Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership

David J. Kennedy†

In the mid to late 1980s, the New York Public Library shared a city block with a virtual open-air drug market. The Library unfortunately shared the block between Fifth and Sixth Avenues and 42nd and 40th Streets with Bryant Park, a rundown, drug-infested symbol of urban neglect. Next to the Library, broken fountains, cracked pavement, and swathes of dirt were all that reminded wanderers, were they brave enough to enter, that the area had once been a park. The condition of the area was a blight both on midtown Manhattan, generally a posh environment, and the Library, one of the City's foremost cultural facilities.

By the early 1990s, however, Bryant Park had changed. The fountains and pavement had been completely reconstructed; grass grew in the park for perhaps the first time in a decade. Where the Park was once "a park that people avoided at all costs," it has now become "a place where office workers go to eat lunch and loll in the sun." Instead of tottering addicts with glassy eyes, the Park hosted parties during the Democratic National Convention in 1992 and now features fashion shows. Improvements enabled neighborhood

† J.D. candidate, Yale Law School, 1997; B.A. Harvard University, 1993. I would like to thank Doug Lasdon of the Urban Justice Center in New York, N.Y., for encouraging me to learn about this issue. I would also like to thank Robert A. Solomon for his guidance in writing this Note, Alison Flaum and Lisa Daugaard of the Urban Justice Center for their thoughts and suggestions, and Quintin Johnstone and John Simon for their helpful advice.

The author has contributed extensively to a currently pending lawsuit mentioned in this Note: Kessler et al. v. Grand Central District Management Association, 95 Civ. 10029 (SAS) (S.D.N.Y. filed Nov. 28, 1995), brought with the Jerome N. Frank Legal Services Organization at Yale Law School and the Urban Justice Center in New York, N.Y. No material obtained in the course of that litigation has been used in this Note, except for the date of the filing of the case. All information has been obtained independently.

1. See City Services: Let the Landlords Do It, ECONOMIST (London), Apr. 25, 1992, at 23 (characterizing Bryant Park as "a block behind the New York public library in midtown Manhattan and once a haven for drug dealers"); see also James Traub, Street Fight, NEW YORKER, Aug. 9, 1995, at 36 ("The only reason to walk into Bryant Park . . . was to buy loose joints.").

2. See 42nd St. Retail Thrives After a Slow Transformation, REAL ESTATE WEEKLY, Dec. 22, 1993, at 2 (characterizing Bryant Park as "a hotbed of criminal activity, a home to the downtrodden and generally a place to avoid") [hereinafter Retail Thrives].


4. See Weiss, supra note 3; see also Retail Thrives, supra note 2.
landlords to charge higher rents. Much of the credit for the revitalization of the area, for years the responsibility of municipal government, went to the local Bryant Park Business Improvement District.

Immediately next to the Bryant Park Business Improvement District is the Grand Central Partnership, within which falls Grand Central Terminal. The Partnership boasts a track record similar to the Bryant Park District in improving the business climate within its jurisdiction, which generally extends from 35th to 54th Streets and First to Fifth Avenues. Yet the Partnership is not only well known for turning the area around. It is also notorious for allegedly hiring “goon squads” to roust homeless individuals from heating grates, sidewalks, and doorways, using force if necessary. The Partnership is well regarded for having taken care to raise the level of sanitation in the district, but is also criticized for having taken even better care of its Chairman, who earned $315,000 in 1995 from the Partnership and its affiliated districts. Finally, the Partnership is hailed for having improved the business climate in midtown Manhattan, but is assailed for having insured that the benefits of this improvement have gone largely to its own members.

While America’s cities seem trapped in a state of decline, Business Improvement Districts, like the Grand Central Partnership and Bryant Park District, are credited with bringing about a renaissance of downtown commercial areas across the nation. In general, business improvement districts are quasi-independent bodies created to reenergize downtown urban areas.

---

5. See Daniel E. North, Owners Must Commit to Constant Improvements, REAL ESTATE WEEKLY, June 22, 1994, at 19.
6. Note, however, that Grand Central Terminal, as a municipal facility, is not a paying member of the BID. See Lois Weiss, Grand Central BID readies for $30M in Capital Projects, REAL ESTATE WEEKLY, Apr. 22, 1992, at 1A.
7. See N.Y.C. DEP’T BUS. SERVS., NEW YORK CITY BUSINESS IMPROVEMENT DISTRICTS 43 (Aug. 1995) [hereinafter NYCDBS REPORT].
8. See Retail Thrives, supra note 2.
11. See Traub, supra note 1, at 36 (“Ten years ago, the area around Grand Central Terminal, in the heart of New York City, was a dismal symbol of urban decline and a constant reminder of the nonchalance toward public life that separates New York from the world’s other great cities.”).
Restraining the Power of Business Improvement Districts

areas through street improvements, improved sanitation, and increased security. Most strikingly, these services are paid for not by the municipal government, but by a self-imposed tax upon all properties within the district. The success of these districts, however, should not obscure the serious problems they may create, both legal and political. This Note will attempt to weigh these benefits and disadvantages and suggest possible avenues for reform. Although this Note focuses on the Grand Central BID and the statutory framework that governs BIDs in New York, it is hoped that this analysis may prove applicable to BIDs generally.

Thus far, little scholarly attention has been given to the BIDs phenomenon; most of the public discussion about these entities has occurred in general interest magazines and newspapers. While these accounts are in many ways useful, they consistently overlook some of the fundamental issues necessary to understand properly the operation of BIDs, and generally lack proposals for reforming BID law to capture the benefits of these entities while avoiding the harms.

This Note will first explain what BIDs are and do, along with a brief history of their use from the early days of this nation to the present. Part II will then critique New York’s BID law, arguing that the entities it creates are undemocratic, enjoy unwarranted § 501(c)(3) not-for-profit status, harm other parts of the city, and lack sufficient oversight. Part III will look to the Grand Central Partnership as a case study of the benefits and harms BIDs entail under New York law. Finally, Part IV will suggest how these harms can be eliminated while retaining the benefits of the Grand Central Partnership’s work.

I. THE RISE OF BUSINESS IMPROVEMENT DISTRICTS AS A CURE FOR URBAN ILLS

A. What is a BID?

Although the mere name “Business Improvement District” might seem sufficiently self-explanatory, there is some confusion as to the nature of the entity it denotes. The origin of this confusion can be traced both to the general lack of knowledge about governmental entities below the state level and the

16. A LEXIS search of the ALLREV law review database in December 1996, using the command “business w/2 improvement w/2 district”, turned up only nineteen articles with peripheral references to the districts.
18. In 1957, a major work on special districts began with the observation that “[s]pecial districts, particularly those in the nonschool category, constitute the ‘new dark continent of American politics,’ a phrase applied earlier in the century to counties.” John C. Bolens, Special District Gover-
use of the term “special district” to describe “an amorphous sort of scrap heap” of governmental bodies. A BID is clearly a form of special district, but defining that term is also problematic as “no one acceptable definition of what constitutes a special district has been formulated.” Part of the problem is the vast range of functions special districts serve. Although four-fifths are simply school districts, the rest include, for example, districts created for sewage disposal, water pollution control, mosquito abatement, sidewalk maintenance, water reclamation, and soil conservation. Nevertheless, the specificity of these functions lends credence to the claim that special districts are “distinct, limited-purpose units of local government,” which may even serve “as the alter ego” of conventional government.

More specifically, special districts are organized to perform one or more governmental services or functions, are governed by a board of directors who possess administrative independence from other units of local government, have independent financial and revenue powers similar to those of other local government units, and are separate corporate entities, with a perpetual existence, created by state enabling legislation.

The New York BID statute never defines exactly what a BID is. However, the entities it creates fulfill all of the conditions of the foregoing definition,
Restraining the Power of Business Improvement Districts

with the clear primary function of improving business in the designated area. Most special districts, particularly BIDs, levy a special assessment or tax on all property in the district to pay for improvements or special services.28

Whether one is concerned with “special assessment districts,” “special districts,” or “business improvement districts,” the primary reasons for their creation are similar. First, such districts are created when it is felt that other forms of government are ill-suited to handle a particular problem, whether this is a failure in terms of size, financing, administration, or lack of sufficient expertise to meet certain needs;29 second, there are financial limitations on taxation ability and debt accumulation;30 and third, there is a desire for more autonomy, which may be linked to a sense that the local government entity otherwise responsible for the service is doing an inadequate job.31 In addition, multijurisdictional entities tend to attract a greater number of experienced managers who are able to ensure a higher level service.32 These may seem to be compelling reasons. However, some analysts caution that “[s]pecial districts seem to be in danger of overuse; they are often created for areas which may not really warrant ‘special’ treatment.”33

Part of the necessity for seriously evaluating the power and impact of BIDs is that they do not fit neatly into preexisting categories. While the awkwardness of preexisting categories is partially the result of the historical evolution of

special assessment districts (SADs). Some analysts equate the two. See Janet Rothenberg Pack, BIDs, DIDs, SIDs, SADs: Private Governments in Urban America, BROOKINGS REV. 18 (Fall 1992).

28. BIDs are thus quite different from enterprise zones, which are distressed urban areas granted tax relief to encourage revitalization and development. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 543. A business in an enterprise zone enjoys lower taxes but a business in a BID pays additional assessments on top of their ordinary tax burden. Furthermore, enterprise zones do not have a separate management structure; BIDs and special districts do. See infra Section II.A.

29. This is particularly true of water management districts. See Phillips, supra note 23, at 102 (“Often the territorial jurisdiction of an existing governmental unit does not conform to the area in need of assistance.”). Imposing governmental authority in developing areas also may require special districts; Florida’s reform of its special district law included a provision that would allow “limited government status” for private developers who would do a better job setting up quasi-governmental services in developing areas. See Hudson, supra note 18, at 64.

30. See BOLLENS, supra note 18, at 6.

31. See Phillips, supra note 23, at 103; see also BOLLENS, supra note 18, at 7 (“a general government attaining its tax or debt limit is prevented from expanding functionally.”). But see N.Y. GEN. MUN. LAW § 980-n(a) (McKinney Supp. 1996) (providing that district with outstanding debt may not be dissolved).

32. See Phillips, supra note 23, at 104; see also BOLLENS, supra note 18, at 9 (“Sometimes the low caliber of present operations has decisive effect. There may be evidence or charges of inefficiency, mismanagement, or unsavory political behavior.”).

33. See Houston, supra note 14, at 16 (noting that the best downtown professional executives “are sometimes the objects of bidding wars between downtown districts.”); see also Comment, An Analysis of Authorities: Traditional and Multicounty, 71 MICH. L. REV. 1376, 1429 (1973) (noting further that, “Continuity of management, attraction of superior personnel, and corporate powers and decision-making will be most beneficial in such areas as transportation, water supply and sewerage, port direction, and pollution control.”).

special districts, the common justifications for creating these quasi-governments cast some light on their contemporary use.

B. The Origins of BIDs: Special Assessment Districts

Modern Business Improvement Districts have many ancestors, but two types of entities are particularly relevant: special assessment districts that sprang up largely in western rural areas; and metropolitan special districts that were created in eastern and midwestern cities. The first are important because they have shaped the case law on the issue. The problem pioneers faced as the frontier moved west was very specific: water management. No individual town, county, or city government was in a position to ensure that the flow, distribution, and control of water remained constant; rivers or streams might pass through several different jurisdictions. Hence "[t]he modern special district is an outgrowth of the drainage and flood control districts that were created to encourage and facilitate development of the Northwest Territory." The water-starved states of the Far West, however, were possibly more important than the Northwest Territories in terms of generating the law of special assessment districts. One major case of the early 1980s, for example, involved the Salt River Project Agricultural Improvement and Power District, which has existed in some form or another since 1895.

Special districts also played a critical role in the development of cities, particularly in the northeast and midwest. Their prominence, in part, stemmed from aversion to centralized political authority. Influenced by dominant "[d]ecentralized, Jacksonian styles of municipal administration," street paving, for example, was left up to the locals: "Abutters decided when and

---

35. These districts in turn may trace their lineage back to England, where special districts were "ad hoc statutory authorities created by Parliament to fill the gap created by the inability and unwillingness of English borough governments to respond to new problems." SANDS ET AL., supra note 18, § 2.18, at 2-45.

36. See POCK, supra note 19, at 14 ("Much 'district law' has been made in controversies involving insignificant rural districts. . . ."). This comment sounds a cautionary note about the relevance to urban business districts of case law developed for governing water districts. See infra Section II.A.

37. The water districts are a good example of how the limits of existing governmental forms gives rise to the need for specialized districts. See BOLLENS, supra note 18, at 6; Phillips, supra note 23, at 102-04.


40. The election procedures in this district were at issue in Ball v. James, 451 U.S. 355, 357-59 (1981).


Restraining the Power of Business Improvement Districts

how streets would be paved." The first special metropolitan districts for such purposes were established in Philadelphia as early as 1790. Districts in Chicago and Portland followed in the latter half of the nineteenth century. Both Chicago and St. Louis grew largely through the use of metropolitan districts, many of which survived well into the twentieth century. The most famous Chicago districts included park districts, proposed by the legislature and approved by referendum in 1869, and the Sanitary District of Chicago, created pursuant to an 1889 state law. Such districts served a variety of functions. In addition to the most common “port facilities, sewage disposal, water supply, and park[]” districts, metropolitan districts were also devoted to “bridges, tunnels, airports, housing, libraries, and mass transit facilities” and many other functions. Prominent metropolitan districts in the 1950s included the New York-New Jersey Port Authority, the Bi-State Development District in the area around St. Louis, and the East Bay Municipal Utility District in the San Francisco-Oakland area. Prominent special districts created by New York City in the 1960s and 1970s included the Special Theater District around Times Square, the Clinton Preservation District, and a Special Park Improvement District for Central Park.

