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The Subdivided City

ABSTRACT. Subunits within a city provide different levels of public services to discrete areas. In theory, these subunits, which typically combine public and private characteristics, enhance preference satisfaction and opportunities for democratic participation in city governance. But they also raise issues concerning their ability to serve the interests of their constituents and of the city that hosts them. This Feature addresses the extent to which those who manage subunits are likely to exhibit fidelity to their constituents and the city. Investigation of managers' incentives leads to a distinction among subunits, largely based on their function. Private-based subunits that serve purely economic interests are likely to be faithful to their constituents but demonstrate less fidelity to the city. Subunits that serve broad community needs are likely to demonstrate less fidelity to their constituents' service needs but more fidelity to the city; however, conflict with the city is more likely where these community-based subunits seek to exercise political authority. Since community-based subunits seek to raise services for their constituents to the level enjoyed elsewhere in the city, any conflict with the city implicates its obligation to provide all residents equal services on a nondiscriminatory basis. The ability of subunits to help the city perform that obligation entails a need for the city's deference to community demands for those services that the city fails to provide.

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INTRODUCTION

Conversations about “the city” imply that governance of dense urban areas comprises a single monolithic administration that provides local public goods and regulatory functions within defined boundaries. From this view, cities offer their residents a basket of services that define a distinct local character and enhance common local government objectives, including sorting, self-government, and community development.¹ Sizeable contemporary cities, however, rarely involve a single entity that performs local government functions uniformly across an entire jurisdiction. Instead, cities authorize multiple subunits within different parts of a municipality to provide services or regulations that deviate from the default level the city presumptively offers to all residents.²

The governance and operation of these subunits frequently involves the participation of private individuals and firms or community organizations, even though city officials may dictate the terms of their creation, define the scope of their authority, and share in their funding and management. These subunits, therefore, differ from purely governmental subdivisions that serve as administrative arms of the city, such as bureaus, departments, or local authorities. Similarly, they differ from fully private entities that provide services for a select group of residents or commercial tenants, such as homeowners’ associations or shopping malls. These public-private subunits include business improvement districts, neighborhood improvement districts, tax increment financing districts, community benefit agreement panels, participatory budgeting delegates, and community land trusts.

Combining public and private characteristics to provide public services within a subunit potentially generates significant benefits in the provision of public goods, participation, and regulation. In this Feature, however, I focus on some risks that accompany the resulting subunits. For one, including both public and private participants in the provision of local public goods may cause those who determine and implement subunit policies (whom I refer to as “managers”) to deviate from the interests of their constituents. Conversely, efforts to serve the interests of those constituents may cause subunit managers to deviate from the interests of the city. I refer to the resulting conflicts as raising issues of fidelity—

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1. See, e.g., Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 16-17 (2000) (suggesting that localism is attractive not just for efficiency reasons but also for democratic-participation opportunities); Gerald E. Frug, *City Services*, 73 *N.Y.U. L. REV.* 23, 23-24 (1998) (describing cities as publicly provided consumer goods that consumers vote for “with their feet”).
 2. See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 *MINN. L. REV.* 503, 503-04 (1997); Clayton P. Gillette, *Opting Out of Public Provision*, 73 *DENV. U. L. REV.* 1185, 1185-86 (1996); Nadav Shoked, *The New Local*, 100 *VA. L. REV.* 1323, 1337 (2014).

fidelity of subunit managers to their immediate constituents and fidelity of those managers to the broader city. The central claim of this Feature is that subunits that primarily conjoin the city with entities that pursue private economic interests – which I refer to as “private-based subunits” – are more likely to exhibit fidelity to their constituents than subunits that conjoin the city with organizations that pursue the broader objectives of their community – which I refer to as “community-based subunits.” On the other hand, private-based subunits are less likely to exhibit fidelity to the objectives of the city than community-based subunits. That conclusion, however, comes with an important proviso when the latter seek additional political authority rather than simply to provide additional services.

There are good reasons for cities to create subunits. By differentiating the quantity and quality of goods and services available to different areas of the city, subunits implicitly recognize that the optimal boundaries for achieving traditional local government objectives rarely correspond to municipal boundaries drawn at distant times and for purposes unrelated to contemporary urban demands. Urban areas imperfectly fit the highly idealized conditions of perfect information, perfect mobility, full choice of residence, and absence of externalities under which local governments would efficiently provide the public goods that their residents prefer.³ There is also little reason to believe that the heterogeneous residents of these cities all prefer the same level of a particular service or have similar access to the level of service they desire. Consequently, subdividing municipal authority may promote the objectives of local government by allocating decision-making to relatively homogeneous groups within the city. Residents or members of a subunit, for example, may desire more frequent trash collection than the city offers and may be willing to pay for it. The city may advance that objective by facilitating the formation of a business improvement district or neighborhood improvement district that provides the additional service for which users within the district then pay a fee.

Similarly, cities do not easily satisfy the conditions for robust participation that local government theoretically should offer.⁴ Even a moderately sized city will struggle to involve a significant percentage of residents in deliberating and deciding issues of common interest. Subunits facilitate the democratic functions of local government by enhancing opportunities for participation and

3. These are the conditions associated with Charles M. Tiebout’s criteria for the efficient delivery of municipal services. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–21 (1956). Satisfaction of those highly idealized criteria, however, does not guarantee the absence of inefficiencies in service delivery. See Dennis Epple & Allan Zelenitz, *The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?*, 89 J. POL. ECON. 1197, 1199 (1981).

4. Shoked, *supra* note 2, at 1377.

community self-governance, even if their deliberation involves only a few of the numerous traditional local government functions.⁵ A community land trust, for example, may permit residents to debate the appropriate use of a vacant lot held by the trust as opposed to proceeding through citywide planning processes. A committee of residents may negotiate an agreement with a developer to minimize the adverse effects of a project and secure offsetting benefits for the community. These relatively small decision-making bodies permit discrete members of an affected community to have more input and decisional authority than would be possible if city officials made the relevant choices. To the extent that community control through subunits involves relatively disadvantaged residents, subunits may even permit a more equitable distribution of public goods that cities fail to achieve due to market forces or political dynamics. For example, a neighborhood improvement district may develop broadband infrastructure and thus increase wireless access for low-income communities that commercial providers consider insufficiently profitable.⁶

Before embracing the proliferation of subunits, however, it is appropriate to assess how well these entities serve the constituents they represent. Similarly, the fact that subunits exist to pursue their constituents' desired level of public goods or participation or regulation – a preferred level that differs from what the city is already providing – raises the prospect that subunit policies will adversely affect nonconstituent residents and the city writ large. If managers exhibit infidelity either to their constituents or to the city, then the presence of subunits may frustrate rather than facilitate the city's optimal achievement of its objectives. For these purposes (and for this Feature generally), the term “constituents” varies with the subunit. Some subunits are membership-based, and those members are the relevant constituents, even if they are nonrepresentative of all persons the subunit affects. Other subunits purport to serve all residents of a distinct community, and those residents qualify as the relevant constituents. Still other subunits are formed to pursue the welfare of a particular subgroup of residents or firms within the subunit (such as garment firms within a district the city has established to support garment manufacturing), in which case those persons or firms are the relevant constituents.

5. Of course, providing the opportunity for participation does not mean that broad participation will materialize. *See id.* at 1376-89.

6. *See, e.g.,* Broadband Deployment Advisory Council, *Increasing Broadband Investment in Low-Income Communities Working Group*, FED. COMM'NS COMM'N 8-9 (2020), <https://www.fcc.gov/sites/default/files/bdac-low-income-communities-approved-rec-12172020.pdf> [<https://perma.cc/47RT-CQNU>]; SHEILA R. FOSTER & CHRISTIAN IAIONE, *CO-CITIES: INNOVATIVE TRANSITIONS TOWARD JUST AND SELF-SUSTAINING COMMUNITIES* 210 (2023). On the difficulties of authorizing localized broadband, *see, for example,* Nestor M. Davidson, *Localist Administrative Law*, 126 *YALE L.J.* 564, 630 (2017).

It is plausible that subunit managers could be highly faithful in one relationship and less faithful in another. For example, subunit managers could serve as faithful agents of their constituents but, by serving those interests, be unfaithful to the city. The possibility that subunit objectives could conflict with those of the city raises a third issue that is crucial for determining the appropriate design and authority of subunits. That is, in the event of conflict between a city and its subunits, which entity should prevail?

In this Feature, I contend that analysis of these issues depends critically on each subunit's function, the incentives that its managers face, and its governance structure. Those characteristics vary among types of subunits. For example, some subunits serve primarily economic interests of their members, and that role may induce members to participate in or monitor subunit governance to ensure satisfaction of those interests. Other subunits serve broader and more diverse objectives that are difficult to verify, which complicates members' capacity to participate in or monitor subunit governance. The result is that different types of subunits are likely to exhibit different levels of fidelity.

These issues of fidelity and conflict between a centralized entity and its decentralized subdivisions arise in other contexts. Students of federalism will recognize the analogous tension between allowing national residents to sort themselves among states in accordance with preferences and the subsequent dilution of national identity.⁷ State and local government scholars consider how local autonomy enables interlocal competition and democratic participation but also fosters inconsistency among state policies.⁸ Institutionalists who analyze corporate structures recognize that firms often organize with different divisions or subsidiaries to achieve efficiencies in production or marketing of their goods.⁹

Nations, states, and firms organize with subunits to minimize transactions costs and agency costs¹⁰ that would exist if all decisions were made at a

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7. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987); Roderick M. Hills, Jr., *Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 239, 242-43 (William Fischel ed., 2006); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 69-70 (2000).
 8. See, e.g., Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1165-66 (2018).
 9. See, e.g., PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION & MANAGEMENT* 544-52 (1992).
 10. While transactions costs have proven notoriously difficult to define with precision, see Lee Ann Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1478 (2013), I use the term to refer to the costs that an entity incurs to enter into and implement transactions related to its functioning. Agency costs comprise the costs that the entity realizes if its agents — officers

centralized level.¹¹ Firms, for example, reduce the costs of negotiating, renegotiating, and implementing inherently incomplete contracts with independent entities by vertically integrating functions but retaining a decentralized organizational structure.¹² Decisions that are insensitive to variations among customers, suppliers, or employees – such as payroll administration – may be amenable to treatment at a centralized level. But where the entity faces customers with different tastes, suppliers with goods or services of different quality, or employees who develop different products for the firm, decentralized decision-making is superior to a one-size-fits-all model.

Cities face analogous problems in their efforts to provide services and opportunities for self-governance. Similar to firms, cities may optimally perform various functions at centralized levels, such as a school system that purports to deliver the same level of service citywide or zoning decisions that implement a citywide comprehensive plan. But if residents within a discrete area of the city prefer a higher level of services than the city's default and have difficulty contracting for the increment – either because of the service's nature as a public good or inequality in resources – then the city's creation of a subunit may reduce transactions costs, just as firms achieve by decentralizing production. Even where it may be reasonable to discriminate among service levels for dissimilar residents – such as where different neighborhoods face different needs for publicly funded services – cities face significant transactions costs in negotiating and implementing diverse arrangements for the relevant residents. Creation of a subunit may reduce political or financial obstacles by enhancing opportunities for democratic participation or localizing redistribution, just as different divisions of a firm may pursue separate product lines for different groups of customers.¹³

City subunits may also reduce agency costs that arise under centralized decision-making. For example, centralized political actors may ignore highly

and employees – pursue objectives that deviate from those of the entity's stakeholders – residents or owners. They also include the costs paid by the owners to ensure the agent acts appropriately, either by monitoring the agent's actions or by giving the agent additional incentives. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

11. See, e.g., Anthony E. Boardman, Daniel M. Shapiro & Aidan R. Vining, *The Role of Agency Costs in Explaining the Superior Performance of Foreign MNE Subsidiaries*, 6 INT'L BUS. REV. 295, 313-14 (1997).
12. The classic example is the vertical integration of General Motors and Fisher Body after a long-term contract between the two separate entities broke down. See Benjamin Klein, *Fisher-General Motors and the Nature of the Firm*, 43 J.L. & ECON. 105, 105-06 (2000).
13. See, e.g., John Joseph & Alex J. Wilson, *The Growth of the Firm: An Attention-Based View*, 39 STRATEGIC MGMT. J. 1779, 1791-92 (2017).

localized interests in favor of providing uniform services across the jurisdiction.¹⁴ As in the case of intrafirm divisions or affiliates that allow the firm to provide different qualities of goods to customers with different preferences or abilities to pay, city subunits may reduce friction between constituents with atypical service demands and officials attentive to citywide service levels.¹⁵

Functionally and organizationally, therefore, public-private subunits have characteristics that provide a healthy addition to the range of options for delivering local public goods and promoting democratic values. At the same time, decentralization may promote inefficiencies. Within firms, subdivisions may pursue objectives that not only differ from but also conflict with those of central management.¹⁶ Similarly, subunits of a city may attempt to implement policies that conflict with those of the city. First, creating a sublocal layer for supplying public goods and opportunities for participation may increase agency costs between those constituents and city officials. It may also increase transactions costs of developing appropriate citywide policies. For example, subunits may promote rather than constrain the NIMBYism¹⁷ that often characterizes local opposition to a development that would benefit a city, notwithstanding adverse effects on the developed area.¹⁸ A business improvement district may increase safety and reduce crime within its boundaries, but only by driving the same conduct to less

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14. At an extreme, centralized officials may affirmatively act to disfavor groups unnecessary to keep those officials in power. See, e.g., JESSICA TROUNSTINE, *POLITICAL MONOPOLIES IN AMERICAN CITIES: THE RISE AND FALL OF BOSSES AND REFORMERS* 22 (2008); Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1, 16 (2005) (discussing how local politicians might increase personal political influence by favoring a subset of the electorate, inducing opponents to exit the jurisdiction).
 15. This is not to say that cities function only to satisfy preferences or to provide local public goods. See Frug, *supra* note 1, at 35-36. But given the current predominant role of cities in providing local public goods, it would be odd to ignore the extent to which they are organized to deliver services or the possibilities of using subunits or other structures to improve their performance.
 16. Susan Helper and Rebecca Henderson, for example, attribute the decline of General Motors partially to the divergence of interests among engineers, process designers, and financial personnel. Susan Helper & Rebecca Henderson, *Management Practices, Relational Contracts, and the Decline of General Motors*, 28 J. ECON. PERSPS. 49, 59-60 (2014).
 17. A NIMBY, or “not in my backyard,” effect materializes where residents oppose the siting of land uses, such as affordable housing units or pollution-control facilities, in their neighborhood, even if those same residents recognize the citywide benefits of those land uses.
 18. See, e.g., Bridget Read, *13 Years, 3 Mayors, Countless Community Board Meetings, and Just One Building*, CURBED (Oct. 19, 2022), <https://www.curbed.com/2022/10/affordable-housing-lirio-apartments-nyc.html> [https://perma.cc/6FCB-FCTV].

protected parts of the city.¹⁹ Second, the involvement of private individuals in subunit governance raises issues about those parties' incentives to pursue public versus private objectives. Compounding this issue, subunit participation costs raise questions about the representativeness of those who purport to act on behalf of affected residents.²⁰ Finally, the very existence of subunits implies fragmented municipal decision-making that can dilute accountability by increasing the costs of monitoring decision makers and subjecting municipal policies to multiple veto points.²¹ In short, the wrong form of decentralization can increase rather than decrease transactions costs and agency costs.

Most of the literature that addresses subunits deals with only a particular form of the phenomenon – for example, by focusing exclusively on business improvement districts.²² That work tends to explore issues that could affect multiple subunits, such as the representativeness of managers and the ability to generate adverse external effects. But by focusing only on specific forms of subunits, the existing literature does not propose general theories about the fidelity of subunit governance either to their constituents or to the city.

