streateries’ on a seasonal basis, from November 30 until March 31 (sidewalk cafés remain year-round).⁷⁴ Notably, the city has also moved away from permanent “barrack-style” structures in its permanent program, requiring both sidewalk and roadway cafés to be “open-air . . . containing readily removable tables, chairs and other removable decorative items.”⁷⁵ ‘Enclosed’ sidewalk cafés are only permitted in places where one

70. Simon van Zuylen-Wood, *How Thousands of Restaurants Speedily, Messily, and Probably Permanently Took Over the Street*, CURBED (Oct. 24, 2022), <https://www.curbed.com/2022/10/outdoor-dining-restaurants-nyc.html> [<https://perma.cc/XRK2-3AM5>].

71. See *infra* notes 87-88 and accompanying text.

72. See Baylen Linnekin, *Another NIMBY Lawsuit Seeks to End New York City Outdoor Dining Program*, REASON (Aug. 6, 2022, 7:20 AM), <https://reason.com/2022/08/06/another-law-suit-seeks-to-end-new-york-city-outdoor-dining-program> (describing the resolution of the first lawsuit against the program, and institution of a second suit).

73. James Barron, *There Are Good Dining Sheds and Bad Ones, Adams Says*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/nyregion/outdoor-dining-sheds-new-york.html> [<https://perma.cc/D7CT-M83Z>].

74. Legislation No. 31-C, § 19-160, N.Y. City Council (Aug. 3, 2023); see also Andrew Siff, *NYC seeks to streamline outdoor dining structures under new batch of rules*, NBC N.Y. (Oct. 20, 2023, 1:29 AM), <https://www.nbcnewyork.com/news/local/nyc-seeks-to-streamline-outdoor-dining-structures-under-new-batch-of-rules/4785168> [<https://perma.cc/Y58P-RTXL>]; Fitzsimmons, *supra* note 33 (“Under a bill passed by the City Council on Thursday, restaurants will be allowed to continue to offer outdoor dining in roadways under a new licensing system. But those structures will have to be removed for the winter, and reconstructed in the spring — a requirement that some restaurateurs say will be a costly and onerous burden.”)

75. Legislation No. 31-C, § 19-101 (“Roadway café. The term “roadway café” shall mean an open-air portion of a ground floor restaurant containing readily removable tables, chairs and other removable decorative items, which is located in the curb lane or parking lane of a roadway fronting the restaurant and is designed and operated pursuant to rules of the department.”); *id.* § 6 (“A sidewalk café, other than an enclosed sidewalk café, shall be open-air and shall contain only readily removable tables, chairs and other removable decorative items as set forth in such rules.”); see Alicia Diaz & Kate Krader, *Inside the Fight Over the Future of New York City’s Outdoor Dining*, BLOOMBERG (Mar. 23, 2022), <https://www.bloomberg.com/news/features/2022-03-23/nyc-s-outdoor-dining-may-soon-look-very-different> [<https://perma.cc/Z3TR-TPZP>]; Sterling, *supra*

either existed prior to the pandemic, or where the Department of Buildings newly issues a permit, posing higher barriers to their installation.⁷⁶ The legislation also bans all advertising on ‘streaterie’ exteriors, allowing only the “logo of the restaurant, [and] the menu and information on the services provided by the restaurant” to be displayed.⁷⁷ In line with this Note’s thesis, New York City has shifted from a highly privatized outdoor dining regime, to a gradual—though not full—publicization of these structures.

The reaction to New York City’s highly anticipated permanent legislation has been mixed. Many restaurant owners are concerned that the seasonality requirement will require destroying complex, artistic outdoor structures that will be too costly to erect on a seasonal basis.⁷⁸ Policy officials and residents, however, seem optimistic about the possibility of a more aesthetically cohesive outdoor dining policy, which balances the need for dining with the need for parking, pedestrian space, and other neighborhood demands.⁷⁹

B. Public Reception: Boom or Bust?

Public reception to the expansion of outdoor dining has been widely varied. Restaurant owners generally laud the programs for saving their economic viability during a dire time and permanently expanding their customer capacity.⁸⁰ Customers also seemingly love dining al fresco: according to the National Restaurant Association, 4 in 10 consumers say the availability of outdoor seating makes them more likely to pick a restaurant.⁸¹ And in a 2020 survey of Manhattanites, a whopping 84% supported replacing vehicle spaces with streetside dining.⁸² Many residents also enjoy the

note 64 (reporting that during a City Council hearing, the Director of the Open Restaurants program stated that “We don’t envision sheds in the permanent program . . . What would be in the roadway is barriers and tents or umbrellas, but not these full houses that you’re seeing in the street”).

76. Legislation No. 31-C § 19-160.

77. Legislation No. 31-C § 19-160.4.

78. Fitzsimmons, *supra* note 33.

79. Marjorie Velázquez & Andrew Rigie, *Building on the Economic Successes of Outdoor Dining Will Propel NYC*, AMNY (July 31, 2023), <https://www.amny.com/oped/building-on-the-economic-successes-of-outdoor-dining> [<https://perma.cc/VE92-MBBA>] (expressing hope that following the legislation’s passing, “[w]e’d like to see a niche market develop of companies that build and sell beautiful modular streateries and store them for restaurants in the off season at a reasonable price”).

80. See Marcus, *supra* note 39 (reporting that among restaurant owners, a “third said [outdoor dining] accounts for 40 percent or more of their sales” and “about 15 percent said they make 70 percent or more of sales outdoors”); Jenn Harris, ‘Sucker Punch’ Proposal Could Doom Outdoor Dining, L.A. TIMES (Feb. 7, 2023), <https://www.latimes.com/food/story/2023-02-07/outdoor-dining-la-city-al-fresco-patio-ordinance> [<https://perma.cc/WND2-D33M>] (quoting a Los Angeles restaurant owner who said that “[t]he Al Fresco dining program saved” their restaurant and “[w]ithout it, we would have had to close”).

81. See Marcus, *supra* note 39.

82. See Julianne Cuba, *The People Have Spoken: DOT Study Reveals Vast Support for Outdoor Dining*, STREETS BLOG NYC (Nov. 22, 2021), <https://nyc.streetsblog.org/2021/11/22/the->

added street life, now describing their cities as more “charming,”⁸³ “bustling,”⁸⁴ and in touch with “*l’art de vivre* (the art of living).”⁸⁵

Other individuals and coalitions, however, have deplored the urban change. Constituents regularly complain of trash, rodents, and noise pollution.⁸⁶ When New York first announced plans to make its Open Restaurants program permanent, the Department of Transportation “received thousands of complaints from residents related to noise, vermin, garbage accumulation, [and] crowded sidewalks,”⁸⁷ and later faced suit regarding the adequacy of the program’s environmental review.⁸⁸ The new outdoor structures also pose accessibility issues for seniors and the disabled,⁸⁹ and have drawn complaints from drivers about fewer parking spots.⁹⁰ Lastly, many have criticized outdoor dining on aesthetic grounds, arguing that the hastily constructed and largely deteriorating sheds are “eyesore[s]”

people-have-spoken-dot-study-reveals-vast-support-for-outdoor-dining [https://perma.cc/V26C-QQEP].

83. Nicole A. Murray, *Op-Ed: The Dangers of Privatizing Public Space*, STREETS BLOG NYC (July 5, 2020), <https://nyc.streetsblog.org/2020/07/05/op-ed-the-dangers-of-privatizing-public-space> [https://perma.cc/29GW-4SQQ].

84. Dodai Stewart, *The Final Days of New York’s ‘Wild West’ Outdoor Dining Scene*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/04/nyregion/nyc-outdoor-dining-sheds.html> [https://perma.cc/422H-7ZHE].

85. *Paris’ Extended Café Terraces Can Become Permanent, City Hall Rules*, THE LOCAL (June 7, 2021), <https://www.thelocal.fr/20210607/paris-extended-cafe-terraces-can-become-permanent-city-hall-rules> [https://perma.cc/AK8U-UETT] (quoting the president of Paris’s hospitality industry union).

86. See, e.g., James Barron, *Opponents of Outdoor Dining Renew Fight Against Sheds*, N.Y. TIMES (Aug. 4, 2022), <https://www.nytimes.com/2022/08/04/nyregion/outdoor-dining-new-york.html> [https://perma.cc/ER3M-VS9] (quoting one Williamsburg resident who complained that “[w]here I used to be able to smell the trees as I walk my dog, it now smells like decay and urine”); Ginia Bellafante, *Dining Sheds Saved N.Y.C. Could They Destroy It?*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/2021/11/05/nyregion/outdoor-dining-nyc.html> [https://perma.cc/N7YX-49ZD] (quoting one Ludlow Street vintage-store owner who asked, “Does this look like Paris?” as she pointed to plywood dining sheds covered in vandalism and trash).

87. See Priscilla DeGregory, *NYC Locals Sue to Block Permanent Expanded Outdoor Dining*, N.Y. POST (Oct. 19, 2021), <https://nypost.com/2021/10/19/nyc-locals-sue-to-block-permanent-expanded-outdoor-dining> [https://perma.cc/943Y-LBCH].

88. Justice Frank Nervo declined to end the Open Restaurants program as part of this 2021 lawsuit, but he did order the City to conduct an environmental impact review after finding that the city had “failed to consider the likelihood [of] ongoing environmental impacts” from outdoor dining. See Linnekin, *supra* note 72.

89. See Schindler, *Making the Temporary Permanent*, *supra* note 11, at 395; Stewart, *supra* note 84. There have also been a small number of lawsuits brought against restaurants with sidewalk and street seating under the ADA. See, e.g., *Whitaker v. Gundogdu, Inc.*, No. 21-CV-03132-JSC, 2021 WL 5937659, at *1 (N.D. Cal. Dec. 16, 2021); *Johnson v. Opa Campbell, LP*, No. 21-CV-01619-PJH, 2021 WL 3493712, at *1 (N.D. Cal. Aug. 9, 2021).

90. See Complaint ¶ 32, *Armer v. City of New York*, No. 156328 (N.Y. Sup. Ct. July 29, 2022) (complaining of “the diminution of available parking upon which some of the petitioners depend”); O’Connell, Gomez-Escoda & Clua Uceda, *supra* note 24, at 5 (summarizing resident complaints in Milan and Barcelona).

depressing their cities, and giving them a “cluttered 3rd [sic] world look and feel.”⁹¹

Across the United States and worldwide, residents have also claimed that outdoor dining privatizes their once-public city streets.⁹² The privatization critique points to streets’ and sidewalks’ antecedent status as public spaces—open, free and accessible to all—which are now being put to exclusive private use, for profit, by industry. The critique points out that private business owners are now able to police both *who can enter* their portion of the street/sidewalk and *what can be done* inside their space, creating a tension with the once-public status of those spaces.⁹³ As one Bloomberg reporter warned: “It remains to be seen whether cities can avoid the worst-case scenario, in which streets become quasi-privatized preserves for paying customers granted new freedoms, while people who are homeless, protesting or simply hanging out find their right to occupy the same spaces curtailed.”⁹⁴ Some who are critical of privatization argue that at the very least, if streets and sidewalks are to be privatized, municipalities should follow the procedures of other privatizations by charging restaurants for their use of public space, as opposed to permitting the widespread free “giveaway” of pandemic-era policies.⁹⁵ By so doing, cities could use increased revenues to then reinvest in the public realm.⁹⁶

91. See Jeanette Settembre, *New Yorkers left feeling queasy after court rules in favor of ‘completely disgusting’ outdoor dining structures*, N.Y. POST (Oct. 6, 2022, 7:18 AM ET), <https://ny-post.com/2022/10/05/court-paves-way-for-nyc-outdoor-dining-to-become-permanent> [<https://perma.cc/BD56-TTU7>]; Ginia Bellafante, *Do Dining Sheds Still Make Sense?* N.Y. TIMES (Mar. 3, 2023) (comments section), <https://www.nytimes.com/2023/03/03/nyregion/outdoor-dining-sheds-nyc.html> [<https://perma.cc/E8LS-NFHV>]; see also *Covid Terraces Become Permanent Summer Fixtures in Paris*, *supra* note 37; van Zuylen-Wood, *supra* note 70 (quoting State Assemblywoman Deborah Glick who described the sheds as “look[ing] like crap”).

92. See, e.g., Brock Keeling, *Welcome to the Parklet Era of San Francisco*, S.F. EATER (July 29, 2021, 9:55 AM PDT) <https://sf.eater.com/2021/7/29/22596225/parklets-permanent-san-francisco-bay-area> [<https://perma.cc/LXP5-BEEY>] (summarizing privatization concerns by S.F. city officials, including Supervisor Aaron Peskin, who compared the right to access parklets to the right to access beaches); Berezi Elorrieta Sanz, Miguel García Martín & Aurélie Cerdan Schwitzguébel, *The ‘Sidewalk Café War’: Privatization of Public Space by Tourism in Seville and Barcelona*, 47 CUADERNOS DE TURISMO 561, 565 (2021) (arguing that in Barcelona “part of [our] public space has [now] been lost in favour of private use by the catering sector”); Complaint ¶ 33, *Armer v. City of New York* (“Temporary Open Restaurants appropriate a substantial share of public sidewalks and streets for private use and profit.”).

93. See Sanz, Martín & Schwitzguébel, *supra* note 92, at 562.

94. Feargus O’Sullivan, *What Happens to Public Space When Everything Moves Outside*, BLOOMBERG (June 29, 2020, 9:07 AM EDT), <https://www.bloomberg.com/news/features/2020-06-29/what-happens-to-public-space-when-everything-moves-outside> [<https://perma.cc/3BXT-MMRY>].

95. See Eve Kessler, *Outdoor Dining Under Fire: Advocates Want Equity at the Curb, Not Parking*, STREETS BLOG NYC (Feb. 7, 2022, 12:01 AM EST) [<https://perma.cc/YZT7-B55P>] (“In the long run, we need to price the curb because curb space shouldn’t be a give-away to anyone . . . Restaurants should pay their fair share and put that toward caring for our public realm.”).

