

# BUSINESS IMPROVEMENT DISTRICTS

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## INTRODUCTION

The national trends of “decentralization” and “privatization” present a challenge to local governments.<sup>1</sup> Federal and state governments are transferring ever larger numbers of public tasks to local officials. At the same time, local governments, like all levels of government, are turning over many functions to the private sector. The current challenge for local government law is to ensure that public interests survive as service provision moves from national and state to local and from local to private institutions.

This challenge of preserving public interests while increasing reliance on the local private sector is often met by the creation of Business Improvement Districts (“BIDs”). Authorized by state statutes,<sup>2</sup> BIDs are special districts where property owners voluntarily

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1. See, e.g., *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1103 (7th Cir. 1995) (“There is a nationwide movement toward the decentralization and privatization of governmental functions . . .”).

2. The following states have enacted statutes authorizing “business improvement districts”: Alabama, ALA. CODE §§ 11-54B-1 to 11-54B-20 (1994); California, CAL. STS. & HIGH. CODE §§ 36601-36651 (West Supp. 1996); Colorado, COLO. REV. STAT. ANN. §§ 31-25-1201 to 31-25-1228 (West 1990); Delaware, DEL. CODE ANN. tit. 22, §§ 1501-1507 (Supp. 1996); Georgia, GA. CODE ANN. §§ 36-43-1 to 36-43-9 (1993); Idaho, IDAHO CODE §§ 50-1701 to 50-1771 (1994); Kansas, KAN. STAT. ANN. §§ 12-1781 to 12-1793 (1991); Massachusetts,

tax themselves to fund an improvement association.<sup>3</sup> Cities usually collect the mandatory taxes and city officials are always represented on the associations, as are area residents. Associations make public area improvements, such as pedestrian walkways, and provide other services, such as extra sanitation.

Since the 1980s, the number of BIDs has increased dramatically, and their prevalence has provoked controversy.<sup>4</sup> Some critics, most prominently Michael Sandel, complain that BIDs exacerbate interlocal inequality: "As municipal services decline in urban areas, residents and businesses in upscale districts manage to insulate themselves from the effects by assessing themselves surtaxes to provide private garbage collection, street cleaning, and police

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MASS. GEN. L. ch. 400, §§ 1-10 (West 1996); Montana, MONT. CODE ANN. §§ 7-12-1101 to 7-12-1151 (1995); Nebraska, NEB. REV. STAT. §§ 19-4015 to 19-4038 (1991); New Mexico, N.M. STAT. ANN. §§ 3-63-1 to 3-63-16 (Michie Supp. 1995); New York, N.Y. GEN. MUN. LAW §§ 980 to 980-p (Consol. Supp. 1997); North Dakota, N.D. CENT. CODE ANN. §§ 40-22.1-01 to 40-22.1-14 (Supp. 1995); Pennsylvania, PA. STAT. ANN. tit. 53, §§ 1551-1554 (1974 & Supp. 1996); South Dakota, S.D. CODIFIED LAWS ANN. §§ 9-55-1 to 9-55-21 (Supp. 1994); Tennessee, TENN. CODE ANN. §§ 7-84-101 to 7-84-530 (1992 & Supp. 1996); Utah, UTAH CODE ANN. §§ 17A-3-401 to 17A-3-414 (1991).

The following states have passed similar legislation under different names: Arizona (Municipal Improvement Districts), ARIZ. REV. STAT. ANN. §§ 48-501 to 48-691 (West 1988 & Supp. 1996); Florida (Neighborhood Improvement Districts), FLA. STAT. ANN. §§ 163.501-163.523 (West 1990); Illinois (Local Improvements), ILL. COMP. STAT. ANN. §§ 5/9-1-1 to 5/9-5-3 (West 1993 & Supp. 1996); Indiana (Economic Improvement Districts), IND. CODE ANN. §§ 36-7-22-1 to 36-7-22-21 (Michie 1989); Kentucky (Community Improvement Districts), KY. REV. STAT. ANN. §§ 107.310-107.410 (Michie 1993 & Supp. 1996); Minnesota (Sidewalk Improvement Districts), MINN. STAT. ANN. § 435.44 (West 1987); Mississippi (Local Improvement Taxing Districts), MISS. CODE ANN. §§ 21-33-501 to 21-33-525 (Supp. 1996); Missouri (Neighborhood improvement Districts), MO. ANN. STAT. §§ 67.453-67.457 (West 1996); New Jersey (Improvement Districts), N.J. STAT. ANN. § 13:17-39 (West 1991); Ohio (Special Improvement Districts), OHIO REV. CODE ANN. §§ 1710.01-1710.13 (Banks-Baldwin 1993 & Supp. 1996).

3. See, e.g., N.Y. GEN. MUN. LAW § 980 (Consol. Supp. 1997).

4. See, e.g., Bruce Lambert, *After Rapid Growth, B.I.D.'s Enter Time of Turmoil*, N.Y. TIMES, Dec. 31, 1995, at 13-6 (stating that the rapid growth of BIDs in New York City stopped abruptly in 1995 due to allegations of wrongdoing, and subsequent investigation and criticism); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1199 n.166 (1996) (reporting study published in 1994 that found 1,000 BIDs in the United States and Canada). For a description of the most recent BID, see Stephen C. Fehr, *Property Owners Commit to Revive D.C.*, WASH. POST, July 27, 1997, at A1.

protection unavailable to the city as a whole.<sup>5</sup> Others credit BIDs with the revival of urban cities such as Philadelphia and New York.<sup>6</sup>

In a technique, if not application, familiar to lawyers, this Article “interprets” BIDs. As Michael Sandel puts the point: “[O]ur practices and institutions are embodiments of theory. . . . they are themselves embodiments of ideas.”<sup>7</sup> Just as interpreting the meaning of a statutory phrase requires lawyers to make “sense not nonsense” out of relevant language, cases and background legal norms, interpreting a local institution requires an account that makes “sense” of relevant practices and norms.<sup>8</sup> In both instances, interpretation consists of identifying the “core ideas” that animate the political act and connecting those ideas to shared experiences and values.<sup>9</sup>

Interpreting BIDs will serve at least three goals. First, an understanding of BIDs should help assess proposed BID reforms and guide the creation of new districts. Second, understanding BIDs will permit a fair assessment of Sandel’s complaint that BIDs are exacerbating interlocal inequality. Third, the explanation will show how architectural theory, here New Urbanism, can contribute to understanding local government institutions.<sup>10</sup>

5. MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 331 (1996) [hereinafter *DEMOCRACY’S DISCONTENT*] (adopting Robert Reich’s view that BIDs represent the “secession” of wealthy areas from urban city).

6. See, e.g., William J. Bratton, *New Strategies for Combating Crime in New York City*, 23 *FORDHAM URB. L.J.* 781, 789 (1996) (New York’s former police commissioner crediting business improvement districts for making many of the city’s areas cleaner and safer); Maryann Haggerty & Margaret Webb Pressler, *Developers Bet Millions that Downtown D.C. Is Far From Dead*, *WASH. POST*, Mar. 26, 1996, at A1, A7 (“Credit for a noticeable turnaround in [Philadelphia] . . . goes to a new convention center and a ‘business improvement district’ . . .”).

7. *DEMOCRACY’S DISCONTENT*, *supra* note 5, at ix; see also JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* 3 (1995).

8. See MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 20, 22 (1983) (“Moral argument . . . is interpretive in character, closely resembling the work of a lawyer or judge who struggles to find meaning in a morass of conflicting laws and precedents.”). Interpretation in this sense collapses any real distinction between description and evaluation; the description is normative and the norms are derived from the description.

9. See *id.* at 20.

10. Vincent Skully argues that architecture is “one of humanity’s major strategies” to “protect human beings from nature in one way or another and to mitigate the effect upon them of nature’s immutable laws.” Vincent Skully, *The Architecture of Community*, in PETER KATZ,

This Article has five parts. Part I describes a typical BID authorization statute. The next two parts describe the three “core ideas” of the BID statute. Part II uses political theory, as articulated in Supreme Court opinions, and welfare economics to explain the form of BIDs. Part III describes New Urbanism and argues that New Urbanism also helps explain BIDs. The remainder of the Article uses the proffered BID interpretation in two ways. Part IV offers an “internal” critique of BIDs, suggesting that the three core ideas can help generate and evaluate BID reforms. Part V considers and ultimately rejects the complaint that BIDs contribute to interlocal inequality.

### I. BUSINESS IMPROVEMENT DISTRICTS: AN OVERVIEW

This Part provides an overview of a typical BID statute. A BID is operated primarily by a carefully balanced representative institution and is restricted to performing limited functions. Understanding the voting structure and permitted functions of BIDs is crucial to ascertaining their core ideas.

Under New York law, New York City’s council may establish BIDs.<sup>11</sup> New York established its first BID in 1984.<sup>12</sup> Establishing a BID requires a district plan, including a map of the district and a list of the properties within the district that will be subject to a “district charge.”<sup>13</sup> If a majority of the property owners do not protest the

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THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY 221 (1994) [hereinafter KATZ, NEW URBANISM]. More particularly, “[a]rchitecture is fundamentally a matter not of individual buildings but of the shaping of community, and that, as in Paris, Uruk, or Siena, is done by the law.” *Id.* at 229. A “Law and Architecture” movement might benefit the local government literature. See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1089-1094 (1996) (summarizing the ideas of New Urbanism).