The relatively small literature that deals with multiple subunits tends to focus on different, albeit related issues. Richard Briffault's influential work on sub-local units was primarily concerned with privatization's effect on local

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19. See Lorlene Hoyt & Devika Gopal-Agge, *The Business Improvement District Model: A Balanced Review of Contemporary Debates*, 1 GEOGRAPHY COMPASS 946, 954 (2007) (collecting sources that show mixed results about crime spillovers from business improvement districts (BIDs)).
 20. See Briffault, *supra* note 2, at 530-32. For example, survey research found that neighborhood councils in Los Angeles were not representative of constituents' identity or interests. See Juliet Musso, *Power and Legitimacy in Place Government Ecosystems: A Comparative Analysis*, in HYPERLOCAL: PLACE GOVERNANCE IN A FRAGMENTED WORLD 103, 112 (Jennifer S. Vey & Nate Storrings eds., 2022).
 21. On the effects of multiple veto points, see GARY W. COX & MATTHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 37-49 (2005); Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371, 380-83 (2009); and Katrina M. Wyman, *Property in Radical Markets*, 87 U. CHI. L. REV. 125, 130-34 (2019).
 22. For literature on BIDs, see, for example, Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 378 (1999) [hereinafter Briffault, *BIDs*]; and Jill Simone Gross, *Business Improvement Districts in New York City's Low-Income and High-Income Neighborhoods*, 19 ECON. DEV. Q. 174 (2005). For literature on community land trusts (CLTs), see, for example, THE COMMUNITY LAND TRUST READER (John Emmeus Davis ed., 2010). For literature on community benefits agreements (CBAs), see, for example, Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010); and Edward W. De Barbieri, *Do Community Benefits Agreements Benefit Communities?*, 37 CARDOZO L. REV. 1773 (2016). For literature on tax increment districts (TIFs), see, for example, Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65 (2010) [hereinafter Briffault, *TIF*].

government.²³ Nadav Shoked’s work on “micro-localism” primarily critiques the claim that sublocal units promote efficiency and democratic participation,²⁴ but it does not distinguish between the incentives of private-based and community-based subunits that motivate my analysis. Sheila R. Foster and Christian Iaione’s distinction between “top-down” and “bottom-up” subunits largely corresponds to the private-based and community-based organizations on which I focus.²⁵ Indeed, the community-based subunits I discuss largely comprise the “public-community partnerships” they endorse.²⁶ Foster and Iaione’s elegant model of how public-community partnerships can develop the common resources of the city, however, does not concentrate on the implications of those categories for the fidelity issues that I address. K. Sabeel Rahman and Jocelyn Simonson’s work on community control addresses issues of representation and service delivery in different forms of community-based subunits, but it does not compare them to private-based ones.²⁷

By focusing on the general phenomenon of subunits and distinguishing among their different types, I build on the foregoing work to provide a more complete picture of the conditions under which decentralized, sublocal governance can facilitate city provision of local public goods and democratic participation or, more problematically, interfere with those same objectives. Further, I argue that subunits that attempt to equalize services across the city should receive more deference than those subunits that attempt to increase services above the city default level.

Part I of this Feature describes a representative selection of subunits. Part II explains crucial similarities and differences among subunits and accordingly classifies these subunits as private based and community based. Part III argues that the alignment of interests, capacity for monitoring, and likelihood of constituent complaint induces greater fidelity to constituent interests in private-based subunits than in community-based subunits. Part IV explains why, compared to community-based subunits, private-based subunits are more likely to be unfaithful to the interests of the city that authorizes them. Finally, Part V proposes institutional and organizational reforms that might increase fidelity for both classes of subunits but argues that a different analysis is appropriate to address conflict between community-based subunits and the city. That Part

23. Briffault, *supra* note 2, at 531.

24. See Shoked, *supra* note 2, at 1349–52, 1376–79.

25. FOSTER & IAIONE, *supra* note 6, at 90; Sheila Foster, *Who Governs? Public, Private, Community, Civic and Knowledge Actors in Place Governance*, in *HYPERLOCAL*, *supra* note 20, at 63–102.

26. FOSTER & IAIONE, *supra* note 6, at 159–60.

27. K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 724 (2020).

contends that the equal services doctrine, which requires cities to provide services in a nondiscriminatory manner, justifies granting substantial latitude to community-based subunit policies because those entities may compensate for cities' failure to comply with their legal obligations. The Feature concludes by summarizing the argument that subunits can enhance service provision and democratic participation, but they require both institutional changes and occasional city deference to play that role effectively.

I. THE VARIETY OF SUBUNITS

Cities authorize subunits that vary in function and institutional design. This Part outlines the objectives and organizational details of common forms of subunits, explains their relationship with the city, and discusses literature that evaluates their performance. Some subunits (e.g., business improvement districts and community land trusts) have formal governance structures with managers and members. Others (e.g., community benefit committees and participatory budgeting processes) can be more transitory and operate only to influence a specific project. Still others (e.g., special zoning districts and tax increment districts) have greater permanence but lack formal governance structures, leaving compliance with legal parameters largely to market actors. However, what all these subunits do have in common is a shared objective of allocating goods, providing services, and promulgating regulations within an area of the city that vary from the background allocations that the city otherwise provides. But the distinctions among them, which I emphasize in Part II, drive the differences in the relationships among subunits, their constituents, and the city, which I discuss in the remainder of this Feature.

A. *Business Improvement Districts*

Business improvement districts (BIDs), perhaps the most common form of subunit, purport to enhance local economic development by subsidizing supplemental local public goods, such as street and sidewalk maintenance, marketing, and security, in commercial areas.²⁸ BID members, which are primarily commercial businesses but could also include individual residents, pay special assessments in addition to city-imposed property taxes to fund district improvements. In theory, therefore, BIDs serve the Tieboutian objective of sorting by preference

28. See *GO LOCAL! Nurturing Neighborhoods & Advancing Equity*, REG'L PLAN ASS'N (June 2023), <https://rpa.org/work/reports/go-local> [<https://perma.cc/8XBA-V872>]; Dan Ziebarth, *Business Improvement Districts and Contemporary Local Governance*, 52 STATE & LOC. GOV. REV. 128, 131-33 (2020).

for a desired level of local public goods, as evidenced by a willingness to pay their tax price.²⁹ In reality, there is some deviation from that objective as BID members are required to pay assessments even if they disapprove of proposed projects or of the required assessments.³⁰ Nevertheless, BIDs may be efficient providers of members' preferred services because their capacity to impose assessments solves collective action difficulties that would frustrate efforts to fund member benefits with voluntary payments.³¹

There are currently approximately 1,500 BIDs in the United States.³² BID formation processes vary from state to state, but cities are typically deeply involved in the organization and operation of their BIDs.³³ The city may initiate the process of establishing a BID, or the city may act on a petition it receives from a specified percentage of owners within the proposed area, with the relevant percentages often weighted by property value or expected assessment.³⁴ Ultimately, the city enacts a local ordinance that sets forth the BID's boundaries, functions, financing, and budget.³⁵ Some jurisdictions permit a specified percentage of district property owners to veto a BID that the city has otherwise approved.³⁶ In contrast, a majority of jurisdictions require an affirmative vote of property owners in the proposed district, again possibly weighted by property value or size.³⁷ Notwithstanding the satisfaction of formal requirements, there is some evidence

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29. Tiebout's classic article contended that, under highly stylized assumptions, local governments would efficiently provide prospective residents with the desired level of public goods. See Tiebout, *supra* note 3. While Tiebout was making a purely descriptive claim, subsequent scholarship often contends that efficient provision is a primary objective of local government. See, e.g., David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1508-09.
30. See, e.g., 2nd Roc-Jersey Assocs. v. Town of Morristown, 731 A.2d 1, 13 (N.J. 1999).
31. For this reason, BIDs frequently adopt voting rules that require a supermajority. The result is that a small number of members cannot hold up the majority as would be the case in a unanimous voting system. However, a mere majority cannot impose its preferences on all members. See, e.g., City of Seattle v. Rogers Clothing for Men, Inc., 787 P.2d 39, 49 (Wash. 1990) (en banc).
32. Jill Simone Gross, *Who Benefits from Place Governance and Who Is Accountable for Its Oversight? The Case of Business Improvement Districts*, in HYPERLOCAL, *supra* note 20, at 127, 131.
33. See, e.g., Jill Simone Gross, *Business Improvement Districts in New York: The Private Sector in Public Service or the Public Sector Privatized?*, 6 URB. RSCH. & PRAC. 346, 348 (2013).
34. See Briffault, *BIDs*, *supra* note 22, at 378.
35. *Id.* at 378-79; see Musso, *supra* note 20, at 113.
36. See, e.g., Schock v. City of Lebanon, 210 A.3d 945, 948 (Pa. 2019); Briffault, *supra* note 2, at 520.
37. Göktuğ Morçöl & Turgay Karagoz, *Accountability of Business Improvement District in Urban Governance Networks: An Investigation of State Enabling Laws*, 56 URB. AFFS. REV. 888, 894-95 tbl.1 (2020).

that cities will only approve proposed BIDs that have the support of a substantial percentage of affected businesses.³⁸

Once formed, a BID is usually managed as a nonprofit with its own board of directors, though some state laws provide that the municipal governing body serve as the formal governing authority of the BID.³⁹ Even in those latter cases, however, the BID board or management tends to set the agenda for and implement the daily operation of the BID.⁴⁰ A 2012 survey found that a plurality of BIDs elect board members.⁴¹ In other cases, board members are appointed by city officials or selected by the existing governing board.⁴² While some BID boards include community representatives or tenant representatives, property owners systematically constitute a majority of the board.⁴³ New York, for example, requires tenant representation on boards but also mandates that property owners constitute a majority.⁴⁴

While BIDs may offer a multitude of public services, as a legal matter, they tend to be recognized as private rather than public bodies.⁴⁵ In the leading case on the issue, the Second Circuit held that New York City's involvement in establishing a BID – defining its boundaries; creating improvements within the district; calculating, collecting, and enforcing the assessments; and approving or disapproving proposals of the BID's management association – did not subject a BID's board of directors to one-person, one-vote requirements.⁴⁶ Similarly, the fact that BIDs serve only limited governmental purposes and conjoin public and private interests allows them to avoid regulatory requirements that constrain public-entity development efforts, such as public hearing requirements. City supervision of BIDs may nonetheless subject these subunits to regulations that apply to public agencies, such as public records requirements.⁴⁷

38. Briffault, *BIDs*, *supra* note 22, at 381-86.

39. Morçöl & Karagoz, *supra* note 37, at 891-92.

40. Briffault, *BIDs*, *supra* note 22, at 409-12.

41. Carol J. Becker, *Democratic Accountability and Business Improvement Districts*, 36 PUB. PERFORMANCE & MGMT. REV. 187, 193 tbl.4 (2012).

42. *Id.*

43. See Gross, *supra* note 32, at 145-47 (discussing the Mount Vernon Triangle Community Improvement District in Washington, D.C., the board of which includes local community leaders and residents).

44. N.Y. GEN. MUN. LAW § 980-m(b) (McKinney 2016).

45. See David J. Kennedy, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 YALE L. & POL'Y REV. 283, 300-05 (1996).

46. *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 134 (2d Cir. 1998).

47. See, e.g., *Riskin v. Downtown L.A. Prop. Owners Ass'n*, 291 Cal. Rptr. 3d 534, 539-40 (Ct. App. 2022); *Kennedy v. Montclair Ctr. Corp. Bus. Improvement Dist.*, No. A-4591-12T2, 2014 WL 4698508, at *5-6 (N.J. Super. Ct. App. Div. June 24, 2014).

The singular focus on economic development defines the scope of a BID's "constituents" and thus the issue of whether BID managers exhibit fidelity to their principals. Both residents within and beyond the borders of the district may be affected by BID operations. But the economic development function of BIDs—reflected in the property-owner voting structure and the imposition of special assessments on property owners—may lead commercial members and managers to consider themselves the exclusive stakeholders for purposes of determining proper BID operations.⁴⁸ Nevertheless, the appointment of residents and noncommercial stakeholders suggests that, at least in those cases, the definition of BID constituents warrants expansion.

B. Special Zoning Districts

Cities form special zoning districts (SZDs) to restrict permissible land uses more narrowly than traditional zoning regulations and to promote specific industries or objectives within the district.⁴⁹ SZDs may, for example, protect coastal areas against development⁵⁰ or limit street walls to enhance pedestrian experiences.⁵¹ Cities largely deploy these subunits to preserve the agglomeration benefits that related businesses enjoy by co-locating in a common area. Agglomeration benefits exist when co-location within a relatively small geographic area increases the business's returns to scale by reducing the costs that firms bear to interact with employees, suppliers, customers, and competitors.⁵² Thus, SZDs exclude land uses that are inconsistent with the current dominant cluster in the area. The very nature of those benefits implies that most constituents of the SZD share a common interest in restricting uses within the district. Any nonconforming use not only fails to benefit the dominant cluster but also increases the distance among firms within that cluster and, therefore, likely reduces the agglomeration benefits that would be otherwise available. As a result, it is unlikely that any member of the subunit will act in a manner that would dilute those benefits. For example, if the district restricted commercial occupants to those involved in the information technology industry, resident firms within that industry would be unlikely to advocate opening the area to alternative industries. Doing so

48. See, e.g., Musso, *supra* note 20, at 107 (arguing that BIDs tend to coalesce around commercial interests while other organizations tend to address interests of residents and find common ground with development interests).

49. See Briffault, *supra* note 2, at 515.

50. See, e.g., N.Y.C. Zoning Res. art. XIII, ch. 7, § 137-00.

51. See, e.g., N.Y.C. Zoning Res. art. XIII, ch. 2, § 132-00.

52. See, e.g., EDWARD GLAESER, TRIUMPH OF THE CITY 11-20 (2011).

would dilute the benefits available when information technology firms operate in close proximity.

Unlike BIDs, however, SZDs do not have any formal governance structure outside of the city's willingness to enforce the criteria for locating within the district. Firms and individuals that comply with those criteria may have incentives to resist infiltration by nonconforming firms and to urge municipal enforcement. They may even act in concert to resist efforts of property owners to expand permissible uses in the district since use restrictions likely artificially repress land values.⁵³ But SZDs typically have no city-sanctioned policing or administrative authority. Instead, market forces and local associations interested in preserving the status quo dictate the extent to which the SZD operates within its establishing parameters.⁵⁴ In that sense, the businesses and residents within the SZD constitute both its managers and its constituents.

SZDs risk ossifying land uses within the district. Indeed, the very function of some SZDs is to preclude development that would alter the current characteristic of the neighborhood.⁵⁵ Although the city establishes the SZD, preservation may prove risky for economic development. At some point, the dominant cluster within the district may falter due to competition for alternative land uses within the district or technological advances that render it obsolete. Should that occur, land values for the specified uses within the SZD may be less than land values for the alternatives. Nevertheless, firms within the SZD may lobby to preserve the limitation to protect the value they receive from the remaining agglomeration benefits, notwithstanding that the city would enjoy even greater economic benefits from more diverse land uses in that area.

C. Tax Increment Financing Districts

Tax increment financing districts (TIFs) utilize incremental increases in tax revenues from designated properties to fund economic development in a defined area of the city.⁵⁶ While TIFs originated in blighted areas, they have expanded into a more general economic development tool employed in virtually every

53. See SPECIAL GARMENT DISTRICT REPORT, N.Y.C. PLAN. COMM'N 2 (Feb. 23, 1987), <https://www1.nyc.gov/assets/planning/download/pdf/about/cpc/870241.pdf> [<https://perma.cc/H8VX-FFST>] (discussing the need to protect garment manufacturing in the special district in the face of landlord pressure to rent to alternative tenants).