96. *Id.*

Other commentators have argued that outdoor dining does not privatize public space but offers a new hybrid public/private space.⁹⁷ Drawing on both property law and sociological theory, this Note defends the view that outdoor dining has improperly privatized our city streets, and that this privatization should be remedied in alignment with broader public principles. The next Part explains the sociological significance of streets and sidewalks, as well as their legal treatment by courts, providing the theoretical foundation for the Note's normative thesis that outdoor space should be re-publicized.

II. The Value and Character of Public Spaces

A. A Sociological Definition

To understand what privatizing public space means requires first setting forth a definition of public space. Public space is commonly defined as urban space that is “open and accessible to all members of the public in a society, in principle though not necessarily in practice.”⁹⁸ Quintessential public spaces include parks, plazas, streets, and sidewalks. Within sociological theory, public spaces are thought to be valuable to cities for four main reasons: (a) they are functional, allowing people to get from place to place; (b) they serve as a “third place” for socialization outside of both home and work; (c) they are crucial sites of democratic assembly and public discourse; and (d) they facilitate contact with diverse people—racially, socio-economically, and ideologically—thereby increasing our tolerance for otherness.⁹⁹

Municipal engineers and city officials are often those who see the value of streets and sidewalks in accordance with the first bucket—as corridors of transportation. As one municipal engineer stated: “When carrying out my responsibilities, the most common and principal concern is the maintenance of a safe passage and a smooth and unobstructed pedestrian traffic flow on the City’s sidewalks.”¹⁰⁰ Nicholas Blomley calls this view of public space ‘pedestrianism,’ a “powerful and prevalent rationality” common among both scholars and public officials.¹⁰¹

97. See O’Connell, Gomez-Escoda & Clua Uceda, *supra* note 24, at 8 (arguing that terraces are not traditional public spaces but rather “collective spaces understood as where community life takes place and, incrementally, these are not public nor private but both things at the same time.”).

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

99. This classification of public-space values is owed to Sarah Schindler, who adds a fifth prong as well: public spaces provide space for those with nowhere else to go. See Schindler, *The “Publicization” of Private Space*, *supra* note 5, at 1101-04.

100. NICHOLAS BLOMLEY, RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW 30 (2011).

101. *Id.* at 34.

In addition to its functionality, a second key value of public space is its contribution to a sense of place, community, and interconnectedness among residents. William H. Whyte has documented how public spaces— from building ledges to street corners— facilitate socialization among citizens and strangers.¹⁰² “If it’s a busy corner, it has a brisk social life of its own,” he writes.¹⁰³ And in studies of cities which lack sidewalks, such as Brasilia, researchers find that “[t]he absence of traditional streets and streets corners as places for social interaction leads to a sense of isolation and a feeling that the city lacks human warmth.”¹⁰⁴ Public spaces are key to building community and providing spaces for inter-citizen socialization.

Third, city public spaces also serve a crucial democratic function. Streets and sidewalks have long been used as places of assembly and public discussion of public questions.¹⁰⁵ Anti-abortion and pro-abortion activists occupy sidewalks to influence opinion.¹⁰⁶ In 2020, protestors congregated on thousands of miles of sidewalk across the country to combat police violence following the death of George Floyd.¹⁰⁷ Indeed, even as the COVID-19 pandemic made in-person demonstrations more difficult,¹⁰⁸ citizens found new ways of expressing their political opinions in urban public space, such as “[b]alcony protests, with participants leaning out from windows or balconies to express dissent” or “shouting from car windows in caravan protests” while driving down public streets.¹⁰⁹ Public spaces have thus

102. WILLIAM WHYTE, *THE SOCIAL LIFE OF SMALL URBAN PLACES* 50-54, 99 (1980).

103. *Id.* at 54.

104. David Brain, *From Public Housing to Private Communities: The Discipline of Design and the Materialization of the Public/Private Distinction in the Built Environment*, in *PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE* 237, 253 (Jeff Weintraub & Krishan Kumar eds., 1997).

105. See BLOMLEY, *supra* note 100, at 18; see also *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (“[W]e have repeatedly referred to public streets as the archetype of a traditional public forum.”).

106. See MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE* 59-62 (2004) (reviewing the Supreme Court’s First Amendment jurisprudence on anti-abortion advocacy on sidewalks); see, e.g., *SIDEWALK ADVOCATES*, <https://sidewalkadvocates.org> [<https://perma.cc/5Q47-W3Y3>].

107. See, e.g., *Photos: Columbus Gathered After George Floyd Death in 2020*, *THE COLUMBUS DISPATCH* (Apr. 26, 2021), <https://www.dispatch.com/picture-gallery/news/2021/04/20/pho-tos-2020-columbus-george-floyd-protests-vigils/7308083002> [<https://perma.cc/BB34-438Y>]. Interestingly, one commentator noted that “with so many people spending so much time at home, there was an unusually large number of Americans available for mobilization” during the pandemic, and even as the overall number of political demonstrations declined, the George Floyd Black Lives Matter protests witnessed some of the largest protest crowds to date. See Deana A. Rohlinger & David S. Meyer, *Protest During a Pandemic: How COVID-19 Affected Social Movements in the United States*, *AM. BEHAVIORAL SCI.* 1, 9 (2022).

108. One empirical researcher, in a survey analysis of seven western European countries, found that in the first phase of the COVID-19 crisis, a substantial percentage of people continued to donate, sign petitions, and help in their local neighborhood but less than 10% of participants were still attending public demonstrations. See Endre Borbàth, Sophia Hunger, Swen Hutter & Ioana-Elena Oana, *Civic & Political Engagement During the Multifaceted COVID-19 Crisis*, *27 SWISS POL. SCI. REV.* 311, 314 (2021).

109. Lucy J. Parry, Hans Asenbaum & Selen A. Ercan, *Democracy in Flux: A Systemic View on the Impact of COVID-19*, *15 TRANSFORMING GOV., PEOPLE, PROCESS & POL’Y* (2021);

remained crucial forums for political expression even since the pandemic, notwithstanding the rise of internet-related civic participation. One reason urban public space remains so crucial for democratic advocacy, even with increasing internet engagement, is that access to public space is free and nondiscriminatory, allowing even “disenfranchised groups [to] build solidarity and political power” and constituting “one of the only places for poor people to speak to each other, inasmuch as they [don’t] have access to the university lectern, country club, or church pulpit.”¹¹⁰ With low (if any) barriers to access, streets, sidewalks, and other public spaces allow people to express marginal viewpoints and contribute broadly to public debate.

Lastly, public spaces are thought to be valuable because they facilitate contact between people of different classes, backgrounds, and beliefs, thereby increasing our tolerance for difference.¹¹¹ “The unpredictable encounters with others that occur on a daily basis—perhaps particularly at sites such as the sidewalk, the most pervasive and everyday of public spaces—encourage us to recognize and accommodate other members of a society beyond our immediate networks and norms.”¹¹² This interaction with and accommodation of difference “promotes tolerance for social and cultural diversity” and consequently facilitates the very emergence of the “public” that is necessary for democratic self-governance.¹¹³ As Jane Jacobs argues, “the sum of each casual, public contact at the local level—most of it fortuitous, most of it associated with errands . . . is a feeling for the public identity of people.”¹¹⁴ Or, as sociologist and geographer Nicholas Blomley described, “It is good to walk about the city, we might claim, as in so doing we encounter diversity and difference and thus become fully public.”¹¹⁵

All four of these views regarding the value of streets, sidewalks, and public spaces are needed to evaluate the privatization argument described

see also Rohlinger & Meyer, *supra* note 107, at 8 (describing how during the pandemic “groups concerned with the rights of immigrants staged drive-by protests outside of detention centers, assembling scores of cars driving slowly and honking”).

110. KOHN, *supra* note 106, at 28-30.

111. *See* BLOMLEY, *supra* note 100, at 18; Trevor Boddy, *Underground and Overhead: Building the Analogous City*, in VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE 123 (Michael Sorkin ed., 1992); Briffault, *supra* note 3, at 374 (“The streets of the city more than any other human artifact, have come to symbolize public life, with all its human contact, conflict, and tolerance.”). Jerry Frug has similarly argued that a city’s primary function is the cultivation of human association and contacts with difference, through which we realize that we must share our lives with “strangers, with strangeness, with the inassimilable, even with the intolerable.” Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1049 (1996).

112. BLOMLEY, *supra* note 100, at 18.

113. Frug, *supra* note 111, at 1060; *see also* Briffault, *supra* note 3, at 374 (“City streets, sidewalks, parks, town commons, and central squares are our great scenes of the civic, visible and accessible, our binding agents, the places where the public itself emerges out of the omnium gatherum of people of different classes, backgrounds, and belief” (internal quotations omitted)).

114. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 56 (1961).

115. BLOMLEY, *supra* note 100, at 101.

in Section I.B. The formal legal doctrines applied to public spaces are also needed to understand the rules constraining the use and transfer of public-trust property, like streets and sidewalks.

B. The Public-Trust Doctrine: The Law of Streets and Sidewalks

Within property law, streets and sidewalks are curious creatures. Ownership of streets and sidewalks is highly fragmented. In many jurisdictions, the municipality owns the sidewalk as public property, but imposes duties of repair and maintenance on nearby private property owners, such as a duty to shovel snow.¹¹⁶ In other jurisdictions, the abutting property owners own the land through to the curb or center street, but the public holds an easement over the sidewalk with rights to walk, recreate, and speak on it; the government also retains a right to build infrastructure even on privately-owned sidewalks.¹¹⁷ Streets differ from sidewalks in that municipalities usually retain the duty to maintain and clean them; however, ownership is no less fragmented, and is usually split among a dizzying array of governmental, quasi-governmental, and private entities (with a public right-of-way).¹¹⁸

Courts ultimately do not tie legal treatment of streets and sidewalks to their ownership status. Courts instead conceive of these spaces as—independent of their title—public-trust property held for the benefit of the public.¹¹⁹ The rationale for this treatment is typically grounded in the democratic function of streets and sidewalks. As the Supreme Court first established in *Hague v. Committee for Industrial Organization* in 1939: “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹²⁰

The central mandate of the public-trust doctrine is that public-trust property not be “alienated or used for an extended period for [non-public] purposes,” absent state legislative approval.¹²¹ As one court explained:

116. See Michael C. Pollack, *Sidewalk Government*, 122 MICH. L. REV. 613, 616 (2024) (describing other repair and maintenance duties imposed on private owners by municipalities).

117. See *id.* at 646–47; Vanessa Casado Pérez, *Reclaiming the Streets*, 106 IOWA L. REV. 2185, 2202–03 (2021).

118. See Pollack, *supra* note 116, at 616; see, e.g., Jim Saksa, *Who Owns the Streets of Philadelphia? It's Complicated...*, WHY PBS (July 13, 2015), <https://why.org/articles/who-owns-the-streets-of-philadelphia-it-s-complicated> [<https://perma.cc/F3KC-PDLR>] (providing an overview of property ownership over Philadelphia’s roads).

119. See Vanessa Casado Pérez, *The Street View of Property*, 70 HASTINGS L.J. 367, 369 (2019); see, e.g., *Sears v. City of Chicago*, 93 N.E. 158, 160 (Ill. 1910) (“Whatever title the city has in its streets and other public grounds is held in trust for the public, and this is true, whether it owns the fee or only an easement.”).

120. 307 U.S. 496, 515 (1939).

121. See *N.Y. State Assemblyman v. City of New York*, 924 N.Y.S.2d 370, 372 (N.Y. App. Div. 2011).

The interest of the public, which is the primary object of the trust, must always be paramount to all other interests. The city cannot grant away the rights of the public, nor can they be encroached upon by private individuals, with or without the consent of the municipality, to the detriment of the superior rights of the public.¹²²

If the public will be deprived of the use of public property for a substantial period of time, this can violate the public-trust doctrine, even if there has been no formal conveyance of title.¹²³

What counts as a ‘public’ purpose under this doctrine? For parks, their public purpose is thought to be the “free public means of pleasure, recreation, and amusement.”¹²⁴ Monuments, gardens, playgrounds, and fountains are seen as serving this public purpose, whereas museums, retail, or entertainment centers are not typically permissible in parks.¹²⁵ For streets and sidewalks, their public purpose is thought to be the “free and unobstructed use of the street.”¹²⁶ Accordingly, courts meet sidewalk obstructions—such as street merchandise, booths, advertising, and stands—with skepticism, permitting them mostly when small and temporary.¹²⁷ The larger, and more permanent, a sidewalk encroachment, the more likely courts are to invalidate a municipality’s authority to license such construction.¹²⁸ For example, erecting a building “or other structure of like nature,” such as a tent, on the street or sidewalk, is typically proscribed.¹²⁹ Smaller and more temporary encroachments on the sidewalk, such as business signs, or flap or trap doors for attics, do not violate the public trust in the street.¹³⁰

122. *Sears*, 93 N.E. at 160.

123. *See, e.g.*, *Friends of Van Cortlandt Park v. City of New York*, 95 N.Y.2d 630, 631 (2001).

124. *See, e.g.*, *Williams v. Gallatin*, 128 N.E. 121, 123 (N.Y. 1920).

125. *Id.*; *Avella v. City of New York*, 80 N.E.3d 982, 984-88 (N.Y. 2017) (holding that the construction of a retail entertainment center on city parkland without the authorization of the state legislature violated the public-trust doctrine).

126. *Sears*, 93 N.E. at 161.

127. *See, e.g.*, *John A. Tolman & Co. v. City of Chicago*, 88 N.E. 488, 490 (Ill. 1909) (holding that the use of skids and other materials to temporarily load and unload merchandise on the street is permissible under the public-trust doctrine); *Smith v. McDowell*, 35 N.E. 141, 144 (Ill. 1893) (discussing how “necessary and temporary obstructions” such as “flap or trap doors, the extension of signs into the street” need not be regarded as nuisances or violations of the public trust).

128. *Snyder v. City of Mt. Pulaski*, 52 N.E. 62, 62 (Ill. 1898).

129. *McDowell*, 35 N.E. at 144. Buildings that abut only *slightly* onto the public right of way, such as by one foot, are not prohibited. *See Att’y Gen. ex rel. Holtz v. Heishon*, 18 N.J. Eq. 410, 413 (Ch. 1867).