11. N.Y. GEN. MUN. LAW § 980-f (Consol. Supp. 1997).

12. Douglas Martin, *Districts to Improve Business Proliferate*, N.Y. TIMES, Mar. 25, 1994, at B3.

13. N.Y. GEN. MUN. LAW §§ 980-a(a), (b)(8) (Consol. Supp. 1997). The city planning commission then reviews the district plan and sends copies of the plan to the city council and the area’s community board. See § 980-d(c). New York has fifty-nine “community boards [that have] advisory and consultative powers concerning budgets, land use, and service provisions.” Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 403 (1993) [hereinafter Briffault, *Who Rules?*]. If the area includes properties

creation of the district (and concomitant tax increase) and the council declares the BID in the "public interest," a BID is formed.<sup>14</sup>

In addition, in New York a "district management association" (DMA) is formed to operate the BID.<sup>15</sup> The DMA has the authority to provide for voting representation of property owners and tenants within the district.<sup>16</sup> The board of directors of the DMA is composed of representatives of owners and tenants within the district. However, more than half of the members of the board must be property owners, and commercial and residential tenants within the district must also be represented on the board.<sup>17</sup> In addition, the DMA's board must include four members from the city government.<sup>18</sup>

DMA's can only spend district charges on two types of improvements. First, the statute provides a detailed list of possible improvements to "municipally or district owned or leased property which will restore or promote business activity in the district."<sup>19</sup> The improvements include construction on existing streets, and the creation of physically aesthetic safety fixtures, landscaping and park areas, and parking facilities.<sup>20</sup> The dominant focus of this first type of improvement is to make the area more attractive to pedestrians. It authorizes constructing "pedestrian overpasses," "pedestrian malls,"

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located in more than one community district, the city planning commission will send a copy to the borough president and borough board. *See* N.Y. GEN. MUN. LAW § 980-d(c). The community boards must notify the public and may hold a hearing. *See id.* The city planning commission must then hold a hearing and submit its report and the community board's recommendation to the mayor, the affected borough president, and the city council. *Id.*

14. N.Y. GEN. MUN. LAW § 980-f(b)(1) (Consol. Supp. 1997).

15. N.Y. GEN. MUN. LAW § 980-m(a).

16. *Id.* The statute calculates voting rights based on property ownership in two ways. First, under "record ownership," anyone who owns property in the proposed district gets one vote. Second, under the "assessed valuation" approach, the vote is weighted by the city tax revenue generated by the property. *See id.* However, the total number of votes under one property owner's control must not exceed one-third of the total votes. *See id.*

17. N.Y. GEN. MUN. LAW § 980-m(b) (Consol. Supp. 1997).

18. *Id.* In a city with a population of one million or more, each of the chief executive officer of the city, the chief financial official of the city, the borough president where the district is located, and the council member of the district appoint one member to the DMA board. *See id.*

19. N.Y. GEN. MUN. LAW § 980-c(a) (Consol. Supp. 1997).

20. *Id.*

and "pedestrian shelters."<sup>21</sup> The goal is to "enhance the movement, convenience and enjoyment of the public."<sup>22</sup>

Second, the DMA has broad authority to propose expenditure on "additional services required for the enjoyment and protection of the public and the promotion and enhancement of the district."<sup>23</sup> These services might include "enhanced sanitation," marketing and advertising for businesses within the district, "decorations and lighting for seasonal and holiday purposes, and enhancing security within the district."<sup>24</sup> The DMA can also approve the private use of public land within the district.<sup>25</sup>

Along with the DMA, the city council helps operate the district. BID taxes are collected by the city along with city taxes.<sup>26</sup> The city council may also raise funds for the district by selling bonds.<sup>27</sup> The resulting debt is counted as city debt and the city must, of course, stay below its New York constitutional debt limit.<sup>28</sup> All district spending "must be [for services that are] in addition to or an enhancement of those provided by the municipality prior to the establishment of the district."<sup>29</sup>

Most BIDs across the country are similar to those in New York. New York is now the center of BID activity and at last count had thirty-four BIDs.<sup>30</sup> While a few BIDs have taxed residential property

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21. N.Y. GEN. MUN. LAW §§ 980-c(a)(5),(7), (11).

22. N.Y. GEN. MUN. LAW § 980-c(a)(11).

23. N.Y. GEN. MUN. LAW § 980-c(c).

24. *Id.*

25. N.Y. GEN. MUN. LAW § 980-m(d).

26. N.Y. GEN. MUN. LAW § 980-j(b).

27. N.Y. GEN. MUN. LAW § 980-j(c).

28. *See* N.Y. GEN. MUN. LAW § 980-k.

29. N.Y. GEN. MUN. LAW § 980-j(a).

30. According to the New York Times, on February 11, 1996 there were thirty-four BIDs in New York City. *See* Jane H. Lii, *Security and Sanitation Are Priorities in a New Business District*, N.Y. TIMES, Feb. 11, 1996, at 13-10. In December 1995, the New York Times reported that the last ten years had seen the number of New York BIDs rise from seven to thirty-three and that thirty-nine more BIDs were under consideration. *See* Michael Cooper, *Money Woes: BID in a Bind*, N.Y. TIMES, Dec. 3, 1995 at 13-14. New York has more BIDs than any other city, in part because the New York statute puts the burden on property owners to stop, rather than approve, a district. *Compare* Legislative Finding and Declaration, N.Y. GEN. MUN. LAW § 980 (Consol. Supp. 1997) ("It is the intent of the State to provide a more streamlined process of

in the business district, others have taxed businesses rather than property owners, with limited success.<sup>31</sup> BIDs have also been set up for residential and industrial areas.<sup>32</sup> Moreover, some proposed BIDs would rely on voluntary, rather than mandatory, tax assessments.<sup>33</sup> In Washington, D.C., the proposed BID law would not rely on the city government to collect BID taxes.<sup>34</sup> Some states, such as Florida, provide even more detailed suggestions for BID fund spending.<sup>35</sup>

In practice, most BIDs cover a small area of no more than a few blocks, assess minimal taxes, and provide only simple services. One journalist reports that “[i]t is at the small neighborhood level rather than in the central business district that most of the business improvement districts have been formed.”<sup>36</sup> Other BIDs are far more ambitious, covering large areas, assessing higher taxes, and issuing bonds to finance large-scale “improvements.”<sup>37</sup>

BIDs present several questions, including: Why are BIDs focused on attracting pedestrians rather than cars or businesses to the downtown area? Why are city officials and residents, who pay no increased taxes, required to have some unspecified association

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establishing and operating these districts . . . .”) with Judith Evans, *D.C. Wants to Join the Boom for BIDs: Improvement Districts’ Accomplishments Cited*, WASH. POST, Jan. 13, 1996, at E1 (stating that BIDs in Washington, D.C. require approval from 51% of property owners and their commercial tenants).

31. See Vicki Torres, *A Bid for Improvement; Business Districts Pool Resources to Draw Patrons*, L.A. TIMES, Feb. 6, 1996, at D1 (attributing demise of downtown BID to tax assessments on small business owners rather than property owners).

32. See Lii, *supra* note 30, at 13-10 (describing the 180th Street BID, the first BID in Queens and the second in New York City).

33. See *Business Improvement Fees: A Winning Idea—If Voluntary*, WASH. BUS. J., May 14, 1993.

34. *Id.* Such a provision, not part of the original proposal, is either the result of the well-know administrative problems of the D.C. government or was an effort to control the committee assignment of the bill.

35. See FLA. STAT. ANN. §§ 163.514(4),(5),(15),(16),(18), 163.517 (West 1990).

36. Alan S. Oser, *Perspectives: Business Improvement Districts; Banding Together for Local Betterment*, N.Y. TIMES, Feb. 10, 1991, at 10-5; see also Evans, *supra* note 30, at E1 (“The most important part of [BIDs] is that they organize and focus activities of businesses from neighborhood to neighborhood.”) (quoting a D.C. council member who sponsored the BID legislation).

37. See Thomas J. Lueck, *Business Districts Grow, at Price of Accountability*, N.Y. TIMES, Nov. 20, 1994, at 1-1 (describing plan for a BID in New York covering over 40 blocks to provide residential security with 350 to 500 security officers).

representation? Why are the tax increases limited to property owners and why are they mandatory? Why do property owners so often vote to increase their own taxes? To answer these and similar questions, the next two Parts try to make sense out of the BIDs statutes.

## II. DEMOCRATIC AND ECONOMIC EXPLANATIONS FOR BIDS

This Part begins the effort to identify the core values latent in BIDs by considering whether the United States Supreme Court decisions explain any distinctive features of BIDs. Part II.B argues that BIDs are best explained by the dissenting opinions in *Avery v. Midland County*.<sup>38</sup> Part II.C provides a welfare economic account of BIDs. This Part concludes that political and economic theories are useful but cannot explain all of BIDs' unique features.

### *A. The Supreme Court's Binary Local Equal Protection Doctrine*

The first place lawyers look to understand the form of local government is usually case law. Through its interpretations of the Constitution's equal protection clause, the Supreme Court has shaped the design of certain local governments. Because BIDs involve voting and have traditional government features, it is plausible that the Court's decisions account for certain core BID ideas. The Court, however, does not acknowledge, and its decisions therefore do not explain, the need for voting structures that depart from egalitarian norms.

Four years after *Reynolds v. Sims*,<sup>39</sup> in which the Court interpreted the equal protection clause to require States to comply with the one-person, one-vote rule, the Court applied the same principle to a county government.<sup>40</sup> In *Avery v. Midland County*, the vote of each

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38. 390 U.S. 474, 486, 495, 509 (1968) (Harlan, J., Fortas, J., and Stewart, J., respectively dissenting).

39. 377 U.S. 533 (1964).

40. See *Avery*, 390 U.S. 474, 485-86 ("[T]he Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.").



subdivision in part determined representation on the Midland County, Texas government. Because ninety-five percent of county residents lived in one subdivision, individuals living outside that subdivision had a larger influence over the county government than those living within.<sup>41</sup> One argument in defense of such a scheme was that the county government dealt with rural issues and thus it made sense for the more rural, less populated, subdivisions to have disproportionate influence.<sup>42</sup> The Court held that the voting structure of the county government violated the Constitution's equal protection guarantee.<sup>43</sup>

The majority opinion in *Avery* suggested that whether or not the equal protection clause applies depends on whether the local government had "general governmental powers."<sup>44</sup> Even though the statute involved in *Avery* carefully enumerated the powers of the county government, the Court found that the county government is a "general government."<sup>45</sup> However, in separate dissents, Justice Fortas argued that Midland County did not possess general powers,<sup>46</sup> while Justice Harlan predicted that such a limitation would allow all local governments to avoid the decision simply by "classify[ing] the governmental unit as other than 'general' in power and responsibility."<sup>47</sup>

A review of post-*Avery* cases suggests that, as Justice Harlan predicted, the "general" label does not sort cases with any coherence.

