Business Improvement Districts and the Constitution: The Troubling Necessity of Privatized Government for Urban Revitalization

Wayne Batchis

Follow this and additional works at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly

Part of the Constitutional Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol38/iss1/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Constitutional Law Quarterly by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Business Improvement Districts and the Constitution: The Troubling Necessity of Privatized Government for Urban Revitalization

by WAYNE BATCHIS*

Introduction

Quasi-governmental Business Improvement Districts ("BIDs") have proliferated in cities across the country. By compensating for the service deficiencies of under-performing city governments, BIDs have been a notable bright-spot in what has otherwise been a grim half-century for America's cities. BIDs have been hailed as a remarkable practical success in the struggle to revitalize urban centers and neighborhoods throughout America. However, their constitutional roots have yet to be explored in significant depth by law and politics scholars.

The decades-long decline in the health and wealth of urban politics and affairs has been well documented. The flight of middle-class residents, retail and business to the suburbs and exurbs has left cities with depleted resources, crumbling infrastructure, a deflated tax base, and an increasingly needy population. At the same time, suburban municipalities, armed with the power to draw political boundaries and keep urban poverty at bay through exclusionary zoning, immunized themselves from many of the worst problems

* Ph.D., Johns Hopkins University, 2009; J.D., University of Pennsylvania, 1999. This article benefited from the comments of participants and attendees of a panel at the 2010 Law and Society Association Annual Meeting in Chicago where a version of this paper was first presented. Particular thanks to discussant Michael Coenen, for his thoughtful and encouraging commentary.
faced by cities. Suburban shopping malls privatized the retail environment, likewise avoiding the chaos, crime and disorder increasingly associated with traditional urban retail districts. In light of the dramatic competitive advantages afforded by the political structure and privatized nature of suburban America, the plight of America’s cities seemed irreversible. BIDs, however, fuse the power of mandatory taxation with private sector business savvy, to successfully co-opt the privatized suburban model.

With the use of BIDs, downtown business districts can now circumvent reliance upon cash strapped city governments, and instead opt for professional management akin to that found in a suburban shopping mall. However, while BIDs mark a notable victory for the urban condition, they have also garnered significant criticism. BIDs continue to face constitutional challenges in courts across the country due to their innovative, yet constitutionally questionable, quasi-governmental structure. BIDs are endowed with many of the powers traditionally possessed by urban governments, yet are arguably undemocratic, and ultimately structured to serve the interests of business, not of the people.

I argue that although BIDs have been a net positive for cities, they were a creature of necessity. BIDs present a range of constitutionally problematic issues that have yet to be resolved by the Supreme Court. At the same time, the very need for BIDs is arguably attributable to a larger political structure that has resulted from a series of flawed and contentious Supreme Court decisions preferring localism over equality and privatization over free speech. I assess the constitutional and political implications of BIDs in light of Supreme Court jurisprudence that placed a constitutional stamp of approval on municipal fragmentation, inequality and privatization—conditions that made BIDs an essential tool for urban success.

I. The Setting

Picture a large American city with more than one million residents. As with many older cities, the past half-century has been less than kind. This city spent many decades immersed in hard times, losing much of its middle and upper income population to neighboring suburban communities. As a result of its dwindling tax

base, the city was forced to drastically cut back on the services it provides. Trash pickup was reduced to once a week, street cleaning was phased out, and regular maintenance of street lights, sidewalks, and streets was cut back drastically. The crumbling infrastructure and dirty streets only accelerated the city’s decline, leading to business closures and further residential losses.

The remaining businesses in the central downtown district—now representing just a small fraction of the business community that once flourished in more prosperous times—are desperate to reverse this dire situation. However, in a large city with a rapidly shrinking tax base and many other pressing priorities, these businesses have little hope that their urban government will be inclined or capable of responding to their concerns effectively. Attempts to voluntarily collaborate and pool funds to fill the gaps in municipal service that are growing wider by the day repeatedly fail, because the temptation of a free ride is simply too great, particularly in a community of businesses struggling for their very survival.

This is when the idea of a BID takes hold. A BID allows for compulsory taxation without dependence upon revenue-starved, social service-providing urban governance. BIDs capitalize on many of the benefits of government, while avoiding the weight and inefficiency that accompanies conflicting political and social interests—a burden inherent in a truly democratic municipal structure.

As a result of the new BID, things eventually start to look up for the city’s downtown. As the central business district begins to get cleaned up, pedestrians once again feel comfortable navigating the district on foot. As foot traffic increases, businesses begin to thrive once more. Real estate price shoot up. The mayor, city council and other stakeholders are relieved. In fact, with the BID providing supplemental services to the most visible, and arguably important, section of town, city officials feel empowered to cut services further across the city, helping to mitigate some of its fiscal difficulties. The BID has done everything possible to return the business district to prosperity, supplementing the many areas where urban governance has failed to come through. In this small district with a residential population making up just a small fraction of the entire city, the sidewalks are clean and unbroken, crime is down, and even the public schools have been improved.

2. See infra Part IV.
Yet, this inspiring tale of urban success comes with footnotes attached. BIDs achieve their goals by harnessing the power of coercive taxation while at the same time eliminating the “messiness” of democracy. And there is much reason to believe that BIDs run counter to Constitutional principle. BIDs operate in what are perhaps America’s most quintessentially public of places. They have succeeded by making the public square desirable once again. No longer are places like New York’s Times Square synonymous with violence and debauchery. Cities can now respectfully compete with the privatized suburban shopping mall, the office park and the gated community. But at what price? By making the “public” incrementally more “private.” The BID is a completely rational choice, perhaps an essential one, in a world where the public realm has largely been displaced by a shiny, and highly controlled, private model.

A shopping mall might superficially have the feel of an old fashioned town square—people busily moving from store to store, families in tow—but those who do not conform to the narrow goals of commerce, for example, visitors who seek to share a controversial political message, are unwelcome. Privatization has succeeded in bottling what worked in traditional public places—the confluence of people and commercial activity—and ridding itself of the distractions, the untidiness, of public life. The Constitution and all of its attendant “inconveniences—democratic governance, equal protection, free speech—apply with full force in the public realm, and the privatized model found competitive advantage in eliminating these intrusive distractions. For many decades, cities were without recourse. However, BIDs allow cities—or at least their commercial stakeholders—to take back some power.

With increasing competition between cities and suburbs to attract and retain a mobile, economically attractive class of citizens, cities eagerly embraced the BID model. Modern America is defined by abundant choice. As growing numbers of mobile citizens make decisions as to where to make their home, where to spend their leisure time, and where to seek employment, a vibrant urban environment is once again becoming a popular choice, particularly for the young and well-educated. Many credit BIDs for making this

3. According to recent estimates there are at least 1,500 BIDs in North America, with more than 55 BIDs in New York City alone. See Robert H. Nelson, Kyle R. McKenzie, Eileen Norcross, Lessons from Business Improvement Districts: Building on Past Successes, MERACATUS POLICY SERIES PRIMER NO. 5, June 2008 at 2-3.
possible. By supplementing municipal services in urban business districts, BIDs have helped many cities bounce back from years of decline.

II. What is a BID?

Although BIDs have roots in legal structures dating back more than a century, their current form has only taken shape in the past twenty to thirty years. They are an unusual hybrid between public and private institutions and are funded through assessments of additional taxes on property owners within designated boundaries. The business and property owning community who foot the bill for BID activities typically provides the impetus for a BID. Although BIDs vary dramatically in both their size and ambitions, and can be found engaging in a wide range of activities, they most frequently “focus on traditional municipal activities, such as garbage collection, street maintenance, and security patrols.” Larger BIDs, like Philadelphia’s Center City District, also play a management role, promoting the city through marketing, engaging in strategic planning for the district, sponsoring events, initiating capital projects and providing grants or loans for storefront façade improvement.

The BID has roots in two traditional tools of urban governance: Special Assessment and Special Purpose Districts. Like Special Assessment Districts, BIDs impose coercive supplemental taxes on a limited set of landowners for a narrow benefit that is both public and private in nature. BIDs differ in that the additional taxes are generally not a “one-shot device.” BIDs tend to promote more diffuse benefits (albeit within the confines of the designated district), and Special Assessment Districts generally mark a unit of territory, not of governance. Special Purpose Districts, while taking a wide range of forms, are similar to BIDs in that they represent a

6. Id. at 368.
7. Id. at 369.
8. Id. at 368-69.
10. See Briffault, supra note 5, at 414.
11. Id. at 416.
specialized governmental subunit, serve a limited purpose, are governed by their own boards, and are in most respects legally independent of other governmental units. However, unlike BIDs, Special Purpose Districts tend to focus on just one discrete goal, typically on physical infrastructure, and are frequently funded by user charges rather than assessments. Thus, BIDs are similar to their urban development predecessors, yet differ in substantial ways.