130. *See McDowell*, 35 N.E. at 144 (“[T]he necessary and temporary obstructions incident to the use or repair of the street . . . if temporary and reasonably necessary, must be borne . . . [so too] flap or trap doors, the extension of signs into the street and the like.”); *see also John A. Tolman & Co.*, 88 N.E. at 488 (“Placing building materials in the street preparatory to building on the land is not unlawful if the street is not improperly obstructed and the materials are removed within a reasonable time.”).

The relationship between public parks and profit-making ventures has recently come to the fore in public-trust doctrine. In *Union Square Park Community Coalition v. N.Y.C. Department of Parks & Recreation*, the New York Supreme Court held that placing a prohibitively expensive restaurant in a park was inconsistent with park purposes, and a violation of the public trust.¹³¹ “[A pavilion] intended to provide food and drink at luxury prices and thus be restricted to the elite, rather than open to broad segments of the public . . . cast[s] doubt on the propriety of its operation as a public park facility.”¹³² In a different case, the New York Court of Appeals held that a luxury restaurant in Union Square Park was permissible, but *only* because the municipality “retained extensive control” over menu items, prices, and fee increases. The Court of Appeals also found the restaurant permissible because it was required to offer free community programs on its premises and to allow non-patrons to use its outdoor seating, to offset its otherwise private use.¹³³ These cases indicate that luxury consumption in parks can threaten the values of public space, and can constitute a privatization, notwithstanding the benefits of offsetting public uses.

C. Evaluating Privatization Claims

If public spaces can be governmentally or privately owned while still being “public space,” what, then does it mean to *privatize* public space? Publicness is not a binary, but instead is “a matter of degree.”¹³⁴ Privatization arguments typically look to the *degree* of control exercised by the private actor over a given space, and to whether public-space values have remained intact or not when evaluating whether there has been a privatization.¹³⁵ Margaret Kohn offers a useful three-part framework for evaluating the extent to which a space has retained its public qualities, or if it has become privatized¹³⁶:

(a) **Ownership & Governance:** Government ownership is typically a strong signal that space is public, and the most quintessentially public

131. *Union Square Park Coal., Inc. v. N.Y.C. Dep’t of Parks & Recreation*, No. 102734-12, 2013 WL 308912 (N.Y. Sup. Ct. Jan. 25, 2013), *rev’d*, 966 N.Y.S.2d 669 (App. Div. 2013).

132. *Union Square Park Cmty. Coal., Inc. v. New York City Dep’t of Parks*, 967 N.Y.S.2d 870 (Sup. Ct. 2013) (quoting 795 Fifth Ave. Corp. v. City of New York, 40 Misc.2d 183, 191-92 (N.Y. Sup. Ct. 1963)).

133. *See Union Square Park Cmty. Coal., Inc. v. New York City Dep’t of Parks & Recreation*, 8 N.E.3d 797, 799 (N.Y. 2014); *see also* Casado Pérez, *The Street View of Property*, *supra* note 119, at 389 (discussing the case).

134. Nadav Shoked, *Property Law’s Search for a Public*, 97 WASH U. L. REV. 1517, 1529 (2020); *see also* Schindler, *The Publicization of Private Space*, *supra* note 5, at 1106 (“Privatization encompasses much more than just conveyances . . . any sort of public space that has some type of private ownership, management, or control could be viewed as privatized public space.”). *See generally* Weintraub & Kumar, *supra* note 104, at xii (arguing that the “public/private distinction is ultimately not unitary, but protean” and “comprises, not a single paired opposition, but a complex family of them”).

135. *Cf.* Briffault, *supra* note 3, at 470.

136. *See* Schindler, *The “Publicization” of Private Space*, *supra* note 5, at 1114.

spaces (e.g., plazas, parks) are governmentally owned. One clear form of privatization is therefore a conveyance of land from a government to a private owner.¹³⁷ Ownership, however, is neither necessary nor sufficient for publicness. Property that is privately owned, such as Privately Owned Public Spaces (POPS), can (by definition) still be public space.¹³⁸ A Privately Owned Public Space (POPS) is a lobby, atrium, or typically a terrace inside a private building that is required to be open and free to the public, granted in exchange for greater development rights from the government.¹³⁹

(b) **Accessibility:** Public spaces are typically broadly accessible, “open and free to all.”¹⁴⁰ Explicit, or even implicit, forms of exclusion can diminish public space’s accessibility norm and render it a privatization.¹⁴¹

(c) **Intersubjectivity:** Lastly, public spaces are thought to be those which “facilitate unplanned contacts between people,” especially strangers.¹⁴² Spaces which atomize participants and do not facilitate intra-audience interaction are unlikely to be public spaces, and may constitute a privatization if the space formerly possessed those attributes.¹⁴³

Street dining has not conveyed formal legal title to private parties. Nonetheless, it has jeopardized the accessibility and intersubjectivity norms of public space and has privatized our streets. Cities have handed over control of our streets and sidewalks to private owners, with little oversight or constraint. Street dining is different from prior profit-making ventures on streets in normatively problematic ways at odds with the sociological and legal values of public streets. The next Part fleshes out this Note’s core privatization argument.

III. The Privatization Critique: Problems & Concerns with Street Dining

Utilizing the privatization lens described in the prior Section, ‘streeteries’ have privatized our city streets. These structures are large in size, functionally permanent, expensive to gain entry into, and more enclosed or “hut-like” than pre-pandemic sidewalk cafés. The facets that make

137. *Id.* at 1106.

138. *See* KOHN, *supra* note 106, at 11; *see also* Marsh v. Alabama, 326 U.S. 501, 507-08 (1946) (holding that the sidewalk of a fully “company-owned town,” where the town otherwise resembled a regular municipality and invited all of the public to use its sidewalks, was public space, subject to the norms of free expression, despite being privately owned).

139. *See* Schindler, *The “Publicization” of Private Space*, *supra* note 5, at 1114.

140. *Smith v. McDowell*, 35 N.E. 141, 145 (Ill. 1893); Union Square Park Coal., Inc. v. N.Y.C. Dep’t of Parks & Recreation, No. 102734-12, 2013 WL 308912, at *6 (Jan. 25, 2013) (stating that the question for public-trust and parkland doctrine is whether “de jure or [sic] defacto, the use [of the space] is open to all); *see also* Schindler, *The Publicization of Private Space*, *supra* note 5, at 1100 (conceiving of public space as space that is “open and accessible to all members of the public in a society”); Brain, *supra* note 104, at 242 (describing public space one “into which anyone may enter, and from which anyone may depart, without the consent of strangers, and without any declaration—however tacit—of a justifying purpose”).

141. *See* KOHN, *supra* note 106, at 13.

142. *Id.* at 11.

143. *Id.*

‘streateries’ unique and, for some, appealing, also undermine our exposure to otherness in public space and our opportunities for socialization or democratic participation. Commerce and public space, while not inherently incompatible, have clashed with the proliferation of ‘streateries’ worldwide.

Outdoor dining is not the first commercial use of the street. Cities have long permitted street vendors and food trucks to operate on sidewalks and have allowed businesses to advertise in front of their premises.¹⁴⁴ In some forms, commerce can be seen as furthering public-space values. Commerce is a form of recreation, which is one purpose of places such as parks or plazas. Commerce can also initiate socialization among city residents, as Carol Rose and William Whyte have documented.¹⁴⁵ And commerce attracts people to walk on the streets and sidewalks, contributing to the overall vitality of street life.¹⁴⁶

In other instances, however, attaching profit motives to public space can undermine its core public values. Commerce can especially jeopardize the accessibility and intersubjectivity norms of public space. Consumerism tends to go hand in hand with the exclusion of the poor, who are often seen as anathema to profitmaking goals.¹⁴⁷ Moreover, market interactions, being transactional and impersonal, can increase feelings of alienation instead of building community, which is one key value of public space.¹⁴⁸ As Ray Oldenburg has commented, when “leisure is perverted into consumption,” it breeds “alienation . . . [and] difference,” dividing, rather than uniting, the public through the streets.¹⁴⁹

Outdoor dining differs from prior commercial uses of the sidewalk in normatively problematic ways. The dining structures’ large size and enclosed nature, the expense of the restaurants, their relative permanence, their exclusionary effects, and their failure to facilitate the kind of socialization and intersubjectivity we value in public space—together render

144. See Pollack, *supra* note 116, at 622, 625-27.

145. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723; WHYTE, *supra* note 102, at 50-53.

146. See WHYTE, *supra* note 102, at 50-53. See *infra* Section III.B.4 for a rebuttal to this response.

147. See BLOMLEY, *supra* note 100, at 13 (discussing the “exclu[sion] [of] abject poverty from prime consumption spaces”); cf. Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 971 (2020) (“[L]ocal businesses have been at the forefront of movements to criminalize and arrest those experiencing homelessness.”).

148. See Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 1, 17 (Jeff Weintraub & Krishan Kumar eds., 1997); see also Allan Silver, *Two Sorts of Commerce: Friendship and Strangership in Civil Society*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 43, 67 (Jeff Weintraub & Krishan Kumar eds., 1997) (discussing the rise of the impersonal commercial market and how this instrumentalism elevated the importance of friendships free from calculations of utility).

149. OLDENBURG, *supra* note 53, at 10-11; see also Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1254 (2003) (“As basic human needs are met increasingly through relationships of sale and consumption, even with vouchers funded collectively, individuals lose chances to take part in communities; to act like citizens concerned with the welfare of others”).

outdoor dining a privatization of our public sphere. Section III.A first argues that outdoor dining is different in both *kind* and *degree* from prior commercial uses of the sidewalk, by comparing outdoor dining primarily to pre-pandemic sidewalk cafés and street vendors. Section III.B then argues that these differences are normatively problematic because they undermine public-space values.

A. Street Dining Differs in Kind from Prior Commercial Uses of the Street

1. Distinguishing Traditional Sidewalk Cafés

Many U.S. and international cities have long offered licenses for sidewalk café seating, yet ‘streateries’ differ from traditional sidewalk cafés in normatively important ways. Traditional sidewalk cafés were most commonly unenclosed structures (consisting of only removable chairs and tables), or, less frequently, enclosed structures (typically consisting of a low fence and platform, plus awnings).¹⁵⁰ Sidewalk cafés, prior to the pandemic, could generally only be built in the space “immediately adjacent to [the restaurant’s] premises”—meaning just in front of and attached to the store.¹⁵¹ The ‘sidewalk’ aspect of COVID-19 ‘streateries’ is therefore not unprecedented; it existed decades prior. What is entirely new, instead, is: (a) the extension of outdoor dining into *parking spots*; (b) the *house-like, enclosed* nature of many COVID-era structures, particularly in American cities; and (c) the eroded public nature of the sidewalk sandwiched between the restaurant and the newly claimed parking spot. Outlining these differences helps also to sketch the contours of the normative problems with COVID-19 ‘streateries.’

a. *Parking Spots:* COVID-era outdoor dining differs from prior sidewalk cafés because restaurants now occupy parking spots never before opened for such use. Those who favor car-free cities rejoice in the widespread reclamation of space from cars for leisure and recreation. For example, Architect David Baker stated he is “all for converting car space to people space” and “prefers the noise of vibrant street life to traffic noise.”¹⁵² Yet parking spots—just as much public space as the nearest street or sidewalk—are infused with public-space norms which must be considered in evaluating the takeover of parking spots by private business.

150. See, e.g., N.Y.C. ADMIN. CODE §§ 20-223 to 20-225, and N.Y.C. BUILDING. CODE § 3111 (overviewing New York City’s pre-pandemic regulation of sidewalk cafés).

151. See N.Y.C. ADMIN CODE § 20-224; see also Pollack, *supra* note 116, at 623 (explaining how owners and tenants of property have the exclusive privilege of appropriating the sidewalk space fronting their premises for outdoor cafés or bars).

152. See Hayden Manseau, *Shared Spaces: A Crisis-Driven Experiment that Could Permanently Change SF’s Urban Landscape*, MISSION LOCAL (Sept. 22, 2020), <https://mission-local.org/2020/09/the-shared-spaces-program-a-crisis-driven-experiment-that-could-permanently-change-san-franciscos-urban-landscape> [<https://perma.cc/7VGS-5VXS>].

Parking spots, though seemingly quotidian, are sociologically and legally public spaces. Parking spaces are governed by the same public-trust principles discussed in Section II.B—cities may charge through parking meters only as much as necessary to defray the costs of installation, operation, and maintenance of the parking spot, or of local street maintenance, but the “municipality cannot be authorized to turn this plan of using parking meters into a business for profit over and above the expenses involved in proper regulation of the public use.”¹⁵³ Many cities also explicitly define streetside parking spaces as “public space” in their administrative codes.¹⁵⁴

Moreover, many of the normative values discussed in Section I.A apply just as well to parking spots¹⁵⁵ Informal public life and socialization takes place in parking spots, such as when youth sit and eat together inside of their cars, or leaning against them¹⁵⁶ Political picketing and pamphleting can take place in or near parking spots, or via flyers and banners left on car windows.¹⁵⁷ In fact, following the COVID-19 pandemic, empirical research found a rise in “caravan” and car-based protests given the difficulty of demonstrating in large crowds, showing again the importance of both cars and stationary parking for democratic advocacy¹⁵⁸ Parking is also frequently a place where the homeless reside and find shelter, advancing the inclusionary norm.¹⁵⁹ And parking is essential for access to *other* public spaces, infusing it with public-space norms. “A parking space is itself public

153. *In re Opinion of the Justs.*, 8 N.E.2d 179, 182 (Mass. 1937). An extensive literature has argued that the privatization of parking meters—such as Chicago’s one-billion-dollar deal sale of 36,000 parking meters to Morgan Stanley—constitutes a violation of the public-trust doctrine. See, e.g., Ivan Kaplan, *Does the Privatization of Publicly Owned Infrastructure Implicate the Public Trust Doctrine?* *Illinois Central and the Chicago Parking Meter Concession Agreement*, 7 NW. J.L. & SOC. POL’Y 136 (2012).