54. See Briffault, *supra* note 2, at 517.

55. See *id.* at 516-17.

56. Briffault, *TIF*, *supra* note 22, at 86-87. Some states restrict TIFs to blighted areas. See DAVID MERRIMAN, IMPROVING TAX INCREMENT FINANCING (TIF) FOR ECONOMIC DEVELOPMENT 8 (2018).

state,⁵⁷ often stimulated by capacious statutory and judicial conceptions of “blight.”⁵⁸ In the self-contained system that TIFs occupy, the city finances new construction, capital improvements in infrastructure, and related economic activity to increase property values in the district. Increased property values, in turn, generate the additional taxes that fund these public investments.⁵⁹ In addition to providing financing, state and local involvement includes authorizing the creation of the TIF, defining its boundaries, assembling the parcels that will constitute the TIF, and specifying its goals, expenditures, and terms of operation.⁶⁰ The city may also issue tax-exempt bonds to subsidize capital expenditures with debt service payable from the incremental tax revenues on district properties.

TIF funding is calculated by taking a base rate of taxes that the property within the district generates prior to development and comparing it to the additional taxes that the city receives and attributes to the appreciation, development, or redevelopment of real estate within the district’s borders. For example, if a parcel generated \$1,000 annually in property taxes prior to development and \$1,200 in taxes after development, the baseline \$1,000 would be paid into the city treasury and \$200 of taxes would be dedicated to paying for improvements within the district. In effect, the increment provides a tax-supported subsidy to developers. After debt is retired or expenditures are repaid, the city continues to impose taxes on the assessed valuation of properties within the TIF but is able to retain all those taxes in the city treasury.

Like SZDs, TIFs do not have a formal governance structure independent of the city. Nevertheless, the city’s involvement may vary depending on the degree of discretion it grants to private developers. Sometimes local governments initiate and plan TIFs to attract investment.⁶¹ In those cases, the city is effectively the manager and the constituent of the TIF, at least until private developers invest in the district and the plan that the city has devised for it. In other cases—the ones most germane to this discussion—the city creates the TIF to implement plans or subsidize the costs of a specific developer or firm that has negotiated with city officials to determine uses within the district. In these situations, developers or firms play a major role in dictating the uses of land within the district and essentially serve as managers of the TIF from the outset. For example, the

57. See MERRIMAN, *supra* note 56, at 8. Arizona does not permit tax increment financing. *Id.* at 4.

58. See Briffault, *TIF*, *supra* note 22, at 78–80.

59. See ROBERT S. AMDURSKY, CLAYTON P. GILLETTE & G. ALLEN BASS, *MUNICIPAL DEBT FINANCE LAW* 288–89 (2013). A variation allows cities to fund development with incremental sales taxes or other revenues rather than property taxes. See *Council of New Orleans v. All Taxpayers*, 841 So. 2d 72 (La. Ct. App. 2003); Briffault, *TIF*, *supra* note 22, at 68–69.

60. MERRIMAN, *supra* note 56, at 6.

61. *Id.* at 8.

City of Minneapolis issued \$50 million of tax increment bonds to acquire, prepare, and transfer properties to a private developer.⁶² The developer then constructed office and retail buildings that generated sufficient revenues to repay the bonds and support unrelated city programs. In a less happy story, Mt. Pleasant, Wisconsin, used a TIF to fund the development of an electronics-manufacturing plant that never delivered its promised scope of jobs or tax revenues, the latter of which were expected to pay the city's related debt.⁶³

Apart from the financial subsidy that TIFs provide, private developers may be attracted to them because they commit municipal funds to a project and thereby circumvent the city's annual budget process. The city's precommitment to pay TIF expenses thus reduces the risk that politically inclined officials will reduce expenditures on which developers rely and instead fund other short-term political objectives. Additionally, the use of a TIF can allow a city to sponsor development that benefits a limited area of the city without generating opposition from nonresidents of the area who might object if their tax payments subsidized the area.⁶⁴ Because the incremental taxes are typically not designated as general revenues and the payments dedicated to debt service on TIF bonds are not general obligations of the city, TIFs allow the city to finance developments while avoiding legal limits on taxation and debt.⁶⁵ A TIF thus "more directly enables a city to mold the physical and economic development of the community than either a tax break or other programs focused more narrowly on services to businesses."⁶⁶ Their relationship to property-value growth, employment, and tax revenue, however, is highly contested in the literature.⁶⁷

62. Alexander von Hoffman, *Improvising and Innovating: A History of Place Governance in North America*, in HYPERLOCAL, *supra* note 2020, at 19, 46-47.

63. See LAWRENCE TABAK, FOXCONNED: IMAGINARY JOBS, BULLDOZED HOMES & THE SACKING OF LOCAL GOVERNMENT 183-84 (2021).

64. MERRIMAN, *supra* note 56, at 13-15.

65. "General obligations" are those paid from all available municipal revenues, as opposed to specified revenues, typically those generated by the project funded with bond proceeds. AM-DURSKY, GILLETTE & BASS, *supra* note 59, at 288-94; Briffault, *TIF*, *supra* note 22, at 75-77.

66. Briffault, *TIF*, *supra* note 22, at 85.

67. See, e.g., MERRIMAN, *supra* note 56, at 45-46 (noting that TIFs provide funding largely for development that would have occurred even in the absence of the subsidy); Richard F. Dye & David F. Merriman, *The Effects of Tax Increment Financing on Economic Development*, 47 J. URB. ECON. 306, 318-27 (2000) (observing that cities that adopt tax increment financing grow more slowly); Joyce Y. Man & Mark S. Rosentraub, *Tax Increment Financing: Municipal Adoption and Effects on Property Value Growth*, 26 PUB. FIN. REV. 523, 539-42 (1998) (finding that "cities with TIF programs experience greater property value growth than those that fail to implement the program"); Kevin Kane & Rachel Weber, *Municipal Investment and Property Value Appreciation in Chicago's Tax Increment Financing Districts*, 36 J. PLAN. EDUC. & RSCH.

D. Community Land Trusts

Community land trusts (CLTs) consist of organizations that the city authorizes to hold land in trust primarily for use as affordable housing and increasingly for commercial or other uses as well.⁶⁸ While varying definitions of CLTs make it difficult to quantify their current number, recent surveys suggest that approximately 300 CLTs and similar shared-equity arrangements exist in the United States and provide at least 15,000 housing units.⁶⁹ This represents significant recent growth over the approximately 240 CLTs operating in 2011.⁷⁰

CLTs seek to provide affordable housing in perpetuity by removing land from the market and leasing it, usually for renewable ninety-nine-year periods, to income-qualified residents.⁷¹ Lessees receive a warranty or surface-rights deed that allows them to use and improve the CLT-owned land, although some CLTs

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- 167, 175-79 (2015) (casting doubt on a purely positive relationship between TIFs and property-value appreciation); Joyce Y. Man, *The Impact of Tax Increment Financing Programs on Local Economic Development*, 11 J. PUB. BUDGETING ACCT. & FIN. MGMT. 417, 426-27 (1999) (finding that TIFs led to higher employment); Rachel Weber, Saurav Dev Bhatta & David Merrihan, *Spillovers from Tax Increment Financing Districts: Implications for Housing Price Appreciation*, 37 REG'L SCI. & URB. ECON. 259, 271-79 (2007) (observing that "houses near commercial and industrial TIF districts appreciated less than those further away" and hypothesizing that this "might be explained by . . . [t]raffic congestion in and around these areas . . . generat[ing] negative externalities that are capitalized in housing prices"); Paul F. Byrne, *Determinants of Property Value Growth for Tax Increment Financing Districts*, 20 ECON. DEV. Q. 317, 325-28 (2006) (finding that property values grow faster among TIFs that are larger, lower density, more industrial, and closer to major cities).
68. See James DeFilippis, Brian Stromberg & Olivia R. Williams, *W(h)ither the Community in Community Land Trusts?*, 40 J. URB. AFFS. 755, 756 (2018).
69. See Katie Michels & David A. Hindin, *Building Collaboration Among Community Land Trusts Providing Affordable Housing and Conservation Land Trusts Protecting Land for Ecological Value* 18 (Lincoln Inst. of Land Pol'y, Working Paper No. WP23KM1, 2023), <https://www.lincolninst.edu/publications/working-papers/building-collaboration-among-community-land-trusts-providing-affordable> [<https://perma.cc/UYYX4-AHAJ>] (finding that 300 CLTs cover about 15,000 housing units). Other research found the number of housing units to be much higher. See Ruoniui (Vince) Wang, Celia Wandio, Amanda Bennett, Jason Spicer, Sophia Corugedo & Emily Thaden, *The 2022 Census of Community Land Trusts and Shared Equity Entities in the United States: Prevalence, Practice and Impact* 3 (Lincoln Inst. of Land Pol'y, Working Paper No. WP23RW1, 2023), <https://www.lincolninst.edu/publications/working-papers/2022-census-community-land-trusts-shared-equity-entities-in-united> [<https://perma.cc/9GGV-V8VY>] (finding that 300 CLTs cover about 40,000 housing units).
70. Emily Thaden, *Results of The 2011 Comprehensive CLT Survey*, VAND. U. HOUS. FUND 3 (Jan. 11, 2012), <http://staging.community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-thaden12.pdf> [<https://perma.cc/GD3W-RWY6>].
71. Karen A. Gray, *Community Land Trusts in the United States*, 16 J. CMTY. PRAC. 65, 69-70 (2008).

also rent properties.⁷² While leases are inheritable and transferable, resale prices are capped to ensure continuing affordability while allowing residents to attain some of the wealth-building benefits of home equity.⁷³ Some recently formed CLTs also serve as land banks that acquire tax-delinquent parcels from the city and hold them until the CLT designates them for specific purposes.⁷⁴ Funding for land purchases often comes from philanthropic institutions, though municipalities have sponsored CLTs from public funds.⁷⁵ Cities may also transfer properties that have suffered tax lien foreclosures to CLTs.⁷⁶

CLTs are organized as private nonprofit organizations under state law and thus do not depend on city authorization for their formation.⁷⁷ Nevertheless, I include them as subunits because the host city typically is involved in land transfers, administrative support, financing, and tax adjustments for resale-restricted land.⁷⁸ CLT core functions have always included community involvement in “bottom-up” decision-making and governance that greatly differs from the “top-down” efforts of centralized city planning.⁷⁹ Foster and Iaione describe the objectives for CLTs as follows:

[A CLT] is not antidevelopment nor anti-wealth-building. It discourages economic development in the absence of community building. It privileges the right to be included in the community over the right to exclude from collective resources. It favors collective, community wealth building

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72. FOSTER & IAIONE, *supra* note 6, at 90-91; Maxwell Ciardullo, *Community Land Trusts Have Renters Too*, SHELTERFORCE (Oct. 15, 2013), https://shelterforce.org/2013/10/15/community_land_trusts_have_renters_too [<https://perma.cc/2S4M-8P73>].
73. FOSTER & IAIONE, *supra* note 6, at 91; John Emmeus Davis, *Common Ground: Community-Owned Land as a Platform for Equitable and Sustainable Development*, 51 U.S.F. L. REV. 1, 3 (2017) (“[T]he forte of community land trusts is stewardship, taking care of this housing long after it is created.” (emphasis omitted)).
74. See FOSTER & IAIONE, *supra* note 6, at 225-26.
75. See Rick Jacobus & Michael Brown, *City Hall Steps In: Local Governments Embrace Community Land Trusts*, in THE COMMUNITY LAND TRUST READER, *supra* note 22, at 335, 335-39 (describing the City of Irvine’s and the City of Chicago’s support of CLT funding).
76. See Julia Duranti-Martínez, John Krinsky & Paula Segal, “Commodifying Our Communities:” *The Case for Abolishing NYC’s Tax Lien Sale and Prioritizing Community Land Trusts in a New Tax Collection and Property Disposition System*, NYC CMTY. LAND INITIATIVE (Nov. 2020), <https://3ji.af2.myftpupload.com/wp-content/uploads/2020/12/Community-Land-Trusts-and-the-Tax-Lien-Sale-11.23.2020-Final.pdf> [<https://perma.cc/6ZUT-38PQ>].
77. See, e.g., Gray, *supra* note 71, at 68.
78. See e.g., JOHN EMMEUS DAVIS & RICK JACOBUS, THE CITY-CLT PARTNERSHIP: MUNICIPAL SUPPORT FOR COMMUNITY LAND TRUSTS 2, 12 (2008).
79. See Davis, *supra* note 73, at 4-6, 17-18; FOSTER & IAIONE, *supra* note 6, at 93.

over individual wealth maximization, although it can create a path for both.⁸⁰

CLT members consist of all residents within the CLT service area, including residents who do not lease CLT land.⁸¹ All CLT members vote for a majority of the board of directors, which traditionally involves a tripartite membership consisting of leaseholders living in leased housing, nonleaseholding community residents who live in the CLT's service area, and "public" representatives.⁸² The last category often includes officials from the local government, funding agencies, or local nonprofits.⁸³ This structure attempts to establish broad representation in the CLT's governance to ensure that the board's decisions reflect the interests of constituents, who are broadly defined to include lessees, neighboring residents, and the broader community. Some governance structures involve more restrictive conditions, perhaps in an effort to sustain neighborhood characteristics. For example, the thirty-five-member board of directors of the Dudley Street Neighborhood Initiative – which created one of the best-known CLTs – reserves four seats each for Black, Cape Verdean, Latino, and White residents.⁸⁴

Recent studies reveal that purchasers of CLT homes are demographically similar to renters but are more likely to be Black or from female-led households than homeowners in traditional markets.⁸⁵ Those studies suggest that CLTs can reduce inequality in home ownership and overall wealth and provide noneconomic benefits associated with market-based home ownership.⁸⁶ Other literature, however, critiques CLTs for constraining wealth building by restricting resale prices and for focusing on housing affordability to the exclusion of

80. FOSTER & IAIONE, *supra* note 6, at 93.

81. See Thaden, *supra* note 70, at 13; Gray, *supra* note 71, at 69.

82. See, e.g., Jeffrey Lubell, *Filling the Void Between Homeownership and Rental Housing: A Case for Expanding the Use of Shared Equity Homeownership*, in HOMEOWNERSHIP BUILT TO LAST: BALANCING ACCESS, AFFORDABILITY, AND RISK AFTER THE HOUSING CRISIS 203, 214-15 (Eric S. Belsky, Christopher E. Herbert & Jennifer H. Molinsky eds., 2014) ("One common approach to governing CLTs is to establish a board of directors consisting of an equal number of representatives of the following three groups: existing owners of homes on land leased from the CLT; residents from the surrounding community; and public officials or other supporters of the CLT.").

83. See Gray, *supra* note 71, at 70.

84. Dudley Street Neighborhood Initiative, Inc., By-Laws art. IV, § 1, <https://www.dsni.org/s/Dsni-By-Laws.pdf> [<https://perma.cc/7YEN-HY3M>].

85. Jakob Kendall Schneider, Mary Clare Lennon & Susan Saegert, *Interrupting Inequality Through Community Land Trusts*, 33 HOUS. POL'Y DEBATE 1002, 1013 (2023).

86. See, e.g., Deborah G. Martin, Azadeh Hadizadeh Esfahani, Olivia R. Williams, Richard Kruger, Joseph Pierce & James DeFilippis, *Meanings of Limited Equity Homeownership in Community Land Trusts*, 35 HOUS. STUD. 395, 399-400 (2020).

community building.⁸⁷ Those critics, for example, suggest that CLTs should focus on community control of basic resources and thus expand their functions to include service provision and preservation of community identity.⁸⁸

E. Participatory Budgeting Delegates

Participatory budgeting (PB) involves the engagement of residents to recommend site-specific expenditures from a city's capital budget. The relevant residents live within a district whose representatives have committed city funds to the PB process. Thus, although the PB involves a designated area within the city, it does not create a continuing sublocal entity since each annual cycle of city appropriations generates new proposals for funding, which may attract a novel set of participants.