C. The Modern Business Improvement District

The modern business improvement district is a fairly distinct entity. While the roots of BIDs run deep, in their current form they are barely two decades old. Although subject to the same uncertainty in classification plaguing earlier definitions of special assessment districts, all modern BIDs share three essential characteristics:

43. Id. This aversion, however, gave way by 1990 to concerns that centralized authority was necessary to improve urban health and safety. See id. at 285; Schultz & McShane, supra note 41, at 392-93.
44. See BOLLENS, supra note 18, at 67-68. For an extensive discussion of the role of special districts in developing Chicago’s suburbs, see ANN DURKIN KEATING, BUILDING CHICAGO: SUBURBAN DEVELOPERS AND THE CREATION OF A DIVIDED METROPOLIS (1988).
45. See BOLLENS, supra note 18, at 63 (noting that only Cook County had more municipalities than St. Louis County in 1952).
46. See id. at 133. These districts, which had their own taxing and bonding authority, proved so popular that seven more were created between 1896 and 1911. See id. at 134. The modern statute is at ILL. COMP. STAT. ANN. 1205/1-1-13-2 (West 1996).
47. See BOLLENS, supra note 18, at 74. Bollens, writing in the 1950s, explains that, “The first sanitary district to be organized in Illinois, it is now the oldest active independent metropolitan district government in the United States.” Id. at 74. Modern sanitary districts in Illinois are governed by ILL. COMP. STAT. ANN. 2205/0.01-29.3.
48. BOLLENS, supra note 18, at 68.
49. See id. at 68. Pennsylvania was particularly active; it enacted general enabling legislation in 1935. See id. at 240. The modern statute is at 53 PA. STAT. ANN. tit. 53, § 1551-54 (West 1996).
50. See BABCOCK & LARSEN, supra note 34, at 29-35.
51. See id. at 45-49.
52. See id. at 101-04.
First, their expenditures are restricted to one section of a city. Second, the districts are organized and financed by property owners and merchants, who operate on the basis of state and local laws that permit them to tax themselves. And third, revenues are used to purchase supplemental services and capital improvements beyond those provided by the city.53

One major difference, however, between modern BIDs and Old West water management districts or nineteenth-century urban expansion districts is the variety of services they provide. Florida's community development district statute, for example, empowers districts to administer parks, fire prevention, security, and waste collection services with the approval of local government.54 California's statute entrusts districts with responsibility for parking, booths, kiosks, trash collection, public restrooms, lighting, street widening, and other capital projects.55 Most BIDs focus on "crime and grime," and others may "pay for economic development and retail promotion and to sweep streets, scrub graffiti, put up holiday decorations, and shovel snow."56 Ordinary special assessment districts tend to perform only one of these functions.57 Most estimates of the number of BIDs currently operating in the United States hover around 900.58 New York City alone has 34 separate BIDs.59 Very few districts devoted to business improvement existed before 1980, and about half have sprung up in the past five years.60 Currently forty states have laws providing for the formation of BIDs.61

53. Pack, supra note 27, at 18. Hence one may define BIDs as a "quasi-public single-function government by a majority of property owners in a limited area who agree to assess themselves a set amount for a specific purpose." James Krohe, Jr., Bunker Metropolis: 'Private Government' Can Deliver Good Services—For a Price, CHICAGO ENTERPRISE, Sept. 1993, at *2, available in LEXIS, Nexis library, nwlttrs file. As demonstrated infra, the functions performed and purposes served by these districts are often quite diverse.

54. See FLA. STAT. ANN. ch. 190.012 (Harrison 1993). Such districts also have the power to sue and be sued, enter into contracts, borrow money, issue bonds, and levy taxes. Id. at ch. 190.011.


56. Krohe, supra note 53, at *2. One survey comparing New York BIDs with national entities found that New York BIDs spent 27% on sanitation, compared to a national total of 31%; New York BIDs spent 23% on security, other BIDs across the nation spent 19%; New York BIDs spent 16% on capital projects, compared to national total of 8%; New York BIDs spent 11% on administration and operations, compared to national total of 13%. Houstoun, supra note 14, at 13 (survey done by the Atlantic Group).

57. See, e.g., Gorenc v. Salt River Project Agr. Imp. & Power Dist., 869 F.2d 503 (9th Cir. 1989) (finding special district not state actor in district's dismissal of employee); Burris v. Sewer Improvement Dist. No. 147, 743 F. Supp. 655 (E.D. Ark. 1990) (rejecting equal protection challenge to special district election because function so narrow); Patterson v. City of Bismarck, 212 N.W.2d 374 (N.D. 1973) (upholding assessment power of Parking Improvement District).

58. Pack notes that estimates go as high as 900. See Pack, supra note 27, at 18. Houstoun states that there are 1000 in US and Canada. See Houstoun, supra note 14, at 16. Other sources suggest that there are 1000 BIDs in the United States. See City Services, supra note 1.

59. See NYCDBS REPORT, supra note 7.

60. See Pack, supra note 27, at 18.

61. See Krohe, supra note 53, at *8. As not every state calls these entities "BIDs", the citations below include the specific term used by the state statute.
Restraining the Power of Business Improvement Districts

The most dramatic tool at the BID's disposal is, of course, the power to assess. Whether an assessment is the same thing as a tax is not always clear. Although the practical effect on property owners might be the same for an assessment as a tax, BIDs proponents hastily dismiss any such comparison, and courts have provided some basis for distinguishing the two. State and


63. Interview with Michael Smith, New York City Department of Business Services, Aug. 24, 1995, in New York, N.Y. [hereinafter Smith Interview]. Assessments are not generally allowed as tax deductions. See Hudson, supra note 18, at 72. Some BIDs proponents, however, including New York City Deputy Mayor John Dyson, have suggested that such payments should be tax deductible. See Smith Interview, supra.

64. One California court recognized "a clear distinction between taxes, which are levied for general revenue and general public improvements; and special assessments, which are levied for local improvements which directly benefit specific real property." Solvang Mun. Improvement Dist. v. Board
federal courts have generally upheld the exercise of a special district's assessment power.\(^{65}\) State constitutional provisions expressly prohibiting delegation of the power to tax may, however, make levying of assessments by the district impossible.\(^{66}\) The assessment amount is often quite small. In Chicago, the assessment is less than 1% of the assessed valuation of the property.\(^{67}\) While the New York statute allows the assessment to be as much as 20% of the real estate taxes levied against the property,\(^ {68}\) in practice it is often far less than 10%.\(^ {69}\) In 1993, the total assessment levied by the Grand Central Partnership amounted to only 12.4 cents per square foot,\(^ {70}\) well below 10% of the property tax levied on the area.\(^ {71}\)

Despite the many indications that BIDs are doing their part to create a cleaner and safer metropolis, "[t]he ultimate effects of BIDs for good or for ill are yet to be seen."\(^ {72}\) Part of the uncertainty springs from the difficulty of weighing clear substantive goods like cleaner and safer streets against procedural qualms about how BIDs operate. In any event, it is worth asking whether improved sanitation, better security, increased property values, and a more auspicious climate for business must be gained at the price of democracy and accountability. Furthermore, these benefits are not usually enjoyed by all

---

\(^{65}\) For cases upholding a district's power to assess, see, e.g., Maumelle Boulevard Water & Sewer Dist. No. 1 v. Davis, 868 S.W.2d 73 (Ark. 1993) (upholding district power to assess even where payor's land had greatly decreased in value); Jensen v. City and County of Denver, 806 P.2d 381 (Colo. 1991) (sustaining power of BID to apply different assessment rates against state constitutional challenge).

\(^{66}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).

Courts have rejected district assessment power only in cases where other statutes have specifically created immunity for certain institutions. See, e.g., Federal Reserve Bank of St. Louis v. Metrocen tre Improvement Dist. No. 1, 657 F.2d 183 (8th Cir. 1981) (invalidating effort of Arkansas municipal district to levy assessment on Federal Reserve Bank).

\(^{67}\) Courts have rejected district assessment power only in cases where other statutes have specifically created immunity for certain institutions. See, e.g., Federal Reserve Bank of St. Louis v. Metrocen tre Improvement Dist. No. 1, 657 F.2d 183 (8th Cir. 1981) (invalidating effort of Arkansas municipal district to levy assessment on Federal Reserve Bank).

\(^{68}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).

\(^{69}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).

\(^{67}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).

\(^{68}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).

\(^{69}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).

\(^{70}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).

\(^{71}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).

\(^{72}\) Extraordinarily, a California Court of Appeal recently held that special assessments are not prohibited by Proposition 13, California's tax relief amendment to the state constitution (Cal. Const. Art. XIII A § 4): "The assessment on businesses for downtown promotion is not a true special assessment \ldots \ldots Where the burden for these expenditures is borne by the group specifically benefitted by them. Proposition 13 is not implicated." Evans v. City of San Jose, 4 Cal. Rptr. 2d 601, 607 (Ct. App. 1992); see also Solvang, 169 Cal. Rptr. 391 (same).
Restraining the Power of Business Improvement Districts

parts of the city, but by a few wealthy commercial enclaves.\textsuperscript{73} Hence BIDs may contribute more to separatism and the privatization of government than to the common good.\textsuperscript{74} The next part of this Note will address these concerns.

II. AN EVALUATION OF NEW YORK STATE'S BID LAW

Although the New York State legislature passed a statute enabling the creation of Business Improvement Districts in 1980,\textsuperscript{75} much of the 1980s was spent refining and improving the concept. The first district created under this statute was the 14th Street-Union Square District, set up in 1984,\textsuperscript{76} when the establishment of a district required a specific enabling act on the part of the legislature.\textsuperscript{77} The reform of the law in 1990 eliminated this requirement\textsuperscript{78} and allowed districts to be created through a process of review requiring the approval of the city planning commission, various community boards, the borough president,\textsuperscript{79} the city council,\textsuperscript{80} and the state comptroller.\textsuperscript{81} Failure to follow such procedures could result in wholesale invalidation of the district.\textsuperscript{82} While this procedure might seem overly onerous, opposing the establishment of the district requires even more effort. To prevent a district from being formed, the owners of more than half of the real property must come forward and file an objection.\textsuperscript{83}

\textsuperscript{73} See Doug Lasdon & Sue Halpern, When Neighborhoods Are Privatized, N.Y. TIMES, Nov. 30, 1995, at A29. Lasdon and Halpern note that other commentators have "extolled business districts, saying that they 'may be the best hope of getting parts of America's cash-strapped cities working again.' The operative word is 'parts.' Private government, ruled by the rich, is a dangerous concept."

\textsuperscript{74} As prominent local government law professor Gerald E. Frug comments, "'The privatization of government in America is the most important thing that's happening, but we're not focused on it. We haven't thought of it as government yet.'" Quoted in Garreau, supra note 18, at 185.


\textsuperscript{76} The BID was created through the effort of the heads of Consolidated Edison, Co., the Guardian Life Insurance Company, and the New School for Social Research. See Douglas Martin, Districts to Improve Business Proliferate, N.Y. TIMES, Mar. 25, 1994, at B3.

\textsuperscript{77} See STARTING AND MANAGING, supra note 75, at 4.

\textsuperscript{78} See id. at 3-4.

\textsuperscript{79} See N.Y. GEN. MUN. LAW § 980-d(c) (McKinney Supp. 1996).

\textsuperscript{80} See id. §§ 980-e, 980-f.

\textsuperscript{81} See id. § 980-g.

\textsuperscript{82} See, e.g., Hood v. Central Bus. Improvement Dist. No. 1, 781 S.W.2d 35, 36 (Ark. 1989) (invalidating district because petitions for formation improperly signed). But see Downtown Palo Alto Comm. for Fair Assessment v. City Council of Palo Alto, 225 Cal. Rptr. 559, 564 (Ct. App. 1986) (holding that state law commands courts to "liberally construe the relevant notice requirements"); Fladung v. City of Boulder, 417 P.2d 787 (Colo. 1966) (holding that insufficient notice did not prevent formation of street and sewer district as city council had power to act swiftly to serve public interest).

\textsuperscript{83} See N.Y.GEN. MUN. LAW § 980-e(b). New York's statute is typical in this regard. In California, those who will pay more than 50% of the total assessments must object. See CAL. STS. & HIGH. CODE § 36625 (West Supp. 1996). In Arkansas, by contrast, owners of two-thirds of the property in the district must petition to begin the process of creating the BID. See ARK. CODE ANN. § 14-184-108 (Michie 1987).
The most useful place to begin the critique of New York’s BID law is with its nondemocratic procedures for the management of the district. Pursuant to state statute, owners of real property within the district are entitled to greater representation on the Board of Directors than commercial or residential tenants. A second interesting aspect of New York’s BID law is its attempt to reconcile this reliance upon wealth-based classifications with the status of BIDs as not-for-profit entities. This status, and the obligation to serve the public good that it entails, gives rise to a third area of difficulty with New York’s BID law: its lack of concern for the impact of BIDs on the broader municipal community. This concern for the public welfare underlies a final objection to BIDs: Public officials do not retain sufficient oversight over BID activities. These four objections are the basis for the suggestions for revising and improving New York’s BID law in Part IV of this Note.

A. Are BIDs Undemocratic?

At the onset of the BID’s development, primary responsibility for seeing that the BID is up and running belongs to the District Management Association (DMA). The DMA is the specific entity with which the City Council contracts for the provision of services in the district and the collection of assessments to finance these expenses. Once the BID is operating as an ongoing entity, the District Management Association entrusts day-to-day responsibility for the operation of the BID to a Board of Directors. As this Board is primarily responsible for the operation of the District, concerns about democratic representation may properly be directed to this entity. The most prominent difficulties lie in how members of the Board of Directors are selected. There are at least two areas in which New York’s BID law employs voting procedures which favor some groups at the expense of others and thus seems inconsistent with democracy.

First, New York’s BID statute raises some concerns in its allowance for weighted voting to favor property owners. The relevant section provides that the votes of board members who are property owners be weighted in proportion to the assessment levied against properties in the district, provided that in no case shall the total number of votes be greater than the number of members of the board. Under this provision, owners of

84. See STARTING AND MANAGING, supra note 75, at 6.
85. See Smith Interview, supra note 63.
86. See N.Y. GEN. MUN. LAW § 980-m; STARTING AND MANAGING, supra note 75, at 6 (“The DMA Board of Directors is accountable to members of the general association and is responsible for management of the day-to-day operation of the BID.”).
87. Frequently there is significant overlap between membership on the DMA and the Board. See Smith Interview, supra note 63.
88. The New York statute provides: the certificate of incorporation or by-laws of such association shall provide . . . that the votes of members who are property owners be weighted in proportion to the assessment levied or to be levied against properties in the district, provided that in no case shall the total number
Restraining the Power of Business Improvement Districts

property within the district may form a powerful bloc effectively able to make any and all decisions by either the District Management Association or the Board of Directors. A separate provision establishes that owners of property within the district shall always enjoy a majority on the Board of Directors. This section guarantees that representatives of owners of property within the district shall constitute a majority on the Board whether or not the owners are in fact superior in number to all other members of the district and whether or not such owners actually live in the district.