III. The BID Debate

BIDs represent a radical shift in urban development strategy. While businesses have traditionally sought to reduce the financial burden of taxation, BIDs have been voluntarily and enthusiastically embraced by urban businesses across the county. Why? Improving the public environment in many downtown retail, business and entertainment districts through additional assessments offers a means of attracting and retaining business. Paul Levy, the executive director of Philadelphia’s Center City District and one of the most visible boosters of the BID concept, argues that BIDs are spurred by a combination of fear and opportunity. Fear is caused by the exodus of a large employer, the closing of a historic retail establishment, a rash of new crime, a sudden increase in graffiti, or by other ailments of modern urban decline. Opportunity can take the form of a new convention center, concert hall, sports facility or a high profile event coming to town. The culmination of the two brings quality of life issues into focus, and can act as a trigger for the development of a BID.

“Suburban malls, office parks, and entertainment complexes are managed places with single owners...[run by] savvy professionals, up to date on trends and on the innovations of their competitors.” To their proponents, BIDs offer cities a fighting chance to compete with these highly managed establishments. In the modern context, choice of location—whether as a shopper, employee, resident or entertainment-seeker—is in many respects akin to any other consumer choice. This competitive climate was observed by political

12. Id. at 418.
13. Id. at 419.
15. Id. at 125.
16. Id.
17. Id.
scientist Paul Peterson thirty years ago, well before the mass proliferation of the BID. He argued that "cities, like private firms, compete with one another so as to maximize their economic position. . . . [T]he city must entice labor and capital resources by offering appropriate inducements." And now, to an even greater extent than when Peterson wrote, cities must compete not only with other cities but with suburbs and exurbs, both nationally and internationally. Office campuses, shopping malls, suburban subdivisions, and theme parks offer a wide range of innovative amenities. A traditional city, it is argued, will not be able to compete without providing a baseline standard of cleanliness and safety—the fundamental goal of most BIDs. "When cities were manufacturing and distribution centers, neither the quality of the public environment nor a focus on customer service mattered much. . . . But in the highly competitive and post-industrial economy, quality-of-life issues become paramount."19

Proponents of the BID model argue that BIDs should be seen as a supplement to, rather than a replacement of, public governance and urban street life.20 While BIDs might be motivated by business interests, the benefits of their activities are arguably broad and diffuse. No one is charged admission to a public park abutting the retail district, recently renovated and cleaned by BID employees. Nor is a fee charged to take a leisurely stroll through one of the recently rehabilitated, and now very expensive, historic neighborhoods that are being revived as a result of the improvement of American downtowns. Thus, BID proponents argue that it is a service to the entire city and region to make the center of town a showpiece that engenders pride in all citizens, regardless of socioeconomic class.21 In contrast to gated communities and other formerly public, privatized places, one might argue that BIDs seek to attract all sorts of people to downtowns, and seek to repopulate long-neglected public spaces.

21. Levy, supra note 4, at 124 (observing that "regional shopping centers had no qualms about lifting Jane Jacob’s insights about active streetlife, placing them under glass, and turning on the air conditioning. What’s wrong when downtowns, blessed with historic architecture and real civic spaces, steal back from the mall the innovation of the CAM [Common Area Maintenance] charge?").
Much of the success of BIDs has been credited to their hybrid, quasi-governmental structure. BIDs have stepped in, with the added benefit of private-sector business acumen, to fill in the gaps left behind by struggling municipalities—without any additional cost to the cash strapped cities. Cities have lost significant support from the federal government in recent decades and “BIDs took the ‘new federalism’ seriously: If you want it, you’re going to have to fund it yourself.”\(^2\) In older cities these supplementary services are especially critical. Faced with high levels of poverty and a declining tax base, such cities often cannot afford to focus on small-scale aesthetic concerns. But it is often these issues, creating a city streetscape that is perceived to be clean and safe, that can determine the future success or failure of a city. The importance of focusing on “public perception” has long been well understood by those in the business community. And BID proponents would likely argue that the private sector is much better equipped to address this issue than city hall.

Indeed, recent scholarship has suggested that many BID services, including the improvement of the appearance of public spaces, are responsible for deterring criminal activity on the streets.\(^2\) In accordance with the “Broken Windows” theory of crime prevention, pedestrians will be more likely to frequent public spaces free of graffiti and litter, and in turn, criminals will be less likely to strike in these orderly areas with high pedestrian traffic.\(^2\) Further, “routine activities theory” suggests a link between the presence of “informal, yet capable guardians,” in this case uniformed BID-employed street sweepers, and reduced criminal activity.\(^2\)

However, there is a dark side to this equation. One common critique of this argument—the most visible (and literal) example being New York City’s Times Square BID—is that such a perspective will lead to the “Disneyfication” of public spaces.\(^2\) Such critics argue that cities should remain distinct from shopping malls and theme parks, and that by following this “managed” model we risk stripping

\(^{22}\) Id. at 126 (original emphasis).


\(^{24}\) Id. at 188–189. While the Broken Windows theory has been criticized as empirically unsubstantiated, many adherents attest to its validity. See BERNARD E. HARcourt, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

\(^{25}\) Hoyt, supra note 23, at 189.

\(^{26}\) Hoyt and Gopal-Agge, supra note 20, at 955.
cities of the very character that make cities unique and desirable environments.\textsuperscript{27} Even though BIDs are typically granted limited and seemingly benign powers, some question whether they actually represent a nefarious trend.\textsuperscript{28} Some critics worry that BIDs threaten to “over-regulate public space,” particularly where BID personnel provide supplemental security and maintenance services.\textsuperscript{29} Public streets, unlike private shopping malls, do not exist purely to serve the financial interests of the businesses that populate them. Superimposing private management models on public places might diminish the relative voice and interests of the nonconsuming public. With the proliferation of BIDs, which place primacy on profit, will the public street remain, unlike the suburban shopping mall, fundamentally public? Do BIDs they foster an elitist urban environment designed to keep out “undesirables?”

Certainly, a more prosperous downtown with thriving upscale retail, costly tourist attractions, white-collar office jobs and pricey restraints will not explicitly cater to all socioeconomic classes. Anyone who has frequented Manhattan or other gentrified city centers in recent years can attest to the homogenizing effects of such change. Some critics have suggested that BIDs have the potential to divert funding and services away less affluent urban areas thereby exacerbating wealth-based inequalities between neighborhoods.\textsuperscript{30} BIDs are explicitly designed to serve the interests of the businesses that fund them. While these interests may align with the interests of citizens and visitors to the city, there is no reason to believe that this will always be the case. Although BIDs may provide certain broad-based quality of life benefits, BIDs are essentially privately interested organizations stepping into roles that were formerly assumed to be the province of democratically elected governments. Indeed, many critics characterize BIDs as one more example of private sector incursion on government responsibilities,\textsuperscript{31} to the detriment of those outside of the private sector. “[S]ome allege that BIDs function more like ‘clubs’ of property and business owners that have been given the power to manage public spaces.”\textsuperscript{32}

\textsuperscript{27.} Id.  
\textsuperscript{28.} Id. at 954.  
\textsuperscript{29.} Id.  
\textsuperscript{30.} Id. at 953.  
\textsuperscript{31.} Id. at 951.  
\textsuperscript{32.} Id.
Other critics question whether BIDs services exacerbate inequality by violating the norm of equitable public services distribution. By providing additional services in accordance with a district’s willingness to pay, BIDs by definition, create intracity inequality. The existence of a BID might also draw greater attention to the district area, and in turn encourage the receipt of additional municipal services that it would not otherwise have received. BIDs are likely to bring attention to district needs “like potholes and broken street lights, and are effective at reporting these problems to responsible city agencies and pressing for the necessary repairs.” As the “eyes and ears” of the district, a BID may be more proactive in requesting city police resources, drawing officers away from other neighborhoods. However, such inequality may be produced in the opposite direction as well. Some BID members may contend that the provision of extra services by the BID ultimately leads the city to cut back on services provided to the portion of the city covered by the BID. While this might be perceived to be unfair to those property owners paying additional taxes in the BID, such reapportionment might free up city resources to increase services in less affluent neighborhoods.

The creation of a BID does invariably involve a tradeoff between increased inequality and the benefits the BID brings to downtown districts and the city at large. BID proponents, however, appear comfortable affording a privileged status to the downtown commercial district, emphasizing a business district’s critical role as the locus of metropolitan areas. In the case of BIDs that serve the commercial heart of a city, BID benefits might arguably “trickle-down” to other parts of the city and region: By making the downtown business district more attractive and competitive, BIDs encourage job growth; by making the city a more attractive residential destination, BIDs might lead to increased property values throughout the city; and by improving the image of the symbolic heart of the region, the morale of all residents might receive a boost.