The standard PB procedure is time-consuming and lengthy.⁸⁹ A city or a city council member may designate part of the city's budget as eligible for distribution through the PB process. In some jurisdictions, PB participants complete a capacity-building component to prepare for informed decision-making.⁹⁰ Volunteers create rules for participation and voting. Residents of the area submit recommendations, which budget delegates refine into concrete proposals. Recommendations may emerge from citizen assemblies, although participation increasingly occurs online. Residents vote on proposed projects to determine which ones qualify for funding. Some processes allow neighborhood residents to recommend specific projects but require a municipal budget council to determine ultimate implementation.⁹¹ Thus, funding of recommended projects may ultimately depend on city approval, bureaucratic capacity, and consistency with other city priorities. Even where the process involves advisory recommendations rather than direct decision-making over project implementation, the overarching objective is to "give groups a sense of ownership over specific places and empower them to change that place in ways that are meaningful to them."⁹² Perhaps

87. See DeFilippis, Stromberg & Williams, *supra* note 68, at 755-56, 764.

88. See *id.* at 758-59.

89. See Carolin Hagelskamp, David Schleifer, Chloe Rinehart & Rebecca Silliman, *Why Let the People Decide?: Elected Officials on Participatory Budgeting*, PUB. AGENDA 5 (Nov. 2016), https://publicagenda.org/wp-content/uploads/WhyLetThePeopleDecide_PublicAgenda_2016.pdf [https://perma.cc/9N2H-XKBQ].

90. Gianpaolo Baiocchi & Josh Lerner, *Could Participatory Budgeting Work in the United States?*, 16 GOOD SOC'Y 8, 9 (2007).

91. Nancy Kwak, *What Can the United States Learn from the Rest of the World About the Stewardship of Place?*, in *HYPERLOCAL*, *supra* note 20, at 197, 211-12. This was the process initially used in Porto Alegre, Brazil, where participatory budgeting (PB) originated. *Id.*

92. *Id.* at 210.

for that reason, PB arose and has been most popular in developing nations with significant imbalances in infrastructure and political influence.⁹³

Within the United States, PB has its greatest appeal in disadvantaged communities rather than in more affluent areas where traditional budgeting tends to reflect resident requirements.⁹⁴ Even for developed areas, PB advocates stress the civic virtues of participation that allow citizens to recognize the needs of neighbors or “learned citizenship.”⁹⁵ Some jurisdictions permit participation by individuals who cannot vote in traditional elections, such as underage residents, noncitizens, and formerly incarcerated residents.⁹⁶ In theory, therefore, PB entails a highly inclusive process that generates results consistent with the preferences of constituents broadly defined. Indeed, there is evidence that PB improves participants’ understanding of government and leads them to maintain positive views about political representatives and government legitimacy, transparency, and access.⁹⁷

The practice and scope of PB in the United States vary. The research group Public Agenda reported that there were PB processes in forty-seven council districts or cities in the 2015–2016 election cycle.⁹⁸ The Participatory Budgeting Project tracked 145 PB votes in the United States and Canada in 2020, though some of these are school district, district, or organization votes rather than citywide votes.⁹⁹ New York City Council members, for example, allocate \$30 million in capital funding to PB annually. This involves a multi-month procedure in which residents of participating districts conduct community meetings to develop proposals and vote on projects to include in the city’s budget.¹⁰⁰ Los Angeles

93. See Baiocchi & Lerner, *supra* note 90, at 10.

94. See Yves Cabannes, *The Impact of Participatory Budgeting on Basic Services: Municipal Practices and Evidence from the Field*, 27 ENV’T & URBANIZATION 257, 261 (2015).

95. BENJAMIN R. BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* 304 (2013).

96. Zachary Roth, *Making Participatory Budgeting Work: Experiences on the Front Lines*, BRENNAN CTR. FOR JUST. (Aug. 23, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/making-participatory-budgeting-work-experiences-front-lines> [https://perma.cc/4JGH-RSBW].

97. Rachel Swaner, *Trust Matters: Enhancing Government Legitimacy Through Participatory Budgeting*, 39 NEW POL. SCI. 95, 99 (2017).

98. Hagelskamp et al., *supra* note 89, at 2.

99. See *New Data-Driven Map Shows Spread of Participation in Democracy*, PARTICIPATORY BUDGETING PROJECT (Apr. 3, 2019), <https://www.participatorybudgeting.org/pb-map-2> [https://perma.cc/FG9M-62B8].

100. *Participatory Budgeting*, N.Y.C. COUNCIL, <https://council.nyc.gov/pb> [https://perma.cc/9NWS-WQJC].

currently allocates \$8.5 million of city funding for PB by residents from nine relatively disadvantaged communities.¹⁰¹

Notwithstanding the aspirations for PB as a mechanism for enhancing democracy and directing more budgetary expenditures to disadvantaged communities, participation has been limited and imbalanced.¹⁰² A study of PB in Germany (which may vary from the United States in practice) concluded that participation “is often below expectations of public administration and politics and rarely surpasses a one-digit percentage of people who are eligible to vote.”¹⁰³ The little empirical evidence that exists reveals that the relatively poor may be the intended beneficiaries of PB, but they often participate less than relatively affluent residents and do not take advantage of the capacity-building programs aimed at facilitating participation.¹⁰⁴ Some commentators further suggest that those who participate are the same residents involved in traditional politics, so PB does little to expand the pool of local government participants.¹⁰⁵ Indeed, at least in New York City, there is some evidence that PB is best interpreted not as a tool for equitably distributing political power or public resources but as a means of political patronage that allows legislators to spread funding throughout their districts.¹⁰⁶

F. Community Benefits Agreements

A community benefits agreement (CBA) emerges from negotiations between a developer and either members or public representatives of a community in which the development takes place. The agreement pledges that the negotiating individuals or groups will support—or not oppose—the proposed development in exchange for benefits that the developer confers on the community.¹⁰⁷

101. *L.A. REPAIR Participatory Budgeting Launches*, L.A. C.R. DEP'T (May 20, 2022), <https://civilandhumanrights.lacity.gov/get-involved/highlights/la-repair-participatory-budgeting-launches> [<https://perma.cc/HRB6-MFHP>].

102. See BARBER, *supra* note 95, at 306–07.

103. Robert Zepic, Marcus Dapp & Helmut Krcmar, *Participatory Budgeting Without Participants: Identifying Barriers on Accessibility and Usage of German Participatory Budgeting*, 2017 INT'L CONF. FOR E-DEMOCRACY & OPEN GOV'T 26, 26.

104. Madeleine Pape & Chaeyoon Lim, *Beyond the “Usual Suspects”? Reimagining Democracy with Participatory Budgeting in Chicago*, 34 SOCIO. F. 861, 874 (2019); Hagelskamp et al., *supra* note 89, at 35–36.

105. FOSTER & IAIONE, *supra* note 6, at 170 (noting that PB is “prone to domination by economic elites and/or strong or corrupt sublocal leadership”).

106. Thad Calabrese, Dan Williams & Anubhav Gupta, *Does Participatory Budgeting Alter Public Spending? Evidence from New York City*, 52 ADMIN. & SOC'Y 1382, 1383 (2020).

107. See Been, *supra* note 22, at 5–6.

Bargained-for community benefits may include developer commitments to fund additional infrastructure in the community (e.g., parks or affordable housing), hire community residents at stipulated wages, and establish mechanisms to monitor and enforce the terms of the CBA.¹⁰⁸ Developers may willingly enter into CBAs because they reduce the transactions costs of working through city approval processes that community opposition to the project might otherwise delay.¹⁰⁹ Further, they arguably create enforceable commitments shaped by the developer and backed by the local government.

To the extent that the CBA is between private parties—the developer and community members—it may fall outside the definition of a city subunit as I have used the term. Nevertheless, there are situations in which it makes sense to include CBAs within that definition. These include situations in which city officials, rather than community members, negotiate the CBA directly;¹¹⁰ local officials initiate negotiations, substantially facilitate negotiations, or officially sanction the resulting agreements;¹¹¹ the city mandates that parties negotiate a CBA;¹¹² or the development receives significant public subsidies from the city. For example, the Detroit Municipal Code mandates CBAs for projects that require an investment of \$75 million or more and involve city subsidies of \$1 million or more.¹¹³ Although the CBA is entered into by the developer and the Director of the City of Detroit Planning and Development Department, the city council may not approve the agreement until it considers a community-benefits report that includes the findings and approval of a nine-member Neighborhood Advisory Council. The final agreement must also provide for an enforcement committee to monitor compliance with developer undertakings.

Similar to other subunits, CBAs have both their supporters and critics. Some commentators herald the ability of CBAs to include traditionally excluded community members in local development debates and mitigate the adverse effects

108. See *id.* at 6, 9; De Barbieri, *supra* note 22, at 1776.

109. See Murtaza H. Baxamusa, *Empowering Communities Through Deliberation: The Model of Community Benefits Agreements*, 27 J. PLAN. EDUC. & RSCH. 261, 263 (2008); De Barbieri, *supra* note 22, at 1813.

110. See De Barbieri, *supra* note 22, at 1780.

111. See Laura Wolf-Powers, *Community Benefits Agreements and Local Government: A Review of Recent Evidence*, 76 J. AM. PLAN. ASS'N 141, 142 (2010).

112. See DETROIT, MICH., MUN. CODE ch. 12, art. VIII, § 12-8-3(f)(1) (2023).

113. *Id.* The subsidies may take the form of city land transfers or tax abatements. *Id.*

of development on an established community.¹¹⁴ Indeed, some argue that inclusiveness and accountability are the essential values of CBAs.¹¹⁵

Other commentators express concern that CBAs implicitly threaten organized community opposition to a project. In the absence of such opposition, developers make concessions unrelated to harms that proposed projects impose on communities, usurp public processes normally associated with land use decisions, or serve narrow neighborhood interests at the expense of broader city interests.¹¹⁶ Others suggest that CBAs simply provide political cover for politicians to approve projects that confer limited benefits on the neighboring community.¹¹⁷ Similar to PBs, critics also suggest that CBA-negotiation participants are not necessarily representative of the community and instead comprise parties already involved in political activity.

II. PRIVATE-BASED SUBUNITS AND COMMUNITY-BASED SUBUNITS

The above descriptions of various subunits reveal some rough similarities and distinctions. Each subunit involves nongovernmental actors providing local public goods, opening them to either criticism or accolade for some degree of privatizing traditional government services. Subunits are also similar in that they provide opportunities for a city to tailor the range of public goods, services, and regulations it makes available across neighborhoods, rather than—at least as a formal matter—providing citywide uniformity.¹¹⁸ Subunits, therefore, offer the possibility of more efficient service delivery. They reduce agency costs between city officials and residents whose service preferences deviate from those that the city proposes to deliver. And they reduce the transactions costs of differentiating among service levels in different areas of the city. To the extent that subunits decentralize the production and allocation of public goods and services, they also create novel opportunities for democratic participation by disadvantaged or disaffected individuals and firms that might otherwise remain disengaged from formal local decision-making.

114. See, e.g., Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Development*, 95 CALIF. L. REV. 1999, 2017-23 (2007).

115. See, e.g., Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORD. HOUS. & CMTY. DEV. L. 35, 36 (2007).

116. See Been, *supra* note 22, at 21-31; Wolf-Powers, *supra* note 111, at 142.

117. See, e.g., Foster & Glick, *supra* note 114, at 2024.

118. I say “as a formal matter” because even where a city formally proposes to provide a particular level of service citywide, neighborhood characteristics such as wealth, political influence, or geography generate differences in the quantity and quality of services actually delivered.

But the more salient characteristics of subunits for present purposes involve the differences among them. The primary justifications for subunits involve satisfaction of constituent preferences and achievement of local government objectives at low cost. The extent to which a subunit achieves those goals is likely to vary with the resources available to the subunit, the capacity of constituents for collective action, and the relationship between leaders of the subunit and of the city. But more general factors may at least explain tendencies for subunits to accomplish (or fail to accomplish) the goals for which they are created. In this Part, I explore two sources of differences among subunits – organizational structure and function – that plausibly affect their success. Perhaps counterintuitively, this Part concludes that organizational structure provides less of a prediction of success than function, in large part because organizational forms of subunits vary so greatly as to obviate connections between any particular institutional design and subunit performance.

A. Organizational Structure Differences Among Subunits

One way of distinguishing among subunits involves their organizational structure. Institutional design is an obvious way to reduce both agency costs between any principal and its agent and transactions costs of providing services. If constituents elect subunit managers, for example, one might anticipate greater fidelity (lower agency costs) to those constituents because managers require constituent support to maintain their positions. If different groups of residents prefer different levels of the same service, city delegation to a subunit to provide that service is likely to be less costly than city negotiation of multitiered contracts with suppliers.

While organizational structure is a useful device for differentiating subunits, its utility in explaining the ability of a subunit to achieve its objectives is limited in part because subdivision design varies so widely as to frustrate efforts at forming any generalizable theory. Some subunits, such as SZDs and TIFs, exhibit virtually no organizational structure at all. Others, such as BIDs and CLTs, have very formal governance structures that involve boards of directors and officers. However, even those organizationally similar structures diverge significantly. As Section I.A reveals, BID boards are dominated by business interests and sometimes consist exclusively of those interests. Board members may be elected but are often appointed. CLT boards typically assume a tripartite structure that includes CLT lessees, residents of CLT areas who are not lessees, and public members. That structure is intended to provide a degree of at least nominal representativeness among those affected by CLT activity.

In short, while it may be possible to tie the organizational structure of a specific subunit to its performance, it is more difficult to use the structure of one

subunit to extrapolate the success or failure of another. Instead, other subunit characteristics appear to explain the selection of a particular institutional design. For example, it is unsurprising that subunits such as BIDs and CLTs have formal organizational structures given those subunits' significant longevity. Creating and administering complex organizational structures is simply worth the cost. Conversely, subunits formed for individual projects, such as PBs and CBAs, have few organizational structures. Their short life cycle potentially renders the creation and administration of formal structures too costly. Nevertheless, the temporal element of the subunit cannot fully explain organizational differences. Subunits such as TIFs and SZDs have significant life cycles but operate with minimal formal governance beyond city restrictions on permissible uses. That may be a function of the fact that their constituents serve subunit objectives through individual market transactions, and they have less need for collective action that justifies supervising or governing institutions.

This is not to say that organizational structure is irrelevant to the performance of subunits. To the contrary, once we understand why some subunits are likely more successful than others, changes to institutional design may increase the fidelity of managers to constituents or to the city and thus improve the capacity of subunits to accomplish their objectives. I explore that issue in Part V below. In order to design those institutions, however, it is first necessary to determine why subunits may fail to act in a manner consistent with the interests of their constituents or their cities.

B. Functional Differences Among Subunits

Focus on the functions of subunits provides a more fruitful source of meaningful distinctions among them because the pursuit of those functions explains why subunits vary in their fidelity to constituents and to the city. Some subunits purport to serve the economic interests of a distinct subset of occupants within the subunit's geographic area. While the subunit's borders may include nonbusiness residents and subunit activity may impact residents beyond those borders, the subunit's stated objective is to advance the interests of the business community within its boundaries. This category encompasses BIDs, TIFs, and SZDs. I refer to these subunits as "private-based subunits."

Other subunits exist for the express purpose of serving a broader range of interests for the community within which they operate. Those interests may include economic development, but they also involve housing, neighborhood amenities, community building, or maintaining community identity. Those objectives may actually entail resisting economic development that threatens the current socioeconomic demographics of the neighborhood rather than pursuing economic benefits for the city. Some advocates view these subunits as a means

for reducing inequality—both economic and noneconomic—by shifting authority to groups historically excluded from discussions concerning city operations, such as policing or development and planning. I refer to this group of subunits as “community-based subunits.” This category includes CLTs, PB delegates, and groups that negotiate CBAs.