154. See, e.g., N.Y.C. ADMIN. CODE § 17-306(e) (emphasis added).

155. See SARAH MARUSEK, *THE POLITICS OF PARKING: RIGHTS, IDENTITY, AND PROPERTY* 5 (2016) (arguing that parking is the “site of law in the everyday in which democracy flourishes”).

156. See OLDENBURG, *supra* note 53, at 17-18.

157. MARUSEK, *supra* note 155, at 39 (describing how labor unions “distribute political literature, either on the windshields of parked cars or personally handed to a driver by an activist” nearby their company parking lots).

158. Parry, Asenbaum & Ercan, *supra* note 109, at 199 (“In Puerto Rico, people demonstrated for better protective measures against the virus from their cars with banners and shouting slogans through car windows in a ‘Caravan for Life.’”); Rohlinger & Meyer, *supra* note 107, at 8 (describing how during the pandemic “groups concerned with the rights of immigrants staged drive-by protests outside of detention centers, assembling scores of cars driving slowly and honking . . . [u]sing cars to create a tableau, make noise, and take up space . . . in the early days of pandemic protest, it generated attention”).

159. See Joe Colletti, *Are All Persons Sleeping in Vehicles Homeless and Should they Be Included in Homeless Counts?* HOMELESS STRATEGY (Nov. 24, 2019), <https://homelessstrategy.com/persons-sleeping-vehicles-homeless-included-homeless-counts> [<https://perma.cc/7UTF-SRXX>].

property, and is instrumental in promoting the use of other public property, such as parks . . . [which] facilitates a city’s democratic community.¹⁶⁰

Outdoor dining is a meaningfully different—and more private—use of parking spots than cars. Although parking involves the temporary storage of private vehicles, one at a time, in designated spots,¹⁶¹ nominal fees and turnover requirements ensured that parking was only a *partial* privatization, and one dramatically different in kind from ‘streeteries.’

“[E]nsuring turnover is one of the goals of parking policies”¹⁶² and cities set time limits typically between 1 and 15-hours to “ensure that curb parking accommodates as many [people] as possible for the adjacent businesses.”¹⁶³ Performance parking policies also promote turnover by adjusting parking prices based on real-time occupancy rates; prices decline when occupancy is low, and increase when rates are high, to enable the availability of spots at any time of day.¹⁶⁴ This continuous turnover of cars ensures that no one vehicle, user, or property owner can monopolize a parking spot for long-term, private use. By contrast, private dining programs allow a single business owner to operate in a parking space year-round, with few permits ever revoked after approval.¹⁶⁵ Whereas turnover ensures that parking spots are continually used by different property owners, and do not accrue to the benefit of a singular one for a substantial period of time, outdoor dining has, in most cities, become a permanent fixture in parking spots.¹⁶⁶

In addition, car parking is managed by the municipality in accordance with public-space values. On-street parking is typically either free, or subject to the payment of a small fee, to enable general access by all demographics.¹⁶⁷ While free parking has been heavily criticized,¹⁶⁸ most cities tend to retain it because of the equitable concerns at stake in parking. Parking spots are “instrumental to participation in the life of a municipality”

160. Casado Pérez, *The Street View of Property*, *supra* note 119, at 269; *see also* MARUSEK, *supra* note 155, at 13 (“Community life does not physically happen within the parking spot, but it cannot happen without access to it.”); Regina Austin, “Not Just for the Fun of It!”: *Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667, 683-84 (1998) (describing how some cities use parking restrictions to curb black access to beaches).

161. *Cf.* O’Sullivan, *supra* note 94 (arguing that parking spaces are “already used privately as vehicle storage paid by the hour”).

162. Casado Pérez, *The Street View of Property*, *supra* note 119, at 392.

163. Gregory Pierce & Donald Shoup, *SFpark: Pricing Parking by Demand*, in *PARKING AND THE CITY* 344, 347 (Donald Shoup ed., 2018); *Street Parking Rates*, N.Y.C. DEP’T OF TRANSP., <https://www.nyc.gov/html/dot/html/motorist/parking-rates.shtml> [<https://perma.cc/UED7-KM88>].

164. *See* DONALD C. SHOUP, *THE HIGH COST OF FREE PARKING*, at xxvii (2011).

165. *See infra* notes 199-200 and accompanying text.

166. *See infra* Section III.A.2 for a discussion of the permanence of dining structures.

167. Casado Pérez, *The Street View of Property*, *supra* note 119, at 371; *see also, e.g.*, SHOUP, *supra* note 164, at xxii (reporting that San Francisco has “281,000 on-street (parking) spaces, but only 9 percent of those spaces are metered”).

168. *See generally* SHOUP, *supra* note 164 (arguing that free curb parking increases overcrowding, congestion, cruising, and produces overall social costs).

especially for lower- and middle-income individuals, who are increasingly being pushed out of gentrified city centers and rely on parking in order to access public spaces and economic opportunities.¹⁶⁹ The surface-level fact that private vehicles remain stationary in these spots misses how parking spaces are integral to and *facilitate* public participation, a function distinct from—and more public than—restaurant use, which by comparison are expensive to gain entry.

Finally, parked cars never fully privatized these spots because the municipality retains the key right to exclude in parking: the city determines parking fees and conditions of access, not the individual car owner. Outdoor dining, on the other hand, has transferred the right to exclude to adjoining property owners, who now have largely free reign to admit or reject whom they like from the very same spots.¹⁷⁰ Whereas before, the homeless could sleep in their cars, or lean up against or near cars, restaurant owners exclude the homeless from inside and nearby their spaces.¹⁷¹ Nominal fees to park have been replaced with “\$30 *cacio e pepe*,” and the municipality retains no residual right to regulate dining menus or prices in order to ensure access to the space.¹⁷² Accessibility and exposure to others—key values of public space—are facilitated by parking, but not by private dining. Parked cars, and parked restaurants, are meaningfully different.

One potential pushback to this argument is that more people use a restaurant at a single moment in time than a parking spot, providing greater public benefit.¹⁷³ But greater use in sheer numbers says little about the accessibility of the space or the *kinds of people* who are accessing it in greater numbers. Restaurants may be used by more people, but if they exclude the “low-income/working-class residents who [] might not have the means to dine,” then a mere increase in numbers does not fulfill public-space values.¹⁷⁴ Professor Schindler has made similar points when

169. See Casado Pérez, *The Street View of Property*, *supra* note 119, at 373-74; see also Schindler, *Making the Temporary Permanent*, *supra* note 11, at 400.

170. See Pollack, *supra* note 116, at 645 (discussing how owners of outdoor cafés and bars “have the power to exclude from the dining space those whom the establishment wishes to exclude—perhaps people who are not patrons, who are disruptive, or who are engaged in panhandling”).

171. See *infra* note 217.

172. See Donnelly, *supra* note 1; cf. *supra* note 147 and accompanying text (discussing a public-trust parkland case in which the municipality retained a right to regulate menu items and fees).

173. See Schindler, *Making the Temporary Permanent*, *supra* note 11, at 394 (pointing out that “privatized streateries in parking spaces allow *more* members of the public to access these spaces simultaneously than when they are reserved for use by individual cars”).

174. Monique John, *Many Pandemic ‘Fixes’ Had Unintended Consequences. Streateries Were One of Them*, WCPO 9 (June 17, 2021), <https://www.wcpo.com/news/transportation-development/move-up-cincinnati/many-pandemic-fixes-had-unintended-consequences-streateries-were-one-of-them> [<https://perma.cc/D2EN-WXSV>].

discussing the impact of Bryant Park’s clean-up, which resulted in increased numbers but not an increase in the diversity of those accessing that space.¹⁷⁵

b. *Sidewalk Cafés*: COVID-era outdoor dining also differs from prior sidewalk cafés because these structures are more *enclosed* and “house-like” than ever before. In cities around the world, businesses constructed house-like structures consisting of three to four walls and a roof to accommodate diners in inclement weather year-round.¹⁷⁶ Regulations which previously restricted the erection of building-like structures on streets were suspended, paving the way for this unique iteration of sidewalk dining.¹⁷⁷ As one Brooklyn resident described, pandemic-era ‘streateries’ are like “building another house in front of your house.”¹⁷⁸ Or as sociologist Ray Oldenburg once commented on New York:

Establishing sidewalk cafés in the Big Apple is akin to transplanting palm trees to Pittsburgh. The environment is not conducive It is nothing like that which the French enjoy. It is not open; it is a shack with windows allowing only a view of the avenue directly in front. Its walls hide from sight¹⁷⁹

175. Cf. Schindler, *The “Publicization” of Private Space*, *supra* note 5, at 1106 (“Certainly, in sheer numbers, Bryant Park is used by more people now than it was before its clean up. But does that necessarily make it more inclusionary?”).

176. See *supra* note 70 and accompanying text. A city like Paris, which has limited its program to the summer season, has naturally seen less of these house-like structures. See *supra* Section I.A.2.

177. See, e.g., N.Y. Exec. Order No. 126, *supra* note 67.

178. Griffin Kelly & Melissa Klein, *NYC Protesters Rally in Greenwich Village Against Outdoor Dining Sheds*, N.Y. POST (Feb. 5, 2022), <https://nypost.com/2022/02/05/nyc-protesters-rally-in-greenwich-village-against-outdoor-dining> [<https://perma.cc/X6WL-VZ67>].

179. OLDENBURG, *supra* note 53, at 151. Oldenburg made this comment pre-pandemic, but the core insight still holds true today.



Enclosed, house-like sidewalk café in downtown Manhattan, 2023.

Allowing restaurants to build enclosed, house-like structures in parking spaces and sidewalks is meaningfully different from prior sidewalk cafés. A restaurant which is open-air is continuous with and integrated into the surrounding public space, and can function as an extension and augmentation of that space. Sitting inside an enclosed structure, on the other hand, cordons off public space for pure internal consumption and constitutes *more* of a privatization than it otherwise would be.¹⁸⁰ In *795 Fifth Ave. Corp. v. City of New York*, for example, the New York Supreme Court held that a restaurant constructed in Central Park was permissible under the public-trust doctrine because it was “*not an ordinary commercial brick building housing a restaurant . . . It is rather a glass-enclosed pavilion, designed in form and structure to be absorbed into and become part of the park setting.*”¹⁸¹ Because those sitting inside the glass restaurant could look out and take in the surrounding park nature, they ‘participated’ in the benefits of the park, and did not fully privatize it.¹⁸² Pandemic-era dining structures, enclosed and house-like, create an abrupt division in the street, resembling more an indoor area than an outdoor area and constituting *more*

180. Cf. ANASTASIA LOUKAITU-SIDERIS & RENIA EHRENFUCHT, *SIDEWALKS: CONFLICT AND NEGOTIATION OVER PUBLIC SPACE* 255 (2009) (“Whereas in Paris the private space of the café blends seamlessly into the public space of the sidewalk, in U.S. cities, fences create an abrupt border.”).

181. 242 N.Y.S.2d 961, 967 (Sup. Ct. 1963), *aff’d*, 205 N.E.2d 850 (N.Y. 1965) (emphases added).

182. *Id.*

of a privatization than prior sidewalk cafés.¹⁸³ Enclosure is a key part of what distinguishes outdoor dining from prior sidewalk cafés, posing unique normative problems discussed in Section III.B.

c. *Between the Sidewalk Café and the Parking Spot*: By extending restaurants into the streets, there is a third important way outdoor dining differs from previous sidewalk cafés: it reverses the typical core-to-edges model of property. David A. Dana and Nadav Shoked, in *Property's Edges*, argue that private property rights are most strongly enforced near the “private core” and diminish gradually (rather than in a binary fashion) as one moves across a piece of land closer to the “public edge.”¹⁸⁴ Sidewalks are a classic example of the core-to-edges phenomenon: *inside* the restaurant (the core), private rights are strictly enforced and trespassers are penalized by law; in the zone directly *fronting* the restaurant (the middle zone), some private rights are still weakly enforced despite municipal ownership of the sidewalk—for example, adjacent businesses have the exclusive right to place advertising in front of their own stores, to load and unload goods or place trash in front of their stores, and an individual standing next to the business entrance can be a trespasser, even while physically standing on a public sidewalk.¹⁸⁵ Lastly, in the area *closest* to the curb and street (*furthest* from the private core), private rights are largely gone and courts strongly enforce the public right of passage.¹⁸⁶ A merchant typically could not place an advertising sign on the curb, and pedestrians near the curb would not be found ‘trespassers’ of any nearby business.

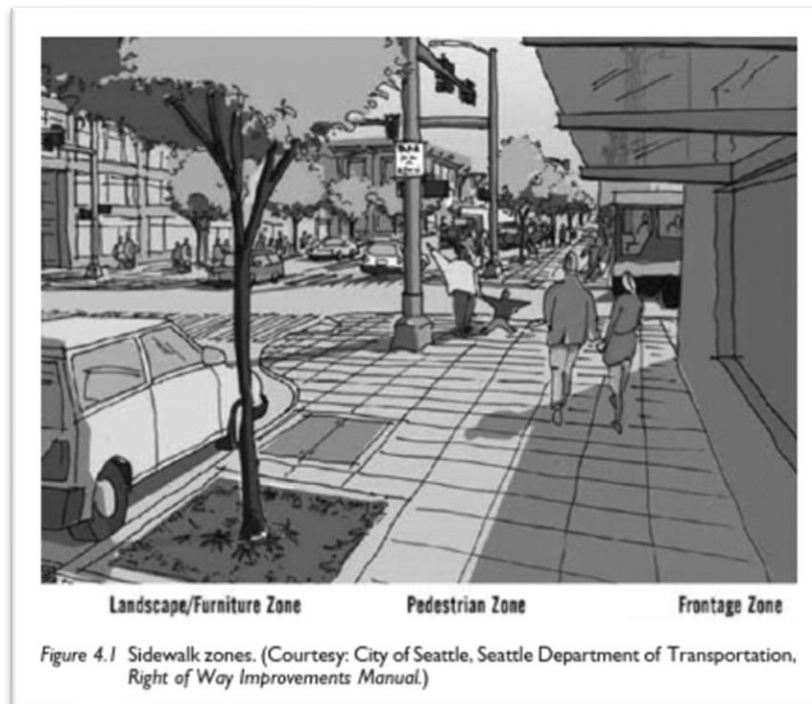
183. See Benjamin Chadwick, @bchadwickfrance, TWITTER (Oct. 10, 2020), <https://twitter.com/bchadwickfrance/status/1314980700391604224> [<https://perma.cc/DBS4-PWKA>] (tweeting, beneath a photo of an enclosed structure, “At what point does a sheltered outdoor area become an indoor area?”).