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41. *See id.* at 475-76.

42. *See id.* at 484.

43. 390 U.S. at 484-85. The Court elaborated:

Were the [county government] a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization's functions. That question, however, is not presented by this case . . . .  
. . . We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

*Id.*

44. *Id.* at 484-86.

45. *Id.* at 483-485.

46. *See id.* at 499 (Fortas, J., dissenting).

47. *Id.* at 492 (Harlan, J., dissenting).

For example, the Court has issued three decisions invalidating city schemes that limited voting on bond issues to property owners.<sup>48</sup> The Court, however, has also approved restricting voting to property owners on three occasions.<sup>49</sup> The Court's constitutional scrutiny of local government arrangements that weight the vote in favor of those most interested in the particular local government has foundered on the enduring need of localities to align local power with local interest.<sup>50</sup>

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48. In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), city property owners voted on whether to issue bonds to finance the city's utility system. In *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), and again in *Hill v. Stone*, 421 U.S. 289 (1975), city property owners voted on the issuance of general obligation bonds. In all three cases, the Court ruled that non-property owners must have the same voting power as property owners in the bond issuance. For example, in *Kolodziejski*, the Court found that property owners might ultimately pass the cost of taxes that funded the municipal bonds to their tenants. See 399 U.S. at 210. Therefore, the Court stated that although property owners' interests were different from those of non-property owners in the bond issuance, non-property owners were not less interested in the issuance of these bonds than were property owners. See *id.* at 212.

49. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), involved a water storage district comprising nearly 200,000 acres of sparsely populated farmland. The district fixed tolls for the use of water and assessed the costs of various water projects to property based on the benefit of the project to each property. Only land owners could vote for district directors and the land owner votes were proportional to assessed land valuations. *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973), decided the same day, involved a similar district in Wyoming. *Ball v. James*, 451 U.S. 355 (1981), involved a large water reclamation district that supplied water to an area including a major part of Phoenix and was one of the largest electricity producers in Arizona. Voting for the district's directors was limited to those who owned land within the district and voting power was weighted according to the property's size. The Court approved the voting regulations of the three water districts because of their special limited, rather than general, purposes. For example, in *Ball*, finding that the function of water reclamation district were narrow and special, see 451 U.S. at 370, the Court concluded:

[T]he voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives. Here, . . . the subscription of land which made the . . . District possible might well have never occurred had not the subscribing landowners been assured a special voice in the conduct of the District's business. Therefore, . . . the State could rationally limit the vote to landowners. Moreover, Arizona could rationally make the weight of their vote dependent upon the number of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District's water operations.

*Id.* at 371.

50. See generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 114 (1990) ("[T]he differences in local needs and

The result of the majority decision in *Avery* is a binary democratic doctrine. If the equal protection clause is applicable, all must have an equal vote and a hybrid arrangement granting everyone some, but not necessarily an equal, vote is not permissible.<sup>51</sup> If it does not apply, a hybrid arrangement is not required and some may be completely denied a vote.<sup>52</sup> As with all binary doctrines, the stark choice posed by deciding to apply the equal protection clause places a great deal of pressure on the classification criteria, a pressure the "general" distinction has not held.

Court precedent does not account for BIDs' voting structure because BIDs fall into the Court's netherland. BIDs must provide for citizen influence on both the board and the association but must also retain ultimate property owner control. If the equal protection clause applies, such an arrangement is not constitutional because, as in *Avery*, all must have an equal vote. If the equal protection clause does not apply, denying residents any vote at all is permissible. Thus, the current BID voting structure is either less or more egalitarian than the Court's equal protection teachings require. To understand the

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conflicts among local interests make the very concept of local power as a general matter, considered apart from the situations of particular local government and people, inherently ambiguous." Compare *Southern Cal. Rapid Transit Dist. v. Bolen*, 822 P.2d 875 (Cal. 1992) (en banc) (upholding a voting scheme under which only owners of commercial property located in the rapid transit district could vote on the creation of the district) with *Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885 (W.D. Wash. 1990) (invalidating a similar voting scheme because of an excessive degree of disproportionate representation).

51. See, e.g., *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969). See also *Quinn v. Millsap*, 491 U.S. 95 (1989) (land-ownership requirement for appointment to the board that considers local governmental reorganization violates the Equal Protection Clause); *Board of Estimate of New York v. Morris*, 489 U.S. 688 (1989) (holding that some city-wide representation and some non-equal participation is insufficient to survive equal protection review); *Hill v. Stone*, 421 U.S. 289 (1975) (limiting franchise in city bond elections to "persons who have made available for taxation some real, mixed, or personal property" violates equal protection clause); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (Arizona statutes excluding non-property owners from voting in bond issuance violated equal protection).

52. Briffault, relying on *Ball v. James*, 451 U.S. 355 (1981), argues that the law preserves for "states and localities the option of using special assessment districts controlled by developers or commercial landowners to finance costly capital improvements." Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 COLUM. L. REV. 346, 383 (1990) [hereinafter Briffault, *Localism*].

democratic conception latent in BIDs we must look elsewhere.

### *B. BIDs Conception of Local Political Equality*

Although the Court's local voting rights cases do not explain the BID voting scheme, the arguments made but rejected in *Avery* are helpful. The dissenting opinions of Justices Harlan and Fortas in *Avery*, and a later concurrence by Justice Powell, explain the BID conception of local political equality.

Justice Harlan's dissent in *Avery* stressed that "local governments, unlike state governments, are often specialized in function."<sup>53</sup> This specialization means that different residents will have different or unequal interest in a particular form of government, and that a particular local government ought to be able to be structured to accommodate such differences. Harlan suggested that "equality" was achieved in local government by unequal voting structures that matched unequal interests.<sup>54</sup>

The "equality" principle of BIDs permits giving those with unequal interest in a government structure unequal power. Because property owners are the most affected by the BIDs (they pay for it and profit most from it), they are given majority control. Property owners decide whether to allow a BID to form and can disband a BID. The BID statute thus codifies Justice Harlan's "unequal interest, unequal power" notion of local political "equality."

Unlike Justice Harlan, Justice Fortas argued in his *Avery* dissent that the Court did have a role in monitoring the "unequal interest, unequal power" balance. Justice Harlan argued that the Court should avoid "determining the form of the country's local governments" because "it would bid fair to plunge this Court into an avalanche of local reapportionment cases with no firmer constitutional anchors than its own notions of what constitutes 'equal protection' in any given instance."<sup>55</sup> Like Justice Harlan, Justice Fortas believed that

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53. *Avery*, 390 U.S. at 492 (Harlan, J., dissenting).

54. *Id.* at 490-94.

55. *Id.* at 494.

voting authority in a local government could reflect the interest of the voters in the activities of the local government.<sup>56</sup> Rather than leaving this unequal weighting of votes to the political process, however, Justice Fortas suggested that the equal protection clause requires “a scheme which, within wide tolerance, eliminates the gross underrepresentation of the city, but at the same time provides an adequate, effective voice for the nonurban, as well as the urban, areas and people.”<sup>57</sup>

The New York BID statute is consistent with Justice Fortas’ refusal to allow Justice Harlan’s “unequal interest, unequal power” notion to sanction a total lack of local electoral representation. The statute requires representation of both local and city residents on both the BID board and the DMA.<sup>58</sup> In other words, it allows a “wide tolerance” while prohibiting “gross underrepresentation” sufficient to ensure an “adequate voice” for non-property owners.

The New York BID statute also reflects Justice Fortas’ belief in the utility of the “general government” classification. Justice Fortas argued that the limited statutory authority of the local county government in *Avery* made it a special, rather than general, type.<sup>59</sup> The BID statute cabins the DMA ends and means. It can only seek to restore business to the district, or to provide services for the enjoyment of the public. The statute gives a precise delineation of the sorts of improvements and services the DMA may provide.<sup>60</sup> At least on paper, BIDs are local governments of limited rather than general powers. BIDs thus reflect an endorsement of Justice Fortas’ faith in an enumerated, limited, nongeneral form of local government.

Another claim, implicitly rejected in *Avery*, that bears on BIDs is the notion that a locality controlled by a larger institution, such as an urban city or a state, may deviate from the simple equality requirement because those adversely affected can gain relief from the urban city or state controlling the BID. The *Avery* Court implicitly

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56. See *id.* at 495 (Fortas, J., dissenting).

57. *Id.* at 509.

58. See N.Y. GEN. MUN. LAW § 980-m (Consol. Supp. 1997).

59. See *Avery*, 390 U.S. at 507-09 (Fortas, J., dissenting).

60. See N.Y. GEN. MUN. LAW § 980-c (Consol. Supp. 1997).

rejected this argument when it rejected the argument that local majorities are adequately protected by their ability to seek redistricting in the State legislature.<sup>61</sup> In the later case of *Ball v. James*, Justice Powell (in his concurring opinion) stressed the importance of state control over the voting requirements for a special district.<sup>62</sup> In a footnote he allowed that two prior cases, *Avery* and *Kramer v. Union Free School District No. 1*,<sup>63</sup> did not consider control by a higher body relevant to whether the smaller government unit complied with the equal protection clause.<sup>64</sup> He suggested that “it must be evident that some of the reasoning in that [line of cases] . . . has been questioned.”<sup>65</sup>

BID statutes reflect Justice Powell’s idea that greater deviance from simple equality is permissible when a large institution that complies with the one person one vote rule has control over the voting scheme.<sup>66</sup> New York BIDs are creatures of state statute.<sup>67</sup> Moreover, BIDs are under the control of the city council, which must approve the voting arrangements and find the BID in the “public interest.”<sup>68</sup> Therefore these two levels of “equal protection” arguably permit some deviance from simple equality in BIDs.