Scholars have observed similar relationships and differences among subunits. Sheila Foster makes a related distinction between “public-private partnerships,” in which private entities contribute to the maintenance of public spaces in an area, and “public-community partnerships,” in which revitalization is undertaken by community groups and related nonprofits often funded through philanthropy and city resources.¹¹⁹ Juliet Musso similarly distinguishes among BIDs, which serve commercial interests; neighborhood councils, which mediate between local governments and the communities in which some action is proposed; and CLTs, which seek “common-good development” in transitional or underserved areas.¹²⁰ Despite these similarities, the above works are distinguishable from this Feature in that they do not relate their subunit distinctions to managers’ fidelity to either constituents or the city. Given that the primary justifications for subunits involve satisfaction of constituent preferences and achievement of local government objectives, fidelity to constituents or to the city should serve as a more robust predictor of subunit performance.

Private-based subunits pursue narrow objectives, which reduces agency costs between subunit managers and constituents below the costs that would be realized between city officials—who pursue multiple objectives—and those same constituents. But that same narrow focus means that subunit managers will be less faithful agents of the city, officials of which pursue objectives that extend beyond the subunit’s singular focus. In contrast, the broad objectives of community-based subunits may have the opposite effect from the one I predict for private-based subunits. Agency costs between community-based subunit managers and their constituents are likely to be high, notwithstanding managers’ professed objective of serving the community. Those managers, however, may be more likely to avoid conflict with the city’s interests because the scope of their activities limits the capacity to impose significant costs on nonconstituents.

III. SUBUNITS AS FAITHFUL AGENTS OF CONSTITUENTS

The possibility that any entity—private firm, government, or not-for-profit organization—will drift from its announced function is endemic to the fact that entities act through agents whose incentives imperfectly align with those of their

119. Foster, *supra* note 25, at 74-87.

120. Musso, *supra* note 20, at 103-09.

principals. The proposition that subunit managers may lack fidelity to their constituents or their city, therefore, cannot be controversial. Indeed, subunit fidelity to both constituents and to the city is implausible where constituents of a subunit oppose policies that the city favors. Since the subunit's objective is typically to provide its constituents with a level of public goods that deviates from what the city provides, some tension between those constituents' objectives and the city's is likely to exist. Even where the city acts in concert with the subunit, the inevitable spillovers of sublocal action will typically create conflict with some group in the city at large.¹²¹ For example, a CLT that provides affordable housing by stabilizing land values and means-testing lease eligibility necessarily prevents those willing to pay market prices for CLT land from gaining an advantage in purchasing.

Typically, we would suspect that subunits serve the interests of their constituents, even if that means sacrificing the city's interests. However, the managers' incentives may interfere with and cause a lack of fidelity between the subunit and its constituents. In this Part, I contend that private-based subunits are less likely to deviate from the interests of their constituents than community-based subunits. This conclusion is counterintuitive, given that community-based subunits avowedly exist to serve the broad interests of their community, whereas private-based subunits serve narrower self-interest. But the pursuit of narrow self-interest creates bonding opportunities between managers and constituents in private-based subunits that are less available in the community-based context. As I discuss below, private-based subunit managers may bond with their constituents because their interests closely align, because constituents can readily monitor managers, and because constituents can exercise exit and voice in reaction to manager infidelity. I begin, however, with an examination of the limited role of elections in bonding managers and constituents of subunits, since electoral accountability is the usual manner through which constituents within a city constrain the risk that their representatives will be unfaithful.

A. *The Limited Role of Subunit Elections in Constraining Infidelity*

Deviation between the conduct of subunit managers and the interests of their constituents derives from an inability of the latter to detect and deter the unfaithful actions of the former. The standard mechanism by which constituents ensure fidelity of their governmental representatives is through elections. Those who manage governments presumably wish to retain their positions and, in an elective system, will be able to do so only if their constituents vote to return them

121. Shoked, *supra* note 2, at 1361, 1396.

to office. Constituents are assumed to vote their interests and thus to elect representatives whose policies are consistent with those interests.

Elections, however, play a limited and complicated role in subunits. Some subunits may be governed by boards, but those boards often consist of appointed rather than elected members.¹²² Even where boards are elected, subunits may impose voting rules that track constituent preferences less than one-person, one-vote systems and are less responsive to the needs of particular constituents. Some subunits reserve board seats for designated constituencies within the area – such as residential or business owners – or allow weighted voting that favors business interests. Other BID boards must retain a majority of seats for property owners but also acknowledge the interests of nonowner constituents by mandating the inclusion of tenants within the board.¹²³

Among community-based subunits, the structure of board elections purports to ensure wide-ranging representation of interests affected by subunit activity. The classic tripartite CLT board, for example, leaves two-thirds of the board in the hands of members of the immediate community and one-third of the board in the hands of public members.¹²⁴ That design purports to promote board fidelity to community interests. Further, the inclusion of public members, which may mean public officials, may enhance fidelity to city interests.

But even those efforts may not necessarily guarantee equal fidelity to all affected parties. Board members from philanthropies may exercise disproportionate influence insofar as they control the purse strings necessary for the CLT's operations.¹²⁵ Representatives from funding organizations, therefore, may be able to distort the CLT's actions if they disagree with the objectives that members prefer to pursue. The formal structure of the board may also permit some groups to have disproportionate authority. As noted above, for example, the bylaws of the CLT created by the Dudley Street Neighborhood Initiative reserves four seats of its thirty-five-member board for each of the following resident groups: Black, Cape Verdean, Latino, and White.¹²⁶ That allocation may have ensured some degree of proportional representation when the CLT was formed in the 1980s, but it may not continue to generate the same benefit as the area's demographics shift.

Elections play even less of a role in ensuring fidelity to community interests in subunits that involve single decisions rather than repeat players. Under those

122. For example, Göktuğ Morçöl and Turgay Karagoz conclude that a majority of BIDs that are not managed directly by local governments are instead governed by appointed boards. Morçöl & Karagoz, *supra* note 37, at 903 tbl.5.

123. See, e.g., N.Y. GEN. MUN. LAW § 980-m (McKinney 2016).

124. See *supra* notes 81-83 and accompanying text.

125. See DeFilippis, Stromberg & Williams, *supra* note 68, at 756-57, 759.

126. See *supra* note 84 and accompanying text.

circumstances, voters have no opportunity to retaliate against rogue representatives. For example, the Detroit CBA ordinance creates a Neighborhood Advisory Council from residents of an “impact area.”¹²⁷ This means different projects require different Councils rather than a permanent body of representatives whose prior performance can predict future performance. Moreover, only two of the nine Council members are directly selected by residents of the impact area.¹²⁸ CBA representatives who countermand the interests of their community may face the opprobrium of neighbors but may receive sufficient benefits from negotiating an agreement with a term of personal interest to incur that personal cost.¹²⁹

PB elected delegates similarly engage with a single project or single PB cycle, relieving them of any risks of electoral retaliation for failing to follow constituent interests. While delegates are likely selected because they advocate for a project that PB participants favor, the details of that project are determined only in subsequent negotiations with city officials and bureaucrats. For example, PB participants may select a delegate based on a preference for city bike lanes. They may subsequently be surprised to learn that the project, as implemented, follows a route that differs from what they proposed. Despite their unrealized expectations, they have little to no recourse against the PB delegate.

B. Sources of Infidelity

Given the limited capacity of elections to constrain subunit managers, constraints on agency costs would have to emerge from some alternative source. In what follows, I discuss three characteristics that plausibly constrain subunit managers: (1) the degree to which the objectives of the managers align with those of constituents; (2) the capacity of constituents to monitor the conduct of managers; and (3) the ability of constituents either to exit when dissatisfied with managers’ performance or to use the alternative of voice to complain about

127. Detroit, Mich. Ordinance No. 2021-4 (Dec. 8, 2021) (codified at DETROIT, MICH., MUN. CODE ch. 12, art. VIII, § 12-8-3(b)(3) (2023)).

128. *Id.*

129. In perhaps an extreme version of the related phenomenon of community opposition to development—though without a formal CBA—much of the opposition to a large-scale development project in Brooklyn known as Atlantic Yards was led by a resident who ultimately agreed to withdraw from the dispute and who reportedly received a \$3 million payment from the developers. See Foster & Glick, *supra* note 114, at 2024-25; Charles V. Bagli, *\$3 Million Deal Ends a Holdout in Brooklyn*, N.Y. TIMES (Apr. 21, 2010), <https://www.nytimes.com/2010/04/22/nyregion/22yards.html> [https://perma.cc/6EKY-YAWT].

unfaithful managers.¹³⁰ These characteristics are not necessarily independent of each other. For example, closer alignment of objectives between subunit managers and constituents may facilitate the latter's ability to monitor the former. But, overall, the nature of these constraints suggests that they will induce subunit fidelity to constituent interests more effectively for private-based groups than for community-based groups.

1. *Interest Alignment*

The literature that addresses subunits frequently expresses concern for the representativeness of those who act on behalf of their constituents.¹³¹ Implicit in that concern is the possibility that the interests of subunit managers will not closely align with those of their constituents and, thus, that the former will implement policies that are not faithful to the latter. But the risk of misalignment is not the same for all subunits. Private-based subunit managers are less likely to deviate from the interests of their constituents. This conclusion stems from the very characteristics that some commentators emphasize to disparage private-based subunits – the groups' primary or exclusive focus on activity that enhances the value of members' businesses.¹³² Indeed, managers involved in the organization of BIDs or TIFs may persuade the city to draw a district's boundaries to avoid properties whose owners are likely to have interests or capacities other than enhancing business value.¹³³ But the subunit's limited and measurable objective helps to ensure that members' interests are served by reducing the range of subunit activities.

a. *Close Alignment of Interests in Private-Based Subunits*

The conclusion that managers and constituents of private-based subunits are likely to have closely aligned interests emerges from the literature that compares the incentives of private-firm officials and government officials. Much of the privatization literature maintains that private provision of local public goods may be more efficient because the owners of the firm providing the service have a

130. The classic work on the last alternative is ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

131. See Been, *supra* note 22, at 24, 33; Rahman & Simonson, *supra* note 27, at 723, 734; Musso, *supra* note 20, at 112; De Barbieri, *supra* note 22, at 1789-90.

132. See Briffault, *supra* note 2, at 530-32; Musso, *supra* note 20, at 114-15.

133. See, e.g., Brian R. Hochleutner, Note, *BIDs Fare Well: The Democratic Accountability of Business Improvement Districts*, 78 N.Y.U. L. REV. 374, 381-96 (2003).

stake in residual profits and, therefore, seek to minimize costs.¹³⁴ Conversely, government officials have no personal interest in cost saving and, therefore, have less incentive to ensure the efficient provision of goods and services.¹³⁵

While private-based subunits tend to be not-for-profit entities without owners entitled to residual profits, those who manage the subunit typically own businesses in the district and have the same incentives as members to increase the profits of those businesses. That objective is reflected in BID governance structures, which permit business owners to be exclusive or majority decision makers even if the board also includes representatives of the community, residents, or local officials. BID activities will often deliver preferred local public goods to both business and nonbusiness constituents without subsidies from taxpayers.¹³⁶ The relevant literature, for example, reveals reduced crime levels within BIDs, an effect that presumably all residents of the area generally prefer.¹³⁷

That does not mean that all BIDs perform identical functions or that all members have identical interests.¹³⁸ While cities create BIDs to promote economic activity and thus to enhance property values within the area, conflicts are

134. See, e.g., Ronald A. Cass, *Privatization: Politics, Laws, and Theory*, 71 MARQ. L. REV. 449, 467 (1988); Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 883-84 (1990).

135. See, e.g., Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347-48 (2000).

136. See, e.g., Leah Brooks, *Volunteering to Be Taxed: Business Improvement Districts and the Extra-Governmental Provision of Public Safety*, 92 J. PUB. ECON. 388, 389 (2008).

137. See, e.g., Brooks, *supra* note 136, at 389; Sehee Han, Göktuğ Morçöl, Don Hummer & Steven A. Peterson, *The Effects of Business Improvement Districts in Reducing Nuisance Crimes: Evidence from Philadelphia*, 39 J. URB. AFFS. 658, 667-68 (2017); Lorlene M. Hoyt, *Do Business Improvement District Organizations Make a Difference? Crime in and Around Commercial Areas in Philadelphia*, 25 J. PLAN. EDUC. & RSCH. 185, 186 (2005); John MacDonald, Daniela Golinelli, Robert J. Strokes & Ricky Bluthenthal, *The Effect of Business Improvement Districts on the Incidence of Violent Crimes*, 16 INJ. PREVENTION 327, 329 (2010) (finding that creation of BIDs was associated with an eight-percent reduction in violent crime). *But see* Jeffrey E. Clutter, Samantha Henderson & Cory P. Haberman, *The Impact of Business Improvement District Proximity on Street Block Robbery Counts*, 65 CRIME & DELINQ. 1050, 1066 (2019) (noting that “BIDs positively and significantly predicted higher expected robbery counts,” perhaps because they are busy areas that provide more robbery opportunities); Janet Rothenberg Pack, *BIDs, DIDs, SIDs, SADs: Private Governments in Urban America*, 10 BROOKINGS REV. 18, 20 (1992) (“At this point little can be said about whether either the potential benefits or costs of BIDs are actually materializing.”).

138. See, e.g., Gross, *supra* note 22, at 175 (concluding that smaller BIDs “focus on physical maintenance of an area,” midsized BIDs “concentrate on marketing and promotional activities,” and large BIDs perform both aforementioned functions but also “engage in capital improvement activities”); Ingrid Gould Ellen, Amy Ellen Schwartz & Ioan Voicu, *The Impact of Business Improvement Districts on Property Values: Evidence from New York City, 2007* BROOKINGS-WHARTON PAPERS ON URB. AFFS. 1, 2; *see also* Gross, *supra* note 22, at 175 (finding that the strategies and effects of BIDs vary with their budgets).

likely to arise among BID members who are renters and wish to keep rents affordable and those who are owners and wish to maximize the value of their properties.¹³⁹ Frictions among members may be particularly acute when the BID is located in a neighborhood undergoing demographic transition.¹⁴⁰ But the internal struggles of BIDs are ultimately subsumed within the common objective of maximizing the value of the constituent businesses. Disagreements about how best to achieve that relatively narrow objective will involve disputes about budgets, stakeholder preferences, the wealth of the surrounding neighborhood, and the type of commercial property represented.¹⁴¹ Those disagreements may be substantial such that some members may consider themselves poorly served by managers who support projects or impose assessments that members perceive as providing little value. But given the consensus about the BID's core function, one would expect that – compared to the variance in objectives for community-based subunits discussed below – BID boards are less likely to deviate from the interests of their constituents than representatives of community-based subunits.

The alignment of interests between private-based subunit managers and constituents is likely to be closest where the subunit seeks to preserve an existing characteristic of the area rather than add to the baseline services that the city provides. The latter provides opportunity for some dispute among constituents about which services should be added, how much, and at what cost. Where the subunit attempts to preserve an existing characteristic of the area, however, constituents have already voted with their feet by locating in an area where the presence of that characteristic enhances productivity. Thus, one would anticipate that all members and managers would prefer preservation of the neighborhood's character.

SZDs exemplify this close relationship between manager and constituent interests in subunits designed to preserve particular district characteristics.¹⁴² For example, the Garment District Alliance is a not-for-profit corporation that provides amenities and public-safety services in New York City's Garment Center Special District.¹⁴³ The market forces that brought the firms into the area defined

139. Gross, *supra* note 33, at 354; Briffault, *BIDs*, *supra* note 22, at 457.

140. See Gross, *supra* note 22, at 178 (“Thus, in the minds of some, BIDs can lead to a perversion of the community development concept when owners are not of the community themselves.”).

141. See *id.*

142. See *supra* Section I.B; see also *Asian Ams. for Equal. v. Koch*, 527 N.E.2d 265, 267–69 (N.Y. 1988) (describing special district zoning as being “based on the premise that certain uneconomic uses and amenities will not be provided by private development without economic incentive”).