The statutory requirement that owners of real property enjoy majority representation on the Board of Directors seems inconsistent with the Fourteenth Amendment. While the first invocation of the principle of "one person, one vote" came a few years earlier, Reynolds v. Sims is widely understood to have established this basic principle. In striking down an apportionment plan for the Alabama legislature which diluted the votes of some citizens based on their place of residence, the Court emphasized its concern that, "[c]itizens, not history or economic interests, cast votes." By guaranteeing property owners a majority vote on the GCP's Board of Directors irrespective of their number, the New York BID statute seems to violate this requirement. To justify a departure from the basic "one person, one vote" principle, entities such as BIDs must establish that they are so different in nature from other quasi-governmental entities that this principle should not apply.

The Supreme Court has made clear that there is an exception to the Equal Protection Clause for special assessment districts that are narrow in function of votes assigned to any one such member or to any number of such members under common ownership or control exceed thirty-three and one-third percent of the total number of votes which may be cast.

N.Y. GEN. MUN. LAW § 980-m(a).

89. This provision establishes:

The board of directors of the association shall be composed of representatives of owners and tenants within the district, provided, however, that not less than a majority of its members shall represent owners and provided further that tenants of commercial space and dwelling units within the district shall also be represented on the board.

Id. § 980-m(b).

90. The phrase is Justice William O. Douglas's, from his majority opinion in Gray v. Sanders, 372 U.S. 368, 381 (1963) (rejecting Georgia's weighted voting system for political primaries) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."). Justice Stewart employed similar language in his concurring opinion. See id. at 382 ("Within a given constituency, there can be room for but a single constitutional rule—one voter, one vote."); see also Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (declaring failure of Georgia to reapportion legislature violated equal protection) ("No right is more precious . . . than that of having a voice in the election of those who make the laws under which . . . we must live.").


92. See id. at 559.

93. Id. at 580. One text on special districts seems to concur: "Using property ownership as the basic test for eligibility ignores the generally accepted concept of citizenship and residence as the fundamental determinants." BOLLENS, supra note 18, at 250.

94. U.S. CONST. amend. XIV.
and limited in effect. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*\(^5\) carves out an exception to *Reynolds* for a special assessment district "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group."\(^6\) The more explicit statement of the distinction, however, came in *Ball v. James*,\(^7\) in which the Court refused to apply the Equal Protection Clause to elections for the board of directors of an Arizona water reclamation district. First, the directors did not "administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services,"\(^8\) and second, the "narrow primary purpose for which the district is created"\(^9\) insured that certain burdens or benefits fell more on one group than another such that these disparities could be reflected in the voting scheme.

As established under New York law, however, it seems questionable whether BIDs can claim the immunity from the Equal Protection Clause created by *Salyer*.\(^10\) The district in *Salyer* was immune because its "limited purpose" entailed "disproportionate effect" on some residents over others.\(^11\) The

---

95. 410 U.S. 719 (1973). *Salyer* answered the question, left unresolved in *Avery v. Midland County*, 390 U.S. 474 (1968), of whether a "special purpose unit of government" may have election procedures in violation of the principle of one person, one vote in recognition that its functions affected "definable groups of constituents more than other constituents." 390 U.S. at 483-84.


98. 451 U.S. at 366.

99. Id. at 369.

100. In Florida, the relevant statute provides for a period of temporary immunity from equal protection challenge. Depending on the size of the district, elections need not be based on the principle of one person, one vote for the first six or ten years. *See* FLA. STAT. ANN. § 190.006(3)(a)2.a and § 190.003(16) (Harrison 1993).

101. 410 U.S. at 728. The district court reasoned from this that multipurpose districts could not be exempt from Equal Protection scrutiny. *See* *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 342 F. Supp. 144, 146 (C.D. Cal. 1972). The *Salyer* district "performs no governmental
functions of New York BIDs, however, are far from specialized. The statute creating BIDs allows them to serve a wide variety of functions, including landscaping, planting trees, setting up parks, constructing lighting and heating facilities, enhancing security, widening streets, rehabilitating or renovating existing properties, constructing garages or other parking facilities, setting up booths, kiosks, benches, holiday decorations, and providing sanitation services. Most special assessment districts perform only one of these functions. The districts held to be exempt from the requirements of the one person, one vote principle in *Salyer* and *Ball*, for example, had no other purpose than water reclamation and storage. As the sole index of benefit and service from the district was the amount of water used by its members, correlating service levels with political control was a straightforward affair. Precisely the opposite is true with respect to the New York BIDs, which function more as substitute governments for the area rather than as specific service providers.

Perhaps the broader principle to be distilled from the Court's distinction in *Salyer* and *Ball* is that where the impact of the decisions made by a governing board has a general and nonquantifiable effect on those living in the affected district, the principle of one person, one vote must shape the voting procedure. In a similar case, the Tenth Circuit held that the statutory system of electing Kansas's State Board of Agriculture by delegates from private functions of general concern to the public... such as found by the court in *Burrey v. Embarcadero Municipal Improvement District...* 342 F. Supp. at 146. In that case, the California Supreme Court held that a district that accorded "extraordinarily more voting strength to some of the district's voters than to others" violated the rule of one person, one vote established by the Fourteenth Amendment. See *Burrey v. Embarcadero Mun. Improvement Dist.*, 488 P.2d 395, 396 (Cal. 1971). The *Burrey* district "construct[ed] and maintain[ed] street lighting and facilities for sewage and garbage disposal, drainage, reclamation, water treatment and distribution... maintain[ed] a fire department and police force [and] create[d] parks and recreational facilities." 488 P.2d at 397.


103. See *Salyer*, 410 U.S. at 728-29 (the district's "primary purpose... is to provide for the acquisition, storage, and distribution of water for farming... It provides no other general public services..."); *Ball*, 451 U.S. at 357 ("the primary purposes of the District have always been the storage, delivery, and conservation of water.").

104. See *Recent Developments, Voting—Property Qualifications for Voting in Special Purpose Districts: Beyond the Scope of "One Man-One Vote"*, 59 CORNELL L. REV. 687, 694-95 (1974) ("[I]t was not difficult to recognize that landowners within the district had overwhelming interests in the successful operation of the district while the interests of other residents was correspondingly remote."). On the other hand, water is a critical human necessity, access to which is not exactly a "remote" concern. See, e.g., *Garreau, supra* note 18, at 193 ("In the dry Southwest, water is the linchpin of the universe.").

105. Another way to understand these rulings could be that the equality of "interest" between voters in a special assessment district should preclude vote dilution. See *Melyna R. Durslag, Salyer, Ball, and Holt: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RES. L. REV. 1 (1982) (arguing that *Salyer* was correctly decided on this basis, but *Ball* and *Holt* were not).
agricultural associations violated the Equal Protection Clause. The court based its reasoning on the extent of the Board’s powers: “ranging . . . from regulating the healthfulness of milk and meat sold in the state to generally regulating all weights and measures, including those commercially used by entities outside the agricultural industry.” The Equal Protection Clause applies even if the duties of the body in question are administrative. As the general power of the Board affects a variety of district members in a number of ways, control over who exercises this power cannot be vested in a minority of voters.

The classification of voters made by New York’s BID law, moreover, is premised upon property ownership. Although laws denying the right to vote based on property ownership have long been dispensed with, and were last a hot political issue during Dorr’s Rebellion in 1844, modern-day property limitations upon the franchise have only recently been eliminated. Within the post-Reynolds framework, classifications among voters predicated on property ownership or lack thereof have consistently failed to satisfy the demands of equal protection. The Court applied the Reynolds rule to the election of trustees of a junior college in Hadley v. Junior College District because those trustees “exercised general governmental powers” and “perform[ed] important governmental functions” which affected all those residing in the district, whether or not they had any other association with the college besides living in the district. Restriction of the franchise to property owners in municipal bond elections is equally impermissible, as well as requiring ownership of land to vote in an election on municipal reorganization. Hence the view of “interest” seemingly espoused by the Court is actually quite extensive. Moreover, the fact that the New York BID statute significantly dilutes the votes of certain residents of the district rather than excludes such individuals entirely

106. See Hellebust v. Brownback, 42 F.3d 1331 (10th Cir. 1994); see also cases cited supra note 96.
107. 42 F.3d at 1334.
108. See Cunningham v. Municipality of Metropolitan Seattle, 751 F. Supp. 885, 888 (W.D. Wash. 1990) (“It does not matter whether the governmental powers possessed be deemed ‘legislative’ or ‘administrative’; if the body possessing them is elected, the one person, one vote principle applies.”).
110. For a brief history of the insurrection and the suffrage issues which partially caused the rebellion, see Luther v. Borden, 48 U.S. 1, 34-41 (1849).
112. Id. at 53-54.
Restraining the Power of Business Improvement Districts

cannot serve as a defense. In *Reynolds*, the Court emphasized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 115 Differential representation based on property ownership, therefore, must be met with the same skepticism as absolute denial of representation. 116 Challenges to weighted voting procedures for a special assessment district have been rejected only where the district's functions were so narrow and specialized as to fall under the rubric of *Salyer*. 117 As already demonstrated, the functions of New York BIDs envisioned by the statute seem neither so limited nor narrow to qualify under this exemption.

In sum, the Equal Protection Clause does not require application of the one person, one vote principle for districts specialized in purpose, narrow in scope, and limited in effect. As the BIDs set up by New York statute are none of these, such districts seem to violate the Equal Protection Clause. The reason this statute is not clearly unconstitutional, however, is likely that these "business improvement districts," the aim of which is to earn a profit, are incorporated as nonprofits and thus are able, under New York law, to create classes of voters differentially represented on the Board of Directors. The next Section discusses this seemingly anomalous status.

**B. Are BIDs Appropriately Viewed as Nonprofit Corporations?**

Although the basic structure of BIDs created pursuant to New York law seems to violate the Equal Protection Clause, there is one major reason most BIDs would be immune from such scrutiny: by statute BIDs can be incorporated as nonprofit 118 entities and exempt from the requirement of one person, one vote. This Section will ask, however, whether this designation is appropriate in light of the fact that the ultimate aim of BIDs is to increase profits to its members. To explore these issues fully, this Section will first examine the nonprofit status of BIDs in relation to potential tax exemptions and then discuss the impact of this nonprofit status on BIDs' voting procedures. As the following discussion indicates, BIDs might be able to qualify as nonprofits

118. Note that the difference between "nonprofit" and "not-for-profit" is purely a matter of emphasis. A "nonprofit" organization can earn profits; it simply does not exist for that purpose alone. The "not-for-profit" designation clarifies this point. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).
under some, but not all, tax-exempt categories of § 501(c) of the Internal Revenue Code. The possibility that certain BID board members could use the district to enrich themselves, however, raises serious problems no matter which specific tax-exempt provision is relied upon. Second, the statutory blessing given to the BID’s undemocratic voting procedures is at odds with broader principles of state not-for-profit law.

The fact that a "business improvement district," whose very name seems to connote a profit-making purpose, may qualify as a nonprofit corporation attests to the expansiveness of New York's nonprofit corporation law. There are two basic aims of nonprofit corporation law: to ensure that the nonprofit serves a charitable purpose and to ensure that the profits or earnings of the corporation are not distributed to those who exercise control over it. One commentator calls the latter concern the "nondistribution constraint," yet notes that this does not mean the corporation may not earn a profit, only that the profit may not then be distributed to those running the corporation. In practice, these two questions are intertwined as one seeks to determine who benefits from an organization's work.

Since its revision in 1970, New York's nonprofit statute has been criticized for its confusing attempt to categorize nonprofit organizations. One commentator calls the New York statute "a distinctly novel approach to nonprofit incorporation" about which there is much to say that is "negative." The New York statute sets up four different types of nonprofits. The most relevant section here describes Type B corporations as those formed for any of the following purposes: "charitable, educational, religious, scientific, literary, cultural, or for the prevention of cruelty to animals." This language specifically tracks the language of section 501(c)(3) of the Internal Revenue Code to qualify presumptively Type B corporations for a federal tax exemption. Other sections of the law specify that Type A corporations may be formed for nonbusiness purposes, including certain non-pecuniary activities as "civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, animal husbandry, and for a professional, commercial, industrial, trade or

119. See Henry B. Hansmann, Reforming Nonprofit Corporation Law, 129 U. PA. L. REV. 497, 501 (1981). This is also called the "inurement" problem, and was most recently addressed in great length in Internal Revenue Service General Counsel Memorandum 39,862 (Nov. 22, 1991).

120. See Hansmann, supra note 119, at 501. As Hansmann's main argument is that "the essential role of the nonprofit organization is to serve as a fiduciary for its patrons in situations of contract failure," id. at 508-09, it is not entirely clear how he would view BIDs. Unlike most nonprofit corporations, the operators and beneficiaries are the same people.

121. Hansmann, supra note 119, at 530, 531. Hansmann is generally hostile to the notion of categorizing nonprofits. See id. at 580-99. But see Note, New York's Not-for-Profit Corporation Law, 47 N.Y.U. L. REV. 761, 791 (1972) (calling statute "carefully drafted and thoroughly considered law, reflecting a reasoned, but idealistic legislative approach").

122. N.Y. NOT-FOR-PROFIT CORP. LAW § 201(b) (McKinney 1970).

123. Compare N.Y. NOT-FOR-PROFIT CORP. LAW § 201(b) with I.R.C. § 501(c)(3) (1996). See also Hansmann, supra note 119, at 531.
service association.” In contrast to the specific language of the Type A and Type B statute, Type C corporations “may be formed for any lawful business purpose to achieve a lawful public or quasi-public objective.” This provision allows the creation of a nonprofit “for a purpose normally carried on by business corporations for profit.” Finally, Type D is simply “a connector to other special-purpose statutes” and is not of concern here.

The essential characteristic of a not-for-profit under New York State Not-For-Profit Corporation Law is “that such organizations do not exist for the pursuit of the self-interest of their members in a proprietary or pecuniary sense.” In general, New York courts have taken care to police this constraint. For at least a half-century, New York courts have enjoined putatively nonprofit entities from conducting certain profit-maximizing activities: an association to secure composers’ rights to their “serious music” could not claim it was a nonprofit because composers profited from the rights to their music; an organization dedicated to the lease and sale of real property was properly denied certification as a nonprofit because such activity “can only be considered a business purpose”; and a trade association for real estate brokers could not operate a nonprofit property listing service for the benefit of its members, who would profit from selling the houses. Finally, at least one New York court has made clear that a § 501(c)(3) exemption does not necessarily mean that a corporation is a type B nonprofit, decoupling the tax exemption and this status.