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61. See Briffault, *Localism*, *supra* note 52, at 348 n.26.

62. 451 U.S. 355, 372, 373-74 (1981) (Powell, J., concurring).

63. 395 U.S. 621 (1969).

64. 451 U.S. 373 n.2.

65. *Id.* More recently, Judge Posner has stressed the importance of the control of larger institutions to the assessment of voting rights in smaller bodies. See *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1102 (7th Cir. 1995).

66. See *Ball*, 451 U.S. at 374 (Powell, J., concurring).

67. This characterization is prevalent in litigation surrounding BIDs. In *Quapaw Central Business Improvement District v. Bond-Kinman, Inc.*, 870 S.W.2d 390 (Ark. 1994), the Arkansas Supreme Court decided a dispute between a BID’s bondholders and a BID contractor that centered on who was entitled to BID funds. Relying on the BID’s taxing power, the court stated that BIDS were “agents of the state.” *Id.* at 392. Because the BID was an agent of the state, certain UCC filing requirements did not apply, and the bondholders’ interests were held superior. See *id.* A more extensive discussion of BIDs took place in *City of Seattle v. Rogers Clothing for Men, Inc.*, 787 P.2d 39 (Wash. 1990) (en banc). In *Rogers Clothing* local business raised a variety of statutory and constitutional challenges to a Seattle BID ordinance, which assessed businesses within the area on a square-foot basis for various services designed to benefit businesses. However, the court unanimously found that this ordinance did not violate the equal protection rights of small businesses within the BID. See *id.* at 49-51.

68. See, e.g., N.Y. GEN. MUN. LAW § 980-f (Consol. Supp. 1997).

To summarize, the first “core idea” of BID statutes is a notion of local equal protection that is different from the one adopted by the *Avery* majority. BID statutes endorse a view of local voting rights that permits wide variation in voting power. The voting scheme can therefore account for the different interests people have in the activities of the BID. BIDs minimize the effect of this deviance from the *Avery* notion of political equality by requiring some court-enforceable minimal level of representation for both local and city residents, providing an enumeration of ends and means, and requiring the city council to approve all aspects of each BID, including voting schemes, boundaries, and proposed activities.

This core idea obviously leaves much of the BID phenomenon unexplained. It does not explain why property owners would vote in favor of BIDs and thereby raise their own taxes, why BIDs are increasingly popular, or why the BID statutes contain particular limitations on ends and means. To answer these questions, the remainder of this Part and Part III seeks to identify other latent ideas embodied in BIDs.

### *C. An Economic Explanation: Collective Action Apart from the City*

The second core idea latent in BIDs is an endorsement of small scale collective action largely independent from city government. This idea is best explained by welfare economic theory, which is the application of economics to political science.

The economic explanation for the government provision of certain services is that voluntary collective action to provide “public goods” does not occur, even though collective action would benefit the majority of individuals, because of “free rider” and “coordination” problems. Fear of the “free rider,” one who will not pay for the collective (public) good but still profits from it, causes many not to pay for the good (in the hope of likewise profiting without paying) and hinders voluntary collective action. Alternatively, problems of knowing what others want or how to implement the action might doom voluntary collective activity.

One government solution to the “free rider” problem is to attempt to change social norms about voluntary contributions.<sup>69</sup> For example, if property owners who do not “voluntarily” contribute to a local improvement fund are thought of as “bad neighbors” by others and themselves, participation rates will be much higher than if contributing is seen as a “bad business judgment.” Governments therefore might use educational campaigns to encourage the development of the “good neighbor” norm among property owners.

BIDs arguably could minimize free rider problems by helping to shape local norms. BIDs are the “lowest possible level of government,”<sup>70</sup> which has both the small size and the confidence of the local property owners. BIDs are also a “public-private partnership” with the expertise necessary to operate effectively.<sup>71</sup> They thus meet the suggested criteria for institutions that are most effective for norm shaping.<sup>72</sup>

Norm shaping is not, however, always sufficient to solve the free rider problem. An extensive study of English town centers concluded that local voluntary “management schemes” were supported by less than twenty percent of area merchants.<sup>73</sup> The study identified the cause of the low participation rates as a view that “the firm next door

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69. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 945 (1996) (“The desire to contribute to a collective good is palpably a function of social norms.”).

70. *Id.* at 952 (stating that the lowest level of government is the “most likely to be trusted”).

71. See *id.* at 951-52 (favoring the change of norms through creative public-private partnerships).

72. See *id.* at 952 (“Purely governmental efforts at norm management may fail for lack of trust . . .”). Professor Sunstein suggests that certain levels of government and certain institutional arrangements are best suited to change norms. First, Sunstein asserts that “it is probably best to have a presumption in favor of the lowest possible level of government.” *Id.* He argues that the local government is most responsive to the local people, most likely to be trusted by the locals, and facilitates the conversations necessary for norm shaping. See *id.* Second, Sunstein states that “public-private partnerships” are often the best approach to shaping norms because private organizations “can have a high level of competence, experience, and [public] trust.” *Id.*

73. See John Grigsby, *Success Story Just Up Your High Street*, THE TIMES (London), Apr. 22, 1996, at 12. This result is higher than what pure rational actor economic models would suggest, but is in line with the “Behavioral Law and Economics” theory of economic action. See Sunstein, *supra* note 69, at 905 n.2.



is not paying its share," and suggested a "movement towards business improvement districts."<sup>74</sup>

The English study favored the use of BIDs because BID assessments are mandatory and therefore prevent property owners from "free riding" off of local improvements. Thus, property owners will "voluntarily" vote to raise their own taxes because there is no fear that the "firm next door" will not pay its own share. Because BIDs prevent "free riders" in the local collective action they often gain majority support.

In addition to free rider problems, local provision of increased area services is also dependent on solving what might loosely be termed "coordination" problems. First, property owners must believe that the locality is capable of providing the cleaning service, either with its own employees or by hiring a private contractor. Similarly, property owners must believe that the locality will in fact increase trash pickups and not divert the extra resources to other areas. In addition, the locality must have some mechanism and incentive to find out about and offer the service, an incentive usually provided by political accountability.

BIDs coordinate local action. Property owners are assured that BIDs will provide the area with the promised services because they control the BIDs. Property owners create BIDs only on the condition that the government not use them as an excuse for even worse performance.<sup>75</sup> The small size of BIDs ensures they will remain responsive to local property owners' concerns. BIDs solve the free rider and coordination problems and thereby enable local collective action.

The rapid proliferation of BIDs suggests that they are enabling local action that was not occurring when the urban city alone had the coercive (taxing) power. Although BIDs do depend on urban city-

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74. Grigsby, *supra* note 73, at 12.

75. See, e.g., N.Y. GEN. MUN. LAW § 980-j(a) (Consol. Supp. 1997). See Evans, *supra* note 30, at E1 ("It's important that the legislation contain strong language preventing the city from reducing services to a neighborhood because it has a business improvement district . . . . We have to make sure a basic level of city services are guaranteed.") (quoting a business owner within the proposed BID in D.C.).

wide government for collection of the taxes, this a ministerial task. Property owners apparently think BIDs are more capable than the urban city government in providing services and in ensuring extra resources to the service provision for which the funds are raised. Similarly, BIDs appear to have greater incentive to obtain better information about local needs than large urban city governments. BIDs are filling the gap between the desire for local collective action and the urban city's perceived or actual ability to solve the local collective action problems.

The welfare economic explanation identifies a second core insight—that BIDs enable local collective action apart from city government. They solve free rider problems by providing an institution that can coerce property owners as well as shape local property owner norms. They provide “coordination” by their small size, property owner's control, and proven success. Thus, BIDs are “replacing city government” in the sense of providing the conditions for collective action that was formerly only available at the city level.<sup>76</sup>

Despite the impressive explanatory power of both democratic and economic accounts of the BID statute, significant features remain unexplained. BIDs focus on public space, improve conditions for pedestrians, and involve the public in planning the public realm. Neither political nor economic theory explains these aspects of BIDs.<sup>77</sup> A theory of architecture provides a third core idea of BIDs.

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76. New York's Mayor Rudolph Giuliani, arguably the most prominent proponent of BIDs, describes BIDs as “filling in for government.” Lueck, *supra* note 37, at 1-1. The claim that BIDs are providing services that city government no longer provides is shared by BID supporters and opponents. See *id.* (quoting a BID critic as saying “[BIDs are] a perverse exchange of responsibility between the public and private domains”); Clarence Johnson, *A Controversial Plan for S.F. Businesses to Tax Themselves, Money Would Provide More Services*, SAN FRANCISCO CHRON., Apr. 24, 1995, at A11 (“In essence, people are finding that municipal government is not able to provide the services people think they ought to get . . .”) (quoting a proponent of BID legislation).

77. It is a common complaint that economic theory takes preferences as a given. In other words, economics does not predict what people will want; it assumes people will decide for themselves what they prefer. Applied to BIDs, the economic explanation assumes business owners know what they need to do to attract shoppers. It thus does not predict that a BID statute will make suggestions for how property owners should attract shoppers to the area. BID

### III. NEW URBANISM AND BIDS

This Part argues that New Urbanism's planning principles complete the BID explanation. Although an architectural movement, New Urbanism is best understood as an effort to put communitarian rhetoric into practice. Accordingly, this Part begins with a brief overview of communitarianism, then describes New Urbanism's communitarian critique of the contemporary suburb as well as the specific planning principles advocated by New Urbanism. This Part then suggests that New Urbanism is the third idea latent in BIDs.