184. David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 757 (2019).

185. See, e.g., Pollack, *supra* note 116, at 645 (explaining how at common law courts held that “a person who stopped on the sidewalk in front of a man’s house and addressed that man abusively was committing trespass—although the speaker stayed on the public sidewalk”) (internal citation omitted); see also Att’y Gen. *ex rel.* Holtz v. Heishon, 18 N.J. Eq. 410, 410 (Ch. 1867) (permitting a building to abut just one foot into the public street because it was so close to the private core); Smith v. State, 23 N.J.L. 130, 132 (Sup. Ct. 1851), *aff’d*, 23 N.J.L. 712 (1852) (upholding a property owner’s right to place stairs or a porch in front of their home, on the public sidewalk).

186. See, e.g., People *ex rel.* Lapice v. Wolper, 183 N.E. 451, 454 (Ill. 1932) (striking an authorization to build gasoline pumps on the curbside closest to the street).

Core-to-edges is not just a mode of legal enforcement; it also reflects a municipal practice of how engineers classify and regulate sidewalk uses.¹⁸⁷ In Seattle, for example, engineers separate the sidewalk into three discrete zones when determining permitted objects and usages—the frontage zone, the pedestrian zone, and the landscape/furniture zone—which almost precisely track the three core-to-edges categories.¹⁸⁸



189

By allowing restaurants to occupy parking spaces for dining, cities have reverted the typical core-to-edges model. Now, the parking space has become nearly indistinguishable from the private core (the main restaurant), in both appearance and governance. The restaurant owner holds a similar bundle of rights in their newly acquired parking space as in their original parcel of land: she can condition access to paying patrons, can exclude those who behave or appear incongruent with her profitmaking motive, and can (to varying degrees depending on the city) decide what her

187. See BLOMLEY, *supra* note 100, at 39.

188. *Id.* (describing these three zones as the “landscape/furniture zone [which] is deemed the appropriate location for street furniture, art and landscaping, while the frontage zone can accommodate sidewalk cafés and retail displays . . . [and] [t]he pedestrian zone is specifically reserved for pedestrian travel”).

189. City of Seattle, Department of Transportation, Photograph/Illustration of Seattle’s Municipal Sidewalk Zones, *in* BLOMLEY, *supra* note 100, at 39.

physical space will look like. Whereas the street formerly progressed from private → mixed → public governance, it now progresses from private → mixed → private governance, altering the traditional core-to-edges model.

The implications here are that the space *in between* the original restaurant and the new parklet—the remaining portion of the public sidewalk—now has an eroded public character. Private rights are weakly enforced in the space fronting *both* restaurant and shed, encroaching on more of the sidewalk than ever before. Bus boys go to and fro on the sidewalk to serve customers in the parking space; customers await entrance near the curb *and* the frontage; and restaurants now extend their exclusionary tactics against panhandlers onto greater portions of the sidewalk than before to serve customer satisfaction.¹⁹⁰ “[W]hen private dining spaces begin to intrude into public sidewalks, streets, and parks, where should it stop?”¹⁹¹ Outdoor dining differs from prior sidewalk cafés because, by extending premises into the parallel street, even the fully public sidewalk—sandwiched in between—has become slightly more private.

2. Distinguishing Street Vending & Food Trucks

‘Streateries’ also differ in kind from another common commercial use of city streets: street vending and food trucks. The key differences between outdoor dining and street vending are the permanence of the structures, their size, the relative expense of the commercial activities, and a difference in *how* consumers engage with street vendors as compared to outdoor dining.¹⁹² Outlining these difference sets the stage for Section III.B’s explanation of why the new ‘streateries’ phenomenon is normatively concerning.

One reason outdoor dining is different from street vendors is that street vendors, and food trucks, are both subject to strict duration restrictions. Baltimore, San Jose, and Columbus, for example, require street carts and stands to relocate every fifteen minutes from a single spot on a city block.¹⁹³ Slightly more generous time limits, such as Chicago’s, still only allow street vendors to remain for two hours on any one city block, on any one given day.¹⁹⁴ Duration regulations for food trucks can also be quite restrictive. In Washington D.C., food trucks must vacate their parking spot by 2:30PM on weekdays and may not park in one spot for more

190. See *infra* note 217 and accompanying text.

191. Schindler, *Making the Temporary Permanent*, *supra* note 11, at 394.

192. This last point, on socialization and how consumers engage with the respective activities, is addressed in Section III.B.4.

193. See Erin Norman, Robert Frommer, Bert Gall & Lisa Knepper, *Streets of Dreams: How Cities Can Create Economic Opportunity By Knocking Down Protectionist Barriers to Street Vending*, INST. FOR JUST. 22-23 (July 2011), https://ij.org/wp-content/uploads/2015/03/street-sofdreams_webfinal.pdf [<https://perma.cc/4XXC-BKEZ>].

194. *Id.*

than four hours on a given day.¹⁹⁵ Nearly half of all U.S. cities have some type of duration restriction in place for food trucks.¹⁹⁶

Outdoor dining booths, by contrast, can remain “overnight in the public right-of-way until permit expiration”—or in other words, 24/7, so long as the license has not expired.¹⁹⁷ While some cities mandate that objects such as heaters or food trays be cleared from the streatery at the close of business, all cities allow the principal platform to remain on a continual basis.¹⁹⁸ And even if dining permits might be revocable and structures “technically” temporary,¹⁹⁹ the clear implication is that once a permit is granted for a streatery, the restaurant will remain in place so long as it does not become out of compliance with code regulations.²⁰⁰

The result of these differences is that outdoor dining is a much more *permanent* use of our city streets than prior vending activities. And on a purely practical level, these structures are quite difficult to move or destroy, even if a city adopts the intention to remove them. In 2022, Mayor Adams declared that all dilapidated sheds in New York City would be destroyed, but over one year later, he had only removed 169 out of more than 13,000 sheds.²⁰¹

Street vending also differs from outdoor dining because vending carts are required by law to be significantly smaller in size, presenting less of an obstruction to sidewalk activities. In Washington D.C., vending carts and stands can be no more than 5 feet wide and 8 feet long.²⁰² Outdoor dining sheds, by contrast, can be up to 8 feet wide, and their length can extend to the entire front of a restaurant’s premises, sometimes amounting to more than half a block, on multiple blocks.²⁰³ This larger size risks impeding passage, and can harm other public-space goals—such as democratic advocacy, or contact with otherness—as argued in Section III.B.²⁰⁴ The diagram

195. See D.C. Mun. Reg. § 24-533-535.

196. See Norman, Frommer, Gall & Knepper, *supra* note 193, at 22-24.

197. S.F. Public Works Order, *supra* note 49, at 9.

198. See O’Connell, Gomez-Escoda & Uceda, *supra* note 24, at 27.

199. See S.F. Public Works Order, *supra* note 49, at 15 (“The permit shall be revocable at the discretion of the Director of Public Works, who may hold a public hearing prior to such revocation consistent with Public Works Code Section 793.4(c).”); N.Y.C. ADMIN. CODE § 20-224(a) (“[S]uch sidewalk café shall be granted a license and a revocable consent by the commissioner.”).

200. See Paris Guidance, *supra* note 57, at 7 (stating that permits are “renewable tacitly each year); *cf.* People *ex rel.* Lapice v. Wolper, 183 N.E. 451, 468 (Ill. 1932) (holding in a public-trust dispute that the revocability of a license did not render an intrusion temporary, under the public-trust doctrine, because “[i]t is a fair conclusion that a permit having once been issued will continue by renewal so long as the holder complies with the provisions of the ordinance, and the structure permitted will become, in fact, permanent”).

201. See Barron, *supra* note 73; Serena Tara, *NYC Is Tearing Down Hundreds of Outdoor Dining Sheds*, THRILLIST (Jan. 3, 2023), <https://www.thrillist.com/news/new-york/nyc-tears-down-unused-outdoor-dining-sheds> [https://perma.cc/Z3CC-ELDW].

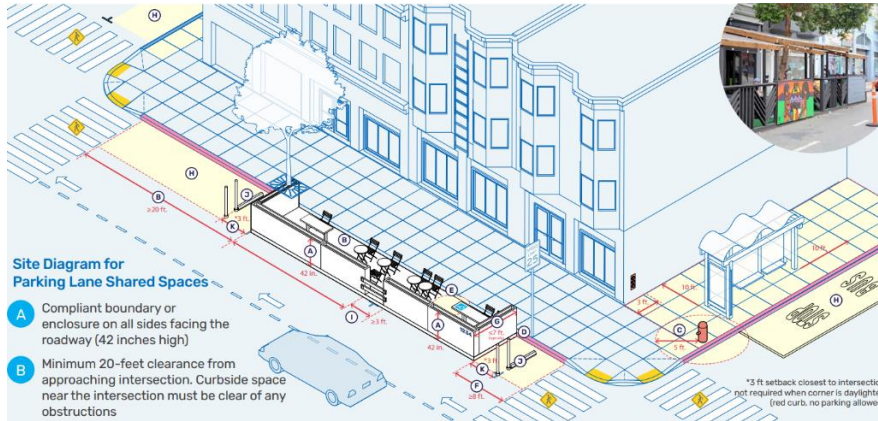
202. DC Mun. Regs. tit. 24, § 545.1: see also Joseph Pileri, *Who Gets to Make a Living? Street Vending in America*, 36 GEO. IMM. L.J. 215, 252 (2021).

203. See SF Shared Spaces Regulation, *supra* note 46, at 12, 18; S.F. Public Works Order, *supra* note 49, at 8; *N.Y.C. Open Restaurants Program*, *supra* note 33; Jenkins, *supra* note 37.

204. See *infra* note 255 and accompanying text.

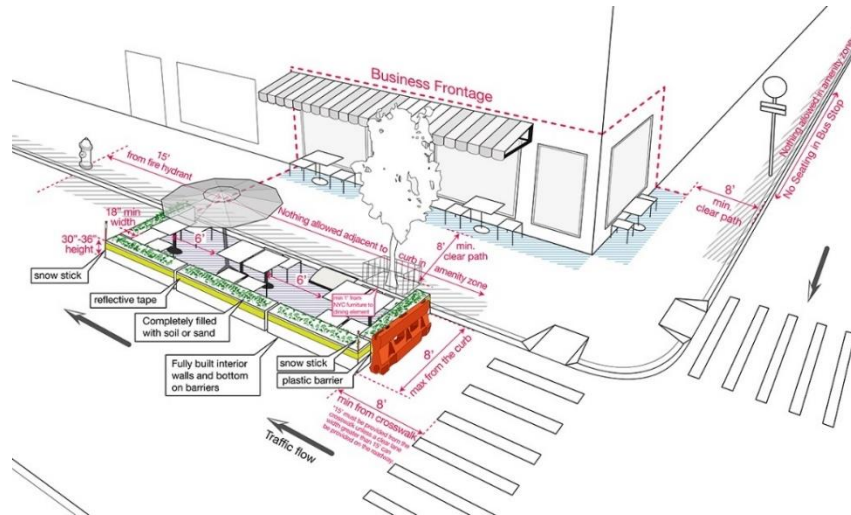
below illustrates San Francisco’s and New York City’s streatery-size regulations:

Figure 1. San Francisco



205

Figure 2. New York City



206

A third key difference between the two commercial activities is that ‘streateries’ are more financially prohibitive than street vendors, posing unique accessibility concerns. Some outdoor dining booths certainly do sell coffee, snacks, or alcohol at relatively low prices, but most outdoor dining

205. Photograph/Illustration of S.F. Outdoor Dining Dimensions, in *SF Shared Spaces Regulation*, *supra* note 46, at 18.

206. Photograph/Illustration of N.Y.C. Outdoor Dining Dimensions, in *N.Y.C. Open Restaurants Program*, *supra* note 33.

is comprised of middle- to high-end establishments.²⁰⁷ This is because only businesses which had the financial capital to build expensive outdoor structures did so in a time when revenues were low to begin with.²⁰⁸ As one Cincinnati resident remarked, outdoor dining “don’t involve most . . . low-income people.”²⁰⁹ Moreover, as temporary programs phase into permanent ones, restaurant owners are finding that building weather-resistant structures and complying with new regulations can be extra expensive, with one owner expressing “worr[y] that only the most successful restaurants will be able to afford to follow the new rules.”²¹⁰ Street vendors and food trucks, by contrast, cater to a lower-income crowd and tend to sell cheap food, in part due to their lower fixed costs.²¹¹

The high price point of outdoor dining renders it more of a privatization than prior commercial uses of the sidewalk.²¹² Public spaces are meant to be free, or subject only to a nominal fee, in order to serve accessibility and inclusionary goals. For example, POPS, a new phenomenon of lobbies, atriums, and roofs in private buildings which are made open to the public in exchange for enhanced development rights, are required by law “not to limit usage to paying patrons” in order to remain genuinely public space.²¹³ Likewise, BIDs—private local entities funded through special tax assessments which help to clean and maintain city downtowns through private personnel—are prohibited from “charg[ing] admission to their districts . . . [or] limit[ing] physical access to paying customers.”²¹⁴ Under the public-trust doctrine, courts have even suggested that restaurants in parks offering “food and drink at luxury prices . . . *restricted solely in use to the elite* rather than open to broad segments of the public” are inconsistent with the public trust.²¹⁵ The expense of dining in a streaterie, compared to buying food from a street vendor, renders outdoor dining a privatization.