143. See *About the Alliance*, GARMENT DIST. ALL., <https://garmentdistrict.nyc/about-alliance> [https://perma.cc/E38M-U7Z5].

by the SZD are likely enough to prevent those firms from pursuing an objective that dilutes the value of the favored characteristic. If a dry cleaner and a pet store locate within a district designated for general commercial uses, neither one is likely to adversely affect the other's business. But if that same pet store located within a district dedicated to garment manufacturing, garment firms will lose some agglomeration benefits. The benefits of agglomeration, therefore, become a self-enforcing mechanism to deter either the firms within the district or any governance structure that affects the quality of the district from neglecting common interests. Garment manufacturing firms and their landlords within a thriving Garment Center Special District have little incentive to attract unrelated firms into the area because doing so would reduce the agglomeration benefits, and consequently the land values, of a garment-manufacturing cluster.

b. Misalignment of Interests in Community-Based Subunits

One might assume that community-based subunits similarly operate in a manner that is highly consistent with the interests of constituents. After all, these subunits typically hold themselves out as proponents for the entire community in which they operate. Membership of CLTs, for example, typically includes all residents of the area that the CLT serves and not just those living on CLT-owned land. By design, these community-based subunits seek significant civic engagement and incorporation of neighborhood preferences into their decisions. In the words of the Grounded Solutions Network, one of the foremost advocates of CLTs, a "community land trust balances the interest of its residents, the broader community, and the public interest to promote wealth building, retention of public resources, and solutions for community needs."¹⁴⁴

Nevertheless, there are reasons to be skeptical that the interests of community-based subunits are as closely aligned with those of their constituents as in the case of private-based subunits. Skepticism arises from the characteristics of community action that reveal the inherent difficulty of discerning and implementing a set of shared community interests. First, the standard collective action problem that arises whenever a subunit attempts to provide a public good may interfere with the relationship between managers and their constituents. For example, community governance constitutes a public good because it is nonrival (i.e., my participation in governance does not preclude your simultaneous participation) and nonexcludable (i.e., if I fail to contribute to governance and you do contribute, you cannot preclude me from benefitting from your

144. *Community Land Trusts*, GROUNDED SOLS. NETWORK, <https://groundedsolutions.org/strengthening-neighborhoods/community-land-trusts> [<https://perma.cc/V5QJ-3PPQ>].

contribution).¹⁴⁵ The result is that I have little incentive to participate in governance. Even if I bear none of the production costs, I obtain substantial benefits if you participate in my absence. Your conception of “good governance” may vary from mine, making the benefit I receive less valuable than if I incurred the costs of participation. But if those costs exceed the value of the difference between what I could have produced by participating and what you produce, then I am likely to save the costs and simply enjoy a lower level of the good.¹⁴⁶

In the case of community-based subunits, this collective action problem is likely to manifest in an unwillingness of individuals to register their interests by participating in the creation, governance, and operation of the subunit. The result is that only those with a very intense interest in governance will become involved in its production since they, by definition, enjoy benefits in excess of the related costs. But the source of that intense interest is likely to be an idiosyncratic, nonrepresentative objective that any other participant would not have pursued. That implies that those who do participate in production of a subunit good—that is, those for whom the benefits of participation outweigh the personal costs—likely have interests that diverge from those of constituents. In short, agency costs between managers and constituents are likely to be high as the former pursue individual interests not necessarily shared by the latter.¹⁴⁷

The problem of free-riding managers is endemic to all collective action situations and consequently infects private-based subunit constituents as well. But constituents of private-based subunit members have significant financial incentives to participate either to realize projects that lie within their interests or to oppose projects that will cost them more than they will benefit. Participation rates may be higher in private-based subunits because members incur the financial cost of subunit activities either by paying fees (in the case of BIDs) or higher taxes (in the case of TIFs) and thus may want to ensure that funds are used in a manner consistent with their interests.

Conversely, community-based subunits typically do not impose financial costs on constituents. True, nonparticipating constituents bear nonfinancial costs, such as accepting a lower level of desired community benefits and allowing

145. See LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 44-49 (6th ed. 2022).

146. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 41-47 (1982).

147. For a similar argument in the context of the analogous situation of sublocal homeowners' associations, see Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1428-31 (1994).

those with the most intense interests to set the subunit agenda.¹⁴⁸ But that may be an acceptable price for many constituents to avoid the costs of participation. While Rachel Swaner's interviews with delegates involved in New York City's PB process reported that their participation enhanced their trust in government, she also reported that some delegates dropped out because of the time commitment and others dropped out after the projects they favored were not adopted.¹⁴⁹

The second difficulty that community-based subunits encounter in aligning manager and constituent interests is defining those interests. Whereas private-based subunits pursue relatively narrow interests of profit maximization, community-based groups typically pursue broad and vague objectives that are difficult to define with precision or to quantify, which complicates efforts to identify manager success. That is not to say that a single-minded focus on enhancing member profits is an unequivocally desirable goal. We may desire private-based subunits to consider other city and social objectives.¹⁵⁰ My point is that to the extent that private-based subunits do pursue narrow financial objectives in common with the objectives of their members, those subunits are more likely to serve those explicit interests of their members. Even if free riding is pervasive among private-based subunit constituents, the fact that they share a common goal of maximizing firm value implies that those few who do participate more likely reflect the interests of nonparticipants. Further, if the specific goals that private-based subunits pursue are relatively susceptible to definition and measurement, then members of those subunits will also have an easier time monitoring the performance of managers.

Community-based subunits pursue interests that, while admirable, are less susceptible to common understanding or measurement. Advocates of community control seek "power" or "participation" within the community or a reduction of inequality within the city.¹⁵¹ Increasingly, subunits embrace "sustainability" in their list of objectives, even though incurring the costs of making homes sustainable may be in tension with stated goals of "affordability."¹⁵² The

148. See Catherine Wilkinson, Jo Briggs, Karen Salt, John Vines & Emma Flynn, *In Participatory Budgeting We Trust? Fairness, Tactics and (In)accessibility in Participatory Governance*, 45 *LOC. GOV'T STUD.* 1001, 1006-07 (2019).

149. See Swaner, *supra* note 97, at 98.

150. See, e.g., Gross, *supra* note 32, at 128 (noting that BIDs historically focused exclusively on economic development but have since expanded their objectives).

151. See Rahman & Simonson, *supra* note 27, at 681-89.

152. Michels & Hindin, *supra* note 69, at 18, 59; see also Plank Road (Baton Rouge) Community Land and Bank Trust By-Laws art. III, § 3.3(j), <https://plankroadclbt.org/wp-content/uploads/2022/12/Plank-Road-CLBT-Bylaws-CCBR-FINAL.pdf> [<https://perma.cc/PYC5-DHX2>] (stating that one objective is to "[a]chieve the Corporation's purposes in a manner

multiplicity of objectives does not represent a defect in community-based subunits. To the contrary, it indicates the scope of substandard services that disadvantaged areas suffer.¹⁵³ Nevertheless, that multiplicity complicates the issue of what the subunits are supposed to do and, therefore, risks misaligning the interests of managers and their constituents. For example, some commentators allege that CLTs have suffered mission drift and a corresponding decline in the initial objective of promoting community control as CLTs have become institutionalized and professionalized and have shifted their allegiance to developers and philanthropic institutions.¹⁵⁴ John Emmeus Davis, perhaps the leading advocate for CLTs, has written that “[a]mong many nonprofits doing community development, there has been a noticeable decline over the past few decades in the number that assiduously incorporate participatory strategies and structures into their organizations and operations.”¹⁵⁵

Community control and participation may well be desirable objectives for community-based subunits, so my point is not that managers who pursue those objectives are misbehaving. But the CLT literature illustrates the tension among the multiple and inherently conflicting plausible objectives for community-based subunits. Such tension complicates the capacity of managers to identify or implement their mission and of constituents to evaluate manager performance. Advocates for CLTs and other community-based subunits applaud the capacity of such organizations to create an environment in which the community prevails over individual interest. But the policies needed to achieve that goal often place those charged with implementation at odds with those who are subject to the policies and who have different objectives.¹⁵⁶ Davis argues:

Prospective homebuyers must be helped to understand why they are not allowed to purchase the underlying land and why so many limits will

that promotes the sustainable use of land and promotes, where possible, the use of green infrastructure in future developments”). In the CLT context, the term “sustainability” may entail the preservation of affordability in addition to its more traditional meaning of minimizing environmental harm. See Davis, *supra* note 73, at 32-33.

153. I am grateful to Sheila Foster for this point.

154. DeFilippis, Stromberg & Williams, *supra* note 68, at 756-57, 759.

155. Davis, *supra* note 73, at 18.

156. See Gray, *supra* note 71, at 74 (“Probably the largest disadvantage [of CLTs] is that the conflicting ideologies of what’s best for the community versus individuals’ best interest plus the concept of homeownership without land ownership make CLT marketability difficult in the United States. As one study demonstrated, even community members and residents who initially seem to understand and agree with CLTs’ philosophies still required reminding.” (citation omitted)); Rick Jacobus & Ryan Sherriff, *Balancing Durable Affordability and Wealth Creation: Responding to Concerns About Shared Equity Homeownership*, CTR. FOR HOUS. POL’Y (2009), <http://staging.community-wealth.org/sites/clone.community-wealth.org/files/downloads/article-jacobus-sherriff.pdf> [<https://perma.cc/3C52-2L8T>].

continue to encumber their home's current use and future resale. The CLT's leaders must carefully educate and actively engage a neighborhood's residents, winning their support for the nonprofit's plan to hang onto land instead of selling it, while soliciting the participation of these same residents in planning for the land's development.¹⁵⁷

Davis is certainly correct that achieving the goals of a CLT requires training and appreciation of the benefits of community over individual welfare. But to the extent that those who advocate community-based benefits meet resistance from constituents who may, for example, prefer to capture the full benefits of home ownership, CLT managers have interests that deviate significantly from those of their constituents.

2. *Monitoring*

Where the interests of agents and their principals are not naturally aligned, the latter may be able to diverge from a desired objective by detecting situations in which agents have demonstrated infidelity. Detection, however, requires that principals are able and willing to incur the costs of monitoring agents' conduct. That ability and willingness may be relatively high or relatively low for different classes of principals. In this Section, I argue that constituent monitoring for manager misconduct will differ for private-based subunits and community-based subunits.

a. *High Monitoring in Private-Based Subunits*

Similar to the initial alignment of interests, private-based subunits have a significant monitoring advantage over their community-based counterparts. That advantage comes from multiple sources. First, as the prior Section demonstrated, the very fact that private-based subunits and their constituents have narrow, observable goals facilitates monitoring. For example, the success of a BID's efforts to increase public safety should be observable and measurable by reference to crime statistics,¹⁵⁸ while efforts to enhance business activity should be reflected in higher profits for business members.¹⁵⁹

Second, constituents of private-based subunits have substantial incentives to monitor. Monitoring managers creates a classic collective action problem in that

157. Davis, *supra* note 73, at 9 (footnotes omitted).

158. See, e.g., Han et al., *supra* note 137, at 658-59; Hoyt, *supra* note 137, at 186; Clutter, Henderson & Haberman, *supra* note 137, at 1066.

159. See, e.g., Ellen, Schwartz & Voicu, *supra* note 138, at 2.

it is costly for any constituent to undertake and, given the aligned interest of all constituents, monitoring by any one constituent reduces the need for others to participate. In theory, therefore, monitoring will be undersupplied as each member relies on others to undertake the task. But the incentive of private-based constituents to monitor is increased because they pay dues, fees, or taxes to fund the operation of the subunit. Presumably constituents would prefer to minimize those fees and to ensure that they are not used for purposes other than enhancing the business environment. Indeed, much of the litigation between BIDs and their members involves member efforts to analyze or amend the taxes or fees that the BID assesses.¹⁶⁰ That phenomenon suggests that BID members both have the incentive to monitor and are genuinely monitoring the activity of group officials.

b. Low Monitoring in Community-Based Subunits

Conversely, the variety of objectives that community-based subunits pursue frustrates monitoring. Consider, for example, the stated objectives of the famed Dudley Street Neighborhood Initiative (DSNI), which formed the Dudley Neighbors, Inc., CLT in 1979 and is often considered one of the nation's most successful community organizations.¹⁶¹ DSNI's website identifies its focus areas as developing without displacement, cultivating young leadership, developing the neighborhood through community revitalization, providing economic opportunities, leveraging the community and diversity of the neighborhood, and empowering residents to assume leadership roles.¹⁶² Mechanisms to achieve these remarkably worthy objectives remain difficult to define and potentially conflict with each other. For example, successful efforts to create economic opportunities are likely to increase neighborhood land values with the concomitant risk of attracting wealthier populations and displacing existing residents. Empowering residents may mean tolerating certain inefficiencies in the delivery of services.

The multiple and potentially conflicting goals of DSNI make it more difficult to determine whether current leaders are doing a "good job." Some constituents may view success in terms of creating more affordable housing units, while others might prioritize attracting commercial investment or avoiding food deserts. Objectives such as increasing the political power of the community are less

160. See, e.g., *Hill RHF Hous. Partners, L.P. v. City of Los Angeles*, 500 P.3d 294, 296-97 (Cal. 2021); *Kennedy v. Montclair Ctr. Corp. Bus. Improvement Dist.*, No. A-4591-12T2, 2014 WL 4698508, at *1 (N.J. Super. Ct. App. Div. June 24, 2014).

161. See *Davis*, *supra* note 73, at 24.

162. See *Home*, DUDLEY ST. NEIGHBORHOOD INITIATIVE (2023), <https://www.dsni.org> [<https://perma.cc/A5EP-9MGJ>].

susceptible to measurement than the increased profitability of constituents in subunits that purport to improve the business environment. “More power” may also fall under several differing definitions. In one sense, it may mean formal power through greater representation within decision-making bodies, such as the city council. Alternatively, it may mean city adoption of policies that community-based subunits prefer or, more radically, diverging from market-based concepts of property.¹⁶³ The varying definitions and measurements of commonly held but vaguely stated objectives make it difficult to monitor their satisfaction or absence. It is perhaps not surprising, therefore, that a recent study of CLTs in Minnesota concluded that, while members viewed themselves as involved in a project to give more people access to stable homeownership, most interviewees “simply did not see CLTs as being part of an effort for transformative social change,” defined as “shifting meanings of home ownership” and “changing subjectivities.”¹⁶⁴

The absence of a financial stake further dilutes incentives to monitor. Constituents of community-based subunits typically do not pay directly for the groups’ activities: PB projects are funded by the city; a CLT that develops a park will likely seek philanthropic funding rather than contributions or fees from users; and individuals who negotiate a CBA are spending the developer’s money, not their own. Those without skin in the game are presumably less likely to invest in monitoring officials than are those who have made an investment that manager conduct may place at risk.

Some community-based subunits may have singular objectives that are theoretically susceptible to monitoring. CLTs that explicitly concentrate on increasing affordable housing in disadvantaged areas while providing community members with a voice in neighborhood development presumably could publicize the number of affordable units made available within a specified period or the number of community residents who participate in decision-making.¹⁶⁵ Foreclosure rates are significantly lower in CLTs than in properties financed with commercial mortgages, which may also be a useful measure of success.¹⁶⁶ Other metrics, such as whether the subunit has increased the city resources invested in disadvantaged communities, are susceptible to measurement. But without access

163. See Davis, *supra* note 73, at 47-48.

164. James DeFilippis, Olivia R. Williams, Joseph Pierce, Deborah G. Martin, Rich Kruger & Azadeh Hadizadeh Esfahani, *On the Transformative Potential of Community Land Trusts in the United States*, 51 ANTIPODE 795, 803, 807-10 (2019).

165. Davis, *supra* note 73, at 3.

166. See, e.g., Emily Thaden, *Stable Home Ownership in a Turbulent Economy: Delinquencies and Foreclosures Remain Low in Community Land Trusts* 2-3 (Lincoln Inst. of Land Pol’y, Working Paper No. WP11ET1, 2011), https://www.lincolninst.edu/sites/default/files/pubfiles/1936_1257_thaden_final.pdf [<https://perma.cc/FQ7K-K25G>].

to the relevant data, it is less likely that constituents will overcome the dynamics of collective action and free riding necessary for monitoring.