#### *A. Three Communitarian Debates*

Professor Stephen Gardbaum has identified three debates where the term "community" is used in different ways.<sup>78</sup> The first debate is over "personal identity" and questions whether a person's attachments, such as feelings for her friends or country, help constitute that individual's identity (i.e., we are what we care about) or whether these attachments are merely a collection of choices made by a complete individual (i.e., a rational economic actor).<sup>79</sup> The second debate centers on whether moral "values" are significantly particular to a "community" or are universal, existing outside of any specific community.<sup>80</sup>

The third debate, and one that often divides communitarians, concerns the content of our community's values. Professor Gardbaum

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statutes, however, do make specific suggestions, such as better landscaping and pedestrian walkways. Whether this gap is a result of a theoretical weakness or is simply not the target of economic theory, BID statutes are not completely explained by economics.

78. See Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 692 (1992).

79. *Id.* at 692-93. According to Gardbaum, those taking the first Communitarian position include Joseph Raz, Charles Taylor, and Michael Sandel. See *id.* at 693. Gerald Frug's effort to imagine local government in Communitarian terms derives support for interlocal arrangements from the idea that an individual (or a government) is partly created by its relationship with others. See Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 273 (1993) ("One way of decentering the subjectivity of localities would be to build on the literature that emphasizes that the self is formed only through a relationship with others.").

80. See Gardbaum, *supra* note 78, at 694. Gardbaum identifies, among others, Benjamin Barber, Michael Oakshott, and Michael Walzer. See *id.*

defines “strong communitarians”<sup>81</sup> as those who argue that people should live as a “political community.”<sup>82</sup> Put another way, strong communitarians advocate the substantive value of community.<sup>83</sup> Strong communitarians argue for shared values of wide “content and scope.”<sup>84</sup>

Strong communitarians do not believe in open neighborhoods. Communitarians, like pluralists and many other political theorists, support strong local governments to encourage politically engaged citizens. Their support of “substantive community,” however, also leads them to support local public policies that exclude outsiders.<sup>85</sup> So, for example, when localities seek to restrict who can move into the neighborhood, strong communitarians defend the action on “community” grounds.

Gardbaum argues that the pluralist position is inconsistent with strong communitarianism.<sup>86</sup> He notes that the world has many different “political cultures and values.”<sup>87</sup> The strong communitarians advocate the “value of community” even for communities that have “substantively individualistic values.”<sup>88</sup> In contrast, pluralists such as Michael Walzer seek to “foster[] the particular and diverse values of different individual communities (whatever these values happen to

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81. *Id.* at 695: The Amish or Mennonites represent examples of “strong communitarian” communities. *See id.* at 740. Gardbaum identifies Michael Sandel, Hannah Arendt, and Alisdair McIntyre. *See id.* In the legal academy, Gardbaum places advocates of “republicanism,” such as Frank Michelman and Cass Sunstein, in this Communitarian camp. *See id.* at 750. On the republican view, democracy “involves deliberating with fellow citizens about the common good and helping to shape the destiny of the political community.” Michael J. Sandel, *America’s Search for a New Public Philosophy*, ATLANTIC MONTHLY, Mar. 1996, at 57.

82. Gardbaum, *supra* note 78, at 695; *see also* Sunstein, *supra* note 69, at 920 (describing “norm communities” organized by locality that express communal norms in law); *The Supreme Court, 1988 Term-Leading Cases*, 103 HARV. L. REV. 137, 249 (1989) (flag-burning as symbolic speech).

83. Gardbaum, *supra* note 78, at 719 (“Strong communitarianism is a theory of substantive community.”).

84. *Id.* at 699.

85. *See id.* at 719 (classifying three “strongly communal types” of “substantive community”: conservative community, republican community, and communist community).

86. *See id.* at 730.

87. *Id.* at 700.

88. *Id.*

be).”<sup>89</sup>

Unlike strong communitarians, pluralists stress the importance of a geographic neighborhood’s “open doors” and diverse population. For Michael Walzer, the neighborhood is “an association without an organized or legally enforceable admissions policy.”<sup>90</sup> As a result, “[neighborhoods] will come in time, barring the use of force, to include a heterogeneous population— ‘not a selection, but rather a specimen of life as a whole,’ or at least of national life as a whole.”<sup>91</sup> Although neighborhoods are random and complex associations,<sup>92</sup> their locations matter: “[P]olitics is always territorially based; and the neighborhood (or the borough, town, township ‘end’ of town: the contiguous set of neighborhoods) is historically the first, and still the most immediate and obvious, base for democratic politics.”<sup>93</sup> The combination of seeing geographic neighborhoods as open institutions and a good location for democratic politics drives much of Walzer’s influential work.<sup>94</sup>

### *B. Pluralist “Community” in New Urbanism*

In 1981, the architects Andres Duany and Elizabeth Plater-Zyberk (together “DPZ”) planned a small Florida beach town, Seaside, with the “one overriding goal . . . of fostering a strong sense of

89. *Id.* at 699. Gardbaum identifies Walzer as a “communitarian” that, rather than believing in “strong communitarianism,” advocates liberal values held by our particular community. *See id.* at 699-700. In Gardbaum’s description of Walzer, “[I]ndividualistic values form a major part of the public culture of our society, which is a common possession of the community as a whole.” *Id.* at 698.

90. MICHAEL WALZER, *SPHERES OF JUSTICE* 36 (1983).

91. *Id.* at 224.

92. *Id.* at 36.

93. *Id.* at 225.

94. Neighborhoods can only be “open,” if the federal government performs certain tasks. *See id.* at 44. For example, the federal government can make naturalization and distribution of welfare more or less widely available. *See id.* at 43-45. Location is also important at the federal level: “[T]he link between people and land is a crucial feature of national identity.” *Id.* at 44. Walzer’s views on education are similarly caused by his position on neighborhoods and territory. For example, Walzer opposes mandatory student busing to achieve racial integration because it undermines the neighborhood school. *See id.* at 221-24.

community.<sup>95</sup> Since then, New Urbanism adherents have developed other small towns and urban areas.<sup>96</sup> In *The New Urbanism: Toward an Architecture of Community*,<sup>97</sup> New Urbanists describe how to plan a place that will create community.<sup>98</sup>

Like Gardbaum's political theorists, New Urbanists use "community" in three ways. First, they argue that people are formed in important ways by their attachments. Second, they implicitly argue that community provides the source of values. Third, like the pluralists (and therefore unlike the strong communitarians), New Urbanism advocates mixed and, by implication, open neighborhoods.<sup>99</sup> New Urbanists use these arguments to both critique the contemporary suburb and to support specific urban planning principles.

New Urbanists argue that the suburbs have disconnected people from who and what they care about.<sup>100</sup> The contemporary suburban development patterns, New Urbanists claim, have "isolate[d] people and activities in an inefficient network of congestion and pollution, rather than joining them in diverse and human-scaled

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95. Charles Mulford Robinson, *Establishing the Urban Pattern*, in KATZ, NEW URBANISM, *supra* note 10, at 3.

96. The largest new town is Celebration, a massive traditional development by Disney. See Caroline E. Mayer, *The Mickey House Club: It's Cute, It's Communal, It's Affluent, But Disney's Town Experiment Has Dissenters*, WASH. POST, Nov. 15, 1996, at A1.

97. See *supra* note 10.

98. Most of this Article's New Urbanism discussion is drawn from KATZ, NEW URBANISM, *supra* note 10. See also Kurt Anderson, *Oldfangled New Towns: A Brilliant Husband-and-Wife Team Lead a Growing Movement to Replace Charmless Suburban Sprawl with Civilized, Familiar Places That People Love*, TIME, May 20, 1991, at 52.

99. New Urbanism is therefore in the tradition of Jane Jacobs who famously argued for mixed uses of an area. See Jane Jacobs, THE DEATH AND LIFE OF GREAT AMERICAN CITIES: THE FAILURE OF TOWN PLANNING 152-77, 222-28 (1961); see also Richard Ford Thompson, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1908 n.215 (1994).

100. See Peter Calthorpe, *The Region*, in KATZ, NEW URBANISM, *supra* note 10, at xii. New Urbanism begins with an account of suburban growth. Americans moved to the suburbs to find privacy, safety and home ownership. They were helped by a federal government providing highways and subsidized home mortgages. See *id.* As a suburb's population increased, it attracted jobs and became what Joel Garreau calls "Edge Cities" which have their own suburbs. See *id.* The process repeats, the suburbs sprawl, and the American landscape takes on a "homogenous quality . . . with chain-store architect, scaleless office parks and monotonous subdivisions." *Id.*

communities.”<sup>101</sup> New Urbanists further assert that Americans increasingly feel “placeless” and that feelings of attachment to a location are not possible when everywhere looks the same.<sup>102</sup> New Urbanism applies the communitarian claim about the constitutive nature of an individual’s attachments, in this case to people, activities and places, to make a bleak assessment of how Americans are building the “American Dream.”<sup>103</sup>

DPZ believe that “the combination of a focus and a limit” can restore a sense of place to a location.<sup>104</sup> For a focus, DPZ require a “center” for every neighborhood.<sup>105</sup> The center is the “locus” of public activity, where a post office, shops, banks and day care centers are located.<sup>106</sup> The limit or “edge,” which is not always necessary, is often a natural boundary, such as a train line, park, or busy road.<sup>107</sup>

To avoid the disconnection of the suburbs, DPZ argue that a neighborhood must be pedestrian friendly.<sup>108</sup> Daily routines, such as shopping, must be within walking distance. DPZ therefore suggest that the best neighborhood size is a “quarter mile from center to

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101. *Id.* at xii.

102. *See id.* As Calthorpe described:

Out of [the] evolution of the modern metropolis there has grown a profound sense of frustration and placelessness. . . . At their extreme, the new forms (of suburban architecture) seem to have an empty feeling, reinforcing our mobile state and the instability of our families. Moving at a speed which allows only generic symbols to be recognized, we cannot wonder that the man-made environment seems trite and overstated.