An examination of IRS policy also indicates that the preferred § 501(c)(3) designation is inappropriate for BIDs even if they qualify as Type B nonprofits in New York State. The IRS makes its own determination, and federal tax law strongly suggests that entities such as BIDs are ineligible for a tax exemption under § 501(c)(3) of the Internal Revenue Code, although the slightly less

124. N.Y. NOT-FOR-PROFIT CORP. LAW § 201(b) (McKinney 1970).
125. Id. § 201(b).
126. Id., comment to § 201.
127. Hansmann, supra note 119, at 531.
128. 6 WHITE, N.Y. CORPS. ¶ 611.01 (13th ed. 1995).
129. N.Y. NOT-FOR-PROFIT CORP. LAW § 204 provides that a nonprofit corporation “shall conduct no activities for pecuniary profit or financial gain, whether or not in furtherance of its corporate purposes, except to the extent that such activity supports its other lawful activities then being conducted.”
130. See Kubik v. American Composers Alliance, 54 N.Y.S.2d 764, 764 (Sup. Ct. 1945). Note that under the earlier version of New York nonprofit law, the ACA could not claim it was a “membership corporation.” Id. at 768.
133. See Bodell, 375 N.Y.S.2d at 428 (“the fact that such activities have been approved by the Internal Revenue Service for tax exemption is not considered conclusive”).
134. See Hansmann, supra note 119, at 532.
desirable exemption under § 501(c)(4) may still be open to them. In 1975, for example, the IRS denied a § 501(c)(3) exemption to a block association, even though its aim was "to preserve and beautify that block, to improve all public facilities within the block, and to prevent physical deterioration of the block." The IRS explained:

By enhancing the value of the roadway sections abutted by property of its members, the organization is enhancing the value of its members' property rights. The restricted nature of its membership and the limited area in which its improvements are made, indicate that the organization is organized and operated to serve the private interests of its members . . . . Accordingly, although the organization is primarily engaged in promoting the general welfare of the community, it is not organized and operated exclusively for charitable purposes. Therefore, it does not qualify for exemption from Federal income tax under section 501(c)(3) of the Code.

The IRS did allow an exemption, however, under § 501(c)(4) of the Code. The fact that a block association, whose increased property values are likely small compared to the profits reaped by a BID, does not qualify for § 501(c)(3) status strongly suggests that BIDs should not either. A second ruling reached a similar result in addressing the status of a commercial improvement district in 1977, holding that an organization whose purpose was "to revive retail sales in an area suffering from continued economic decline," did not qualify for a § 501(c)(3) exemption. The reason was that "the activities of the organization . . . result in major benefits accruing to the stores that will locate within the shopping center." The inurement of benefits to members of the organization, therefore, strongly militates against § 501(c)(3) status.

Faced with the relatively stringent approach taken by New York courts and the IRS in ensuring that § 501(c)(3) nonprofits refrain from profit-maximizing

---

135. There is an important distinction between qualifying as a § 501(c)(3) nonprofit and qualifying as another § 501(c) nonprofit. All § 501(c) organizations are exempt from federal income taxation, but only § 501(c)(3) organizations allow contributors to deduct their contributions for purposes of determining their federal income tax liability. Section § 501(c)(3) specifies that "religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual . . ." shall be exempt from federal taxation. Section 501(c)(3) is thus the most sought-after designation, as "contributions of cash or property (but not services) to these charitable groups are deductible by individuals and corporations for income tax purpose (under § 170 of the Code) and are also deductible for estate and gift tax purposes (under §§ 2055, 2522)." John G. Simon, The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies, in JAMES J. FISHMAN & STEPHEN SCHWARZ, CASES AND MATERIALS ON NONPROFIT ORGANIZATIONS 309, 310 (1995).

137. Id. at 210.
138. Id.
139. See id. at 211.
141. See id. at 145.
142. Id.
Restraining the Power of Business Improvement Districts

activity benefit, it is unclear why BIDs should enjoy this status. In contrast to other states' statutes which specifically invoke public welfare justifications for BID legislation,143 the New York legislature simply cited the need for "an effective means for restoring and promoting business activity" in creating BIDs.144 Furthermore, New York's statute allows BIDs to incorporate as Type B nonprofits.145 As the language characterizing Type B corporations is exactly the same as § 501(c)(3), this creates a presumptive exemption from taxation under § 501(c)(3), a benefit conferred because Type B organizations are "expected in some way to serve the public."146 While an exemption from taxation may be good policy for those entities who serve charitable purposes, why taxpayers should subsidize the activities of an organization whose goal is to improve business and increase their own profits is difficult to discern.

Furthermore, it seems impossible to police the nondistribution constraint, intended to prohibit benefits from accruing to those operating the BID, when the very aim of a BID is to increase its own members' profits. Problems of inurement of organizational resources to private good arise "where the financial benefit represents a transfer of the organization's financial resources to an individual solely by virtue of the individual's relationship with the organization."147 This prohibition prompts a closer look at "persons who, because of their particular relationship with an organization, have an opportunity to control or influence its activities,"148 or in other words, whether a conflict of interest exists. Yet inurement problems exist not simply when a few people at the top profit, but when the entity as a whole serves as a vehicle for private enrichment in the guise of social welfare: "an organization must establish that it is not organized or operated for the benefit of private interests such as . . .

143. See, e.g., ARK. CODE ANN. § 14-184-103(3) (Michie 1987) ("The elimination of urban blight and decay and the modernization and general improvement of central business districts by governmental action are considered necessary to promote the public health, safety, and welfare of the communities . . . ."); CAL. STS. & HIGHS. CODE § 36601(b) (West Supp. 1996) ("It is in the public interest to promote the economic revitalization and physical maintenance of the business districts of its cities in order to create jobs, attract new businesses, and prevent the erosion of the business districts."); TENN. CODE ANN. § 7-84-102 (1992) (citing "the elimination of urban blight and decay"). Other states, however, seem to invoke a more clearly profit-oriented justification. See, e.g., DEL. CODE ANN. tit. 22, § 1501(2) (Supp. 1994) ("The availability of enhanced municipal services . . . serve as a magnet to the consuming public . . . ").

144. N.Y. GEN. MUN. LAW, comment following § 980, at 130 (McKinney Supp. 1996). The legislature merely alluded to "the economic and general well-being of the people of the state." Id.

145. See, e.g., Certification of Incorporation of the Grand Central Partnership (copy on file with author). This status seems just as anomalous as the designation of a BID as a nonprofit. Examples of Type A nonprofits include Boards of Trade or Chambers of Commerce, which seem far closer to the purpose of a BID than Type B nonprofits. Type B nonprofits include cemetery associations, associations to prevent cruelty to animals, historical societies, and soldier's monument corporations. See 14 N.Y. JUR. 2D, BUSINESS RELATIONSHIPS § 60, at 140-41 (1996).

146. Note, supra note 121, at 777.


148. Id. at 17-18.
shareholders of the organization."149 A New York City Council report has noted that many of the BIDs currently operating in New York City seem plagued by conflicts of interest and are in danger of becoming "cash cows for other organizations."150

The nonprofit designation is important for a second reason: it links the BID law to a provision of the not-for-profit law insulating such entities from an equal protection challenge to their voting procedures. The New York BID statute provides that the district management association may have different classes of voters, pursuant to the not-for-profit corporation law.151 The same section also provides, as described above, that owners of property in the district are entitled to a vote weighted in proportion to the amount of property they own.152 These sections of the BID law rely on provisions of the nonprofit corporation law that provide that voting may be by class,153 and that entire classes of members may be denied a vote:154 the BID statute explicitly exempts BIDs from compliance with section 611 of the nonprofit corporation law which requires that, "in any case in which a member is entitled to vote, he shall have no more than, nor less than, one vote. . . ."155 Yet the exemption created by the BID statute eviscerates an important principle of nonprofit corporation law, that "a corollary to the absence of proprietary interest is the presence of a right to participate in the uses and administration of power on a broad and democratic basis."156 Hence "there can be no class

149. Id. at 31.
150. CITIES WITHIN CITIES, supra note 75, at 32.
151. N.Y. GEN. MUN. LAW § 980-m(a) (McKinney Supp. 1996) provides that, "There shall be a district management association for each district established pursuant to the provision of this article (which shall pursuant to the not-for-profit corporation law have one or more classes of membership, voting or non-voting) . . . ."
152. The certificate of incorporation of a BID "may provide that the votes of members who are property owners be weighted in proportion to the assessment levied or to be levied against the properties within the district . . . ." Id. § 980-m(a).
153. N.Y. NOT-FOR-PROFIT CORPS. LAW § 616(a) (McKinney 1970) provides as follows: "The certificate of incorporation or the by-laws may contain provisions specifying that any class or class of members shall vote as a class . . . ."
154. Id. § 612 provides that: "The certificate of incorporation or by-laws may provide, either absolutely or contingently, that the members of any class shall not be entitled to vote . . . ." This provision, however, is employed only in limited instances. For example, a volunteer fire company is free to adopt bylaws which provide that "only firemen who attend at least 15 percent of all fire calls during the year may vote in an election of line officers of the fire company," and that "they attend at least three meetings annually." Comment to § 612, at 60 (Supp. 1996) (citations omitted).
155. Id. § 611 (e). The statute creates an exception for member organizations. Id. The BID statute provides that, "Notwithstanding any inconsistent provision of paragraph (e) of section six hundred eleven of the not-for-profit corporation law," weighted voting is permissible. N.Y. GEN. MUN. LAW § 980-m(a).
156. WHITE, supra note 128, 156, at ¶ 611.01. Or, as one New York Supreme Court put it, "[s]ince the primary objective of a not-for-profit corporation is not to generate a return on invested capital, power is more appropriately shared between members on an equivalent basis, rather than on the degree of investment." Roxbury Estates, Inc. v. Roxbury Run Village Association, Inc., 526 N.Y.S.2d 633, 636 (App. Div. 3d Dep't 1988) (holding that owner of 130 lots was limited to single vote under nonprofit corporation law).
Restraining the Power of Business Improvement Districts

in which voting rights are other than equal.” 157 By weighting the votes of owners of property within the district, the New York BID statute sharply conflicts with this provision.

New York’s BID statute, in short, creates organizations which may avail themselves of all the advantages of nonprofits such as the exemption from taxation, but none of the obligations, such as compliance with the principle of one person, one vote. BIDs clearly are not § 501(c)(3) entities; a more appropriate status would be § 501(c)(4) or § 501(c)(6), which specifically includes “[b]usiness leagues [and] chambers of commerce.” 158 While the tax advantages are not so large from the BID’s standpoint in that no deductions would be allowed for contributions made to it, 159 preserving the principles of nonprofit corporation law is a more important goal. When such departures from the larger legal framework occur, they should be based on a sober evaluation of the good such a departure might detail. A subsequent section of this Note will assess whether the Grand Central Partnership BID has used this status to effect public good, or whether this status has served as a vehicle for exploitation. 160

C. Should BIDs Be Able to Affect City Residents Without Giving Them a Vote?

A third problem with the New York BID statute is the remarkably low level of broader public involvement in the creation and management of these entities. Although it seems clear that BIDs may have a variety of effects, many of them quite negative, on the rest of the municipality, the general public is largely without a voice in the creation and ongoing operation of these districts. These

157. WHITE, supra note 128, 156, at ¶ 611.01. Courts have applied these provisions with alacrity. In Procopio v. Fisher, 443 N.Y.S.2d 492 (App. Div. 4th Dep’t 1981), the court cited a long string of cases to support the claim that each member of a nonprofit organization was entitled to one vote. See 443 N.Y.S.2d at 495, thereby preventing a residential association from allocating one vote for each subdivided lot owned by a member. See also Roxbury Estates, 526 N.Y.S.2d 633.

158. I.R.C. § 501(c)(6). To qualify under § 501(c)(4), an organization must be “primarily engaged in promoting in some way the common good and general welfare of people in the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements.” Treas. Reg. § 1.501(c)(4)-1(a)(2) (1996). As the aim of a Business Improvement District is to improve business, however, § 501(c)(6) seems a closer fit: such an organization is of the same general class as a chamber of commerce or a board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of the performance of particular services for individual persons. An organization whose purpose is to engage in a regular business of a kind ordinarily carried on for profit, even though the business is conducted on a cooperative basis or produces only sufficient income to be self-sustaining, is not a business league. Treas. Reg. § 1.501(c)(6)-1 (1996) (emphasis added). As the last sentence indicates, it is possible that BIDs do not qualify under any of the § 501(c) categories for tax exemption, either on their own income or on contributions.

159. See supra note 135.

160. See infra Section III.B.
considerations do not seem to fatally undermine the statute. However, they call into question the wisdom of the choices made by the legislature. Since these choices are largely policy issues, intervention by courts appears to be an unlikely path to reform.

While tenants or property owners within a business improvement district may report that their sales are up, spirits are high, and streets are prettier, the impact of such districts on the rest of the city is less benign. As two analysts contend: "We end up with a parochial clash between the city as a whole and the neighborhood and the special district. Rather than promoting the good of the entire city, the special district and its neighborhood associations frequently succumb to the NIMBY ("Not In My Backyard") syndrome." Former Secretary of Labor Robert B. Reich situates this clash in the context of the "secession of the successful," which for Reich means the exodus of "symbolic analysts," highly paid professionals and consultants, from the public sphere. Reich explains:

[Public funds have been applied in earnest to downtown "revitalization" projects, entailing the construction of clusters of postmodern office buildings . . . multilevel parking garages, hotels with glass-enclosed atriums rising twenty stories or higher, upscale shopping plazas and gallerias, theaters, convention centers, and luxury condominiums. . . . The fortunate symbolic analyst is thankfully able to shop, work, and attend the theater without risking direct contact with the outside world—in particular, the other city.]