In the example of Philadelphia, “the downtown is just 3% of the city’s total land area, but holds 85% of the city’s commercial office space, 67% of hotel rooms, provides 40% of the city’s jobs... [b]ut

33. Id. at 953.
34. Briffault, supra note 5, at 463.
35. Levy, supra note 4, at 126.
this economic engine is home to just 2% of the electorate. With such a disproportionately small percentage of the electorate relative to its economic significance, there is support for the assertion that downtown districts are in fact in need of extra-municipal services. Thus, arguments regarding inequality of public services might be more compelling when applied to BIDs located in select, economically advantaged, peripheral urban neighborhoods. The provision of services in downtown business districts arguably raises a different set of concerns because of the profound impact downtowns have on the city and region at large.

Furthermore, BID proponents would urge that assertions of inequality be tempered by perspective. The budgets of BIDs are remarkably small when compared to that of municipalities. For example, in New York City, home of the most extensive network of BIDs in the country, total BID assessments come to “less than two-tenths of one percent of the city’s $34 billion budget.” A portion of these BIDs’ budgets “is devoted to marketing, promotions and other direct business-related services that would be irrelevant to residential areas.” Indeed, when compared to the vast levels of inequality that exist between various suburban and urban municipalities within a metropolitan region, it might be argued that the inequality created within a city by the existence of a BID is relatively insignificant.

IV. BIDs as Governance

Does a BID represent the privatization of government? Much concern has been raised as to whether it is proper for a private organization to act in a public governmental capacity. A BID’s unelected board is handed significant authority, power that was traditionally in the hands of a democratically elected municipal government. In this respect, BIDs are seen as undemocratic. It is argued that the growth of “BIDs threatens the principle of ‘public stewardship’ of public spaces, and necessarily ‘represents a narrowing of the public sphere.’” As a replacement of local government, BIDs

36. Id.
38. Briffault, supra note 5, at 464.
39. Id.
40. Id.
42. Briffault, supra note 5, at 373.
are said to jeopardize the long-standing principle of "equal provision of public services." And finally, many claim that BIDs are insufficiently accountable to the residents of the BID district and the residents of the city at large.

BID formation and structure can vary from jurisdiction to jurisdiction. However, all BIDs must be established in accordance with the specific BID enabling legislation in the state where they are formed. Enactment of a local law or ordinance addressing the basic functions and limits of the BID is usually required; discretion over whether or not to create a BID, regardless of the degree of private sector support, ultimately lies with the city. In many states, to varying degrees, landowners also have the right to veto a municipality's approval of a BID. Once formed, BIDs can take on a variety of structural forms, depending on the locality. However, the majority are governed by a board of directors made up of property owners and prominent civic leaders. This "board is officially the principal decisionmaker in a BID's management structure, just as a corporate board of directors is in a more conventional nonprofit company."

To what extent are BIDs held accountable for their actions and to whom should they be? Although it is generally the large property owners, and not individual residents, who fund BIDs, BID actions clearly have a direct impact on the citizens residing in the district. Depriving these residents of a voice in this quasi-governmental institution clearly raises concerns. BID proponents emphasize the arguably limited and circumscribed nature of BID power. For example, Brian Hochleutner argues that "less BID power means BID officials make fewer choices about fewer things; this means that BID officials need not be as accountable as more traditional public officials." In theory, because BIDs are established under the authority of the elected municipal government, they are ultimately democratically accountable for any undesirable behavior. However, the claim that BIDs will truly be responsive to the concerns of the

43. Id.
45. Id. at 378.
46. Briffault, supra note 5, at 379.
47. Id. at 380.
48. Hochleutner, supra note 44, at 381.
49. Id. at 383.
larger, non-property-owning public, is dubious. Many point out that, once established, BIDs largely act with impunity.\textsuperscript{50} It is likely that the vast majority of voting city residents are not even aware of what a “BID” is, let alone comprehend the technical attributes of BIDs’ public-private hybrid legal status. The likelihood that voters will hold their elected officials accountable for the actions of a seemingly private, independent organization would thus appear to be slim at best.

A partial solution to BIDs’ lack of \textit{direct} accountability—sunset provisions—has been recommended by legal scholar Richard Briffault and other BID experts.\textsuperscript{51} After a designated number of years—five is common—BIDs would be forced out of business unless reestablished by the city in a manner similar to the procedure for initiating the BID.\textsuperscript{52} Such requirement ostensibly ensures that the city—and thus the citizens of both the district and municipality at large—has the opportunity to routinely reassess the performance of the BID. Ultimately however, BIDs maintain substantial autonomy. Sunset provisions may thus be dismissed as simply an inadequate patch on what is essentially a privatized, undemocratic—and perhaps unconstitutional—institution.

\textbf{A. The Constitutional Issue}

Is the existence of a BID board, controlled by unelected property owners, antidemocratic? One of the most prominent challenges to BID governance concerns the question of whether or not the BID structure violates the one person, one vote doctrine under the Constitution’s Equal Protection Clause.\textsuperscript{53} The principle of one person, one vote, firmly established by the Supreme Court in \textit{Reynolds v. Sims}, confirms that voting is a fundamental interest “in a free and democratic society.”\textsuperscript{54} According to the Reynolds Court, suffrage is “preservative of other basic civil and political rights” and therefore subject to strict constitutional scrutiny.\textsuperscript{55} Thus, voting schemes that provide voters in certain areas with “two times, or five times, or ten times the weight” as “those residing in the disfavored

\begin{footnotes}
\item[51] Hoyt and Gopal-Agge, \textit{supra} note 20, at 952.
\item[52] Briffault, \textit{supra} note 5, at 458.
\item[53] Id. at 430.
\item[55] Id.
\end{footnotes}
areas,” have the unconstitutional effect of diluting the vote of some voters, to the benefit of others.\textsuperscript{56} In \textit{Kramer v. Union Free School District} the Court extended this principle from inter-geographic voting inequalities—providing greater or lesser weight to individual voters based on the district in which they reside—to intra-geographic inequalities—those schemes that provide the vote selectively to particular classes of individuals within particular boundaries.\textsuperscript{57} Thus, a law providing voting rights on a selective basis—here, only to those within a school district who were deemed to have a sufficient stake in the public schools—was deemed unconstitutional.\textsuperscript{58} While the Court declined to establish an absolute constitutional prohibition on all laws limiting “the exercise of the franchise to those ‘primarily interested’ or ‘primarily affected,’” the \textit{Kramer} Court set a high bar for attaining “sufficient precision” to constitutionally justify such voting regimes.\textsuperscript{59}

What would be the implications for BIDs if such principles were held to apply to the highly selective voting schemes inherent in the structure of Business Improvement Districts across the country? If one person, one vote did apply, states would be required to either fully enfranchise BID district residents through elections or shift control of the BID to city government.\textsuperscript{60} However, while the Supreme Court has unequivocally concluded that the one person, one vote principle does apply on the local level, the Court carved out a limited exception for certain special purpose units of government.\textsuperscript{61} Thus far, this exception has been read by lower courts to apply to BIDs.\textsuperscript{62}

\textbf{B. \textit{Kessler v. Grand Central District Management}}

The application of the one person, one vote special-purpose exception to BID voting was tested by the Second Circuit Court of Appeals in 1998.\textsuperscript{63} The Federal Appeals Court confronted a challenge to one of the largest and most prominent BIDs in the nation, the Grand Central Business Improvement District in New York City.\textsuperscript{64} Ultimately ruling in its favor, the Court concluded that the BID did

\begin{itemize}
  \item \textsuperscript{56} \textit{Id.}
  \item \textsuperscript{57} \textit{Kramer v. Union Free Sch. Dist.}, 395 U.S. 621, 622 (1969).
  \item \textsuperscript{58} \textit{Id.}
  \item \textsuperscript{59} \textit{Id.} at 631–32.
  \item \textsuperscript{60} \textit{Briffault}, supra note 5, at 430.
  \item \textsuperscript{61} \textit{Kessler}, 158 F.3d at 98–99.
  \item \textsuperscript{62} \textit{Id.} at 103.
  \item \textsuperscript{63} \textit{Id.} at 92.
  \item \textsuperscript{64} \textit{Id.} at 95.
\end{itemize}
not run afoul of the Equal Protection Clause. Due to the district’s “circumscribed” responsibilities and powers, its “limited goal of improving the area for business,” the significant city “control over” the BID, and the fact that BID had a “substantially greater effect” and concomitant “principal burden” on voting property owners, the Court determined that the BID fell within the special district exception to one person, one vote. However, it is far from clear that other BIDs would, if challenged, similarly pass constitutional muster, nor is it clear that the Supreme Court would arrive at the same conclusion reached by the Second Circuit. Considering the critical constitutional principles at stake, the High Court’s precedents in related cases, and a compelling dissent by Judge Weinstein, the Kessler decision was, at best, a close call.