In some community-based subunits, constituents do have a significant stake in effective management and, therefore, greater incentives to monitor.¹⁶⁷ Perhaps the best example involves CLT homeowners who have intense interests in the value of their property. As in the case of BID members who pay dues, homeowners' financial stakes should induce monitoring and overcome the incentive to free ride. But that incentive does not necessarily coincide with—and may actually conflict with—monitoring for compliance with the subunit's objectives. For example, a lessee who has purchased a home on CLT land may want to maximize the value of that land to increase the already-constrained resale value.¹⁶⁸ That might entail advocating for the use of subunit parcels that attract wealthier lessees and inviting the very gentrification that the CLT was presumptively formed to deter. Conversely, another constituent who favors more affordable housing may resist CLT board measures that would increase housing costs or the inclusion of more commercial parcels. Neither of these objectives is unreasonable. But the potential division among reasonable objectives means that if advocates monitor for compliance based on their favored objective, it would be difficult to claim that a board pursuing alternative objectives lacked fidelity. That conclusion itself reduces the incentives for monitoring. Determining that a manager pursues one of a number of conflicting but reasonable objectives does not mean that the manager is imposing agency costs. It means only that the manager prefers the appropriate objectives of some members over those of others.

The limited monitoring incentives of community-based subunit members could be mediated to some degree by philanthropic and other organizational partners. In theory, a philanthropy that funds multiple CLTs could have sufficient information to determine whether a client CLT is well managed or poorly managed. But again, it is not clear that professionals with the capacity to monitor will monitor for the same objectives that constituents prefer. They may instead have their own priorities that differ from those of their beneficiaries.¹⁶⁹ For instance, the foundations that underwrite the organization and development of CLTs may prefer subunits that cover larger geographic areas inconsistent with small-scale community control or may set the agenda for the subunit despite residents' preferred objectives.¹⁷⁰ As James DeFilippis, Brian Stromberg, and

167. Davis, *supra* note 73, at 19.

168. Resale prices are limited in a CLT to ensure permanent affordability. See Stephen R. Miller, *Community Land Trusts: Why Now Is the Time to Integrate This Housing Activists' Tool into Local Government Affordable Housing Policies*, 23 J. AFFORD. HOUS. & CMTY. DEV. L. 349, 357-58 (2015).

169. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 845-51 (1990).

170. See DeFilippis, Stromberg & Williams, *supra* note 68, at 762.

Olivia R. Williams conclude, “The influence of large-scale funders of nonprofit organizations is of great significance in considering what agendas are pursued in communities. This is particularly true because of shrinking federal support for communities since the 1980s.”¹⁷¹

The same difficulty holds for local or national groups that engage with community organizations. For example, the Center for Community Progress¹⁷² and the Grounded Solutions Network¹⁷³ provide professional expertise and capacity training that is often lacking in disadvantaged areas. These organizations thus create a broader base of residents able to serve as informed representatives of their communities. Many of these NGOs specialize in designing institutions for local decision-making, rather than in imposing policies on the communities they advise. That “bottom-up” arrangement is one hallmark of more contemporary movements to assist the relatively disadvantaged and differs importantly from the top-down decision-making that characterized early – and oft-criticized – efforts at “urban renewal.”¹⁷⁴

But ostensibly altruistic institutions may have their own agendas that vary from the preferences of the community. For example, Laura Wolf-Powers notes that labor unions have become involved in CBA negotiations. The expertise of unions in negotiating and their role as repeat players in CBAs (as opposed to local residents who may be involved only in a single CBA) likely enhance coalitions between labor and communities.¹⁷⁵ But the interests of labor may diverge from those of community members. Unions may want developers to commit to hiring union workers, while community members may simply want well-paying jobs that do not necessarily require unionization. That division apparently led labor to distance itself from community groups seeking a CBA for the renovation of Yankee Stadium.¹⁷⁶ In another situation, building-trade unions negotiated for a prevailing wage requirement that would benefit its middle-income suburban members as a key element of a CBA for a TIF district adjoining a Black

171. *Id.* at 757, 762 (citations omitted); see Deborah G. Martin, *Nonprofit Foundations and Grassroots Organizing: Reshaping Urban Governance*, 56 *PRO. GEOGRAPHER* 394, 397 (2004).

172. *CTR. FOR CMTY. PROGRESS*, <https://communityprogress.org> [<https://perma.cc/J6JU-S5R8>].

173. *GROUNDLED SOLS. NETWORK*, <https://groundedsolutions.org> [<https://perma.cc/3FAF-RKZG>].

174. See, e.g., LIZABETH COHEN, *SAVING AMERICA'S CITIES: ED LOGUE AND THE STRUGGLE TO RENEW URBAN AMERICA IN THE SUBURBAN AGE 207-38* (2019) (recounting city imposition of urban renewal planning on resistant neighborhoods).

175. Wolf-Powers, *supra* note 111, at 153.

176. *Id.* at 154. Ultimately, no community group signed the agreement. See Gross, *supra* note 115, at 42.

community in Milwaukee.¹⁷⁷ Some CBAs have stipulated that developers will not oppose proposed ordinances that prohibit or restrict “formula businesses” or retail stores, notwithstanding that community members might benefit from the lower prices that chain stores provide shoppers.¹⁷⁸

In the absence of monitoring, there is increased risk that low participation rates among constituents allow managers to deviate from constituent interests. PB processes effectively illustrate the problem. Those who participate in formulating or adopting specific projects or serve as delegates in implementing successful proposals act as the representatives of the PB district where they reside. Thus, they are effectively the managers of the subunit that makes budgetary decisions. Unfortunately, the little data that exists suggests not only that the costs of democratic involvement do not warrant participation for a substantial majority of residents but also that participation rates are particularly low for relatively poor residents – those whom PB seeks to empower. Data gathered from New York City’s database on PB participation¹⁷⁹ and demographic information about city council districts suggests an inverse relationship between participation rates and poverty levels, with a lower participation rate correlating with a higher poverty rate.¹⁸⁰

177. Wolf-Powers, *supra* note 111, at 154.

178. See, e.g., Dearborn Street Agreement art. 4, § 7 (Aug. 29, 2008), https://julian-gross.net/docs/CBA/Dearborn_Street_Agreement.pdf [<https://perma.cc/JH6F-RSCY>]. A “formula business” is an establishment “required by contract to adopt standardized services, methods of operation, decor, uniforms, architecture or other features virtually identical to businesses located in other communities.” Patricia E. Salkin, *Municipal Regulation of Formula Businesses: Creating and Protecting Communities*, 58 CASE W. RESV. L. REV. 1251, 1252 n.4 (2008).

179. See *Participatory Budgeting Projects*, N.Y.C. OPENDATA (Feb. 7, 2020), <https://data.cityof-newyork.us/City-Government/Participatory-Budgeting-Projects/wwhr-5ven> [<https://perma.cc/ZD59-QRW2>].

180. For example, in 2023, residents in New York City’s 3rd City Council district cast 3,333 votes for a variety of proposals through the PB process. Gus Saltonstall, *West Village Participatory Budget Winners Revealed: Tree Beds, Schools*, PATCH (May 17, 2023, 2:30 PM), <https://patch.com/new-york/west-village/west-village-participatory-budget-winners-revealed-tree-beds-schools> [<https://perma.cc/5UVJ-U84J>]. Residents in New York City’s 5th City Council district cast approximately 4,500 votes during that same PB process, although that represented a historically high turnout in the district. See Peter Senzamici, *Menin Doubles Participatory Budget Bucks After Outstanding UES Turnout*, PATCH (Apr. 27, 2023, 2:24 PM), <https://patch.com/new-york/upper-east-side-nyc/menin-doubles-participatory-budget-bucks-after-outstanding-ues-turnout> [<https://perma.cc/G5RY-QXA8>]. The 2020 population of District 3 was 202,572, and the population of District 5 was 181,432. See *Number of People in Prison in 2020 from Each NYC City Council District*, PRISON POL’Y INITIATIVE (2021), https://www.prisonpolicy.org/origin/ny/2020/nyc_citycouncil.html [<https://perma.cc/Q9N3-BV7H>] (providing decennial census data for New York City). Thus, the participation

Low PB participation rates do not necessarily indicate a mismatch between voter and nonvoter objectives. If voter preferences were similar to nonvoter preferences, voters would serve as faithful proxies for nonvoters in the community and diminish the importance of participation. But there is at least some evidence that a mismatch occurs and may be exacerbated by the selected voting mechanism. Benjamin R. Barber reported the results of a process in Lichtenburg, Germany, in which residents could vote by mail, online, or in a citizen's forum.¹⁸¹ The results varied significantly depending on the voting method. Funding for a dog station that registered ninth among mail-in voters finished third among online voters and did not register at all for voters at citizen's forums. A cycle-path plan that finished first among online voters ranked third for mail-in voters and sixth for forum voters. Given the variations in preferences among voters depending on method of voting, it would be difficult to infer that voters represented nonvoters.¹⁸²

3. *Exit and Voice as Constraints on Infidelity*

In theory, constituents who are dissatisfied with the services they receive may exit a subunit and thereby signal that their subunit managers are not faithful agents.¹⁸³ But some subunit constituents may be relatively immobile. A business constituent of a BID who has invested in a brick-and-mortar presence and attracting a customer base at a specific location is unlikely to exit notwithstanding disapproval of an assessment that exceeds the perceived personal benefit from

rate in 2023 for District 3 was approximately 1.64 percent while the participation rate for District 5 was approximately 2.48 percent. The percentage of residents of voting age would have been higher in each case. The Institute for Children, Poverty and Homelessness estimated that the poverty rate for District 3 in 2009-2013 was 10.9 percent, while the poverty rate for District 5 was 7.8 percent. See *Poverty in New York City Council Districts*, INST. FOR CHILD., POVERTY & HOMELESSNESS 53 (Apr. 2016), <https://www.icphusa.org/wp-content/uploads/2016/04/Poverty.pdf> [<https://perma.cc/WN77-QS47>]. The example is suggestive of the inverse relationship between wealth and participation, though too anecdotal to prove the proposition definitively.

181. BARBER, *supra* note 95, at 309. Barber cites a 2010 study by Yves Sintomer, Carsten Herzberg, and Giovanni Allegretti. The authors updated their study in 2013, but that update omits the data. The 2010 version of the study is not available online.

182. Barber reports that there were 600 forum voters and 2,500 online voters. He does not indicate the number of mail voters. *Id.* at 308. The 2010 population of Lichtenburg was approximately 260,000. See Katinka Schlette, Present Borders in Border-Memoryland Berlin 18 (Aug. 2017) (master's thesis, Radboud University Nijmegen), https://www.academia.edu/34791218/Present_Borders_in_Border_Memoryland_Berlin_Contemporary_in_visible_b_ordering_dynamics_and_creative_border_deconstruction_in_an_urban_space [<https://perma.cc/VBF7-5BLV>].

183. HIRSCHMAN, *supra* note 130, at 21-29.

BID activity. Indeed, managers of private-based subunits may be able to exploit relatively immobile members and make investments that those constituents oppose. For example, a multistory department store with significant voting power in the BID may successfully oppose sidewalk improvements that confer more benefits for street-level stores that constitute a majority of the membership but a minority of the vote. Additionally, SZD members cannot readily exit because doing so entails the loss of the agglomeration benefits that make the SZD a more productive location. Residents who oppose the recommendations of a PB process may find the costs of their disfavored project too small to warrant exit.

But dissatisfied subunit members who do not or cannot exit may send a stronger signal if they exercise the “voice” option of complaining about subunit misbehavior.¹⁸⁴ If the costs of voice are lower than those of exit, one would expect that dissatisfied constituents would still exercise the former option in an effort to increase the fidelity of managers. Voice may involve low-cost measures such as registering complaints at subunit meetings, engaging in informal discussions with other members, or supporting alternative candidates for managers during the selection process. But even costly exercises of voice, such as lawsuits to contest manager actions, may be justified if manager conduct imposes substantial costs on constituents.¹⁸⁵

Significantly, as in the case of alignment of interests and monitoring, the exercise of voice is more likely to constrain managers of private-based subunits than managers of community-based subunits. That is due in large part to the higher personal costs that unfaithful managers of private-based subunits are likely to impose on their constituents. Excessive financial assessments that reduce profitability may easily justify the expenditure of time and effort to complain to managers or to show up at a board meeting to register disapproval. Conversely, constituents who object to projects favored by PB delegates or CBA panels will likely not suffer enough cost relative to their favored disposition to protest what the subunit decides. Given the relatively small size of PB-initiated projects, a constituent’s objection to a specific proposal is unlikely to impose a

184. See Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 525-26 (2009).

185. For examples of lawsuits against BIDs, see *City of Seattle v. Rogers Clothing for Men, Inc.*, 787 P.2d 39 (Wash. 1990) (en banc); *S.O.L. Club, Inc. v. City of Williamsport*, 443 A.2d 410 (Pa. Commw. Ct. 1982); *L Street Investments v. Municipality of Anchorage*, 307 P.3d 965 (Alaska 2013); *Madaloni v. City of Mobile*, 37 So. 3d 739 (Ala. 2009); *Zimmerman v. City of Memphis*, 67 S.W.3d 798 (Tenn. Ct. App. 2001); *Howard Jarvis Taxpayers Ass’n v. City of San Diego*, 84 Cal. Rptr. 2d 804, 810 (Ct. App. 1999), which held that an assessment is neither a special tax nor an assessment imposed on real property and thus subject to a state constitutional voting requirement; and *2nd Roc-Jersey Associates v. Town of Morristown*, 731 A.2d 1, 11 (N.J. 1999), which held that a clause requiring all property taxes be assessed according to the same standard of value is inapplicable to BID assessments.

cost sufficient to justify taking the time or effort to protest or to lobby the city not to implement the recommendation. Similarly, a CBA may not provide a benefit that an objecting constituent prefers, such as a promise of jobs rather than union jobs. But if the CBA provides a new benefit to the neighborhood—albeit not one that an objecting resident might prefer—that lost opportunity cost is unlikely to be sufficient to justify the disgruntled constituent’s investment of time and effort to lobby for disapproval of the agreement.

CLTs may be an exception as a community-based subunit in which constituents frequently use voice to constrain agency costs. A CLT lessee’s investment in a home is as much a location-specific investment as the investment by a business within a BID or an SZD. The lessee thus has limited ability to exit and greater willingness to complain. Suppose the CLT conducts itself in a manner that threatens to reduce the value of the member’s property, such as by locating an undesirable land use next door or failing to maintain a park within the CLT’s jurisdiction. In that case, the costs of remedial action may be worth incurring. It remains unclear, however, whether voice is commonly used to constrain managers in CLTs. There appear to be no reported appellate cases in which CLT members bring actions against their CLTs.¹⁸⁶ This could mean that CLT members have few complaints against their managers that are not worked out in the cooperative communal manner in which CLTs purport to operate, that any disputes that do arise are settled before they reach the appellate stage, or that the costs of pursuing litigation are too high for members to proceed. The first possibility would suggest that the voice option is both used and is effective in CLTs. The other options, however, would suggest that voice may be underutilized given its costs to constituents.