207. See John, *supra* note 174 (describing the “higher price point[]” restaurants characteristic of streateries).

208. See Eve Batey, *Restaurants Are Paying \$20,000 (or More) So You Can Dine in the Street*, S.F. EATER (Oct. 16, 2020, 10:28 AM PST), <https://sf.eater.com/2020/10/16/21519596/parklets-shared-spaces-zazie-palm-house-dorian-page> [<https://perma.cc/E7D3-JRC5>] (providing an overview of the cost of a San Francisco restaurant parklet, ranging from \$12,000 to \$90,000); Brock Keeling, *Welcome to the Parklet Era of San Francisco*, S.F. EATER (July 29, 2021, 9:55 AM PST), <https://sf.eater.com/2021/7/29/22596225/parklets-permanent-san-francisco-bay-area> [<https://perma.cc/7VQK-T3YL>] (“Restaurant and bar owners . . . cried out that they have spent tens of thousands of dollars on parklets.”).

209. John, *supra* note 174.

210. Fitzsimmons *supra* note 33.

211. See Pileri, *supra* note 202, at 247.

212. See, e.g., Boyd, *supra* note 14 (arguing that outdoor dining is “a land grab that privatizes public space for one business industry, commercial landlords, and the customers who can afford the \$20 burger and \$15 cocktail”).

213. See Schindler, *The “Publicization” of Private Space*, *supra* note 5, at 1137.

214. See Briffault, *supra* note 3, at 429.

215. 795 Fifth Ave. Corp. v. City of New York, 242 N.Y.S.2d 961, 961 (Sup. Ct. 1963), *aff’d*, 205 N.E.2d 850 (1965) (emphasis added).

B. Street Dining is Normatively Problematic

The discussion of how outdoor dining differs from prior commercial uses of the sidewalk has also begun to expose the fault lines in these programs. Because of the distinct nature of outdoor booths—their greater enclosedness, permanence, size, and expense—widespread private dining on city streets, at the magnitude permitted since 2020, threatens public-space values. This Section analyzes the normative harms of privatization through the theoretical lens set forth in Section II.A. This Section argues that outdoor dining is exclusionary and undermines exposure to otherness, socialization, and opportunities for democratic engagement. Although municipalities regularly enact inequitable programs, outdoor dining enacts equity harms *without* the offsetting public benefits of comparable municipal programs. Outdoor dining has not effectively increased street vitality and, as currently regulated, is too nuisance-filled and enclosed to provide the offsetting public benefit of improved street life.

1. Privatization Breeds Inequality & Exclusion

Private ownership or management of public spaces often results in space that is “exclusionary . . . segregates . . . and prevents people from different walks of life from interacting with one another.”²¹⁶ POPS, for example, despite being required by law to be open and accessible to all, often exclude in informal enforcement and design.²¹⁷ Some private building owners with public spaces in their lobbies or atriums adopt “Rules of Conduct” barring entry by “undesirable persons.”²¹⁸ Other POPS have built armrest dividers on benches to prevent the homeless from lying down.²¹⁹ Surveillance systems, security officers, and the prevalence of people dressed in business attire, can also implicitly make certain populations feel unwelcome in POPS.²²⁰ BIDs have also faced a slew of criticism for their attempts to “cleanse” downtowns of marginalized populations. BIDs have sought to exclude and criminalize street vending, claiming they contribute to visual

216. Schindler, *Making the Temporary Permanent*, *supra* note 11, at 393; *see also* Frug, *supra* note 111, at 1076 (arguing that the private sector has “not characteristically been open to engagement with otherness”); Els Leclercq & Dorina Pojani, *Public Space Privatisation: Are Users Concerned?*, 16 J. URBANISM 1, 4 (2023) (“Private owners or private management companies naturally prioritise business interests above public values. Therefore, privatised public spaces often feel ‘sanitised,’ homogenised, and devoid of opportunities for social reproduction.”).

217. *See* Schindler, *The “Publicization” of Private Space*, *supra* note 5, at 1129; *see also* LOUKAITU & EHRENFEUCHT, *supra* note 180, at 249 (describing POPS as creating a contrived urban space and “analogous city” which keeps out the poor and undesirable).

218. *Id.* at 1128-34.

219. *Id.*

220. *Id.* at 1131-32; *cf.* KOHN, *supra* note 106, at 13 (pointing out that the relative accessibility or exclusiveness of a place should be assessed based on explicit criteria of entrance, as well as “subtle or invisible forms of exclusion”).

disorder,²²¹ and also routinely seek to remove the homeless and suppress panhandling on public streets.²²² According to some, privately managed BIDs have turned diverse city downtowns into “sanitized” shopping malls.²²³

‘Streateries,’ like other privatizations, have also had exclusionary effects. Technically, restaurants are open to anyone willing and able to pay. However, because ‘streateries’ disproportionately serve wealthier income classes, conditioning access on payment “excludes those with lesser means.”²²⁴ Aside from the economic barriers to entry, restaurants also communicate implicit norms of exclusion to the public. “Even if parklets or streateries are technically open to all, if most of the people using them are well-dressed patrons of nearby restaurants, this creates a norm of exclusion for those who might not fit that mold,” Professor Schindler explains.²²⁵

Outdoor dining’s exclusionary impacts also extend to the *surrounding* sidewalk, near the booths. Nearby uses of sidewalk space which conflict with consumption interests are increasingly being shunned or ousted by business owners. Restaurants have sought to expel children playing football near their premises,²²⁶ nearby street vendors,²²⁷ and, of course, the homeless and panhandlers who approach their consumers and threaten the dining experience.²²⁸ As one restaurant owner said, it’s “hard to sell a bottle of wine for \$100 when there’s a homeless guy asking for money.”²²⁹ Professor Schindler further framed the tension between outdoor dining and marginal populations as follows:

[C]afé sidewalk expansion results in an ironic (if unsurprising) situation in some towns that have ‘move along’ ordinances or other laws criminalizing

221. See Briffault, *supra* note 3, at 427, 441; Janet Allon, *Navigating 125th Street*, N.Y. TIMES (Feb. 4, 1996) (“A principal goal of merchants in 125th Street BID is to get street vendors removed from the sidewalks.”).

222. *Id.* at 401-03 (explaining how BID “homeless assistance can turn into homeless removal”); see also Jeffrey Selbin et al., *Homeless Exclusion Districts: How California Business Improvement Districts Use Policy Advocacy and Policing Practices to Exclude Homeless People from Public Space* (U.C. Berkeley Pub. L. Rsch. Paper 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3221446 [<https://perma.cc/EX8F-ELEA>] (finding that BIDs exacerbate homeless exclusion and criminalization on city streets).

223. KOHN, *supra* note 106, at 82.

224. Leclercq & Pojani, *supra* note 216, at 1; see also Schindler, *Making the Temporary Permanent*, *supra* note 11, at 394 (arguing that streateries “alienate certain residents—especially those who cannot afford to eat at the streateries in their communities”).

225. Schindler, *Making the Temporary Permanent*, *supra* note 11, at 398.

226. Lorena Mongelli, Kevin Sheehan, David Meyer & Tamar Lapin, *De Blasio’s ‘Open Streets’ Rapidly Vanishing Causing Fights Among Neighbors*, N.Y. POST (June 28, 2020), <https://nypost.com/2020/06/28/de-blasios-unenforced-open-streets-causing-neighborhood-tension> [<https://perma.cc/N24R-GUXN>].

227. Murray, *supra* note 83 (“In Manhattan, a halal vendor is still fighting with a hotel chain over a sliver of space the vendor used for years, now taken by the hotel’s restaurant.”).

228. See Marcus, *supra* note 39; Settembre, *supra* note 91.

229. Marcus, *supra* note 39.

homelessness. In these locations, an unhoused person or a person who is panhandling might be fined or even arrested for sitting, loitering, or resting on the sidewalk. In contrast, a person paying for an expensive meal at a restaurant while sitting in a parklet or at a sidewalk café table is free to occupy that space as long as they like.²³⁰

As business interests become more prominent on sidewalks, there is serious risk that vulnerable populations will be erased from public space without other offsetting benefits equally accessible to all, such as increased street vitality or public beautification.²³¹

The exclusionary and homogenizing impact of outdoor dining reduces our opportunities to engage with and accommodate otherness, both inside the dining structures, and on our city blocks more generally. Public space is not meant to be reserved for the “well-dressed, middle-class”; it should instead represent the “full spectrum of local humanity,” the “elderly and poor, the ragged and infirm.”²³² The core *function* of cities, according to scholar Jerry Frug, is to “teach people how to interact with unfamiliar strangers, how to deal with their terror of the black poor, or of whomever else they imagine as ‘the mob.’”²³³ By excluding from our sidewalks those deemed as “threatening” to consumption, we fail to even *see* difference, which can have harmful consequences. Margaret Kohn has written extensively about how face-to-face interactions with otherness on city streets increases tolerance for others in a way that is not adequately replaced by seeing otherness in magazines, or online.²³⁴

Municipal policies favoring the rich and harming the poor are sometimes justified as still *indirectly* benefiting the poor by (a) attracting more residents, which increases taxes and overall municipal revenue for public spending; or (b) by creating more jobs, thereby stimulating the overall economy and benefitting all city residents. Outdoor dining harms the marginalized but *without* these offsetting benefits. ‘Streateries’ are so filled with nuisances, odor, trash, and rodent problems that they do little to attract new residents and are mostly frequented by nonlocal visitors.²³⁵ And, as emergency pandemic-era conditions wane, the economic benefit of added jobs through outdoor dining programs have become much less significant.²³⁶ The problem with ‘streateries’ is that they neither provide the

230. Schindler, *Making the Temporary Permanent*, *supra* note 11, at 394.

231. See John, *supra* note 174; see *infra* Section III.B.4 for a discussion of the street vitality objection.

232. OLDENBURG, *supra* note 53, at 14.

233. Frug, *supra* note 111, at 1077.

234. See KOHN, *supra* note 106, at 4 (“The face-to-face interactions that take place in public are different from interactions via email or the mass media.”).

235. See *supra* notes 86-92 and accompanying text.

236. Cf. Complaint ¶ 27, *Armer v. City of New York*, No. 156328 (N.Y. Sup. Ct. July 29, 2022) (questioning why outdoor dining persists when there is “no public health emergency” anymore).

benefits they purport to, while simultaneously harming the public value of our city streets.

2. Privatization Diminishes Community and Intersubjectivity

A key function of public space is to build community and facilitate socialization and intersubjectivity among residents—to offer a “third place” which is neither home nor work, where informal public life can emerge. Public-space socialization is about more than just providing a place for existing friends to gather—it is about the “unplanned contacts between people,” *especially* strangers, which helps to bond the public.²³⁷

Sociologist Ray Oldenburg, who coined the idea of the “third place” in his book *The Great Good Place*, believes some restaurants and cafés can function as third places, despite being privately owned.²³⁸ Under Oldenburg’s definition of the “third place,” however, only a particular *type* of community-gathering spot facilitates the socialization we normatively value in urban life. According to Oldenburg, true third places have the following characteristics: (i) the place is a “a leveler [or] by its nature, an inclusive place” which brings together those of “higher and lower status” and “abolish[es] all differences”;²³⁹ (ii) in third places, conversation is the main activity, rather than the drinking or eating itself;²⁴⁰ (iii) people visit third places with regularity and arrive unannounced, “unplanned, unscheduled”;²⁴¹ and, (iv) the physical structure of third places tends to be modest, plain, and unimpressive, in order to “discourage pretention . . . [and] encourage leveling” and inclusivity.²⁴²

As seen from these descriptions, Oldenburg does *not* envision as third places those gentrified, commercial establishments which rely on a rotating “volume of transient customers” and “discourage hanging out” for extended periods.²⁴³ Places which implicitly welcome only the well-dressed or affluent, and exclude the disadvantaged, are not levelers, and are not third places.

Under Oldenburg’s framework, ‘streateries’ are not third places and do not further the intersubjectivity goals of true public space. Dining booths are “transactional spaces—those with clear-cut rules of engagement—[which] exist in order to attract the ‘right’ kinds of people.”²⁴⁴ They function not as levelers, but as *dividers* of class and status.²⁴⁵ Moreover,

237. KOHN, *supra* note 106, at 11.

238. OLDENBURG, *supra* note 53, at 14-15.

239. *Id.* at 23-25.

240. *Id.* at 26-27.

241. *Id.* at 32-33.

242. *Id.* at 37.

243. *Id.* at 36.

244. Murray, *supra* note 83.

245. *See* John, *supra* note 174.

particularly in large cities, ‘streateries’ are destinations unto themselves for an ever-rotating array of customers and nonlocal visitors, rather than a community-gathering spot for regular locals.²⁴⁶ To the extent a private restaurant could serve as a quasi-public “third place,” outdoor dining falls short.

Dining booths also fail to facilitate interaction among strangers, which is a key trait of public-space socialization. William Whyte coined the concept of triangulation to explain how a good public space successfully facilitates intermingling among strangers. Triangulation is “[t]he process by which some external stimulus provides a linkage between people and prompts strangers to talk to each other as though they were not.”²⁴⁷ Street vendors, street performers, and public art are all triangulating stimuli for Whyte. They attract a “knot of people around [them]” who are prompted to start conversations with one another as they await their food, or as they watch a performance.²⁴⁸ Good public space, for Whyte, contains triangulating stimuli which facilitate unplanned conversations between strangers.

Private dining sheds do not have a triangulating effect. People sit *inside* the booths, rather than gathering spontaneously around them, and are therefore not stimulated into conversations with new people. Moreover, inside the private dining boxes, parties are atomized into the groups with which they arrived, sometimes even formally separated by plastic dividers as a remnant from COVID-era health precautions.²⁴⁹ Contacts while outdoor dining are not the “unplanned encounter of fluid sociability among strangers and near-strangers” that is characteristic of true public space.²⁵⁰

246. This reality, in many ways, predates the pandemic. Americans in general, unlike their European counterparts, historically have not made a habit of regularly visiting their local pub, café, or other informal gathering space after work. See OLDENBURG *supra* note 53, at 4-5, 9. This has been no less true of pandemic-era outdoor dining.

247. WHYTE, *supra* note 102, at 94.

248. *Id.* at 50-53, 96-98.