On the spectrum of urban significance, the Grand Central Business Improvement District (“GCBID”) could hardly have been more consequential. The BID incorporated an area of midtown Manhattan that included “approximately 71 million square feet of commercial space.” While the district comprised less than twenty percent of the commercial space on the island of Manhattan, the office space included in the BID exceeded the entire inventory of central business districts in cities such as “Houston, San Francisco, Dallas, Denver, [and] Boston.” The GCBID’s functions also extended beyond typical BID services such as sanitation and aesthetic maintenance. The activities included employing a 63-member security force, “operating tourist information booths,” sponsoring special events, and running a “24 hour ‘outreach, assessment and referral’ facility for homeless persons that provides service such as job training.”

Although the functions actually performed by the Grand Central BID were perhaps more extensive than the typical BID, these functions may represent just the tip of the iceberg. As quasi-governmental bodies, BIDs continue to expand to fill ballooning service gaps left in the wake of shrinking local governments budgets. The contract between New York City and the GCBID provided a vast grant of authority to perform “any other activities or service and

65. Id. at 93–94.
66. Id. at 104–07.
67. Id. at 95.
68. Id.
69. Id. at 95–96.
purchases... which the [manager of the GCBID] determines will enhance the safety, convenience, cleanliness, attractiveness or usefulness of the District."

Included in the New York Municipal Code list of approved BID activities are a startling array of government-like functions, including, among others: "closing, opening, widening or narrowing of existing streets; relocation of utilities...; and construction of... park areas;... safety fixtures, equipment and facilities;... pedestrian overpasses and underpasses and connections between buildings;... ramps, sidewalks, plazas, and pedestrian malls;... parking lot and parking garage facilities."

Without question, these functions are tasks historically fulfilled by local government. Indeed, the Kessler Court readily conceded this point. However, very much unlike government, a BID's board of directors is elected in accordance with a weighted voting system that radically diminishes the relative voice of many stakeholders in the BID area. In the case of elections for the GCBID's management association, the bylaws provide for four distinct voting classes. Owners of real property in the district are deemed "Class A" voters, and are entitled to elect thirty-one board members. This privileged class is in fact guaranteed majority representation at all times. On the other hand, "Class B" voters consist of commercial tenants and elect just 16 board members, while "Class C" voters, limited to residential tenants, may choose just one board member. The four "Class D" directors, in contrast, are not elected at all; they are there by virtue of their appointment by the city. This weighted voting scheme was predictably at the heart of the one person, one vote constitutional challenge to the GCBID. "[B]ecause residents are consigned to a permanent minority status on the Board even though they are numerically superior to the class of owners of property

70. Contract between City of New York, Department of Business Services and Grand Central District Management Association, Inc. 5-5 (July 30, 1993); see also Kessler, 158 F.3d at 112.
71. N.Y. GEN. MUN. LAW § 980-c (McKinney 1998); see also Kessler, 158 F.3d at 112-13.
72. Kessler, 158 F.3d at 104.
73. Id. at 97.
74. Id.
75. Id.
76. Id.
77. Id.
within the district, they are deprived of any meaningful opportunity to advance their interests." 78

The common refrain? "So what?" BIDs are a win-win-win for all involved. Cities are served by keeping businesses in the city; businesses are served by targeting quality of life issues that would otherwise hamper the city's survival—while at the same time avoiding the free rider problems endemic to volunteer efforts; and other stakeholders who reside in the BID simply reap the benefits of a happier, healthier, cleaner, professionally managed neighborhood. What's not to like? It is not as if BIDs are engaging in high level policy making—they are keeping the streets clean. What could be constitutionally suspect about this? Well, it turns out, a good deal. This rosy portrait glosses over many troubling constitutional implications.

As discussed previously, BIDs are not necessarily limited to eminently uncontroversial functions such as sweeping the streets and covering graffiti; their activities are increasingly much more extensive than this—reaching into the realms of social welfare, policing and urban planning, among others. For the sake of illustration, consider the GCBID's funding and support of a homeless outreach facility. The Kessler majority dismisses these activities by contrasting the BID's relatively minor role with New York City as a whole, which "has an entire Department devoted to assisting the homeless." 79 Even if the BID expanded its activities, and "provided the homeless with more extensive services, such as temporary housing," the GCBID, we are told, would not be transformed "into a general governmental body." 80

It is certainly true, as the Kessler majority points out, that many non-governmental religious and charitable organizations engage in similar activity, and concomitantly manage to avoid classification as a "general governmental body." 81 However, such organizations also do not, like BIDs, owe their survival to the benefits derived from governmentally sanctioned mandatory taxation. Reliable funding promotes year-to-year consistency, fostering potential dependency by those to whom the provision of social services is provided. Like government service entitlements, there is reason to believe that the

78. Id. at 98.
79. Id. at 105.
80. Id.
81. Id.
homeless will come to rely on BID service programs. However, in stark contrast with government, the homeless and their advocates have no voice in determining the nature of these services. And there is simply no reason to believe that the property owners and businesses that make up the “Class A” and “Class B” voters will have interests directly aligned with the homeless they serve. Indeed, there is reason to believe that their interests are quite distinct—and that the choices a BID makes as to how and what services it will provide will be informed not by what is in the best interest of the homeless, but rather by what will best serve “Class A” and “Class B.”

Indeed, the Kessler dissent points to a 1995 City Council report that is highly critical of the GCBID’s “lack of accountability” with regard to its social service programs. The report cites allegations that BID “workers operated as ‘goon squads’” as well as the fact that the BID’s social service arm was “subject to two separate $5 million lawsuits stemming from incidents in 1990 and 1992 which alleged that . . . excessive physical force [was used] against homeless people.” As the dissent argues, “such potential episodes demonstrate how the safety and well-being of the inhabitants of this portion of Manhattan can be powerfully touched” by the presence of the BID. One vision of promoting a district’s “quality of life” may directly conflict with another such vision. Political controversies over how police are to manage homelessness are thus understandably common. Of course, unlike a BID security force or BID social service workers, the police are directly under the city’s, and thereby the voters’, control. How a BID “hires, trains, assigns, supervises, and disciplines its security detail can have a dramatic effect on the lives of all those who reside where the guards patrol. District residents’ views on such subjects may differ from those of property or business owners.”

In arriving at its conclusion that the GCBID does not contravene the Equal Protection Clause, the Kessler Court emphasizes its determination that the BID’s “responsibilities and powers are . . . circumscribed”—even though “a few of [its] functions are of the type

82. Id. at 122.
83. Id.
84. Id. at 122–23.
85. See, e.g., Damien Cave, At Key West Beach, Wondering Who’s a Vagrant, N.Y. TIMES, Mar. 30, 2010.
86. Kessler, 158 F.3d at 122.
that the City also performs.\textsuperscript{87} However, even if one were to accept the premise that BIDs have a relatively narrow, and therefore unproblematic, scope when compared with a democratically elected local government, there may be few clear statutory constraints as to how far BID functions may expand—as exemplified by the discussion above of the relevant New York law governing BIDs. The Kessler Court does not answer the question of when BID activities become too extensive, too broad, or too “governmental” to allow for an unequal voting scheme under the one person, one vote principle. Implicitly, this constitutional line of impropriety exists, and it is just a matter of time before a court, perhaps the Supreme Court, will declare that a particular BID has crossed it. Indeed, the only special purpose districts with weighted voting schemes held to be constitutional exceptions to the one person, one vote principle by the Supreme Court were districts devised for the sole narrow purpose of water conservation\textsuperscript{88}—such a singular purpose is a world away from the diversity of functions today’s BIDs engage in.

To take just one example, Philadelphia’s largest BID, the Center City District, has expanded its mission to include the marketing of Philadelphia’s public schools. A report produced by this influential BID explains:

We compete in an economy in which knowledge, not manual dexterity or strength, determines success... In recent decades, Center City has dramatically expanded its share of young, well-educated professionals: 30% of downtown dwellers, 24,000 residents, are now aged 25 to 34, double the citywide and regional averages. They work in downtown office buildings, hospitals and universities. They rent apartments and buy homes. They patronize restaurants, shops, cafes and cultural attractions. They bring vital workplace skills and entrepreneurial drive. But 86% of them have no children... Center City is a mecca for recent college graduates, but once they have children, we lose a significant share to the suburbs.\textsuperscript{89}

\textsuperscript{87} Id. at 104.


The BID's response to this dilemma? Make "public schools even more customer friendly, mirroring the culture of independent schools." So, once again, we find an example of a BID attempting to harness the benefits of the privatized model; but here it is not simply seeking to create a clean and safe, mall-like environment on city streets. Instead, it is attempting to make a public education system look more like a private one. It proposes that the Center City BID "work with the School District" to do so.