In one sense, a BID is the opposite of an enterprise zone. While the latter is intended to improve the prospects of the poorest city neighborhoods, BIDs inevitably tend to serve wealthy areas. A BID will generally not be created without a sufficient tax base, and funding improvements for the

161. BABCOCK & LARSEN, supra note 34, at 143.
164. Id. at 270-71.
165. See supra Section I.A.
166. See, e.g., Ellen P. Aprill, Caution: Enterprise Zones, 66 S. CAL. L. REV. 1341 (1993) (arguing that tax incentives are insufficient to lift poor districts from poverty); Cisneros, supra note 13 (arguing, inter alia, for enterprise zones to reduce poverty and isolation of inner cities); Barry M. Rubin & Margaret G. Wilder, Urban Enterprise Zones: Employment Impacts and Fiscal Incentives, 55 AM. PL. ASS'N J. 418 (1989) (concluding that enterprise zones are cost-effective and job-creating development tools); David Williams II, The Enterprise Zones Concept at the Federal Level: Are Proposed Tax Incentives the Needed Ingredient?, 9 VA. TAX REV. 711 (1990) (recommending larger tax breaks for enterprise zone legislation); Williams & Sander, supra note 13, at 2042-47.
167. See STARTING AND MANAGING, supra note 75, at 2 ("A BID usually works best in retail, commercial, and industrial areas where . . . [t]he tax base is sufficient to generate the revenue needed."); Smith Interview, supra note 63.
Restraining the Power of Business Improvement Districts

district requires that businesses within the district be able to afford additional assessments.

The creation of a BID impinges upon the ability of a city to provide for its less wealthy areas in at least three ways. First, the voluntary assessment agreed to by district residents to fund their own services decreases their willingness to tolerate other taxes: "'If we let everyone retreat into their little domains, how much sharing is there going to be? . . . We could see more and more opposition to general tax increases.'"168 The fear is that wealthy BIDs will focus their energies on their own immediate area and ignore the broader municipal picture to become "pacified and wealthy hamlets amidst the urban jungle."169 Reich agrees: "The pattern is familiar. With each sought-after reduction in their taxes, symbolic analysts in effect withdraw their dollars from the support of public spaces shared by all and dedicate their savings to private spaces . . . ."170 Second, the BID statute itself contains a provision specifying that "[t]he district charge so levied shall be included in the total amount, if any, that the municipality is permitted by law to raise in that year by a tax on real property."171 Hence the assessments so raised by BIDs for the sole benefit of their part count against the ability of the city to raise revenue for the whole. Third, the statute also allows BIDs to inhibit municipal efforts to fund improvements by enabling BIDs to issue their own bonds,172 and thereby compete with the city on the bond market.

Given the possibility that BIDs may adversely affect the interests of city dwellers, one might think that urban populations deserve some sort of vote on the formation or continuing operation of a BID. Yet while the statute provides for hearings before the affected community boards and the City Council in


170. Reich, supra note 163, at 268. These conflicts were partially responsible for the consolidation of the Chicago water districts discussed earlier. An inquiry in 1933 found that there had been "disintegration in control . . . and gross inequalities." BOLLENS, supra note 18, at 136.

171. N.Y. GEN. MUN. LAW § 980-k(b) (McKinney Supp. 1996). For example, assume that the city may raise one million dollars through property taxes. If the total BID assessment equals $250,000, the city's property tax ceiling drops from one million to $750,000.

172. See id. § 980-j(c). This section provides that, "Any municipality which has been established pursuant to this Article, may, for the purpose of providing funds for making capital improvements within a district, issue and sell bonds or other municipal obligations as provided in the local finance law and other applicable laws and statutes." For similar provisions in other state statutes, see FLA. STAT. ANN. § 190.016 (Harrison 1993); ILL. COMP. STAT. ANN. 200/27-45 (West 1996); MICH. COMP. LAWS ANN. § 125.1666 (West Supp. 1996); N.M. STAT. ANN. § 3-63-12 (Michie Supp. 1996); TEX. LOC. GOV'T CODE ANN. § 375.201 (West Supp. 1996).

One response to this fear is that a city will simply decide not to allow a BID to issue bonds when doing so would create undue competition. However, as described infra at Subsection III.B.3, BIDs' bonds may also enable a city to concentrate and attract investment to its wealthiest areas to the detriment of more needy areas. While city mayors are certainly within their discretion to adopt trickle-down economics, this provision allows them to do so in a circuitous manner and creates competition for their own bonds, both of which add up to bad policy.
which interested parties may advance arguments for and against a proposed BID, only City Council and community board members in which the district is to be created are actually granted a vote.\textsuperscript{173} The degree to which the average city resident has any control over the potentially negative effects of BIDs is minimal; only through voting for City Council members and other officials, in elections in which the status of BIDs is quite unlikely to be the sole issue, do residents outside the district have any say over the formation and conduct of BIDs.

A legal challenge to the relative disempowerment of city residents, however, would likely fail. The reason is that the state's legislative power conclusively encompasses the ability to create separate cities, towns, and districts. The classic case establishing the broad power of the legislature to do virtually anything it wants in the area of district creation is the 1907 case \textit{Hunter v. City of Pittsburgh},\textsuperscript{174} usually cited for the proposition that “[t]he number, nature, and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.”\textsuperscript{175} In New York, the presumptively valid legislative power has been used to justify broad impositions on the rights of voteless citizens. In \textit{City of New York v. State of New York},\textsuperscript{176} the New York Court of Appeals held that the passage of a law by the New York State legislature allowing the likely secession of Staten Island from New York City did not amount to “State interference in New York City property, affairs or government,”\textsuperscript{177} and so did not require a home rule message. As a result, New York City voters were deprived of a voice in the potential deannexation of one of their boroughs despite the significant effects this might cause. If the legislature can enable the secession of Staten Island, the creation even of a vaguely separate BID is well within its power.\textsuperscript{178}

The plenary power of the legislature to create special districts seems immune from the argument that the affected residents deserve some vote in the process. Federal courts have been unreceptive to the claim that the impact of the creation of a district should give affected residents some voice in deciding

\begin{footnotesize}
\begin{enumerate}
\item[173.] N.Y. GEN. MUN. LAW § 980-d(c).
\item[174.] 207 U.S. 161 (1907).
\item[175.] Id. at 178.
\item[177.] Id. at 120.
\item[178.] One way to distinguish the two situations, however, is that the creation of a BID involves delegation of governmental power to a private entity, which recommends greater caution and scrutiny. New York Community Board 5 member Nicholas Fish points out: “There is a principled issue of transferring control of pure public space to private entities, . . . This whole BID movement represents experiments in privatization. They raise pretty fundamental policy questions which people ought to ponder carefully.” \textit{Quoted in Tom Gallagher, Trespasser on Main St. (You!),} NATION, Dec. 18, 1995, at 787, 790.
\end{enumerate}
\end{footnotesize}
Restraining the Power of Business Improvement Districts

whether such a district should be created. *Moorman v. Wood,*\(^{179}\) for example, involved a Kentucky annexation statute, under which an annexation could proceed if a majority in the annexing city as well as a majority in the portion of the unincorporated territory to be annexed approved the proposal. Voters in the unincorporated territory that was not to be annexed sued, claiming that the loss of a part of their territory to a nearby city would clearly affect them. The court took note of several law review articles which point out that "it is impractical, if not impossible, to find some manner in which everyone who has a substantial stake in the outcome of an election, residents or non-residents alike, may be permitted to vote"\(^{180}\) and upheld the annexation statute.\(^{181}\) The problem of effects might be solved if those people negatively affected by BIDs simply registered their dissatisfaction in their votes for City Council or State Legislature.\(^{182}\) As Justice White wrote in the majority opinion to the companion case to *Salyer:* "The statute authorizing the establishment of improvement districts was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented."\(^{183}\) The fact that a statute was enacted by a popularly elected legislature cannot make it presumptively constitutional. Courts have indicated extreme unwillingness, however, to analyze critically the creation of special districts.

Finally, it should be noted in passing that another source of challenge to the operation of BIDs is that an unconstitutional delegation of legislative power has taken place. There are some very rare cases in which judicial review has rebuked legislative authority to create a special district.\(^{184}\) There are also cases in which the state constitution bars the legislature from delegating certain

---

180. Id. at 476 (citing Note, The Right to Vote in Municipal Annexations, 88 HARV. L. REV. 1571, 1609 (1975), and Note, Annexation Elections and the Right to Vote, 20 UCLA L. REV. 1093 (1973)).
181. 504 F. Supp. at 471. A virtually identical statute to the Kentucky law at issue in *Wood* was sustained against an equal protection challenge in *St. Louis County v. City of Town and Country,* 590 F. Supp. 731 (E.D. Mo. 1984), and *Adams v. City of Colorado Springs,* 308 F. Supp. 1397 (D. Colo. 1970) (allowing annexation when landowners of more than 50% of territory to be annexed voted for annexation). The analysis in *Adams,* however, concentrated more on a contiguity requirement than the property ownership requirement.
182. Alternatively, preexisting state constitutional provisions may enable affected voters to challenge secession or annexation. In *Lockport v. Citizens for Community Action,* 430 U.S. 259 (1977), the United States Supreme Court upheld Article IX § 1(h)(1) of the New York State Constitution, which required that any change in the distribution of powers between cities and the rest of a county be approved by majorities both within and outside the borders of the cities so benefitted, even if this meant that the vote of a county minority would outweigh the vote of an urban majority. See 430 U.S. at 271.
183. *Associated Enters. v. Toltec Watershed Improvement Dist.,* 410 U.S. 743, 744 (1973). If this is the case, however, it is far from clear how any limit may be placed on the power of the legislature.
184. *State v. Town of Lake Placid,* 147 So. 468 (Fla. 1933), for example, annulled a legislative establishment of a town because the court felt the act had created a resort village rather than recognized an already existing entity: "the scheme was one to build an attractive pleasure and health resort, not for persons already living within the area, but for persons who might be drawn thither by the alluring prospects of play grounds and elegant clubs . . . . but that is for private industry and not for legislation under the guise of establishing municipalities." Id. at 472.
powers, such as taxation. In general, however, "[t]he frequent attempts to vitiate legislation aimed at solving metropolitan area problems, by claiming an unconstitutional delegation has taken place, have met with notable lack of success." Challenging the actual assessment, moreover, runs up against the principle of legislative supremacy. As articulated by Justice Holmes: "The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law . . . ." In sum, giving residents of areas affected by BIDs some sort of vote may be good policy, but a choice that rests within the political discretion of the legislature.

D. Do BIDs Require More Accountability?

A final weakness of the entities established by New York's BID law is the lack of oversight powers the statute vests in local government as well as in district residents. This flaw is a common problem with special districts; one authority writing in the 1960s commented that, "[o]ne serious argument against [special districts] is the inability of the public to exert adequate control over them." This lack of accountability creates a number of problems. Apart from the inherent difficulty of coordinating services, usually a more significant problem for multijurisdictional districts, the absence of oversight allows for BIDs to assume even greater authority than initially intended and leaves open the possibility that conflicts of interest may go unmonitored. As a subsequent section will demonstrate, city officials have implemented more thorough oversight provisions only after harm has been done.

Perhaps the reason why the lack of an ongoing government role in the affairs of a BID is so pronounced is because the difficulty in getting a BID up

185. See supra note 66.
187. Louisville & Nashville R.R. Co. v. Barber Asphalt Co., 197 U.S. 430, 433 (1905); see also Alan H. Nichols, Comment, How Not to Contest Special Assessments in California, or You Can't Beat City Hall, 17 STAN. L. REV. 247 (1965) (outlining possible challenges to special assessments).
188. BOLLENS, supra note 18, at 252. This, however, may be partially a result of the fact that "[c]itizens have too little interest and consequently too little participation in the affairs of most districts." Id. at 253.
189. See supra Section I.C.
190. As "one long-time observer" of private government has explained, these entities "move into vacuums . . . . They get into one issue and they've got a professional here and a technician there. And then they'll give you an opinion on what you're ordering for lunch. And before you know it, they've named two of your children. They eat up power, like the science fiction movies. They eat living things, derive power from what they've ingested, and develop an independent power base." GARREAU, supra note 18, at 195; see also infra note 252.
191. See infra Section IV.D.
Restraining the Power of Business Improvement Districts

and running is so intense. The process requires the approval of the city planning commission, the community boards in which the district is located, the board and president of the borough in which the district is located, the city council, and the state comptroller. However, the ability of objectors to the district to prevent its formation is sharply circumscribed. First, to prevent the formation of a district, either fifty-one percent of the owners of property in the district or the owners of fifty-one percent of the property in the district must file an objection with the city clerk. Hence the burden is on objectors to the district to come forward and register their dissent. Second, judicial review of district formation is limited to thirty days after its establishment. While those relying on the district certainly have a right to know when the district is conclusively formed, limiting the period of review to thirty days is a convenient way to limit disagreement.

Once the BID is actually established, the degree of oversight by politically accountable bodies is relatively low. The mayor, comptroller, president of the borough in which the BID is located, and council member representing the district in which the BID is located each appoint a representative to sit on the Board of Directors. As noted above, however, the owners of property within the district are guaranteed majority representation on the Board. The BID is hardly accountable to district residents, for the residents are a permanent minority. There is no ongoing review of BID activities. The statute does not require any yearly reports or statements of expenditures from the BID; no approval is required for specific proposed projects or improvements; a recent New York City Council report, relying on a survey of district residents and tenants, found that few had any idea how their money was being spent. Furthermore, the BID is granted authority to operate in perpetuity. The BID may be dissolved by vote of the City Council or upon petition of either fifty-one percent of the owners of property in the district or the owners of fifty-one percent of the property in the district, but only if it has no outstanding indebtedness. However, there are no designated times at which the City Council or any other responsible political body must examine the

192. At least one commentator has noticed this contrast: "While a prospective group must run the gauntlet of city review boards on the road to BID-dom, the public has little recourse after the BID is formed." Wolfson, supra note 169, at 21; see also CITIES WITHIN CITIES, supra note 75, at iv-v.
193. See N.Y. GEN. MUN. LAW § 980-d(c) (McKinney Supp. 1996).
194. See id. at § 980-e-f.
195. See id. at § 980-g.
196. See id. at § 980-e(b).
197. See CITIES WITHIN CITIES, supra note 75, at 18-19.
198. See N.Y. GEN. MUN. LAW § 980-h(c).
199. See id. at § 980-m.
200. The City Council must first, however, vest the BID with the power to effect broad categories of improvements. See id. at § 980-c.
201. See CITIES WITHIN CITIES, supra note 75, at 60-62.
202. See N.Y. GEN. MUN. LAW § 980-n.
question of whether to renew the BID’s authority to operate. The presumption is that the BID simply continues to exist; the danger is that it takes on a life of its own.203

Although part of the charm of Business Improvement Districts is that they circumvent government red tape, this red tape often serves a useful purpose by promoting public accountability. The absence of serious public scrutiny increases the potential for conflicts of interest to arise. If BIDs really can be run as personal fiefdoms of rich and powerful property owners, their claim to assist urban renewal is tenuous at best. One problem with the Chicago park districts discussed earlier is that they became “political prizes subject to partisan manipulation.”204 As the New York statute includes no provision for oversight to reduce and eliminate conflicts of interest, BIDs can easily turn into massive “public” improvement projects that benefit certain private businesses.205

In sum, there are four distinct problems with the New York BID statute. It creates an undemocratic structure, particularly in favoring property owners over all other classes of voters represented on its Board of Directors; the § 501(c)(3) nonprofit status of the BID seems highly questionable in view of the pecuniary goals it serves; affected citizens are afforded no voice in the process creating BIDs; and meaningful accountability is absent. Of course, the problems made clear from a close reading of the statute may not be the problems BIDs create on a practical level. Hence the next section will take the Grand Central Partnership as a case study to illustrate how these fears are confirmed.