249. See Dan Lederer, *Newport Food Scene: Honoring Restaurant Workers Who Have Made It This Far*, NEWPORTRI.COM (Mar. 15, 2023), <https://www.newportri.com/story/lifestyle/food/2023/03/15/covid-19-anniversary-a-time-to-look-back-at-impact-on-newport-restaurants/70011223007> [<https://perma.cc/6T5U-MPXD>] (discussing one restaurant’s use of plastic dividers); see also below for two recent photos of restaurants implementing a divider set-up.

250. Weintraub, *supra* note 148, at 17 (internal quotations omitted).



Layla Malamut, Photograph of two Manhattan outdoor setups implementing the use of party dividers, 2023.

3. Privatization Reduces Democratic Engagement

The last major normative critique of privatization is that it diminishes opportunities for free speech and risks a loss of democratic process.²⁵¹ There are two reasons a dining takeover can harm democracy. First, public spaces are formally protected by the First Amendment and restraints on political speech in public space are subject to the highest constitutional scrutiny.²⁵² In purely private spaces, by contrast, political activity can be restrained because “it is the law of property that governs and the right to exclude dominates.”²⁵³ Spaces which occupy an ambiguous place on the public/private continuum—such as shopping malls, POPS, or online forums—pose complicated issues for political rights. The Supreme Court held in *Lloyd Corp. v. Tanner*, for example, that shopping malls could restrain leafleting and protesting, even though malls invite all members of the public to their premises and today, function as the modern public plaza.²⁵⁴ “The First Amendment does not limit restrictions of speech on private property—even property, like shopping centers, which the public is generally invited to use.”²⁵⁵ Because of the fundamentals of First Amendment doctrine, the more that “private spaces replace public

251. See Schindler, *Making the Temporary Permanent*, *supra* note 11, at 393.

252. See *supra* note 107 and accompanying text.

253. Schindler, *The “Publicization” of Private Space*, *supra* note 5, at 1121-23.

254. 407 U.S. 551, 564-68 (1972).

255. *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 247 (D. Conn. 2012) (citing *Lloyd*, 407 U.S. at 569).

gathering spaces, the more that opportunities for political conversation are diminished.”²⁵⁶

The second reason privatization risks democratic loss is because of the increased risk of self-policing of expression, even absent formal laws excluding expression. Empirical researchers have found that infusing a space with more private “norms” gives users the perception that political activity is unwelcome, even if it is not.²⁵⁷ In a study of three London neighborhoods, researchers found that in Liverpool One—an open-air shopping mall, and the most visibly private of the three spaces—pedestrians “sense[d] that there are implicit restrictions on their behavior . . . [and] refrain[ed] from engaging in certain activities” like “skateboarding, delivering political speeches [or] playing music.”²⁵⁸ In more discernibly public spaces—those which were less manicured, and more diverse in population and use—the researchers found evidence of more appropriation, like “graffiti, gardening . . . skating, and busking.”²⁵⁹ The privatization of public space increases self-policing of speech and political expression, risking further democratic loss.

Losing thousands of miles of public streets to restaurants has diminished opportunities for democratic engagement. Protesting is, naturally, not permitted inside dining booths, where the private property owner’s right to exclude reigns supreme. Yet even after-hours, when some booths are made fully accessible to the public (e.g., in San Francisco), pedestrians *still* do not appropriate that space for political use.²⁶⁰ “Streateries have not been perceived by the public as public space . . . [and] public amenities and invitations for use after business hours have been limited at best.”²⁶¹ In accordance with the research above, the lack of appropriation could be attributed to ‘streateries’ visibly commercial look, which does not clearly invite political expression or space for debate.

Furthermore, occupying a substantial amount of sidewalk space for dining diminishes the political use of the rest of our open streets too. Physically, the size and permanence of the booths means that the space leftover for protesters and leafleteers has shrunk, especially in denser cities. Whereas cities can typically ask cars or street vendors to clear the streets for parades and protests, dining booths cannot be cleared for such

256. KOHN, *supra* note 106, at 2.

257. Leclercq & Pojani, *supra* note 216.

258. *Id.* at 14.

259. *Id.*

260. See *supra* note 51; see also O’Connell, Gomez-Escoda, & Uceda, *supra* note 24, at 28 (discussing how terrace furniture which remains “when the premises are closed . . . stacked or chained” prevents streateries from becoming, after-hours, “informal public meeting places, capable of being used by everyone without the need to consume”).

261. Bela, *supra* note 45.

events.²⁶² One video shows protesters quietly squeezing through narrowed Manhattan passageways as they attempt to maintain the strength and synchrony of their chanting.²⁶³ Further, as our sidewalks are infused with more private norms, pedestrians may increasingly self-police behavior. Already, restaurant owners and outdoor diners have expressed discomfort at passing protesters during business hours, with one video from 2020 showing “white curbside drinkers in Brooklyn looking deeply uncomfortable as a passing ‘March for Black Womxn’ calls them gentrifiers.”²⁶⁴

As the age of privatization increasingly diminishes our public realm, commentators have expressed concerns about diminishing spaces for protest and political conversation:

In the age of privatization, we are losing the public realm. If you and I want to protest, the best place to go is a freeway overpass with our signs because that’s where the majority of the citizens are sitting at eight miles an hour or less is in the freeway at 5 o’clock. Instead of the freeway overpasses, it should be in the plazas and the squares in the cities and the towns where we can sit and talk to each other and work things out.²⁶⁵

While it remains to be seen just how much of a threat outdoor dining will pose to democratic process, the trends we have witnessed with other privatizations suggest that structures this large and permanent, with this degree of control handed over to private owners, will threaten political advocacy.

4. Street Vitality

One objection to this Note’s normative critique of outdoor dining is that dining offers one major public benefit that offsets the privatization concern: increased street vitality.²⁶⁶ “[T]he sight of people attracts still

262. See, e.g., N.Y.C. ADMIN. CODE § 17-315j (requiring that food vendors move when the city gives notice of a parade or demonstration); cf. Max Fisher, *Why Does Abu Dhabi Own All of Chicago’s Parking Meters?* THE ATLANTIC (Oct. 19, 2020), <https://www.theatlantic.com/business/archive/2010/10/why-does-abu-dhabi-own-all-of-chicago-s-parking-meters/339805> [<https://perma.cc/6KVQ-URT4>] (discussing how the privatization of Chicago’s parking meters made “clos[ing] down parking for a street festival or parade” more difficult because decision-making power now rested in private hands).

263. See Kelly & Klein, *supra* note 175.

264. See Murray, *supra* note 83.

265. Robert Steuteville, *25 Great Ideas of New Urbanism*, CONGRESS FOR NEW URBANISM 126-28 (2018), <https://www.cnu.org/sites/default/files/25-great-ideas-book.pdf> [<https://perma.cc/96FY-Q2A2>] (arguing further that “[t]he way in which we inhabit and connect with our streets and streetscape is the biggest social justice issue happening in cities today”).

266. See *supra* notes 84-86 and accompanying text; see also London Breed, *Let’s Make the Shared Spaces Program Permanent*, MEDIUM (Mar. 12, 2021), <https://londonbreed.medium.com/lets-make-the-shared-spaces-program-permanent-9d42c6edde12> [<https://perma.cc/8FP8-D2ZP>] (arguing that Shared Spaces have brought “magic to our streets” and “life and excitement to our neighborhoods”).

other people,” Jane Jacobs famously wrote,²⁶⁷ and food in particular tends to draw people out into public space.²⁶⁸ “Stores, bars and restaurants draw people out of their houses and into the streets, and that, in turn, attract[s] more people whose intention and interest has been piqued by the people gathered in both private establishments and on the public streets.”²⁶⁹ Outdoor dining, the rebuttal goes, attracts more people to our streets and makes the walking experience more lively and enjoyable for all.

The problem with this objection is that it is not clear outdoor dining has been effective at increasing street vitality on net. First, the enclosed nature of many structures reduces the visual enjoyment of passersby and the public benefit of vibrant streets. According to William Whyte, the users of a public space are not only those who sit or act inside of it, but those who *pass by* and receive pleasure in watching the “great show” of the street.²⁷⁰ The best way to preserve this great show, he argues, is “simply, *not to wall it off*.”²⁷¹ Maintaining visual access to the activity on the street is key to ensuring secondary uses of our public sphere by passersby. Enclosed outdoor booths have disrupted this possibility: by blocking visual access to diners, outdoor dining has given us a “stage, without a theater,” and has failed to generate the public benefit of vibrant streets for all.²⁷² “Patios must adhere to basic good design principles like a 42-inch height maximum . . . in order to generate the public benefit of vibrant, lively streets,” yet most cities have not imposed restrictions on the height or enclosedness of outdoor structures.²⁷³

Second, even structures which are not completely enclosed do not obviously provide a boon for street vitality. For all of the well-maintained dining booths attracting passersby, there are just as many graffiti-covered, dilapidated structures emitting odors, attracting rodents, and driving people *away* from the streets.²⁷⁴ “Disorder and physical decay drives people off the streets and into their homes.”²⁷⁵ While some level of amiable disorder is desirable in good public space, most sidewalk users will not tolerate

267. JACOBS, *supra* note 114, at 37 (“[P]eople’s love of watching activity and other people is constantly evident in cities everywhere.”).

268. WHYTE, *supra* note 102, at 52.

269. Briffault, *supra* note 3, at 474.

270. WHYTE, *supra* note 102, at 57.

271. *Id.* (emphasis added).

272. *Id.* at 59; *cf.* OLDENBURG, *supra* note 53, at 149 (arguing that the French “bistro benefits mightily from not being separated from the view and life of the street along which it is located. The openness of the bistro lends legitimacy born of visibility . . . [and] makes the Frenchman’s community.”).

273. Bela, *supra* note 45. Paris and very recently, New York, have moved away from enclosed structures. Yet for the majority of the post pandemic years, enclosed structures persisted.

274. See Barron, *supra* note 86 (reporting that one Brooklyn resident moved away from her home because of a streater’s smell of “decay and urine”); *Covid Terraces Become Permanent Summer Fixtures in Paris*, *supra* note 37 (describing the “trashed Paris” social media surge).

275. Briffault, *supra* note 3, at 473-74.

Public Space or Private Profit?

truly unbridled disorder for very long.²⁷⁶ Street vitality may be a public good, but hastily-built structures and inadequate regulations have failed to facilitate this vibrancy without the accompanying nuisances and decay that drive people *off* the streets. In sum, this Part has argued that dining booths are inequitable, without the kind of offsetting public benefits that might otherwise justify an inequitable municipal privatization.



Layla Malamut, Photograph of a graffiti-covered and vandalized soho restaurant, 2023.



Layla Malamut, Photograph of a dilapidated and weathered Upper West Side outdoor setup, 2023.

276. Pollack, *supra* note 116, at 654.

IV. Implications & Prescriptions

Outdoor dining has privatized our city streets. This use of public space differs in kind and degree from prior commercial activities, and undermines the accessibility, diversity, and democratic openness of our public sphere. Dining outdoors need not, however, be completely banned to remedy this diagnosis. Instead, following the approaches of other privatization critiques, the remedy should be to “publicize” outdoor dining structures: to infuse ‘streateries’ with more public-space norms and ensure offsetting public uses for this private takeover of the public realm.²⁷⁷ In fact, New York—initially one of the most private of the ‘streateries’ programs—has very recently begun improving a number of publicization tactics.

Publicization should involve three main initiatives: (a) creating more space sharing and public-use mandates for parking spaces both during, and after, operating hours, to more equitably spread the benefits of COVID-era reclamation projects; (b) opening parking spots for bidding and reinvesting the fees collected into alternative public-space projects, or into street maintenance; and, (c) improving the aesthetics of dining booths in order to genuinely enhance street vitality and the secondary enjoyment of all passersby.

A. Space Sharing & Public-Use Requirements

Many critics of outdoor dining often support reducing vehicle presence on our streets, but question why we have given parking spaces to private dining, rather than to other public uses.²⁷⁸ Alternative uses for parking spaces include free public seating, landscaping, play areas, or spaces for free cultural or arts events, as San Francisco’s prepandemic parklet program or Barcelona’s “citizen spaces” both envisioned.²⁷⁹ Parking spaces could even be used to solve urban sanitation and public restroom problems by stationing “toilets, showers . . . [or] sanitation bins” in those spots, according to some more radical initiatives.²⁸⁰ Others further point out that if parking spots are to be given away to private industry, then those spots

277. See Schindler, *The “Publicization” of Private Space*, *supra* note 5, at 1140-41 (offering a publicization remedy for the privatization problems inherent in POPS).

278. See, e.g., Donnelly, *supra* note 1 (quoting one resident who told Streetsblog, “I think it’s fine if they want to get rid of cars . . . But why do they have to give the space to a restaurant? The space belongs to all of us”).

279. See *supra* notes 45-50 and accompanying text; see also Stephen Burgen, *Barcelona's Car-Free 'Superblocks' Could Save Hundreds of Lives*, THE GUARDIAN (Sep. 10, 2019), <https://www.theguardian.com/cities/2019/sep/10/barcelonas-car-free-superblocks-could-save-hundreds-of-lives> [<https://perma.cc/3V89-QZA3>] (“The superblocks are groups of streets where traffic is reduced to close to zero, with the space formerly occupied by cars given over to pedestrians and play areas.”).