Without a doubt, the state of urban public schools in America is a public policy issue of paramount concern for the health of cities generally. Many scholars have attested to the fact that perceived school quality is one of the main "push factors" encouraging middle class families to flee to the suburbs. Yet, regardless of whether one agrees with this rather uncontroversial conclusion, by engaging this issue, a BID is undeniably taking a position in the volatile public debate over what constitutes an ideal public school system. This BID's "vision" of making urban public schools more attractive to "young, well educated professionals" may indeed have significant merit. But regardless of how convinced one is that this is the best way to improve city schools, it must be conceded that it is one "vision" or strategy, among many other possibilities. Such a strategy may have unintended ramifications for children of less well educated, non-professionals. While this complex policy issue will not be resolved here, what is crucial is that it be recognized for what it is: a public policy issue.

At what point does BID involvement with a public school system begin to wrest public control of a public asset and transfer it to a select group of privileged "Class A" voters? Even minimal BID engagement with the school system might to some extent risk replacing a public vision of public schooling—ensured by the constitutional one person, one vote requirement—with a private one, reflecting primarily the interests of a narrow group of voters. Thus, if, as the Kessler Court concluded, providing services to the homeless may be said not to exceed the narrow purposes allowable under the one person, one vote exception, how about public education? What if the BID engages in both areas? Would this still constitute an "entity with a 'special limited purpose and . . . [a] disproportionate effect' on

90. Id. at 2.
91. Id.
certain constituents[?]." Recall that in Kramer v. Union Free School District, the Supreme Court denied that a "31 year-old college educated stockbroker who live[d] in his parents' home" could be constitutionally denied the right to vote in school board elections, just because he had "no children and neither own[ed] nor lease[d] taxable real property." Putting aside the reality of potentially expansive BID functions, even the very assumption that certain services—the limited role of supplementary street sweeper and graffiti scrubber—are simply too mundane and uncontroversial to justify a mandatory ballot-box check, is deserving of some constitutional scrutiny. The Kessler majority minimizes BID activities as "nothing more than efforts to make the district more attractive to tourists and other consumers." However, quality of life concerns such as cleanliness and perceived safety can spell the difference between economic life and death for urban neighborhoods. In the high stakes competition for consumer dollars waged against suburban developments, office parks, and shopping malls—whether it be for those who would frequent an area to make purchases or conduct business, or for those who would buy or rent commercial or residential space—the survival of urban neighborhoods may turn on the very function BIDs specialize in, making their districts "attractive." Indeed many BIDs, perhaps correctly, may claim credit for reestablishing urban vitality, once again making certain city neighborhoods viably competitive following painful decades of suburban economic drain. This role can hardly be characterized as being of marginal significance, let alone not meriting democratic input under the one person, one vote principle.

Self-help among urban businesses and property owners in the form of a BID may indeed be admirable, particularly in light of the trying urban conditions the BID model emerged from in the 1980s and 1990s. However, the so-called "limited purpose" of BIDs to maintain reliably clean and safe streets, was once a baseline expectation of local government. This baseline was presumably

93. Kessler, 158 F.3d at 103 (citation omitted).
95. Kessler, 158 F.3d at 105–06.
96. Leah Brooks, Unveiling Hidden Districts: Assessing the Adoption Patterns of Business Improvement Districts in California, 60 Nat’l Tax J., 6 (March 2007) (explaining “quantitative analysis shows that [BIDs] have been able to reduce crime in Los Angeles and Philadelphia and increase property values in New York City. In addition, anecdotal evidence credits them with a myriad of neighborhood improvements.”).
reached with citizen input, and significant discretion is involved in deciding how to achieve it. How should street cleaners and security guards be supervised? If motorized vehicles and trucks are used to clean the streets, at what times will they operate? At 2 AM when their decibels might prove to be a menace to sleeping residents; or at 2 PM when they may interfere with pedestrian and vehicular business traffic? If capital infrastructure projects are undertaken to improve the appearance and functionality of the street, should the street be designed to better accommodate public buses utilized by the city's lower income population, or taxis and limousines more likely to be the domain of the middle and upper classes? Discretion looms large. Even in their most rudimentary functions, BIDs invariably make "long-term judgments about the way the district should develop when it decides to spend money in one way rather than in another."97 Yet the residents who would formerly have had a democratic check over decision making with which they were displeased no longer have such a check under the BID regime.

Finally, it is argued that even though BIDs might be said to primarily serve business interests, such businesses are the ones who pay for this benefit.98 Thus, even though BIDs are funded through a form of mandatory taxation, the system is said to be fundamentally fair.99 In other words, those who are mandated to pay, i.e., the property owners, are the primary beneficiaries, while those who do not pay, simply reap tangential benefits. This formulation, however, may not be truly reflective of the underlying reality. As the Kessler dissent points out, "[i]n all likelihood the tenants in the district do in fact 'pay' for the services . . . in the form of higher rents passed on as a result of higher property 'taxes.'"100 Thus, it is not necessarily the case that only those who have the privilege of a vote, pay for BID benefits. Many who are deprived of a democratic voice may also be shouldering a good portion, albeit indirectly, of that financial burden. Furthermore, in the case of the GCBID and other similarly authorized BIDs who have the ability to raise money through the issuance of tax exempt bonds, there is a significant risk that the city will directly bear a financial burden. "These bonds are charged against the City's constitutional debt limit, reducing the amount of

97. Kessler, 158 F.3d at 124.
98. See supra Part II.
99. See supra Part III.
100. Kessler, 158 F.3d at 123.
money that the City can raise through its own future bond issues.\textsuperscript{101} Not only do bond issues by a BID have a potentially adverse impact on a city’s future ability to secure funds, the city may be held legally and financially responsible should the BID default on its obligations or go “belly up.”\textsuperscript{102}

The Kessler Court points out that there is not a constitutional prohibition on “experimentation” and “innovation.”\textsuperscript{103} The majority suggests that the complexities and challenges confronted by local government merit creative solutions.\textsuperscript{104} And certainly, considering the grave circumstances confronted by cities across the country during a half-century of urban decline, such a conclusion might strike one as eminently reasonable. BIDs’ innovative way of circumventing the free rider problem was of enormous consequence for cities. It was a problem that, for a generation, frustrated cities’ futile attempts to compete with the professionalized management provided to shopping mall and office park tenants who eagerly shell out the fees that allow for a pleasant—some would argue sterile—shopping and workplace environment.\textsuperscript{105}

On the other hand, one might argue that even though the BID framework attempts to replicate the relatively recent, but now ubiquitous, privatized “common interest” model of development, there is in fact nothing at all innovative occurring. Tailoring influence to those identified as “having the greatest stake” in an endeavor is nothing new. On the contrary, limiting the franchise to those who happen to own property is a very old technique with deep, but dubious, roots.\textsuperscript{106} A brief review of American history might even lead one to the conclusion that the BID formula for success constitutes a giant leap backward—a reversion to an undeniably less democratic era in which one’s political voice was regularly determined according to property wealth—the assumption being that only those who own property have a sufficient stake in political outcomes. “At one time the franchise was regarded as the rightful possession of the most privileged and wealthy in society... [Yet] since the nation’s founding the right to vote has been steadily expanded to include larger and larger classes of American citizens. Over the course of the last two

\begin{flushleft}
101. Id. at 111–12.
102. Id. at 112.
103. Id. at 100–01.
104. Id. at 103.
106. Kessler, 158 F.3d at117.
\end{flushleft}
hundred years, both the states and the federal government have
stripped away those restrictions which once limited suffrage to a
privileged minority.\footnote{107}

C. Parceling Governmental Power

The debate over BIDs has deep roots, deeper than one might
imagine at first glance. The contentious debate over how
governmental power should be apportioned stretches back to the
Constitutional Convention in Philadelphia. There America's
founding fathers brokered the great compromise, one which divides
political power both functionally and spatially. The spatial division is,
of course, federalism—a sharing of power between the federal
government and the states which ensures federal supremacy, while at
the same time according significant autonomy to the states. The
proper parameters of this division have been a source of fierce
contention ever since. And while the Constitution does not directly
address the allocation of political power between states and their
many political subdivisions, nor of the further subdivision of those
municipalities, these questions invoke many of the same philosophical
questions, and indeed constitutional principles, that recur in the
debate over federalism.

Returning to the hypothetical from the beginning of the article,
let us suppose that Mr. Old City Dweller, a longtime resident of our
hypothetical city, lives in an unfashionable section of town. He would
like to move to the BID area—with its suburban-like expectation of
cleanliness and order—but he finds himself locked out due to the
prohibitively high price of real estate. His taxes continue to rise and
city services continue to decline. Outside the small geographic area
of the central business district, poverty remains endemic. Benefits of
the revival of downtown do not appear to redound to Mr. Old City
Dweller; in fact, in many respects, he feels worse off since the creation
of the BID. He cannot afford to move to the BID district, and feels
marginalized by his own elected city government. As a resident and
citizen of the city he remains locked out of BID elections. Nevertheless,
he believes that the policies carried out by the downtown BID may be adversely affecting the remainder of the city.
He feels that he has been deprived of his voice as a citizen. Does Mr.
Old City Dweller have any recourse? Might he have a claim that he

\footnote{107. \textit{Id.}}
has been denied equal protection under the law? What might the Supreme Court have to say to Mr. Old City Dweller?