III. A CASE STUDY IN SUCCESSES AND FAILURES: THE GRAND CENTRAL PARTNERSHIP

A. Successes

As a major gateway to one of the world’s leading cities, Grand Central Station would seem a natural magnet for investment. However, one realtor commented in 1988 that the Grand Central Station area “lacks what we call classy amenities.”206 While part of the problem certainly was the low rental

---

203. As a BID may not be dissolved if it has any outstanding debt on its bonds, BID directors and city officials could foreclose dissolution by not repaying debt or issuing more bonds. See id. at § 980-n(a).

204. BOLLENS, supra note 18, at 136.

205. The possibility for conflict of interest suggests that there may be inurement to the benefit of district operators, prohibited by I.R.C. § 501(c)(3). See supra note 119, and infra Subsection III.B.3.

Restraining the Power of Business Improvement Districts

values for office space, the more obvious problems for the neighborhood were ground level. Simply put, the Grand Central area was filthy and unsafe.

Seven years later, the area is certainly cleaner and, perhaps as a result, safer. Street cleaners now patrol the area. The Grand Central Partnership (GCP) recently leased the dark and dirty space beneath the Park Avenue ramp over Grand Central Station from the city and plans to set up a park and restaurant in the space; instead, an improvement modeled on the Bryant Park restoration project. One benefit, increasing both the cleanliness and safety of the area, is street lighting; the Partnership installed 549 lampposts as part of a $38 million capital improvement project. There is evidence that these efforts are paying off: crime has been reduced by 50% in the GCP area. Purse snatching went down by 38% in the adjoining Times Square BID. Three-card monte, a trusty barometer of lawlessness, also went down by 70% from June to August 1993 in the GCP area. The GCP has brought pedestrian malls, taxi stands to help unsuspecting tourists, and a war on graffiti, all for an assessment of 12.4 cents per foot in 1993. The GCP's homelessness outreach program was also in full swing by the early 1990s. Outreach workers, many of them formerly homeless, would approach street people and persuade them to take advantage of the food and social services at the St. Agnes Drop-In Center on East 44th Street. One GCP official estimated that by late 1993, over 150 formerly homeless individuals had passed through the program and on to full-time jobs.

By attacking the problems of crime and grime, BIDs such as the GCP seemed poised to reverse the flight of commercial capital from urban areas.

208. See Martin, supra note 76, at B3.
210. See id. and notes 1-5 and accompanying text.
211. See id.
212. See Weiss, supra note 3, at 20.
213. Id.
214. See Oser, supra note 70, at 8. Measuring whether a decrease in crime has actually occurred is virtually impossible as the areas around the GCP are covered by other BIDs; moreover, there has been a dramatic decrease in crime in New York City over the past year such that it is hard to tell whether reductions have been caused by GCP activity. See Clifford Krauss, New York City Crime Falls, But Just Why Is A Mystery, N.Y. TIMES, Jan. 1, 1995, at 1.
216. See Oser, supra note 70, at 8.
217. See id.
218. City Services, supra note 1.
219. As one commentator noted, "Companies that leave the city for outlying suburbs cite crime and dirty streets as two reasons for making the move. Business Improvement Districts have proven their
B. Problems

The concentrated effort to reverse the Grand Central Station area's decline came at a price. As the following discussion will demonstrate, the GCP took full advantage of the flexibility granted by New York's BID statute to create an entity threatening in size and power to the rest of the city, and even perhaps to residents of its very own district. It is far from clear, moreover, whether the GCP's overreaching was a critical element to its success. In fact, much of what the GCP has accomplished in terms of safety and cleanliness could well have been done by a less intimidating entity. Several minor scandals, and one major scandal, surrounding the GCP may also chip away at its credibility, thereby poisoning the waters for future BIDs.

1. The GCP and the Equal Protection Clause

First, the bylaws of the GCP, written in accordance with New York state statute, violate the principle of one person, one vote by providing that the class of owners of property in the district shall always have majority representation on the Board of Directors, the forty-five person body that manages the district. Specifically, the bylaws provide that the representatives of owners of real property "shall at no time constitute less than a majority of the Board," and that residential tenants of the district shall have only one representative on the Board. Property owners therefore always have a majority vote on the Board of Directors even if they do not live in the district. This means that BID President Daniel Biederman, who lives in the blue chip Westchester suburb of Scarsdale, and Chairman of the Board of Directors Peter Malkin, who lives in the equally comfortable suburb of Greenwich, Connecticut, have more power over the district than the people who actually live there. As a result of this provision, the 200 property owners in the worth by reducing street crime and removing tons of litter from sidewalks. Their capital programs are rebuilding our sidewalks and relighting our streets." North, supra note 5, at 19. This account is not entirely accurate. A survey of all New York City BID residents and tenants found that roughly one-third believed that business had not improved. See CITIES WITHIN CITIES, supra note 75, at 83. The same survey found that about half of BID residents and tenants were dissatisfied with their investment. See id. at 75-76.

220. In November 1995, two apartment owners in a building within the district filed suit against the Board of Directors of the GCP alleging that this system of representation violated the principle of one person, one vote. See Kessler et al. v. Grand Central District Management Ass'n, 95 Civ. 10029 (SAS) (S.D.N.Y. filed Nov. 25, 1995); Thomas J. Lueck, Suit by Apartment Owners Challenges Business District, N.Y. TIMES, Nov. 29, 1995, at B4.

221. Bylaws of the Grand Central Partnership, Art. II, § 1 (copy on file with author) [hereinafter Bylaws].


223. See Wolfson, supra note 169, at 15.

Restraining the Power of Business Improvement Districts

Grand Central Partnership have twenty-seven seats on the Board while the 920 residential tenants have only one.\(^{225}\) These bylaws set up a system in which voting power is directly proportional to wealth and status, an arrangement closer to the prerevolutionary Estates General of France\(^{226}\) than to accepted forms of American democracy.\(^{227}\)

Whether the GCP bylaws run afoul of the principle of one person, one vote depends on whether New York BIDs can claim the exemption from Equal Protection scrutiny established by \textit{Salyer}. It seems, however, that the functions of New York BIDs are not sufficiently specialized to claim this exemption. Far from confining its efforts to one specific purpose, the GCP performs the following activities, according to its District Plan: “1. security; 2. sanitation; 3. tourist information; 4. social services for homeless persons; 5. special maintenance and repair; 6. public events; 7. retail improvements.”\(^{228}\) The GCP District Plan additionally commits funds to streetscape and capital improvements.\(^{229}\) Performance of these many functions, any of which taken alone would constitute the sole task of many special assessment districts,\(^{230}\) confer a great deal of power upon the GCP. More importantly, the broad and far-reaching effects upon everyone in the district suggest that there is simply no clear basis on which votes may be weighted where district services are so broad in nature and effect.

The nature of the functions performed by BIDs, moreover, are governmental in nature. The range of “traditional government functions” has been defined to include “fire prevention, police protection, sanitation, public health, and parks and recreation. . . . [I]t is functions such as these which governments are created to provide.”\(^{231}\) Some commentators maintain that BIDs or similar

\(^{225}\) See Lueck, \textit{supra} note 220.

\(^{226}\) As one commentator describes these governing processes, “This one-dollar, one-vote democracy harks back to the earliest days of the Colonies, when the vote was reserved for white male owners of property because they were viewed as having the biggest stake in how the society was run.” \textsc{Garreau, \textit{supra} note 18, at 200.}

\(^{227}\) As the Supreme Court emphasized in \textit{Harper v. Virginia Board of Elections}, “[A] state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard. Voter qualifications have no relation to wealth . . . .” 383 U.S. 663, 666 (1966). Applying this test in \textit{Burrey v. Embarcadero Municipal Improvement District}, 488 P.2d 395 (Cal. 1971), which required a municipal improvement district to conform to the principle of one person, one vote, the California Supreme Court agreed: “It should also be pointed out that the inequality of voting strength in this case, as compared to district apportionment cases, is all the more questionable for being based directly upon the land-wealth of the voter.” \textit{Id.} at 401. Note, however, that the municipal improvement district in \textit{Burrey}, also vested with powers quite similar to that of New York BIDs, was the sole governing authority in its area, \textit{id.} at 399, something not true of New York BIDs.

\(^{228}\) \textsc{Grand Central Partnership, Amended District Plan for 1994, at 9 (copy on file with author) [hereinafter GCP Plan]. These functions are typical of New York BIDs. See Cities Within Cities, \textit{supra} note 75, at chart following 77.}

\(^{229}\) See GCP Plan, \textit{supra} note 228, at 13-14.

\(^{230}\) See \textit{supra} note 96.

entities are "shadow governments"; others declare BIDs to be "private governments." These appellations are more than useful turns of phrase: they accurately capture the role served by BIDs as well as the degree of power they enjoy. Hence New York BIDs cannot claim immunity from the principle of one person, one vote, as they "exercise general governmental powers," and "perform important governmental functions" which affect all residents of the district. The assessment on owners of property is collected in precisely the same way as ordinary taxes, which further underscores the parallels between the quasi-government of the BID and other forms of local government.

Privileging the votes of owners of property, therefore, seems geared largely to protecting the interests of this class over all others. This inequitable arrangement is quite common among these entities. When the types of services are narrow and limited, such exclusion may be acceptable, as the Court indicated in Salyer. However, a far different situation exists when BIDs make decisions that affect large numbers of people in many ways both within and outside the district. The difference between these districts and those in Salyer indicates that residents in the district must enjoy equal voting rights. The unequal voting arrangement is particularly troublesome as residents of the district are assessed on the same basis as owners of industrial or commercial properties.

This concern for the rights of residential tenants stems not from an abstract theoretical commitment to the Fourteenth Amendment but from a concern for accountability. Even if the City of New York is able to provide oversight for BID activities, it is equally important that members of the district have some control over the entity that operates on their behalf. The recent City Council survey of BID residents and members found that they were generally left in the dark due to poor outreach by BID management. Respondents had doubts

---

232. GARREAU, supra note 18, at 186-87.
234. Hadley, 397 U.S. at 53-54. Performance of governmental functions may suffice to turn a putatively private entity into a state actor, thereby requiring adherence to the Fourteenth Amendment. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991) (holding private party's use of peremptory challenges to exclude black jurors would constitute impermissible state action).
235. N.Y. GEN. MUN. LAW § 980-j(b) (McKinney Supp. 1996) provides that the City of New York levies and collects this assessment as part of its general taxation function, then passes these monies back to the GCP. The District Plan confirms this procedure. See GCP PLAN, supra note 228, at 15-16.
236. See Pack, supra note 27, at 20; Houstoun, supra note 14, at 14 fig. 2.
238. See N.Y. GEN. MUN. LAW § 980-j(a) (McKinney Supp. 1996). This section provides that: "The expense and cost apportioned to benefited real property in accordance with the plan shall be a charge upon each benefited parcel of real property within the district." The District Plan also specifies the means of assessment. See GCP PLAN, supra note 228, at 16. Note that not-for-profit and public purpose buildings are exempt from taxation, which explains why Grand Central Station itself is not taxed.
239. See CITIES WITHIN CITIES, supra note 75, at vii, 23.
Restraining the Power of Business Improvement Districts

as to whether their investment in the BID was paying off, and noted that the absence of any complaint process at any BID made it difficult for them to register their concerns. BID apologists insist that BIDs draw enough public scrutiny because they exercise power over large and important sections of urban areas, but the extent of this power argues for more systems of control rather than fewer. As a disgruntled resident of the Center City Business District in Philadelphia, one of the nation's most successful BIDs, puts it: "I never elected [the BID's directors] to anything... and I can't vote them out. That's a fine situation to have in the birthplace of democracy." 242

2. The GCP as a Nonprofit Entity

The privileging of property owners to the exclusion of other affected classes of district residents also speaks volumes about the appropriateness of the GCP's nonprofit status. In general, "[f]ew states allow nonprofit corporations to administer districts," and the GCP is a good example of why states should so refuse. First, the undemocratic system of voting is at odds with important principles of New York nonprofit corporation law. Second, the dominance of property owners, and the procedures they have set into place, suggest that the BID is largely a profit-making endeavor. The Grand Central Partnership's performance of the abovementioned functions is intended for "the promotion and enhancement of the District," which presumably increases the profit to each property owner. As such, BIDs have more commonly inspired battles for cash rather than community participation to improve depressed areas. Citing a war between factions of property owners over control of one district, Robert Richards, executive director of the Chamber of Commerce of Jamaica, Queens, complains: "Instead of cooperation, the BID's are attracting greed." The GCP is also hardly nonprofit material in employing nonunionized workers and giving substandard pay; other BIDs have contracted out to firms that supply undocumented immigrants.

One high-profile activity of the GCP is especially indicative of its attempts to enrich its own members under the pretense of improving city life. The GCP

240. See id. at 26, 75-76.
241. See Andrew M. Manshel, Business Improvement District Accountability, CITYLAW, Dec. 1995, at 102, 105. Many of the oversight provisions Manshel mentions, moreover, were adopted only after the GCP embroiled itself in scandal. See infra Subsection III.B.4.
244. See supra Section II.B.
245. GCP PLAN, supra note 228, at 9.
246. Lueck, supra note 9, at 1; see also CITIES WITHIN CITIES, supra note 75, at 33-40 (describing conflict of interest problems in Jamaica BID).
247. See David Henry, As City Cuts Services, Firms Tax Themselves to Keep Streets Clean and Safe: It Works, but is it Good Public Policy?, NEWSDAY, Mar. 23, 1992, at 27.
248. See CITIES WITHIN CITIES, supra note 75, at 57-58.
Yale Law & Policy Review
Vol. 15:283, 1996

has recently sponsored tougher city regulations against book vendors within its
district, on the grounds that “[r]etailers have complained for many years
that street peddlers, who don’t have the same overhead costs, sell for
less.” Part of the argument, expressed by Bruce Cohen, a spokesman for
the GCP and the 34th Street Partnership, was as follows: “I happen to love
vendors. But there are places for them to be and places where they should
not be.” In other words, “not in my backyard.” The GCP has also called
for increased enforcement of a law that would push out of the area sidewalk
food vendors, purveyors of hot dogs, gyros, bagels, and knishes. GCP
President Biederman justified the move by declaring that such lawlessness was
“very much of a piece with truancy and squeegee enforcement.” More
likely is that, like book vendors, food carts compete with district retailers’ own
ability to turn a profit. Why the burden of competition should be placed onto
neighboring areas, which can likely afford it less, is far from clear.