*Id.*

By “[u]nderstanding the qualities of nature in each place, expressing it in the design of communities, integrating it within our towns and respecting its balance,” *id.* at xiii, New Urbanism tries to create a “sense of place” in suburban developments. *Id.* at xx.

103. *See id.* at xii (“Ironically, the American Dream is now increasingly out of sync with today’s culture. Our household makeup has changed dramatically, the workplace and work force have been transformed, family wealth is shrinking and grave environmental concerns have surfaced.”).

104. Andres Duany & Elizabeth Plater-Zyberk, *The Neighborhood, the District and the Corridor*, in KATZ, *NEW URBANISM*, *supra* note 10, at xvii, xx.

105. *See id.* at xvii.

106. *See id.*

107. *See id.* at xviii.

108. *See id.*

edge.”<sup>109</sup> Similarly, New Urbanism insists that streets should be designed to facilitate their use by pedestrians.<sup>110</sup> Local streets should “provide equitably for pedestrian comfort and for automobile movement.”<sup>111</sup> Slower cars and more pedestrians, a function of street design, “encourage[] the casual meetings that form the bonds of community.”<sup>112</sup>

According to DPZ, a “sense of place” is also encouraged by insisting that public activities occur in prominent places.<sup>113</sup> DPZ insist that public buildings for schools, local government and libraries occupy important sites.<sup>114</sup> Giving “priority to public space” contributes to civic pride and reinforces community identity.<sup>115</sup> In addition, a central concern of New Urbanism is the existence of a “public realm.”<sup>116</sup> A public realm is “that shared space in society which brings people to gather together, to relate to one another and/or to be separate.”<sup>117</sup> New Urbanism is “above all . . . about ensuring that there is a public realm.”<sup>118</sup>

New Urbanism also applies the pluralist concern for open

109. *Id.* New Urbanism’s proposal of a specific size of a neighborhood avoids problems caused by the lack of local boundaries. As Briffault argues:

Only the metropolitan area is expansive enough to include most of the daily activities and social and economic concerns of the residents of metropolitan area localities. Yet it is difficult for most area residents to conceive of the metropolitan area as a community. With millions of people scattered across a sprawling network of localities, the contemporary metropolitan area typically “lacks any definable borders, a center or a periphery.” The economic and cultural relations that bind a region together are largely invisible to most residents, who are likely to view their home locality as their community and to view the metropolitan area as little more than a Census designation.

Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1143 (1996) (footnotes omitted) [hereinafter Briffault, *Local Government*].

110. See Elizabeth Moule & Stefanos Polyzoides, *The Street, the Block and the Building*, in KATZ, *NEW URBANISM*, *supra* note 10, at xii.

111. Duany & Plater-Zyberk, *supra* note 104, at xix.

112. *Id.*

113. See *id.* at xix.

114. See *id.*

115. *Id.* at xix.

116. See Moule & Polyzoides, *supra* note 110, at xxi.

117. *Id.* at xxi.

118. *Id.* at xxii.



neighborhoods. New Urbanists contend that “[s]ettlement patterns are the physical foundation of our society and, like our society, they are more and more fractured.”<sup>119</sup> The demographic separation endemic to the suburbs reinforces separation in the political realm because “[s]pecial interest groups now replace the larger community within our political landscape, just as gated subdivisions have replaced neighborhoods.”<sup>120</sup> Just as Michael Walzer’s pluralism calls for “open,” “random” neighborhoods, New Urbanism calls for mixed neighborhoods with all types of people and activities.<sup>121</sup> Furthermore DPZ argue that a place must encompass a “balanced mix of activities—dwelling, shopping, working, schooling, worshipping and recreating.”<sup>122</sup> DPZ maintain that “the modern North American workplace is no longer a bad neighbor to dwellings and shops.”<sup>123</sup> In other words, neighborhoods should be “open” to both people and activities.

Nevertheless, New Urbanism explicitly tolerates urbanized districts “that are functionally specialized.”<sup>124</sup> New Urbanists do suggest that “few pure districts are really justified.”<sup>125</sup> Conceding that some level of specialization is inevitable, New Urbanists note that

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119. Calthorpe, *supra* note 100, at xii.

120. *Id.*

121. *See id.* at xvi.

Diversity is a fundamental component of Urbanism at both the neighborhood and regional scale. At the regional scale it is too often taken for granted—but diversity without connections (segregated diversity) is not urban at any scale. The diverse population and functions within a region should have a connecting fabric which makes the region vital and inclusionary. Our freeway and arterial networks now seem to privatize and isolate the components of a region more than connect them.

*Id.*

122. Duany & Plater-Zyberk, *supra* note 104, at xvii.

123. *Id.* New Urbanists propose (and have built) telecommuter centers. Workers leave home but, rather than commute to work, work from terminals at the center. Thus, DPZ use modern computer technology, often derided for increasing isolation, to improve the sense of neighborhood attachment.

124. *Id.* at xix. DPZ argue: “Although [specialized] districts preclude the full range of activities necessary for a complete neighborhood, they are not the rigorously single activity zones of suburbia: the office parks, housing subdivisions or shopping centers. The specialization of a district still allows multiple activities to support its primary identity.” *Id.*

125. *Id.* at xix.

“[c]lear boundaries and dimensions facilitate the formation of special taxing or management organizations.”<sup>126</sup>

Again like the pluralists, New Urbanism seeks to involve the local public in planning and controlling the public realm.<sup>127</sup> At the planning stage, New Urbanists hold on-site “charrettes” where the development firm “confers with local officials, community leaders and interest groups; stages public meetings and presentations; and calls in local architects, planners and citizens to collaborate.”<sup>128</sup> New Urbanism argues that a zoning code would serve as a “covenant among the owners, designers and users” of a place and “the individual interests and actions will incrementally but inevitably generate the public realm.”<sup>129</sup>

### C. New Urbanism in BIDs

By adhering to many of New Urbanism’s planning principles, BIDs promote “community,” as New Urbanist’s understand the phrase.<sup>130</sup>

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126. *Id.* at xx.

127. See also Stephen C. Fehr, *A Downtown of Their Own; Kentlands Residents Seek Intimate Setting*, WASH. POST, March 25, 1996, at D1 (describing a weekend charrette where residents will help plan part of town and noting the “demalling” of America because shoppers prefer to be outside rather than in a mall).

128. *Yale Architects Breathing Life Into Urban Areas*, YALE MAGAZINE, Mar. 11, 1996, at 17 (defining “charrette” as a “three-or-four day period in which . . . architects work intensely with each other and with members of the community in developing a plan to revitalize a town or neighborhood” and describing volunteer efforts of Yale architecture students to assist 250 neighborhood residents of a neighborhood that received a HUD grant in “asses[ing] their wants and needs for the neighborhood and . . . incorporating them into a vision of physical community”); Todd W. Bressi, *Planning the American Dream*, in KATZ, NEW URBANISM, *supra* note 10, at xxxvi; see also Fehr, *supra* note 127, at D1 (describing DPZ’s recent charrette in Kentlands).

129. Moule & Polyzoides, *supra* note 110, at xxiv. New Urbanism is, however, criticized for failing to consider the “layers of community organization [that] will evolve” after the charrette’s decisions are implemented. See Bressi, *supra* note 128, at xlii.

130. See generally Calthorpe, *supra* note 100, at xvi. As Calthorpe summarized:

The goal [of New Urbanism] is to apply the best of urban design to both the region and the neighborhood—applying them to a new context and at a new scale. The New Urbanism is not just about the city or the suburb. It is about the way we conceive of community and how we form the region—it is about diversity, scale and public space in every context.

## 1. BIDs Restore a Sense of Place

As New Urbanism recommends, BIDs define an edge.<sup>131</sup> The district plan must have a map with well defined boundaries. The district's center is often the focus of BID "improvement" efforts as well as the location for additional services.<sup>132</sup> BIDs define an edge and focus attention on the center thereby restoring a sense of place to the area.<sup>133</sup>

New Urbanism also makes suggestions to increase the number of pedestrians on city blocks. Buildings should be serviced from alleys to allow the "outer faces of blocks to become more intensely pedestrian."<sup>134</sup> Significant indoor interior spaces, such as lobbies, are an "extension of the public space of the city."<sup>135</sup> New Urbanism insists that "[a]ccommodating the pedestrian is the first order of priority for parking."<sup>136</sup> Parking garages should be underground or in the middle of the block, in a building with a "significant public face."<sup>137</sup> New Urbanists encourage landscaping, such as trees and parks, because these "artifacts from man's historical contact with nature" remain critical to successful urban life.<sup>138</sup>

Again in keeping with New Urbanism, BID statutes focus on improving pedestrian movement.<sup>139</sup> BIDs are responsible for improving public landscaping, making decision about street size and use and constructing various pedestrian structures.<sup>140</sup> Similarly, the usual small size of BIDs is consistent with New Urbanism's "quarter

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*Id.*

New Urbanism urban planning ideas have already influenced New York's zoning laws. See Bressi, *supra* note 128, at xxxviii.

131. New Urbanism advocates that every neighborhood have a center and an edge, or outer limit. See Duany & Plater-Zyberk, *supra* note 104, at xvii.

132. *See id.*

133. Similarly, New Urbanism emphasizes the importance of creating "a sense of place for its users." *Id.* at xx.

134. Moule & Polyzoides, *supra* note 110, at xxiii.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *See, e.g.*, N.Y. GEN. MUN. LAW §§ 980-c(a)(5), (7), (11) (Consol. Supp. 1997).