In Warth v. Seldin, the Supreme Court denied standing to urban plaintiffs who were locked out of neighboring communities due to highly restrictive exclusionary zoning—zoning that virtually precluded the construction of lower to moderate income housing. The "ordinance, by virtue of regulations concerning 'lot area, set backs . . . population density, density of use, units per acre, floor area, sewer requirements, traffic flow, ingress and egress[, and] street location,' [made] 'practically and economically impossible the construction of sufficient numbers of low and moderate income' housing." By law, ninety-eight percent of the vacant land in the town was committed to "single-family detached housing." As a result the plaintiffs, who were lower-income, were unable to afford housing in this and other suburban communities. Instead the only affordable option was to remain a resident of the metropolitan area's financially strapped anchor city.

Greater residential density meant that housing prices were within reach in the city. But the high concentration of poverty, no doubt exacerbated by the exclusionary practices in the surrounding suburban communities, also meant that the city was "forced to impose higher tax rates . . . than would otherwise have been necessary." Furthermore, as a result of the highly restricted living options sanctioned by the force of law, the plaintiffs "incurred greater commuting costs, lived in substandard housing, and had fewer services for their families and poorer schools for their children." Similar to the dichotomy that might exist for Mr. Old City Dweller between the worn and tattered neighborhoods unaided by supplemental extra-governmental services and those within the confines of the downtown BID, the plaintiffs in Warth identified a dramatic disparity between city and suburb. Service deficiencies in the city included a lack of adequate police protection, an absence of "play areas for children" and inadequate garbage disposal—all of

109. Id. at 522 (Brennan, J. dissenting).
110. Id. at 495.
111. Id at 496.
112. Id.
113. Id. at 523 (Brennan, J. dissenting).
which were provided in exclusionary suburban communities with greater resources.\textsuperscript{114}

In a five to four decision, the Supreme Court rejected that the plaintiffs had standing to sue on the basis of this striking alleged inequality.\textsuperscript{115} The Court reasoned that none of the plaintiffs had an actual interest in property within the boundaries of the suburban town at issue, they were not subject to the laws in place in this municipality, and they have never been “denied a variance or permit” by officials in the town.\textsuperscript{116} The implications of this holding are, as the dissenters protested, seemingly perverse.\textsuperscript{117} By virtue of the laws that existed in these neighboring suburban municipalities, the plaintiffs were not only excluded from those communities, they were also excluded from meeting the standing criteria set-out by the court permitting a judicial challenge. The dissent decried that “the Court turn[ed] the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation... [T]hey will not be permitted to prove what they have alleged... because they have not succeeded in breaching... the very barriers which are the subject of the suit.”\textsuperscript{118}

In the BID context, Mr. Old City Dweller might have an even weaker claim to standing, for he lives in the very city where BID enabling legislation was passed—by democratically elected public officials. Even though BIDs have been thus far exempted from the one person, one vote principle, BIDs are arguably still a product of democratic governance. Not only must they be formed through a frequently time consuming and arduous legislative process, in many states BIDs must be established with a sunset provision and require renewal or reauthorization upon expiration.\textsuperscript{119} In many states where the duration of BIDs is not explicitly limited, “either the assessment payers or the municipal government, or both” have power to dissolve the BID.\textsuperscript{120} If Mr. Old City Dweller were to file a constitutional claim, the Court would likely point out the ostensible recourse he has through the political process—arguably making a claim of standing even less persuasive that the denied request in \textit{Warth}. Furthermore,
it might be pointed out that BIDs carry substantially more modest powers than politically independent suburban jurisdictions. For example, although some scholars have suggested that BIDs should play a role in zoning decisions, they are typically not provided with such power. Thus, aggrieved citizens may very well be locked out of judicial redress, even though, as many BID critics have argued, once established, BIDs operate in a fundamentally undemocratic way. The organizational structure of BIDs, although widely varied, provides inequitable representation to “residents and the less privileged” and weight voting such that larger property owners are entitled to greater authority. The potential absence of judicial recourse is particularly troubling considering the evidence that indirect political checks on BIDs—via municipal government—are not sufficient.

V. Moving Beyond the Debate

Perhaps it would be useful to move beyond the question of whether or not BIDs, viewed in isolation, are in fact desirable or consistent with current constitutional doctrine. Perhaps it is also important to ask why? Why are BIDs necessary in the first place? What about the American legal and political context makes them so valuable, arguably even essential, for well-functioning urban centers? The Supreme Court’s jurisprudence sheds light on this question. In fact, I argue that its decisions have helped lay the foundation for BIDs by contributing to the relative disadvantage that has hampered large urban centers for decades. The Supreme Court has the power to shape what democracy means, to determine how equality is to be defined within democratic subdivisions, to clarify what rights are guaranteed in public and quasi-public places, and to determine how we are to distinguish the “public” from the “private.”

A. BIDs, Political Fragmentation, and the Constitution

The U.S. Constitution, with its precarious balance of federalism, did not explicitly address the relationship between states and their political subdivisions. In fact, as far back as 1909, the Supreme Court confirmed that as a matter of constitutional law, municipalities are

122. See supra Part III.
123. Hoyt and Gopal-Agge, supra note 20, at 951.
mere creatures of the state. When a soon-to-be-annexed municipality attempted to resist a merger with the city of Pittsburgh, the Court responded that the "number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." According to the Court, this principle holds true even where a majority of voters in the annexed city opposes a merger.

Thus, there seemed to be little ambiguity that "the State is supreme [over its subdivisions], ... unrestrained by any provision of the Constitution of the United States." Ironically, with the Warth decision, the Supreme Court stepped in to ensure that the boundaries of municipal subdivisions—even though of minimal constitutional significance with regard to state supremacy—become highly significant when it comes to federal judicial intervention. After Warth and other high court decisions, such boundaries would effectively become judicially impenetrable barriers.

The Warth decision is thus instructive as a lesson in why BIDs were needed in the first place. Some lament that BIDs "threaten to replicate within cities the fragmented political and fiscal structure and interlocal public service inequalities characteristic of most American metropolitan areas." But they do this, quite simply, because cities and their stakeholders have no other viable choice. The reality of a harshly competitive landscape in which local governments must compete with one another (in the same way Home Depot competes with Lowes), cannot be simply wished away. Decisions such as Warth v. Seldin cemented this reality, ensuring that the dramatically inequitable distribution of political power and resources between "municipal haves" and "municipal have-nots" is practically immune from constitutional challenge.

State laws do delegate a wide range of powers to municipalities. They do so by providing for both specific powers in particular areas and the more general delegation of home rule authority. Home rule provisions vary from state to state, but generally provide the power to act without first requesting permission from the state legislature.

125. Id. at 178.
126. Id. at 174–75.
127. Id. at 179.
128. BRIFFAULT, supra note 5, at 376.
Municipalities are typically provided with the power to establish a governmental structure of their own, to elect local officials, to zone and regulate land use, and to raise property tax revenue which may be used for their own purposes. So, although the U.S. Constitution does not provide state subdivisions with sovereign constitutional powers, local governments are effectively established by their states as independent governments with considerable political power to shape their own destiny.

As Warth illustrates, the Supreme Court has been loath to permit intrusions into this local autonomy. Ironically, the Court has steadfastly defended such local autonomy while at the same time maintaining its own precedential assumptions rejecting an independent constitutional status for municipalities within the Constitutional framework of federalism. It has done so even where such autonomy leads to countervailing constitutional concerns. The Court has rejected, or refused to consider, constitutional challenges to inter-local disparities, such as vast school funding inequalities and residential housing disparities, in the name of “the state’s legitimate interest in preserving local control. Local control may not be constitutionally required . . . but it does seem to be constitutionally favored.”

BIDs constitute an eminently rational response to suburbia’s privileged constitutional status.

The Supreme Court’s constitutional preference for the localism—a preference that has helped support and maintain the relative disadvantage with which cities contend—is perhaps nowhere as evident as it is in the area of public education. Two critical Supreme Court decisions, Milliken v. Bradley and San Antonio v. Rodriguez illustrate the Court’s perspective. In Milliken, the Court accorded a peculiar level of constitutional respect to state political subdivisions. Despite the fact that internal subdivisions are purely matters of state discretion, and that states are ultimately legally responsible for and in control of ostensibly autonomous local political decision making, the Court in Milliken concluded that judicial remedies for constitutional violations “must stop at the school district line.”