The nonprofit status of the GCP is also vitiated by its violation of the
nondistribution constraint on nonprofit activity. If “the very essence of a
nonprofit corporation is its commitment not to distribute profits to controlling
persons,” there are real problems with current management procedures.
The President of the GCP, Daniel Biederman, earns a salary of $315,000 for
operating three BIDs at once, which is more than what the mayor, any
borough president, city council representative, or community board representa-
tive makes. Furthermore, an outside audit pointedly criticized the GCP’s
expenditure of $1.3 million to install floodlights on a building owned by Peter
Malkin, Chairman of the Board of Directors. More money was spent on
Malkin’s building than on any other. These are not isolated problems.
As the aim of the GCP is to increase the district’s opportunities for profit-
making, and those controlling the GCP are the major profit-makers within the
district, it seems impossible not to violate the nondistribution constraint. This
in turn suggests that nonprofit status is inappropriate for BIDs. To operate
under the profit motive of a BID while granting it nonprofit status strains
credibility, and simply amounts to a massive tax subsidy to already wealthy

249. See Judith Evans, Street Vendors Will Have to Book, NEWSDAY, June 24, 1993, at 41.
250. Id.
251. Judith Evans, It’s A Living, Barely, Say Peddlers on City Streets, NEWSDAY, Apr. 14, 1993,
at 37.
252. See Douglas Martin, City Begins Enforcement of Food Cart Restrictions, N.Y. TIMES, Apr.
21, 1994, at B3. This crusade seems to vindicate the concern expressed supra note 190 (“And then
they’ll give you an opinion on what you’re ordering for lunch.”).
253. Id.
254. Hansmann, supra note 119, at 511.
255. See Lueck, supra note 12.
257. See Lueck, supra note 12.
258. Excessive salaries is a problem for many BIDs. See CITIES WITHIN CITIES, supra note 75, at
63-64.
Restraining the Power of Business Improvement Districts

areas. When so many other municipal needs go unmet, such areas hardly deserve top priority.

3. The Impact of the GCP on the City

While it has been argued that "a successful downtown produces economic benefits throughout the city," the harms such districts cause are all too evident. Business Improvement Districts, especially successful ones, may simply push problems of crime and grime into adjacent neighborhoods, may reduce the district's willingness to participate in and support local government; and attract more than its share of investment and funds, setting its interests at odds with those of the city at large. The relative novelty of BIDs renders many of these impact assessments somewhat premature; however, these trends are already emerging, both in New York City and other parts of the country.

The increase in cleanliness and safety in the area served by the GCP is clear; less clear is whether the district may have simply moved these problems elsewhere, to less wealthy districts less able to cope with these problems. One study of BIDs points out that "the declining crime rates claimed by many BIDs may simply move crime across the district border." The GCP's success has also shifted other social problems to neighboring areas. One member of a community board adjacent to the GCP complained: "What we're concerned about is moving homeless people from place to place, based on a community group's ability to pay." In other instances, such as its war on food cart vendors, the GCP has pursued a policy of spillover, simultaneously asserting its right to be free of certain burdens and its right to lay these burdens on other areas.

A second potentially negative impact on the city stems from the district's self-contained package of services financed by a special assessment. Although there has not yet been extensive study on the issue, most analysts believe that the additional assessments placed on taxpayers within special districts will decrease their tolerance for general tax increases. Guided by this intuition, New York City community boards that were traditionally responsible for many of the local government functions now performed by BIDs have called for limitations on the power of BIDs, fearing that "property owners who opt in to quasi-governments opt out of the real one." Social critic Jonathan Kozol

259. Houstoun, supra note 14, at 18.
261. Sylvia Friedman, head of Community Board 6's committee for homeless and homeless services, quoted in Marvine Howe, Homeless Program Suspended, N.Y. TIMES, Mar. 6, 1994, § 13, at 6.
262. See Pack, supra note 27, at 20 ("Still another cost to others will arise if the BID increases the opposition of downtown businesses to general tax increases.").
has persuasively linked the opting out of wealthier areas with the increased disempowerment of poorer ones:

The mayor insists that “all the people of the city” will be shouldering the human costs of his decisions; but this is obviously not so. The costs of cuts in sanitation, for example, are incurred and felt almost immediately in the South Bronx. Their consequences are significantly diluted in those neighborhoods where sanitation, like so many other basic services, is being purchased more and more through private means by local business and homeowners’ groups, which have been granted semi-governmental taxing powers to raise money locally and spend it locally, another stage in the secession of the fortunate from common areas of shared democracy.264

The fragmentation of interest created by BIDs could have deeply divisive effects on city life. The two-tier system of assessment, moreover, also seriously hampers the redistributive function of taxation:

[It may appear that ‘downtown’ is obtaining an unfairly increased share of resources. If the BID response to such a criticism is that it is paying for its new services, community groups are likely to argue that the level of public security or cleanliness in a neighborhood should not be a matter of ability to pay.265

The disparity between city districts becomes even more skewed as more and more businesses move into BIDs, leaving behind neighborhoods with weaker tax bases.266

A third negative impact of BIDs is that even as they become less willing to contribute to the municipal coffers, they also draw investment away from other sources of funding. One authority explains that because “downtown business interests are not notably powerless,” BIDs “could thus divert resources from elsewhere.”267 One example is bonds. The GCP’s $32 million bond issue268 in 1992 was the first time the city had approved a bond issue of this scale by a private group.269 Compounding the problem was first, that the bond issue counted against the city’s borrowing limit,270 and second, that the bonds were

---

264. JONATHAN KOZOL, AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION 109 (1995). Many BID residents agree that despite promises not to do so, the City has been scaling back its sanitation efforts because it believes the BIDs will pick up the slack. See CITIES WITHIN CITIES, supra note 75, at 78-79.
266. See id. at 20 (“BIDs may draw the most vigorous businesses, capable of paying the additional assessments, to the downtown from other parts of the city where services are inferior, causing a further decline in already troubled neighborhoods.”).
267. Id. at 19. At one point, the GCP was receiving a grant of half a million dollars from the Department of Housing and Urban Development. See infra note 285 and accompanying text.
268. See Martin, supra note 76.
Restraining the Power of Business Improvement Districts

rated A-1, two notches above New York City's own bonds. Thus the GCP's bond issue attracted investment away from the City the GCP is purportedly helping. In this respect, many of the weaknesses plaguing enterprise zones, particularly that "these zones simply intensify the bidding wars that already pit cities against each other to attract investment" apply equally well to BIDs. Recognizing these problems, Mayor Rudolph Giuliani has recently announced that he will attempt to sharply limit or eliminate the power of BIDs to issue their own bonds.

As previously discussed in greater length, individuals outside the district are without a voice in the process of creating a district. Yet their lives and fortunes may be adversely affected by the formation and operation of a BID. Although courts have generally been unable to develop an appropriate standard to empower these individuals, the degree of harm experienced by all city dwellers from an overweening, domineering BID such as the Grand Central Partnership calls for some legislative remedy.

4. Insufficient Oversight: The GCP's Greatest Scandal

The abovementioned problems are serious ones. However, they pale in comparison to the GCP's greatest public relations disaster, an incident which more than any other impropriety has prompted a reevaluation of BIDs. On April 14, 1995, the New York Times broke the story of the GCP's "goon squads." As the Times reported, the Partnership ran a training program for formerly homeless individuals which involved, among other things, rousting currently homeless people from sidewalks, doorways, and ATM lobbies, using violence if necessary. As one member of the "goon squads," Sylvester Williams, explained to the City Council: "We did go out and beat people up. I know for a fact that we done it, because I was part of it. And Frank Schiazza [the GCP's director for social services] told us to do it." Mr. Williams, one of the four men who told their story to the Times, recanted a week later when six unknown assailants beat his girlfriend and sent her to the hospital.
After the beating, he received an anonymous call asking him to meet with Schiazza and recant his allegations, which he did.\textsuperscript{277} Mr. Williams later reiterated his initial account to the City Council.\textsuperscript{278} Although officials of the Partnership denied they had ever told any member of their outreach program to use physical force,\textsuperscript{279} the former outreach workers said that GCP officials’ “meaning was always clear but never explicit.”\textsuperscript{280} This was not the first time that improprieties or violence had been alleged in the GCP’s treatment of homeless individuals.\textsuperscript{281} In early 1995, homeless advocates brought a suit charging that the homeless participants in the GCP’s “job training” were being paid below minimum wage: the “job training” was really more a cheap labor program for the Partnership.\textsuperscript{282} Participants were paid only $1.16 an hour.\textsuperscript{283}

The revelation that the GCP was running a “social services”/“job training” program which hired homeless people at $1.16 an hour to beat up other homeless people unleashed a storm of criticism. The United States Department of Housing and Urban Development and the Manhattan District Attorney’s Office both commenced investigations into the GCP’s homeless services program;\textsuperscript{284} eventually, HUD rescinded its grant of $547,000 to the GCP.\textsuperscript{285} Explaining the agency’s decision, Assistant Secretary of Housing and Urban Development Andrew M. Cuomo cited “substantial evidence” of harassment and brutality, then concluded: “There’s no doubt that these things happened.”\textsuperscript{286} The City’s Department of Homeless Services launched its own investigation to determine whether the $1.6 million it allocates every year to the GCP’s outreach program was properly spent.\textsuperscript{287} An internal review of the

\textsuperscript{277} See Firestone, supra note 276.
\textsuperscript{278} See id.
\textsuperscript{279} See Bruce Lambert, Charges of Rousting Homeless Are Made Up, Group Says, N.Y. TIMES, Apr. 27, 1995, at B3.
\textsuperscript{280} Lambert, supra note 279.
\textsuperscript{281} The arm of the GCP that provided social services, the Grand Central Social Service Center, has also been sued by a homeless man claiming that workers at the Center threw him through a glass window and a second homeless man claiming that workers at the Center poured boiling water over him. See CITIES WITHIN CITIES, supra note 75, at 86-90.
\textsuperscript{283} See Archie, No. 95 Civ. 0694; see also Edward R. Silverman, Abuse by BIDs Called Into Question; Critics Say More Oversight Needed, NEWSDAY, Apr. 15, 1995, at A15.
\textsuperscript{286} Id. HUD also discovered that money it had given to the GCP specifically for temporary shelter, meals, and loans for permanent housing had been instead diverted to the outreach program. See id.
\textsuperscript{287} See Dwight R. Worley, Abuse Reports Spur HUD to Rescind Grant, NEWSDAY, July 6, 1995, at A7.

322
Restraining the Power of Business Improvement Districts

GCP's social service program by homeless advocate Robert Hayes found that the program was poorly structured and managed, and lacked sufficient oversight.\textsuperscript{288} Citing the Hayes report, one major sponsor of the program, Chase Manhattan Bank, cancelled its $450,000 contract with the GCP and said it would use its own professional guard service to police ATM lobbies.\textsuperscript{289} Although GCP officials insisted that they had completely revamped the program following the Hayes report,\textsuperscript{290} homeless advocates were not so sure. Doug Lasdon, executive director of the Urban Justice Center, a homeless advocacy organization, commented: ""[I]t's curious that after all this scandal, the entire management staff has remained intact. Not one of those people responsible at the top has been changed.""\textsuperscript{291}

The "goon squads" disaster was not the only impetus to increasing municipal oversight for BIDs. Even before the story broke, GCP President Daniel Biederman was under investigation for having improperly diverted GCP resources to help create another BID in Jersey City.\textsuperscript{292} Biederman is known as the "Mayor of Midtown" since "the area under his jurisdiction is greater than many large cities."\textsuperscript{293} In an effort to restrain such power, Mayor Giuliani announced on April 22, 1995, one week after the "goon squads" story broke, that a City Hall auditing agency would conduct routine independent audits of every district's finances.\textsuperscript{294} In November of the same year, a City Council inquiry completed "the first government review of the self-taxing improvement districts that have proliferated in New York City in the last decade"\textsuperscript{295} and found a wide variety of serious problems, including vastly inflated salaries for BID executives, conflicts of interest, illegal loans, use of illegal immigrants at below minimum wage, poor financial management, and dissatisfaction among property owners in the districts.\textsuperscript{296} The report also concluded that GCP President Biederman should "not be allowed to take on any more districts."\textsuperscript{297} While the recommendations of this report are compel-
ling, it is unfortunate that more conscientious oversight did not happen before the GCP and other BIDs had caused such problems.

The efforts to provide greater oversight and accountability for BIDs are critical to restraining their power and occasional lawlessness. Most commentators recognize this much. A *New York Times* editorial emphasized that, "As BIDs have proliferated rapidly, growing pains were inevitable. More thoughtful oversight can make them better." Community Board #5 representative Nicholas Fish agrees that, "The irony is that the BID's have a splendid record of achievement in improving communities, but their internal processes are so sloppy." Reviewing the misadventures of many New York City BIDs, a report to the City Council concluded that, "it is imperative that BIDs be held to a high degree of accountability." However, rethinking BIDs cannot begin and end with merely increasing oversight; as some of the preceding sections of this Note indicate, several fundamental changes are in order. The next Part of this Note will propose some of these changes.

IV. RESTRAINING THE POWER OF BIDS: SOME PROPOSALS

Underlying the legal and political arguments developed in this Note is a straightforward normative proposition: BIDs should not be allowed to become vehicles for private profit and exclusion under the guise of reversing the decline in America's cities. If city officials and state legislatures allow BIDs to become enclaves for the wealthy who run the show within the area they govern, they will have contributed to the "secession of the successful." One commentator agrees: "A potentially high cost of BIDs may be a perception of inequity that exacerbates existing social divisions." BIDs may deepen social divisions by structuring differential levels of government services according to class and by allowing the rich to outvote poorer masses.