140. *See, e.g.*, N.Y. GEN. MUN. LAW §§ 980-c(a)(1), (5), (7) (Consol. Supp. 1997).

mile” or “walking distance” rule.<sup>141</sup>

Enacting a BID also gives priority to public space. When property owners voluntarily increase their taxes to improve the public areas, public space is improved and the social identity of a place reaffirmed. Indeed, BIDs may sometimes offer the only way to ensure there is any public space.

## 2. BIDs Encourage Diverse Neighborhoods and Local Political Activity

Property owners create and fund BIDs in part to attract shoppers. With increased numbers of shoppers, the profits of property owners’ business tenants, and thus the property’s value, will increase. Therefore, the first goal of a BID is to “preserv[e] and enhanc[e] commercial enterprise in the traditional business centers of the cities and towns.”<sup>142</sup> Unlike other proposals to restore downtown areas, BIDs focus on attracting shoppers, not businesses, to the area. This “attraction” goal fits the pluralist notion of “open” neighborhoods.<sup>143</sup>

New Urbanism would tolerate the development of BIDs because BIDs’ specialization, if any, would not lead to isolation.<sup>144</sup> First, BIDs often seek to enrich the activities of an area. Second, and more importantly, BIDs can co-exist with other institutions seeking to bring different types of activities or people to the same “district.”

BIDs also provide a forum for citizens to deliberate about the “public realm.”<sup>145</sup> Rudolph Giuliani, current Mayor of New York City, describes BIDs as “local democratic institutions.”<sup>146</sup> Indeed, although BIDs are not “equal” in the simple *Avery* sense, they are democratic in the sense that residents and property owners together design the neighborhood’s “public realm.”

In summary, the third core idea latent in BIDs is pluralist

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141. See Duany & Plater-Zyberk, *supra* note 104, at xviii.

142. DEL. CODE ANN. tit. 22, § 1501 (Supp. 1996).

143. See WALZER, *supra* note 90, at 36.

144. See Duany & Plater-Zyberk, *supra* note 104, at xix (“The specialization of a district still allows multiple activities to support its primary identity.”).

145. See *supra* text accompanying notes 116-18 for a discussion of the “public realm.”

146. Lueck, *supra* note 37, at 1-1.

community. BIDs restore a sense of place to the area by creating an edge and improving the center, making the area more suitable for pedestrians and giving priority to public space. BIDs foster pluralism by involving the public in planning the “public realm” and by working to attract people to the neighborhood.

#### IV. BID REFORMS

Understanding BIDs as endorsing specific democratic, economic and architectural theories suggests that the best changes to BID statutes are those derived from one of the three theories: political theory, welfare economics and New Urbanism. As an illustration, this Part first derives from each of the three theories a proposed modification to the BID statutes. Second, this Part uses the BID interpretation to evaluate the most common proposals for how to modify BIDs.

##### *A. Three Internal Suggestions*

###### 1. Political Theory: Courts Should Monitor BID Voting Arrangements

Current BID statutes provide no role for the courts. As a result, citizens that believe a particular BID’s voting scheme is unfair must rely on general state or federal constitutional voting rights doctrines. BID statutes do not provide such a litigant with much, if any, assistance. Current BID statutes thus appear to endorse Justice Harlan’s view of no role for the courts in monitoring the correlation between power and interest.<sup>147</sup>

This limited role for courts appears inconsistent with much of the content of BID statutes. BID statutes endorse Justice Fortas’ (rather than Justice Harlan’s) view of the possibility of classifying government by their limited powers.<sup>148</sup> More importantly, BID

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147. See *Avery*, 390 U.S. at 487-89 (Harlan, J., dissenting).

148. See *id.* at 507 (Fortas, J., dissenting). See, e.g., N.Y. GEN. MUN. LAW § 980-c (Consol. Supp. 1997) (listing BID powers).

statutes contemplate a fairly significant role for non-property owners. For example, the New York BID statute reserves four seats on the board of the district management association (DMA) for city wide representation.<sup>149</sup> Yet, it requires only that tenants “also be represented.”<sup>150</sup>

The New York statute might, through an amendment, require, in Justice Fortas’ phrase, that non-property owners have an “adequate, effective voice” in the operation and governance of a BID.<sup>151</sup> Even under the amendment, many of the voting structures of the BID would remain unchanged. Nevertheless, litigants could challenge those individual BIDs that seem most unfair without having to rely on the Supreme Court doctrines, which do not work well in the BID context.<sup>152</sup> An amendment providing assurance of an “adequate, effective voice,” would help insulate BIDs from charges of undemocratic and unequal operation while preserving property owners’ control, which is critical to their approval of increased taxes.

## 2. Welfare Economics: BIDs Should Have Sufficient Eminent Domain Authority to Seize Abandoned Buildings

Abandoned buildings harm neighborhoods.<sup>153</sup> “An abandoned home . . . may be conceptualized . . . as a negative externality.”<sup>154</sup> Empty houses “become magnets of vandalism, havens for crime, and fire hazards to the buildings around them.”<sup>155</sup> Abandoned buildings are a “negative externality” imposed on current property owners by a former property owner. Urban city government often takes a long time to address the problem of a single abandoned building.

BIDs have a strong incentive to eliminate abandoned buildings because they reduce property values. BIDs are small enough to

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149. See N.Y. GEN. MUN. LAW § 980-m(b) (Consol. Supp. 1997).

150. *Id.*

151. *Avery*, 390 U.S. at 509 (Fortas, J., dissenting).

152. See *supra* Part II.A.

153. See Joshua A. Newberg, *Anatomy of a Housing Program: Urban Homesteading in Theory and Practice*, 8 J.L. & POL. 731, 751-52 (1992).

154. *Id.* at 751.

155. *Id.* at 752.

remain responsive to such a local concern, but under current BID statutes, there is little a BID can do to address the problem of abandoned buildings.

Providing BIDs with a narrow form of eminent domain would allow the BIDs to force the owner of the uninhabited property to stop damaging the neighborhood or risk losing title. Historically, localities have addressed the problem of abandoned buildings.<sup>156</sup> There is precedent for giving eminent domain authority to public and/or private organizations.<sup>157</sup> States could, for example, allow a BID district plan, which is subject to city approval, to indicate abandoned buildings that it would like to seize provided that the plan establishes the status of abandoned buildings and provides a detailed proposal for rehabilitation of the site.

### 3. New Urbanism: BIDs Should Have Some Zoning Authority

One of New Urbanism's most important methods of creating a "sense of place" involves zoning.<sup>158</sup> For example, parking requirements should be set at a neighborhood or district basis as opposed to building by building.<sup>159</sup> "Specific street, block and building design rules for public or private developments" must be "presented in the form of a code."<sup>160</sup> To maintain a sense of neighborhood identity, the zoning code should exert an "extraordinary level of control . . . to force greater attention to detail, thereby invigorating suburban architecture and imparting a greater level of civility to the street-scape."<sup>161</sup>

Consistent with New Urbanism, neighborhood BIDs should have

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156. *See id.* at 733.

157. *See* Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1069 (1996) ("[S]tatutes in several states authorize private redevelopment corporations to exercise the power of eminent domain."). For example, in Massachusetts, a private project to redevelop a "blighted open, decadent or substandard area" may exercise the power of eminent domain. *Id.* at 1074-75.

158. *See supra* notes 101-15 and accompanying text.

159. *See* Moule & Polyzoides, *supra* note 110, at xxiv.

160. *Id.*

161. Bressi, *supra* note 128, at xxxv.

some influence over zoning decisions. BIDs should work to encourage property owners to create an architectural identity for the district, perhaps by establishing a recommended zoning code. DPZ suggest a scheme whereby proposed developments that comply with a neighborhood's master plan are exempt from certain (time consuming) planning reviews.<sup>162</sup> One way to do this is to allow the district plan to contain zoning rules, such as permissible setbacks or total parking spaces for the district. Regardless of the form, city governments should shift some zoning authority to BID officials.

### *B. Two Common Proposals*

In addition to generating BID reforms, BID interpretation also helps evaluate proposed reforms. This Part considers the two most common BID reforms proposals: expanding their size and encouraging their formation in low property value areas.

#### 1. BIDs Should Never Cover More than a Single Neighborhood

Although most BID statutes do not restrict the geographic size of a BID,<sup>163</sup> BIDs should always be and often are neighborhood size.<sup>164</sup> Small BIDs are consistent with DPZ's "walking distance" or "quarter mile" rule, reinforcing the sense of place by defining an edge and a center on a pedestrian scale.<sup>165</sup> From an economic perspective, restricting the size of a BID appears critical to its ultimate success.<sup>166</sup>

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162. See Bressi, *supra* note 128, at xxxvii.

163. See, e.g., N.Y. GEN. MUN. LAW § 980-a (Consol. Supp. 1997).

164. Most improvement districts include only one neighborhood. See Oser, *supra* note 36, at A3 ("It is at the small neighborhood level rather than in the central business district that most of the business improvement districts have been formed."); Evans, *supra* note 30, at C2 ("BIDs are extremely important to the economic health of neighborhoods . . . [T]he most important part of them is that they organize and focus activities of businesses from neighborhood to neighborhood."); see also Enrique Lavin, *Merchants Propose Improvement Districts*, L.A. TIMES, Oct. 3, 1995, at B2 ("With the city cutting back we see a need to improve our two-block area on our own.") (quoting a local business owner).

165. See *supra* notes 104-07 and accompanying text for a discussion of DPZ's "edge/center" principle.

166. Small BIDs promote efficient provision of services. Charles Tiebout, a leading political economist, proposed that potential residents select a locality based on the mix of



Democratic participation also requires confining BIDs to neighborhoods that citizens already identify as political units.<sup>167</sup> In sum, each of the three latent BID principles (political theory, welfare economics, and New Urbanism) suggest keeping BIDs small.