130. Id.
Just one year earlier, in Rodriguez, the Court had revealed the true contours of this principle. Although the Court emphasized its respect for the political autonomy within internal state political boundaries, in Rodriguez it was the boundaries themselves, not the people within those boundaries, that were deemed to be most constitutionally significant. The Court rejected the argument that the individuals within each local subdivision, here school districts, represented a definable suspect class appropriate for strict equal protection scrutiny, even where there were vast disparities in school funding between localities. Thus, if we were to ask why large BIDs such as the Center City District in Philadelphia feel compelled to expand their activities to include involvement with the public school system, Milliken and San Antonio might provide some answers.

Milliken, a decision from 1974, was a product of the protracted struggle to enforce the constitutional mandate of Brown v. Board of Education to desegregate America’s public schools. It addressed a judicial remediation order resulting from a successful complaint that the Detroit public school system was racially segregated “as a result of official policies and actions.” Due to the rapidly declining white population within the city limits of Detroit, both the District Court and Court of Appeals concluded that the only feasible solution to the endemic segregation in Detroit was a metropolitan-wide desegregation plan. Otherwise, the clear result would be “an all black schools system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.”

However, the Supreme Court adopted a much more constrained reading of the kinds of constitutional remedies a court may require. It reversed the lower court decisions, concluding that the scope of a “remedy is determined by the nature and extent of the constitutional violation.” For the majority, “the boundaries of separate and autonomous school districts” were determinative constitutional boundaries. However, the public agencies who discriminated acted

134. San Antonio, 411 U.S. at 54.
135. Id. at 28.
138. Id. at 735.
139. Id.
140. Id. at 744.
141. Id.
on the State's authority, and therefore on the State's behalf. Of course, the language of the Equal Protection Clause reads: "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It says nothing of a state's political subdivisions. Nevertheless, the implications of the Court's decision in *Milliken* were clear: Cities were stuck with their predicament of having a disproportionate share of poverty and disinvestment, a condition that was driving the middle classes across political boundaries to advantaged suburban locales.

The Supreme Court had the opportunity to harness the power of the Equal Protection Clause to help ensure that minority-saturated schools continue down the road toward integration. Instead, it did the opposite. Had it remained faithful to the constitutional ideals of *Brown v. Board of Education*, the result would have been urban schools that are more palatable to white middle-class families—families who resisted enrolling their children in systems where they would stand out as racial and economic outliers. The conditions in these schools were unequivocally rooted in state violations of the Fourteenth Amendment. Nevertheless, in *Milliken* the Supreme Court's own peculiar brand of localism trumped equality. BIDs simply seek to replicate the same sort of prosperity that accompanies, and has accompanied during decades of urban decline, localism at the suburban level. They have done so by cordoning off localities within localities and imbuing sublocal urban neighborhoods with some of the same advantages suburban communities have been afforded via the Supreme Court's arguably misguided jurisprudence.

In *San Antonio Independent School District v. Rodriguez*, what began as a class action lawsuit by a group of parents with students attending the San Antonio, Texas, public schools became a definitive constitutional statement on the limits of equality, and a further illustration of the puzzling constitutional respect the Court would accord local boundaries. Those challenging the endemic inequality in the Texas public schools argued that the system of funding, which relied heavily upon local property tax, discriminated on the basis of wealth in violation of the Equal Protection Clause. The disparity in per-pupil expenditures in the various school districts in the San Antonio metropolitan area was vast—for example, in one inner-city

142. *Id.* at 772 (White, J. dissenting).
143. U.S. CONST. amend. XIV, § 1 (emphasis added).
school district just $356 was spent per pupil, while an affluent school district allocated nearly $600. At the same time, the poorest school districts in the region were on average burdened with some of the highest property tax rates, while the most affluent benefited from the lowest. A majority of the Court, however, denied that the alleged discrimination between children living in localities with well-funded schools and those residing in districts that were relatively deprived, could be said to have been imposed on a definable “suspect class” eligible for strict scrutiny under the Fourteenth Amendment. In other words, school districts were each made up of “a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.”

The Supreme Court seemed to be saying in *Rodriguez*, as it did in *Milliken*, that it was unwilling to breach the autonomy of localities—that the internal political functioning of local districts in worthy of constitutional respect—even when such deference results in generalized disparities that contravene equal protection principles. Why? Because those who reside within such localities do not possess the requisite uniformity to constitute a sufficient “class” for equal protection purposes. Thus, localities are at once constitutionally impenetrable and internally incoherent. They provide for critical political independence that is simultaneously at the heart of a traditional constitutional respect for local power, and insignificant when judged by the human-level disparities produced.

The reality is that the true political decision-maker responsible for vast inequalities among political subdivisions—the State—is graced with constitutional impunity. As the *Rodriguez* dissenters so poignantly explained:

> The means for financing public education in Texas are selected and specified by the State. It is the State that has created local school districts and tied educational funding to local property tax and thereby to local district wealth. At the same time, governmentally imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or

145. *Id.* at 11–13, n.33.
146. *Id.* at 75.
147. *Id.* at 28.
148. *Id.*
commercial use, and thus determined each district’s amount of taxable property wealth.149

Thus, the true constitutional actors—the States—have systemically permitted, if not promoted, dramatic intrastate disparities. Their political choices have advantaged suburban localities—particularly those who leveraged their political boundaries to maintain an exclusively middle to upper-class population by imposing policies such as exclusionary zoning. The Court in Rodriguez immunized the very political actors targeted by the Fourteenth Amendment. By shifting the focus to local autonomy, the Rodriguez Court lifted constitutional responsibility from where it belonged and put the political onus of dealing with the resulting inequality on those who had no effective means of fighting back—the big cities that already harbored a disproportionate share of disadvantaged population.

BIDs are typically, if at all, only tangentially involved with urban schooling. Yet as precedent, Rodriguez says much about how American cities arrived at the predicament they found themselves in—and why quasi-privatization in the form of BIDs, was a necessary remedy. By providing localities with a form of preferred constitutional status, downtown districts had no other choice but to find an innovative way to “exclusivize” themselves—as suburban jurisdictions have been doing for decades.

B. The Public Forum Conundrum

The loss of competitiveness by urban business districts is not limited to the political disadvantages borne of the Supreme Court’s constitutional imprimatur on political fragmentation. The Court’s jurisprudence could also be said to have contributed to the need for BIDs in another way—by way of its evolving, and arguably contracting, interpretation of the public forum doctrine.

Under America’s constitutional system, public places have always carried certain accompanying “inconveniences.” These “inconveniences” include the understanding that citizens sharing public spaces will at times be confronted with what might feel like a cacophony of unwelcome voices and messages. The ideas expressed, and the manner in which they are conveyed, may provoke distaste, revulsion or mere annoyance, but it has long been understood that

149. Id. at 123–24 (emphasis added).
First Amendment freedoms come with certain costs—and a consensus appears to have been reached that the benefits are worth the price. As Justice Roberts famously proclaimed in 1939:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege... must not, in the guise of regulation, be abridged or denied.150

Roberts’ dictum would come to form the “public forum doctrine,” utilizing principles of common law property rights to assert a “kind of First Amendment easement” by the public over certain public property.151

The public forum doctrine is, of course, consistent with the long tradition of conceptualizing public places as loci of expressive social and political interaction. It is here, in the proverbial public square, where all of the unpredictable benefits and burdens of the expressive freedoms America’s Founders so courageous established play out, like a daily impromptu chemistry experiment. These are the places where Americans must learn about one another, confront difference, and come to terms with the vast spectrum of humanity that comprises the American political landscape. A public forum is at once mundane and sacred. A public park where one walks one’s dog or a main street where one shops for daily necessities is concomitantly an essential location for critical political speech—a sui generis destination where individuals and groups who run the gamut of religious, ideological or just plain eccentric predispositions engage in a wide range of expressive discourse.

However, the world has changed much since 1939. The rapid growth of the automobile, and the transformation of the country into a suburban nation, has fundamentally reshaped the public forum. Today, the public square takes many forms. As mobile consumers of place, Americans confront a menu of options. Profligate fuel consumption, three-car garages and an endless web of interstate

highways have removed the constraints that made the traditional public square—the pedestrian-packed sidewalks and streets envisioned in *Hague*—a mandatory destination, or at minimum, an unavoidable thoroughfare. Justice Kennedy acknowledged this modern reality when he argued—unsuccessfully—that an airport should be deemed a public forum for First Amendment purposes. “It is of particular importance to recognize these spaces are public forums because in these days an airport is one of the few government-owned spaces where many persons have extensive contact with other members of the public . . . [I]t is critical that we preserve these areas for protected speech.”

In light of the nationwide trend toward urban gentrification, the perspective that cities are once again desirable places to live has taken root. As a result, many Americans consciously choose to live in the vicinity of a downtown public forum. One might imagine a contemporary suburbanite choosing to sell their suburban home in a pristine gated community, and opting for the “public square product”—an expensive condominium in the center of town that offers all of the “vitality and excitement of urban living.” But as BID directors across the country are certainly aware, this consumer could just as easily retreat back to the suburbs if the downtown district’s luster begins to fade. BIDs are thus diligently focused of perfecting their urban product. Their job however, has been made much more difficult by the Supreme Court. They must do their job within the constraints of a constitutionally designated public forum. Their competitors have the distinct advantage of being exempt from this requirement. The playing field is not level.