280. See Murray, *supra* note 83; Natalie Marchant, *Paris Halves Street Parking and Asks Residents What They Want to Do with the Space*, WORLD ECON. FORUM (Dec. 7, 2020), <https://www.weforum.org/agenda/2020/12/paris-parking-spaces-greenery-cities> [<https://perma.cc/SUZB-PTSB>].

should be made open to *non-restaurant* merchants too, such as local bookstores or florists, spreading the benefits of these initiatives more widely.²⁸¹

To offset the private takeover of our city streets, cities should enact policies that enable space sharing between merchants on the same block, and further, that enable spots to turn over from private dining to fully public spaces during non-business hours. The first step to enabling space sharing would be to mandate more temporary dining furniture as a cue inviting a variety of uses. Cities should limit furniture to movable chairs, tables, and umbrellas, rather than fixed huts or larger pieces of furniture, to enable quick space turnover after operating hours. Indeed, New York City—which suffered from the most severe case of hut-like structures—has recently proscribed closed roofs in favor of movable umbrellas or awnings for ‘streateries’, to enable more flexible use. Booths should also be de-branded, as they are in Paris, so they can be more effectively appropriated for non-restaurant use off-hours.²⁸² Signs should also clearly demarcate the space’s alternative public uses.²⁸³

During restaurant operating hours, cities can also consider offsetting privatization with other creative ‘publicization’ tactics. Barcelona, for example, mandates that businesses operating outdoor cafés provide pedestrians with free access to use their restrooms, as a concession for privatization of the sidewalk.²⁸⁴ Municipalities could also consider keeping more control over menu items or prices in ‘streateries’ and, akin to inclusionary zoning, mandate that restaurants offer at least one menu-priced item at a bargain deal for lower-income consumers on a semiregular basis.²⁸⁵ By making dining booths more genuinely inviting public spaces after operating hours, opening up the space to sharing by multiple businesses during business hours, or including public-use mandates, municipalities can mitigate the democratic and accessibility concerns outlined in Part III. Off-hour

281. See Sterling, *supra* note 64.

282. See Paris Guidance, *supra* note 57, at 14 (requiring that no signs or advertisements be placed on outdoor dining barriers). New York bans general advertisements on streaterie exteriors, but still permits the restaurant logo and service options to be displayed. See Legislation No. 31-C § 19-160.

283. Analogously, San Francisco’s pre-pandemic parklet program required a “small sign indicating that seating and amenities are open to all” in order to invite passing pedestrians into use, and San Francisco’s Pandemic Shared Spaces regulation requires restaurants to post a sign indicating that their public bench is open to public use. See Sant, *supra* note 41; Joe Kokura, *Outdoor Dining Parklets Becoming Permanent, But New Permits and Costs Are Looming* SFIST (Mar. 8, 2022), <https://sfist.com/2022/03/08/outdoor-dining-parklets-becoming-permanent-but-new-permits-and-costs-are-looming> [<https://perma.cc/SA8E-99SJ>].

284. See Bianca Cia, *Bursting on the Sidewalk*, EL PAIS (Oct. 18, 2012), https://english.elpais.com/elpais/2012/10/18/inenglish/1350563985_476613.html [<https://perma.cc/RG36-PFN6>].

285. Cf. *Union Square Park Cmty. Coal., Inc. v. New York City Dep’t of Parks & Recreation*, 8 N.E.3d 797, 799 (2014) (holding that a restaurant in Union Square Park did not violate the public-trust doctrine, in part, because the city retained control over “menu items and prices” and required the restaurant to “include breakfast items ranging from \$1.95 to \$15.95; brunch options costing \$2.95 to \$19.95; and lunch and dinner sandwiches and entrees at prices of \$8.95 to \$33.95”).

‘streateries’ can become places for communal gathering and interaction, and on-hour ‘streateries’ can become more inclusive of greater swaths of the public.

B. Pricing the Curb & Earmarking Funds

The publicization of outdoor dining—which involves remodeling outdoor dining programs, rather than proscribing them wholesale—must also grapple with the issue of how, or whether, to charge restaurants for their use of that space. In 2020, cities worldwide handed over scarce and valuable public space at no cost to the restaurant industry—given the state of crisis at the time—with many municipalities yet to reinstate full fees to this day.²⁸⁶ While waiving fees for outdoor dining was a unique emergency-era response to a business crisis, if ‘streateries’ are to remain in one form or other, then the curb must be properly priced so they can provide offsetting public benefits to balance out their normative harms. Collecting fees from restaurants would allow for municipal reinvestment into other public initiatives and would incentivize better-kept structures. While some cities have already begun to reinstate fees, debates on how to structure and collect these fees remain contested.

To price the curb appropriately, cities should open parking spots up for bidding. The benefit of bidding, as opposed to a flat-fee approach, is that only those who most value the space, and who are therefore most likely to care for it adequately, will acquire a license.²⁸⁷ Across different legal literatures the “highest value user”—the user willing to pay the most for a resource is often said to be most likely to maximize social welfare and put that resource to best use.²⁸⁸ Thus, under a bidding system for ‘streateries,’ as opposed to a flat-fee approach, abandoned dining sheds would not be cost-effective, nor those that are not well-utilized by customers, because the cost would simply be too high. Consequently, bidding would increase street vitality and resolve the problems of decrepit, poorly maintained dining sheds occupying valuable public space with little offsetting benefits to the larger public.²⁸⁹

Bidding would also decouple COVID-era street changes from the inequalities of accession. Under property law’s doctrine of accession, the owner of a preexisting piece of property is granted new property rights in a resource to the extent he or she is the “most prominently connected to

286. See, e.g., *supra* notes 44, 55, 67 and accompanying text.

287. See Robert T. Miller, *Inefficient Results in the Market for Corporate Control: Highest Bidders, Highest-Value Users, and Socially Optimal Owners*, 39 J. CORP. L. 71, 73 (2013) (discussing the highest-value user in the context of the market for corporate control of companies); see also Richard Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUDS. S515, S537 (explaining how auctions allow participants to “bid in accordance with the intensity of his own preferences”).

288. Miller, *supra* note 287.

289. See *supra* Section III.B.4.

the new resource.”²⁹⁰ For example, the owner of a tree typically holds rights to its fruits, and the owner of the surface estate holds rights to minerals discovered underground, because each are most prominently connected to the new and unclaimed resource through their existing statuses as property owners.²⁹¹ An acknowledged problem of the doctrine of accession is that it gives *more* to those who already *have*, and thereby tends to exacerbate inequality.²⁹² In the above examples, only preexisting property owners could gain rights to the trees’ fruits, or to the surface estates’ minerals, while those who may never have owned any property are unable to bid on that resource.

During the pandemic, restaurant owners were granted property rights in parking spots under accession-like principles. The nearby restaurants most “prominently connected” to the parking spot—based on physical proximity—acquired exclusive rights over that nearby spot without any competition from other interested parties. Nearby merchants or businesses had no claim to that piece of land, even if they by pure coincidence lacked the sidewalk space in front of their store to erect a streatery at all. However, by opening up parking spots for bidding, anyone can obtain a right to occupy the parking space—not just the nearest restaurant. Bidding would invite a greater variety of merchants to occupy that space, with this diversity incentivizing greater variety in uses too. And, using bidding, municipalities can decouple ‘streateries’ from accession’s known shortcomings and inequalities.

Upon opening spots up for bidding, cities should then use the revenue generated from the bids to create community parklets, enhanced plazas and squares, and better public spaces open and accessible to all members of the public, to balance out privatization’s harms.²⁹³ Under analogous public-trust precedent, when public-trust property is taken for private use, municipalities must offset the privatization with initiatives that directly address the harms borne by that *particular* type of privatization.²⁹⁴ Earmarked funds therefore should not go into the general municipal bank

290. Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 459 (2009).

291. *See id.* at 460.

292. *See* Lucas Forbes, *Property’s Effect on Economic Inequality—Property, Piketty, and Capitalism* 13 (Working Paper 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4056215 [<https://perma.cc/X2Q5-QXHG>].

293. Bela, *supra* note 45 (advocating that cities reinvest in the “parklets and pop-up plazas that can continue to fulfill a crucial role for everyday, informal social encounters that form the basis of social bonding and community cohesion”).

294. *See* Casado Pérez, *The Street View of Property*, *supra* note 119, at 405 (describing the equivalency test that is applied when parkland is converted to nonpublic uses). A similar argument related to earmarked funds has been made in the context of parking prices. *See* SHOUP, *supra* note 164, at xxviii (explaining that “[t]he simplest way to convince people to charge for curb parking in their neighborhood is to dedicate the resulting revenue to paying for added public services *in the neighborhood*” or to subsidizing public transit for those too poor to move by car).

account.²⁹⁵ Instead, the funds collected through bidding should go into creating better alternative public spaces for socialization and democratic engagement. Fees could also be used for street maintenance and cleaning to offset the nuisances caused by dining expansions. In sum, opening parking spots for bidding and collecting revenues from ‘streateries’ would, on the whole, increase street vitality and incentivize a greater variety and inclusive types of uses for parking spaces.

C. Beautification & Expanding Visibility

The last intervention this Note proposes is aimed at addressing the street vitality concerns in Part III, through an aesthetic intervention. Beautiful outdoor structures draw people into public space and can increase their use of that space.²⁹⁶ Aesthetic appeal also provides secondary enjoyment to passersby, who appreciate and are enriched by the cultural additions to the street.²⁹⁷ Importantly, these benefits can accrue equally to any pedestrian, not just paying patrons, addressing the accessibility concerns of Part III.

The first and most basic aesthetic intervention is to mandate a “42-inch height maximum for surrounding enclosures . . . in order to generate the public benefit of vibrant, lively streets.”²⁹⁸ High walls and enclosed structures not only create darker and more unappealing streets,²⁹⁹ but also block the visibility of other shops behind the restaurant, decreasing the openness and lightness of the walking experience.³⁰⁰ Walls, tarps, and tents are also more prone to vandalism than shorter enclosures, further driving disorder and decay that leave people away from the street.³⁰¹

Second, cities should provide affirmative guidance to businesses on how to make dining booths more beautiful and filled with art and cultural objects. Cities should mandate the inclusion of plants, greenery, and art in

295. Cf. SHOUP, *supra* note 164, at xxix (arguing that cities should not let “parking revenue disappear[] into a city’s general fund” but should use it to pay for *local* public services ensure the money “stays in the neighborhood”).

296. See Leclercq & Pojani, *supra* note 216, at 2 (explaining how people enjoy privatized commercial centres “for their aesthetics and neatness”).

297. See Steuteville, *supra* note 265, at 126 (arguing that “[b]uildings and landscape design have an obligation to place, to contribute to the public realm”); cf. BLOMLEY, *supra* note 100, at 51; 795 Fifth Ave. Corp. v. City of New York, 40 Misc. 2d 183, 190 (N.Y. 1963) (finding that the park restaurant was consistent with park purposes because “the proposed Hartford Pavilion will enhance the beauty and natural appeal of the southeast corner of Central Park without destroying the tone and character”).

298. Bela, *supra* note 45.

299. Cf. Pollack, *supra* note 116, at 630 (“Scaffolding also obscures business signage and eliminates daylight, harming the trees beneath and transforming the sidewalk space into a dark and often dank cubby that is unappealing for residents and property owners alike.”).

300. Cf. WHYTE, *supra* note 102, at 58 (“Sightlines are important. If people do not see a space, they will not use it.”).

301. This is based largely on my own personal observations of vandalized structures throughout Manhattan, such as the structure photographed at the end of Section III.B.

each structure, as Paris has.³⁰² Cities should also form design taskforces to create “model” structures, or kit parts, which developers can easily work off of, in order to attain cohesion in material and form.³⁰³ Restricting materials and colors to those which blend in with the surrounding street would further increase visual coherence and minimize streets’ “cluttered, third-world look and feel.”³⁰⁴ An aesthetic intervention, though seemingly superficial, can offer the public benefit needed to justify the new private use of our public space.

Conclusion

America has been witnessing an “ever-increasing retreat into privacy.”³⁰⁵ More and more, citizens are encouraged to find their “relaxation, entertainment, companionship, even safety, almost entirely within the privacy of homes” rather than in the public realm.³⁰⁶ The traditional town square—the core urban setting in which publicness was historically displayed—is being replaced by social media platforms, or shopping plazas and centers, as the main places for socialization and democratic conversation.³⁰⁷ The pandemic exacerbated these trends inwards. With fifty-eight percent of the workforce still working remotely in some capacity³⁰⁸ and suburban housing prices skyrocketing in the years since,³⁰⁹ America has become, relative to 2019, a less urbane population.

The risks of this retreat into suburbia are normative, and democratic. The core value of big cities, compared to suburbia, is the “being together of strangers” and the “experience of otherness,” which promotes tolerance for social and cultural diversity and helps us overcome the political

302. See Paris Guidance, *supra* note 57, at 14-15; *Paris’ Extended Café Terraces*, *supra* note 85 (reporting that under Paris’s outdoor dining program, “plants and other greenery will be encouraged, with an annual contest for the most attractive designs”).

303. See *The Future of Outdoor Dining in New York City*, ALFRESCO N.Y.C. COAL. (Nov. 2022), <https://rpa.org/alfresco-nyc/outdoor-dining-open-streets-recommendations#three> [<https://perma.cc/24MB-2Y2B>] (recommending that cities create a “kit of parts” menu with pre-approved design options for outdoor dining); *cf.* Stewart, *supra* note 84 (discussing how the hospitality alliance hoped New York City would approve of “multiple versions of outdoor dining setups that all have more standardized looks, with specific requirements for building materials”).

304. See *supra* note 92.

305. OLDENBURG, *supra* note 53, at 13; see also Steuteville, *supra* note 265, at 128 (describing the “age of privatization” and the increasing retreat into cars and suburbia).

306. OLDENBURG, *supra* note 53, at xxix.

307. See Leclerq & Pojani, *supra* note 216, at 2; LOUKAITU & EHRENFUECHT, *supra* note 180, at 48.

308. See *Americans are Embracing Flexible Work—and They Want More of It*, MCKINSEY (June 23, 2022), <https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it> [<https://perma.cc/3KXH-23WB>] (reporting on the number of Americans working from home as of spring 2022).

309. Richard Florida, *How the ‘Rise of the Rest’ Became the ‘Rise of the Rents,’* BLOOMBERG (Sept. 8, 2022), <https://www.bloomberg.com/news/features/2022-09-08/why-did-housing-costs-explode-during-the-pandemic> [<https://perma.cc/748M-6RPY>] (describing the explosion in housing prices since the onset of the pandemic).

division, suspicion, and fear, now characteristic of American life.³¹⁰ Debates on COVID-era public-space reclamation projects touch precisely on the normative and democratic risks of this turn inwards. Outdoor dining worldwide has expanded private-norm enforcement on our streets and has jeopardized their public character. Now is the time for municipalities to take seriously the need to “publicize” these structures through regulatory reforms. In so doing, cities can successfully adapt to twenty-first century needs, while still protecting the entire public’s right to the streets and to the city.

310. See Frug, *supra* note 111, at 1050-51, 1074-75.