## 2. Contributors to BIDs in Low Property Value Areas Should Receive Partial Rebates

Professor Robert Nelson argues that “troubled inner-city” neighborhoods should establish BIDs.<sup>168</sup> One way to encourage this development would be to provide property owners in poor districts with rebates for BID assessments. New York’s deputy mayor spoke of offering a rebate of fifty percent of the assessments that property owners pay to be part of the district.<sup>169</sup> Because states and counties also benefit from the BID-led revival of urban areas, state and federal governments could help cities provide the rebates.

Such a proposal makes sense from the perspectives of all three BID principles. Professor Skully writes:

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services and taxes rates. See Charles M. Tiebout, *A Pure Theory of Local Government*, 64 J. POL. ECON. 416, 417 (1956), cited in Briffault, *Local Government*, *supra* note 109, at 1124-25. Under his theory, some localities would offer low taxes and low services while other localities would offer higher taxes and more services. Potential residents would pick among the localities, and those localities that offered a popular mix of services and taxes would grow while those who failed to offer an attractive package would lose residents. Thus, localities are pressed to be “efficient”; otherwise a similar locality would provide the same level of services for lower taxes. The balance of taxes and services provided by BIDs might mimic this pattern. Potential property owners and shoppers might choose an area based on the mix of BID rates and services. Some might prefer an area with an active BID, such as one that holds frequent marketing events and employs many extra sanitation workers, and willingly pay the higher BID fees. Others might prefer lower costs and want a BID to provide only minimal services. Still others might prefer an area without a BID, just as some residents choose to live in “unincorporated” areas. The more BIDS, the more likely BIDs will remain efficient and diverse. Concentrating many BIDs in the same area requires that each BID be small.

167. Although all advocates of local government suggest “small districts,” they rarely define how small is small, often describing New York City as small. As Part III of this Article suggests, a neighborhood-size BID is consistent with Michael Walzer’s claim that the neighborhood is the best location for active democratic politics. See *supra* notes 145-46 and accompanying text. See also WALZER, *supra* note 90, at 36-37.

168. Robert H. Nelson, *Privatize Inner-City Neighborhoods*, AM. ENTERPRISE, Nov./Dec. 1996, at 68.

169. See Martin, *supra* note 12, at B3.

[One] cannot help but hope that the lessons of Seaside [in Florida] and of the other new towns now taking shape can be applied to the problem of housing for the poor. That is where community is most needed and where it has been most disastrously destroyed. Center city would truly have to be broken down into its intrinsic neighborhoods if this were to take place within it.<sup>170</sup>

The need for collective action might well be higher in poor neighborhoods, where "coordination" problems such as information may abound. Moreover, democratically, it is essential that a local institution as effective as BIDs exist (or at least be a realistic option) in every area.<sup>171</sup>

#### V. BIDS AND INTERLOCAL EQUALITY

The most common criticism of BIDs is that they contribute to interlocal "inequality."<sup>172</sup> To press this complaint, the BID critic must

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170. Skully, *supra* note 10, at 229.

171. It is surprising how rarely advocates for the disorganized or disenfranchised advocate for local government institutions. *See, e.g.,* Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995).

172. Another concern is that BIDs will harm the homeless. As one writer puts it, there is a "fear that the [BIDs] would ultimately pay for private security forces to sweep away people as well as debris." Johnson, *supra* note 76, at A11. This objection might be either to the method of "encouraging" certain people to leave or to the goal itself. Whether BIDs are more likely than city governments to use undesirable methods to achieve agreed-upon goals is an empirical question. Quite possibly, homeless advocates will have an easier time pressuring and monitoring local BIDs than they would with larger urban city governments. As to the goal, the success of suburban malls has contributed to the deterioration of urban downtown property values and the depletion of city governments' tax base, and has also increased the isolation and the numbers of the very poor. *See generally* Calthorpe, *supra* note 100, at xii ("[O]ur city centers have deteriorated because much of their economic vitality has decanted to the suburbs."). Arguably, the success of the suburban mall is driven by the mall's owners ability to exclude people that most shoppers want excluded. *See* Ellickson, *supra* note 4, at 1172 n.28 ("In general, the private owner of a regional shopping mall has greater authority over the use of its common areas than a city has over the use of open-access public lands."). Moreover, as the New Urbanists remind, the demise of public urban life has decreased feelings of community with negative effects on our democratic and personal lives. *See id.* ("Americans initially moved to the suburbs for privacy, mobility, security and home ownership. What we now have is isolation, congestion, rising crime, pollution and overwhelming costs . . ."). Whether an accommodation that allows all to enter the public space but requires all to abide by certain

explain either why interlocal inequality of any sort is undesirable, or why the type of inequality perpetuated by BIDs is undesirable. Neither proposition is accurate. Instead, BIDs represent a commitment to the urban realm that may well further egalitarian goals.

### *A. Interlocal Inequality Is Inevitable*

Some BID critics assume that any difference in provision of services, such as increased police or garbage collection, is undesirable. As Professor Frug writes, "it is no more justifiable, in my view, for the quality of police protection, hospitals, or welfare programs to vary with district wealth than it is for the quality of the schools."<sup>173</sup> This is "bad utopianism" at a local level.<sup>174</sup>

As Michael Walzer points out, inequality is inherent in any society.<sup>175</sup> An America where location did not correlate with increased social goods would be unrecognizable. Only continual intervention by a totalitarian state could prevent variations in the quality of localities' schools, police protection, and so forth. The key for equality advocates is to identify and minimize those inequalities that are undesirable, such as *significant* differences in educational quality, and ignore those that are the inevitable effects of a democratic, welfare capitalistic society, such as differences in frequency of garbage pick-up.<sup>176</sup>

### *B. BIDs Are Not Contributing to Undesirable Interlocal Inequality*

Other critics argue that BIDs are undesirable because they

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uniformly enforced rules might better balance the concern for individual autonomy with the need for successful public urban space is a normative judgment that a political community must make.

173. Frug, *supra* note 79, at 327.

174. See MICHAEL WALZER, *ON TOLERATION* 4 (1997).

175. See WALZER, *supra* note 90, at 3-6.

176. As Professor Briffault's critique of funding local services with property taxes suggests "[w]ith municipal budgets largely dependent on the local tax base, intermunicipal wealth inequality becomes the source of significant differences in the quantity and quality of public services." Richard Briffault, *Localism*, *supra* note 52, at 437-38.

represent a “balkanization” of the urban city. To repeat Sandel’s remark, “[a]s municipal services decline in urban areas, residents and businesses in upscale districts manage to insulate themselves from the effects by assessing themselves surtaxes to provide private garbage collection, street cleaning, and police protection unavailable to the city as a whole.”<sup>177</sup> Sandel argues that the problem with BIDs is that they “erode those aspects of community life that bring rich and poor together in public places and pursuits.”<sup>178</sup>

BIDs are not, in fact, contributing to the balkanization of the city. Sandel’s critique of BIDs is followed by his endorsement of New Urbanism.<sup>179</sup> As Part III of this Article shows, BIDs are consistent with many principles of New Urbanism. Had Sandel acknowledged that BIDs promote rather than undermine the “class mixing” that he seeks to further, he might well determine that BIDs are helping to move towards, not away from, a more “egalitarian” society.

Finally, BIDs are not always, and certainly need not be, confined to wealthy areas.<sup>180</sup> If all areas had BIDs, the claim that BIDs are contributing to balkanization reduces to the already rejected claim that any variation among localities is unacceptable.

### *C. BIDs Represent a Commitment to the Urban Public Realm*

A related but deeper challenge is, in Albert Hirschman’s words, that BIDs replace “voice,” or political pressure, with “exit,” or opting out.<sup>181</sup> Precisely because BIDs allow localities to succeed without city government, cities may lose those most likely to advocate for needed changes. The result is a less effective city government for all, and less services for those without BIDs.<sup>182</sup>

177. DEMOCRACY’S DISCONTENT, *supra* note 5, at 331.

178. *Id.* at 332.

179. *See id.* at 336.

180. *See supra* Part IV.A.2.

181. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

182. One manifestation of this criticism is the requirement that BIDs only provide services above those provided by the city. To the extent this provision in fact prevents cities from reducing services to the BID area, concerns about “exit” are reduced. *See, e.g.*, 34 C.F.R. §

This critique confuses city government with city life.<sup>183</sup> An “investment” through voluntarily increased property taxes in urban public services beyond those provided by the city does not represent a withdrawal from urban public life even if it occurs independent from the sometimes ineffectual city governments. BIDs represent a commitment to, not an abandonment of, cities.<sup>184</sup>

Empowering neighborhoods through the formation of BIDs should disproportionately *help* the poor, both by reviving the urban city and thereby restoring a tax base to the city government, and by enabling collective action in poor neighborhoods which have the most to gain. The egalitarian position on BIDs is precisely backwards.

#### CONCLUSION

The goal of this Article was to interpret Business Improvement Districts (BIDs). Drawing from democratic, economic, and architectural theories, the Article identified three core ideas in BID statutes. First, BIDs contain a specific conception of local political equality, an understanding that differs from that adopted by the Supreme Court. Second, BIDs reflect an endorsement of small scale collective action apart from urban municipal government. The third guiding idea of BID statutes is the restoration of “community” to urban neighborhoods. This Article argued that BIDs do not contribute to undesirable interlocal inequality, but rather represent a commitment to the urban public realm.

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200.12(a) (1997) (requiring federal funding under Title I of the Elementary and Secondary Education Act of 1965 to “supplement, and in no case supplant, the level of services” already provided by private schools), *cited in* *Agostini v. Felton*, 117 S. Ct. 1997, 2004 (1997).

183. See Eleanor Holmes Norton, *The Loss Is Personal*, WASH. POST, Aug. 27, 1997, at A19 (“In consistently fighting for home rule, I have always thought that I was fighting for D.C. residents, not the D.C. government.”).

184. As the front page headline heralding Washington, D.C.’s new district stated, “owners commit” to D.C. See Stephen C. Fehr, *Property Owners Commit to Revive D.C.*, WASH. POST, July 27, 1997, at A1.