This would not been the case if comparable privatized quasi-public places such as the mall, corporate office park, private residential communities and the most recent contemporary hybrid of all three, the so-called Lifestyle Center—were also deemed public fora, and thus “inhibited” by First Amendment entitlements. All of these modern incarnations include spaces that mimic the traditional public square, and, in some sense, seek to replicate traditional public destinations. But the Supreme Court, after initially extending the public forum doctrine to privatized public places, sharply reversed course.

It only took seven years from the time Roberts uttered his famous dictum in *Hague* for the Court to recognize inherent

difficulties of applying the Court's public forum doctrine in a world where public places may be placed in private hands.\textsuperscript{153} In \textit{Marsh v. Alabama}, the Court considered the town of Chickasaw, a suburb that was, with one exception, comparable to any other municipality in the Mobile, Alabama region.\textsuperscript{154} While Chickasaw functioned like any other typical town of the time, the entirety of Chickasaw was in fact privately owned by the Gulf Shipbuilding Corporation. "In the stores the corporation had posted a notice which read as follows: 'This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.'"\textsuperscript{155} Translation: Supreme Court Keep Out—The Public Forum Doctrine Does Not Apply Here.

The Supreme Court, however, did not cooperate. It explained that "[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."\textsuperscript{156} Even in a company town such as Chickasaw, private owners "cannot curtail the liberty of press and religion."\textsuperscript{157} Thus, the Court carved out a "public functions" exception to the otherwise applicable rule that the First Amendment only applies to state action.

Had this exception remained intact, the relative disorder which accompanies unbridled free expression would have applied equally to privatized and government-owned public places. Without such an exception urban business districts will presumably become much less desirable for retailers and other businesses who seek a controlled environment to maximize profits—particularly in a world where privately owned public places have become an increasingly ubiquitous option. The implication of \textit{Marsh}, however, was that suburban shopping malls and office parks would also be required to tolerate the mandates of the First Amendment. Such mandates would clearly make fostering a public environment most conducive to business activities—if this is defined as one devoid of burdensome expressive distractions—much more difficult.

\begin{footnotes}
\item[154] \textsuperscript{154} \textit{Id.}
\item[155] \textsuperscript{155} \textit{Id. at 503.}
\item[156] \textsuperscript{156} \textit{Id. at 506.}
\item[157] \textsuperscript{157} \textit{Id. at 508.}
\end{footnotes}
The modern suburban shopping mall and office park of course did not exist at the time *Marsh v. Alabama* was decided. Twenty years later, however, the Court did have the opportunity to confront this modern incarnation of the company town. In *Amalgamated Food Employees Union v. Logan Valley Plaza*, the owners of a then “newly developed shopping center complex” near Altoona, Pennsylvania, what today would be characterized as a “strip mall,” sought to exclude picketers from its property. The peaceful picketers, members of the Amalgamated Food Employees Union, stood in protest outside of a new supermarket, drawing attention to the nonunion status of its employees and resultant nonunion wages and benefits. Clearly such activity was inconsistent with the goals of the businesses that occupied the shopping center. Such expression did not contribute to the pleasant, undisturbed public environment—singularly focused on the promotion of commerce—the owners presumably had an interest in maintaining.

Nevertheless, the majority opinion, penned by Justice Marshall, began with “the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment.” Had this store been a part of “the business area of a municipality,” the Court opined, there would be no question that the union members’ expression would have been protected. Like *Marsh v. State of Alabama*, the Logan Valley strip mall was the “functional equivalent” of a downtown “business district.” The mall opened itself to the public, and like a town center, was utilized by citizens for prosaic daily tasks—the only difference being that a walk across an expanse of pavement to and from one’s car replaced the traditional promenade down Main Street. Privatization would not be permitted to strip the public of its fundamental right of expression in a public forum.

This principled conclusion would last precisely four years. In *Lloyd Corp. v. Tanner*, the Supreme Court substantially pared back the applicability of its holding in *Logan Valley*. Just four years after that, a majority of the Court explicitly overruled *Logan Valley*—all

159. *Id.* at 313.
160. *Id.* at 315.
161. *Id.* at 318.
but extinguishing *Marsh's* limited exception to the state action doctrine. At issue in *Lloyd* was whether an enclosed mall—a “relatively new concept in shopping center design” according to the majority—could constitutionally exclude those engaged in a peaceful distribution of handbills protesting the draft and the war in Vietnam. The entirely internal, climate controlled “mall” represented the next logical step in the evolving privatization of the public realm. Indeed, the design was described by an architectural expert as a method for making “shopping easy and pleasant. [T]o help realize the goal of maximum sales (for the Center), the shops are grouped about special pedestrian ways or malls. Here the shopper is isolated from the noise, fumes, confusion and distraction which he normally finds along city streets.” Indeed, such shopping centers not only inoculated their environment from the hassles and untidiness of real world city streets, not unlike many modern BIDs, their visitors had the benefit of private security guards which had “police authority” within the center. These guards wore “uniforms similar to those worn by city police” and were “licensed to carry handguns.”

Both a District and Appeals Court concluded that because the mall was the “functional equivalent of a public business district,” the anti-handbilling scheme violated the constitutional rights of the respondents. This time, however, the Supreme Court disagreed. The High Court emphasized the differences between the speech at issue here, and that in *Logan Valley.* For the majority the distinction merited a different outcome—here the expression concerned American foreign policy, a topic unrelated to the operation of the shopping center—whereas in *Logan Valley,* the picketers focused on the non-union hiring policies of a resident retail establishment.

The final nail in the coffin of the public functions exception for privatized public space was delivered in *Hudgens v. National Labor Relations Board.* In *Hudgens,* the Court concluded that warehouse employees did not have a First Amendment right to enter a shopping

163. *Id.* at 553–56.
164. *Id.* at 554.
165. *Id.*
166. *Id.* at 556.
167. *Id.* at 569.
168. *Id.* at 563–64.
169. *Id.* at 562.
center in suburban Atlanta, Georgia in order to make public their strike against the shoe company that employed them.\textsuperscript{171} Although the Court did not explicitly overrule \textit{Marsh v. Alabama} in \textit{Hudgens}, the Court reversed \textit{Logan Valley}.\textsuperscript{172} In doing so, it made its holding in \textit{Marsh} a virtual nullity. According to the majority, the reasoning in \textit{Lloyd} was simply inconsistent with its \textit{Logan Valley} decision—and it was the \textit{Lloyd} rationale, prioritizing property rights over free speech, that would ultimately prove victorious.\textsuperscript{173} This victory for property rights was a relative loss for the American city. Urban business districts, already awash in troubles, now faced one additional obstacle in their attempt to remain viably competitive with suburban shopping malls. Their competition had been given a valuable handicap—First Amendment immunity.

\textbf{Conclusion}

BIDs have both proponents and detractors. They remain perched in an unsettling and precarious constitutional position, and their constitutionality remains very much an open question. Behind the scenes, BIDs are in fact nursing a disadvantageous constitutional condition established long before the concept of a BID was a reality. BIDs, in other words, devote much of their energy to contending with the legacy of \textit{Warth, Milliken, San Antonio, Lloyd} and \textit{Hudgens}. The Constitution, as interpreted by the United States Supreme Court, compounds the urban disadvantages borne of metropolitan fragmentation, school systems weighted down by a legacy of racism, and unequal application of the public forum doctrine.

By treating municipal borders as daunting walls that keep out constitutional challenges, the Court has validated systemic urban disadvantages. By defining school district lines as constitutionally impenetrable boundaries for purposes of judicial intervention intended to remedy deeply entrenched racial segregation, the Court has helped ensured that urban public schools maintain their status as "identifiably Black"\textsuperscript{174}—thus cementing the status quo that remains after decades of urban the white flight. By insisting that First Amendment "inconveniences" be borne only by nonprivatized public

\begin{itemize}
  \item \textsuperscript{171} \textit{Id.} at 521.
  \item \textsuperscript{172} \textit{Id.} at 518.
  \item \textsuperscript{173} \textit{Id.}
\end{itemize}
places, the Court chose favorites in the competitive struggle to create and maintain attractive public places.

Alas, if Constitutional Law is not capable of welcoming the middle classes to American cities—and in fact seems to exacerbate the ills that led to their exodus—why not do so through private sector “innovation” in the form of a BID? Stripped of their ability to challenge their disadvantaged political and economic position caused by years of competition from economically and politically nimble suburban competitors, big city survival demands the surgeon’s knife. In a sea of poverty, educational inequality, impoverished urban politics and disorder, BIDs allow struggling business districts to surgically carve out some prosperous autonomy of their own.