Speaking of similar entities in the residential context, urban sociologist Jane Jacobs apocalyptically concludes: "It's a gang way of looking at life, the institutionalization of turf. And if it goes on indefinitely, and gets intensified, it practically means the end of civilization." Rice University sociologist Stephen Klineberg concurs: "If I'm making it, it's not my responsibility to

---

298. *Improving the Improvement Districts*, supra note 292.
299. *Quoted in* Lueck, supra note 9.
300. *Cities Within Cities*, supra note 75, at 98.
301. Reich, supra note 162. Leanne Rivlin, professor of environmental psychology at the City College of New York, explained further: "BIDs represent a narrowing of the public sphere. Our society has become very exclusionary, and BIDs contribute to that trend." Wolfson, supra note 169, at 21.
303. As one BIDs opponent has pointed out, "it is not so much government itself to which the wealthy object as the idea of being governed by those poorer and more numerous than they. 'Us' being governed by 'them.' And BIDs have offered a way out of this distasteful aspect of democracy." Gallagher, supra note 178, at 787.
Restraining the Power of Business Improvement Districts

look after others. That's the direction American society seems to be going, and it's ominous. It will destroy us in the end.'

For government to aid and abet this retreat from civic responsibility is deeply problematic, "a shameless abdication by the city of its responsibility to the people of New York."306

The separatism of BIDs is doubly cynical because the initial justification for the creation of BIDs was to improve the welfare of America's cities.307 If BIDs are able to manipulate hopes for urban renewal to line their own pockets, state legislatures will have made a significant mistake in authorizing their creation. Even as many scholars advocate greater integration as the solution to urban ills,308 BIDs have the reverse effect. The experience of the Grand Central Partnership illustrates how BIDs may simply move their problems onto other areas of the city less able to handle these burdens. Shaping a role for BIDs in urban renewal first involves bringing these entities back to earth. As one newspaper editorialized: "A BID is not a nation state. It exists to fill in the gaps . . . . BIDs aren't beyond the reach of the U.S. Constitution, the state constitution or the city charter."309 Urban improvement coalitions will hardly be built around domineering organizations that forget these fundamental facts.

BIDs can make a positive difference. Many do.310 The Pitkin Avenue BID in Brooklyn has done an excellent job providing security to the district, not simply by providing security personnel, but also by tracking the crime rates across the district to determine which security measures worked and which did not.311 Many smaller districts in other parts of the city have done a tremendous job of fighting crime and grime without some of the harmful effects of the GCP.312 Personalities matter as well. Robert Walsh, head of the 14th Street-Union Square BID, has received acclaim for his skill in creating a united coalition for improving the fortunes of all citizens in his district, evincing a special commitment for helping the life prospects of children in the neighborhood.313 Finally, the Times Square BID has a successful, professionally operated social services program for homeless individuals, proving that such services are possible if done properly.314 The close examination of the Grand

---

305. Quoted in id. at 10.
307. See supra note 143.
308. See Cisneros, supra note 13, at 634-35 ("This intensified spatial, racial, and social isolation of the inner-city poor is the single most significant aspect of American urban decline in the latter half of the twentieth century. Successful urban revitalization depends on our willingness to confront it.")
309. Wake-Up Call; BIDS are not Above the Law, NEWSDAY, July 7, 1995, at A28.
310. See generally CITIES WITHIN CITIES, supra note 75, at 94-97 (lauding accomplishments of various BIDs in New York area).
311. See CITIES WITHIN CITIES, supra note 75, at 44-45.
312. See David Henry & Barbara Selvin, Other Districts Make Good on a Smaller Scale, NEWSDAY, Mar. 23, 1992, at 29 (citing example of Myrtle Avenue BID in Brooklyn).
314. See CITIES WITHIN CITIES, supra note 75, at 92-93.
Central Partnership is not intended to demonstrate what we can typically expect of BIDs, but instead what happens when they are improperly structured and administered.

Creating more democratic and socially responsible BIDs has costs. State law privileges property owners over all other classes of district members because they generally have the strongest economic interest in the success of the BID. Once representation on the BID's board of directors is equally apportioned, the BID's expenditures may become more diffuse and less efficient. To some degree, this may undermine the very point of the BID's existence: BIDs usually perform municipal services more cheaply than the city. Furthermore, imposing more oversight provisions may stifle creativity and initiative by binding the entrepreneurial spirit in red tape. Without such constraints, however, BIDs could use their quasi-governmental power for private profit rather than public good. As the following recommendations indicate, the normative choices embodied in the New York BID statute do not represent the only way BIDs can or should be designed.

There are several ways in which BIDs can be more appropriately organized. First, internal BID procedures should be guided by the principle of one person, one vote. As discussed in preceding sections, much of the case law regulating special assessment districts developed within the framework of highly limited-purpose entities such as water reclamation districts. The jurisprudence must adapt to adequately address the problems caused by more complicated entities like BIDs. It can begin by requiring these organizations to share power on a more democratic basis. Reserving a majority voice on the Board of Directors to property owners within the district only adds to the perception that BIDs are fiefdoms for the wealthy and powerful. Weighted voting not only amounts to a violation of the Equal Protection Clause; it generates poor decisions uninformed by the impact a BIDs' policies might have upon those outside a very privileged class.

315. See Lueck, supra note 9; see also GARREAU, supra note 18, at 199 (quoting Robert C. Ellickson, who argues: "There's no question that [private governments] are faster and cheaper. The incentives for prompt performance are stronger in the private sector.").
316. See, e.g., Manshel, supra note 241, at 106.
317. Manhattan Borough President Ruth Messinger has recognized this problem: "'state action triggers such constitutional protections as the Equal Protection Clause and the 'one person, one vote' standard. Clearly, the current voting and decision making procedures employed by BIDs do not meet this standard.'" Quoted in Gallagher, supra note 178, at 790.
Restraining the Power of Business Improvement Districts

Second, BIDs should not be able to incorporate as § 501(c)(3) nonprofits. Although the tax savings are great, there is no way to accommodate these entities without warping the law of nonprofits. BIDs inherently violate the nondistribution constraint essential to the proper operation of nonprofits because their very aim is to generate profit. Hopefully, greater accountability, oversight, and attention to the needs of the city as a whole may make the nonprofit designation a more appropriate one sometime in the future. For now, the emphasis on improving the profits of its members argues against treating BIDs favorably as § 501(c)(3) nonprofits.

Third, the state legislature must give a greater voice to affected citizens in determining whether a BID should be created and maintained. Such proposals have already been floated: “Both New York city and New York state politicians want to curb BIDs by curtailing the amount of debt they can take on and limiting their life to ten years.” As BIDs cannot be dissolved if they have any outstanding debt, the key to perpetual existence is in their hands. Yet BIDs need not be forced out of existence after ten years, particularly if they have not fulfilled their part in fostering urban renewal. Instead, the question of whether a BID should be allowed to continue operation after a certain period should be subject to a citywide referendum. If the public is not granted a voice in determining whether to form the BID in the first place, although this Note suggests that it should, referendums should come at shorter intervals of every five years. Placing BIDs at the mercy of public opinion is perhaps the only way to remind such entities that their very existence is intended to benefit urban welfare, not private fortunes.

Fourth, both municipal and state authorities need to increase their oversight of BID activities. The independent audits of BID finances announced by Mayor

319. Few other states specify that BIDs are nonprofit entities. See, e.g., ALA. CODE § 11-54B-20 (Michie 1994) (BID is nonprofit exempt from state taxes).

320. As well as more consistent with the stated legislative purposes for creating the BID. See supra note 143.

321. City Services, supra note 1, at 24. Many other states have automatic review provisions, lacking in the New York legislation. See, e.g., GA. CODE ANN. § 36-43-9 (1993) (district ends in five years); MISS. CODE ANN. § 21-43-131 (1995) (property owners only, not city council, may vote to reauthorize district); MONT. CODE ANN. § 7-12-1141 (1993) (district must be reauthorized every ten years); N.M. STAT. ANN. § 3-63-15 (Michie 1995) (city council must renew every five years). A recent City Council report, however, has recommended that property owners should have an election every five years to determine whether the BID should continue operation, see CITIES WITHIN CITIES, supra note 75, at 20, an imperfect solution in its failure to broaden the franchise.

322. See N.Y. GEN. MUN. LAW § 980-m(a) (McKinney Supp. 1996). This is a typical requirement. See, e.g., Ark. CODE ANN. § 14-184-130(c) (Michie 1987); CAL. STS. & HIGH. CODE § 36650 (a) (West Supp. 1996); COLO. REV. STAT. ANN. § 31-25-1225 (West Supp. 1995).

323. There are some ways around this problem: W. VA. CODE § 8-13A-15(b) (1995) provides that a BID may not issue bonds for which the repayment schedule is greater than ten years.

324. More stringent oversight provisions may do this as well. See, e.g., CAL. STS. & HIGH. CODE § 36650(a)(1) (West Supp. 1996) (BID may be dissolved upon finding of mismanagement); N.C. GEN. STAT. § 160A-541 (1994) (city may dissolve “upon finding that there is no longer a need” for district); WIS. STAT. ANN. § 66.608(5)(b) (West 1990) (city may dissolve at any time).
Giuliani are a right step in this direction. The analysis of this Note is in agreement with Giuliani's point that, "because BID's serve as a public-private partnership and receive monies levied by the public, it is perfectly appropriate that they be subjected to reviews and audits on a regular basis." The conflicts of interest and incidents of self-enrichment that have plagued the GCP were all readily preventable. The assumption of new district functions must also be more carefully policed. How expertise in dealing with crime and grime should presumptively translate into handling homeless people is unclear; the very fact that this assumption seems to have been made by the GCP should have set off alarm bells. In the area of municipal oversight, BIDs have much to learn from the experiences of special districts, which were subject to a wide degree of regulation:

Other provisions to deter misconduct include[d] the powers possessed by governors to remove directors for cause or, more rarely, to veto authority activities. Some authorities are empowered or required to hold public hearings before taking certain actions. A majority of authorities are required to submit annual reports to executive officials or state legislatures. The presence of state or locally elected officials as ex officio members of an authority's governing body may also keep authority policies in harmony with those of general governments.

Several of these provisions, particularly the last one, are already in place and simply need more vigorous enforcement. While one great advantage of BIDs is the way they avoid red tape to get things done, the experience of the GCP advises against granting too much latitude in this respect.

Fifth, legislatures and municipalities should increase aid to poorer areas to enable them to create their own districts. As one authority on BIDs comments: "We should make sure there are many of these things, including in

---

327. See Letter from Max Silverstein, Emeritus Professor, School of Social Work, University of Pennsylvania, to PHIL. INQUIRER, May 29, 1992 (on file with author) (opposing Philadelphia BID's efforts to create social service program).
328. Analysis of Authorities, supra note 33, at 1433. There are some such provisions already in effect in some states. See, e.g., DEL. CODE ANN. tit. 22, § 1507 (Supp. 1994) (annual review of district operation); N.J. STAT. ANN. § 40:56-88 (West 1992) (providing for annual audit of BID expenses); TENN. CODE ANN. § 7-84-519(d) (1992) (state legislators serve on board of directors). In some cases, political control is quite extensive. See, e.g., NEB. REV. STAT. § 19-4021 (1991) (Board all appointed by mayor); S.D. CODIFIED LAWS ANN. § 9-55-5 (same) (Michie 1995).
329. New York State Senator Manfred Ohrenstein of Manhattan also has proposed oversight legislation. See Wolfson, supra note 169, at 21.
330. Several states target underserved areas for improvement districts. See, e.g., MONT. CODE ANN. § 7-12-2101 (1993) (providing for rural improvement districts); TEX. LOC. GOV'T CODE ANN. § 375.003(4) and § 375.222 (West Supp. 1996) (special benefits for minority-owned businesses).
Restraining the Power of Business Improvement Districts

poor business districts, which could be able to do the same things if they had some help from the city.”331 Currently, the New York City Department of Business Services discourages districts from forming where the tax base is weak,332 in other words, where the district is most needed. Deputy Mayor John Dyson has explained that “his goal is to see Manhattan ... blanketed with such districts . . . at least south of 96th Street.”333 96th Street, as Jonathan Kozol points out, “is the point at which the Harlem ghetto starts on the East Side” and wealthy Manhattan ends.334 In many ways, the solution is simply to supplement enterprise zone legislation to include business-enhancing services. Current enterprise zone legislation would give priority to community policing, community development banks, drug prevention, worker training, housing, and child care.335 Additional enterprise zone services could include security, sanitation, business improvement, graffiti removal, and streetscape improvements: exactly the services BIDs presently provide.

Balancing these considerations will not be easy. As the New York Times, itself a major participant in the Times Square BID, explains: “The challenge is to hold B.I.D.'s to the highest performance and ethical standards without smothering an innovative movement that contributes to the city's livability and economic vitality.”336 It is hoped that the proposals advanced by this Note may meet this challenge. Otherwise, we are faced with the false alternatives of granting carte blanche to profit-hungry behemoths or tossing aside yet another failed initiative to reverse urban decay.

V. CONCLUSION

Special districts helped build our cities. It would be a sad historical irony if their descendants, Business Improvement Districts, tore our urban areas apart. Concerted efforts to increase oversight, compel BIDs to adhere to democratic principles, and link their success to the city’s welfare are prerequisites for the survival of BIDs. BIDs should not be abolished simply because some entities, such as the Grand Central Partnership, have become vehicles for private profit and brutality rather than civic virtue. They have too much potential to offer. Barbara Wolff, Assistant Commissioner of the New York City Department of Business Services, frequently describes meeting a GCP snow shoveler working furiously during a blizzard. When asked why he was bothering to assume such a difficult, if not Sisyphian, burden, he told her,

331. Krohe, supra note 53, at *7 (quoting Janet Rothenberg Park).
332. STARTING AND MANAGING, supra note 75, at 2.
333. KOZOL, supra note 264, at 109.
334. Id.
335. See Aprill, supra note 166, at 1363.
336. Improving the Improvement Districts, supra note 292.
"'Well, this is my job . . . . I'm making New York City a clean place.'"\textsuperscript{337}

If the United States is to make a serious attempt at resolving its urban crisis, we cannot afford to lose this spirit. On the other hand, if BIDs are allowed to be too powerful, profit-hungry, and high-handed, we cannot afford the risks they pose to America's cities.

\textsuperscript{337} Quoted in Martin, \textit{supra} note 76, at B3.