IV. SUBUNITS AS FAITHFUL AGENTS OF THE CITY

My argument to this point has been that private-based subunits are more likely than community-based ones to serve the interests of their constituents. That is not because community-based subunits suffer from nefarious motives or incompetence. Rather, the conclusion rests primarily on the argument that,

¹⁸⁶. On the assumption that the board of directors would be named or mentioned in any such lawsuit, I conducted a Westlaw search of [“community land trust” & board or director]. That search revealed no cases in which a member brought an action against the community land trust. One case, *Hunter v. Johnson*, No. 06-cv-4316, 2008 WL 11435640, at *1 (D. Minn. April 24, 2008), involved a lawsuit that claimed the trust increased the advertised purchase price of a home when plaintiff attempted to purchase it. The court dismissed the claim on the pleadings. *See id.* at *2-3. Since plaintiff did not purchase the home, it is unclear whether plaintiff was a member of the community land trust, though membership could include community members. I have not searched district court records.

relative to community-based subunits, the objectives of private-based subunit managers are more likely to align with those of their constituents, are easier to monitor, and are more susceptible to the use of voice to constrain agency costs. Constituent interests are only one part of the analysis, however. In this Part, I contend that private-based subunits are also *more* likely than community-based ones to deviate from the interests of the city as a whole.

A. *Private-Based Subunits and City Interests*

Cities authorize private-based subunits to offer public goods in the belief that private provision will enhance the economic welfare of the city as a whole. But the interests of private-based subunit managers may cause them ultimately to ignore city interests in favor of their constituents, potentially reducing broader city welfare. Commentators skeptical of private-based subunits such as BIDs or TIFs, for example, argue that private providers of public goods ignore the negative externalities they impose on nonmembers who are unrepresented in BID formation or operation – shoppers, unhoused individuals who use public BID spaces, and neighboring residents or businesses outside the BID.¹⁸⁷ Enhanced security in a BID may reduce crime within its boundaries, but only by driving crime to neighboring areas. Similarly, a large BID may make capital expenditures unaffordable to smaller BIDs, thereby increasing a gap in services or attractiveness between two areas.¹⁸⁸

There exist some city-imposed constraints that moderate the tendency for private-based subunits to impose negative externalities. For example, some BIDs and CBAs require city approval to implement their plans.¹⁸⁹ BID boards may be appointed by local officials accountable to the electorate, may be compelled to file financial reports with the city, and are subject to termination or alteration by

187. See, e.g., Gross, *supra* note 32, at 157–58; Susanna Schaller & Gabriella Modan, *Contesting Public Space and Citizenship: Implications for Neighborhood Business Improvement Districts*, 24 J. PLAN. EDUC. & RSCH. 394, 396 (2005); Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 972–76 (2013). See generally Paul Hess & Claire Stevenson-Blythe, *Infrastructural Reuse Projects, Lost Spaces, and Spaces of Homelessness: A Case Study on the Bentway in Toronto*, J. URBANISM (2022) (arguing that infrastructural-reuse projects should be examined for their unanticipated effects on marginalized persons); Pol’y Advoc. Clinic, *Homeless Exclusion Districts: How California Business Improvement Districts Use Policy Advocacy and Policing Practices to Exclude Homeless People from Public Space*, U.C. BERKELEY SCH. OF L. (2018), <https://www.law.berkeley.edu/wp-content/uploads/2018/09/SSRN-id3221446.pdf> [<https://perma.cc/ET6Y-2J2Z>] (arguing that BIDs exclude homeless persons from public spaces through policy advocacy and policing practices).

188. See Briffault, *BIDs*, *supra* note 22, at 373.

189. See *id.* at 442; Patricia E. Salkin, *Community Benefits Agreements: Opportunities and Traps for Developers, Municipalities, and Community Organizations*, 59 PLAN. & ENV’T L. 3, 4 n.10 (2007).

the city.¹⁹⁰ Subunit boards may also include representatives from the city who moderate projects that threaten significant external consequences.¹⁹¹

These formal constraints, however, may not be very effective. First, even though cities retain jurisdiction over private-based subunits, they rarely exercise that authority to countermand subunit decisions. Carol J. Becker found that only 12.8% of surveyed BIDs reported that governments ever set a different level of funding than the one that the BID requested, although that figure includes BIDs that had unilateral authority to set funding levels.¹⁹²

Second, adverse effects on the city could be relatively subtle or arise only in the future, leading current city representatives on the subunit board to ignore them, discount their effects, or lack the facility to investigate them. For instance, a TIF that attracts new population and business could subsequently increase stress on city infrastructure and require additional investment from city resources.¹⁹³ At the time the decision is made, however, those effects may be insufficiently salient to decision makers or be so diffuse as to forestall organized opposition.

Third, the very characteristics that make private-based subunits effective representatives of their constituents also provide them with the capacity to overcome objections from nonmembers at the city level. The interest alignment between subunit managers and their business-oriented constituents and the resources of these business constituents create both the conditions and the incentives for private-based subunits to coalesce into a relatively concentrated, well-financed interest group that can lobby effectively for advantages that impose costs on others.¹⁹⁴ Private-based subunits typically comprise members and managers that are already deeply involved in political activity at the city level. For example, developers of TIFs or organizers of BIDs work with city officials to design the boundaries, the budgets, and the operations of their subunits. As a result, they are consistently engaged in the traditional politics of lobbying, cooperating with city officials, and providing electoral support for favored candidates.

190. Becker, *supra* note 41, at 190; *see also* Hochleutner, *supra* note 133, at 380-81 (“While a significant minority of BIDs are managed directly by governmental bodies or by public nonprofit partnerships, the majority are operated by nonprofit corporations under the supervision of local government.”).

191. *See, e.g.*, Gross, *supra* note 32, at 142-43 (recounting the resignation and replacement of a BID executive director at the behest of public-sector actors on the governing board in response to frustration with BID policies).

192. Becker, *supra* note 41, at 191-92.

193. *See* Stahl, *supra* note 187, at 1001.

194. *See* ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 129-32 (1984).

One might counter that the presence of city officials on private-subunit boards means that the interests of the city are well represented. However, those public representatives may obtain reputational or other benefits from serving on boards, leading them to facilitate private-subunit approval with the relevant city agencies. In other words, city representatives may be captured by the private-based boards on which they serve just as regulators may be captured by the industries they are expected to regulate.¹⁹⁵ The repeat play of private-based subunits with city officials also makes it worthwhile for related subunits to form coalitions to seek advantages from which all members could benefit. Multiple BIDs within the same city may pool resources to obtain mutually beneficial advantages in city legislation, or BIDs in cities with few similar subunits may draw on trade associations for assistance with local legislatures. For example, the International Downtown Association (IDA), a trade organization for BIDs, provides training, research reports, and advisory services to its members.¹⁹⁶ These efforts may advance the IDA's objectives of "deliver[ing] key services and activities within the boundaries of their districts," but those goals may be inconsistent with efforts to improve urban life outside those districts.¹⁹⁷

B. Community-Based Subunits and City Interests

Conflicts between community-based subunits and the city may be less common because community-based subunit activities impose fewer substantial costs on nonconstituents. Nevertheless, conflicts are likely to arise where the community exercises democratic control – especially for its disadvantaged city constituents – to increase the level of public goods and services to the city's default level. Those efforts may be perfectly appropriate, given the city's obligations to all of its residents. But the propriety of the activities may still permit community-based subunits to affect nonconstituents adversely.

Much of the controversy surrounding CBAs illustrates the possibility of conflict between community-based subunits and broader city policies. Vicki Been explains the potentially detrimental externalities of CBAs as follows:

CBAs may compromise the interests of the local government as a whole . . . by diverting resources that the local government might

195. See, e.g., Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340 (2013); Davidson, *supra* note 6, at 630 (noting both the possibility of capture at the local level and features of localism that help resist it).

196. See *About IDA*, INT'L DOWNTOWN ASS'N, <https://downtown.org/about-ida> [<https://perma.cc/XT44-8GCT>].

197. See *About the Industry*, INT'L DOWNTOWN ASS'N, <https://downtown.org/about-the-industry> [<https://perma.cc/U59P-Y8Q9>].

otherwise have received from the developer and chosen to spend in other neighborhoods or on other issues; by making it more likely that the local government will approve development that is inappropriate; and by committing the local government's own resources to projects that it might not have prioritized absent the CBA.¹⁹⁸

The fact that CBA negotiators are generally not repeat players means that even those who are faithful to constituents' interests have less incentive to consider city interests. Many of these risks are similarly present in the PB process. PB delegates act in a limited capacity to advance discrete, small-scale projects. They have limited incentives or information to consider how their proposals intersect with potentially conflicting or alternative uses of the dollars they allocate.

Despite these risks, community-based subunits are relatively limited in their ability to harm broader city interests when compared to private-based subunits. Community-based projects tend to be limited in geographic scope so that, opportunity costs aside, they are unlikely to affect outlying areas. PB proposals in New York City in 2017, for example, included science materials for a public elementary school, street trees and tree guards, a recording studio for a high school, installation of flexible concrete at bus stops, and a free outdoor gym.¹⁹⁹ It is unlikely that adoption of any of these measures could either adversely affect other communities or require additional funding that other communities would have to subsidize.

Moreover, a community-based subunit that wished to undertake action deleterious to city interests is less likely than a private-based one to be able to do so. Most obviously, community-based subunits lack the resources available to their private-based counterparts to engage in significant lobbying or override organized city opposition. For example, philanthropies rather than political enterprises support CLTs and could lose their tax-exempt status if they are viewed as engaged in lobbying.²⁰⁰ Further, community-based subunits involved in single-play activities rather than repeat-play interactions have fewer opportunities to form relationships with or influence city officials who may allow conduct inconsistent with city objectives. PB delegates and most CBA committees, for

198. Been, *supra* note 22, at 33; *see also id.* at 25–26 (noting that CBAs may not “channel resources into the neighborhoods that need them most”); *The C.B.A. at Atlantic Yards: But Is It Legal?*, OBSERVER (Mar. 14, 2006), <https://observer.com/2006/03/the-cba-at-atlantic-yards-but-is-it-legal> [<https://perma.cc/NK7Q-ZH6J>] (arguing that CBAs allocate municipal funds to areas that are not necessarily high priority from the city's perspective).

199. *See Participatory Budgeting Projects*, *supra* note 179.

200. *See* I.R.C. § 501(c)(3), (h)(1) (2018).

example, pursue their favored one-off projects and then retreat to private roles.²⁰¹ In short, the same characteristics that lead managers in one-shot interactions to be less solicitous of constituents' interests may also lead them to be less willing to make the investments necessary to overcome city resistance to projects that conflict with broader city interests.

C. *Community-Based Subunits and Community Control*

There is, however, one subset of community-based subunit activities that could more intensely conflict with broader city interests. That involves subunit activities that demand more community control for disadvantaged residents over decisions concerning the quality and quantity of city-provided services. It is the very nature of community-based subunits to promote policies critical of the existing allocation of city services, thereby creating tension between the city and the communities that the subunits serve.²⁰² The emphasis of CLTs on affordable housing means that, by definition, they will exist in poorer parts of the city. CBAs often arise to negotiate for housing, higher wages, or parks because the underlying project will locate in an area that lacks those characteristics. PB had its origins in efforts to include those without a voice in government decision-making and continues to be utilized in disadvantaged areas.²⁰³ Thus, while private-based subunits typically seek a level of public goods above the default level that the city purports to provide, community-based subunits seek to raise services in their area to that default level. That objective is inherently in tension with the status quo of city decision-making. That tension, in turn, means that community-based subunits are more likely to be in conflict with the city over issues of political authority as opposed to service delivery.

These tensions extend beyond service delivery to the city's role as a focal point for democratic participation. Community-based subunits in disadvantaged areas typically serve a population that has historically had limited political involvement in allocating city resources, often because top-down decision-

201. See, e.g., Gross, *supra* note 115, at 39. Detroit may be a special case. The city's community-benefits ordinance creates a Neighborhood Advisory Council for each project. But each Council remains in place until completion of the project and serves to review compliance with the agreement it has negotiated.

202. See DAVIS & JACOBUS, *supra* note 78, at 12.

203. See Hollie Russon Gilman, *Engaging Citizens: Participatory Budgeting and the Inclusive Governance Movement Within the United States*, HARV. KENNEDY SCH. ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION 2-5 (Jan. 2016) <https://ash.harvard.edu/files/ash/files/participatory-budgeting-paper.pdf?m=1455295224> [<https://perma.cc/AP8V-PYMR>] ("PB in the United States has worked to empower traditionally marginalized residents, including non-citizens, seniors, people of color, and youth.").

making has deprived those residents of access and opportunities to participate.²⁰⁴ As a result, community-based subunits regularly include the transformation of political power within their objectives to ensure the inclusion of community members in the determination of area land uses and the provision of services.²⁰⁵ In short, community-based subunits seek to increase not only the level of public goods and services within disadvantaged areas but also community control over neighborhood assets.²⁰⁶

Sheila R. Foster and Brian Glick explain how community groups have evolved from responding to development plans to “strengthen[ing] and leverag[ing] the capacity of the community (particularly those members who have the least voice and influence in the process) to become a ‘player’ in its own development and revitalization.”²⁰⁷ As Rahman and Simonson argue, community control is intended “to influence policy outcomes and control the distribution of state resources.”²⁰⁸ The primary objective of at least some community-based subunits, therefore, should be to contest and alter existing allocations of city authority.²⁰⁹ In that case, divergence between subunit interests and those of the city is a feature of the subunit’s existence, not a bug.

Given the reallocation of political authority that community control implies, it is almost inevitable that city officials will oppose some of the policies that community-based subunits advocate.²¹⁰ Indeed, the community-control movement in the 1960s and 1970s—initially based on the principle of “maximum feasible participation” and underwritten by traditional philanthropies and federal programs—ultimately disbanded, in part because relationships between community groups and city officials became hostile.²¹¹ Community groups considered confrontation with city officials an inherent element of broad participation, while

204. Foster, *supra* note 25, at 87-90.

205. See De Barbieri, *supra* note 22, at 1783 (“The movement to organize for CBAs is founded in progressive political action.”).

206. See *id.*

207. Foster & Glick, *supra* note 114, at 2054.

208. Rahman & Simonson, *supra* note 27, at 692; see also Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1777 (2005) (endorsing dissent as “both an act of affiliation and an act of contestation” to facilitate governance); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (explaining how federalism is a tool of minority rule that “promotes choice, competition, participation, experimentation, and the diffusion of power”).

209. Rahman & Simonson, *supra* note 27, at 683.

210. See, e.g., De Barbieri, *supra* note 22, at 1798-99 (describing a failed CBA attempt in the Bronx).

211. See generally DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY (1969) (discussing social strife in 1960s America).

city officials anticipated coordination and cooperation.²¹² Developments in community organizing and organizational theory that prioritize inclusive participation, public-private partnerships, and performance-based evaluation rather than confrontation and absolutist legal demands may relegate that failure to the historical dustbin.²¹³ Thus, community-based subunits do not necessarily occupy an adversarial relationship with the city. Indeed, authorization of CBA and PB processes reveal city willingness to entertain a significant reallocation of political power for land use and expenditure decisions—often the most powerful tools that city officials wield to solidify or expand their base of political support.²¹⁴

Nevertheless, city officials are unlikely to cede much authority to sublocal priorities or coalitions, leaving significant space for conflict with community-based subunits. Budget allocations to PB, for example, remain relatively small. New York City’s citywide PB process allocates only \$5 million of the City’s budget, which exceeds \$100 billion.²¹⁵ The \$8.5 million that Los Angeles allocates to PB is merely a fraction of the City’s \$43 billion budget.²¹⁶ Other processes that ostensibly share political authority between the city and community-based subunits may, in practice, subordinate the latter to the former, as evidenced by the claims that cities sometimes co-opt the community role in CBA negotiations to achieve city rather than community priorities.²¹⁷

Of course, the presence of conflict does not necessarily mean that the subunit is acting as an unfaithful agent of the city. Indeed, if city officials fail to adopt or

212. *Id.* at 141-44.

213. See Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 *YALE HUM. RTS. & DEV. L.J.* 1, 5 (2010) (arguing for a return to a “practical, locally-responsive, yet federally-orchestrated orientation of U.S. social welfare law” grounded in decentralization and stakeholder participation).

214. See, e.g., TROUNSTINE, *supra* note 14, at 10.

215. See Jacques Jiha, *City of New York - Financial Plan*, N.Y.C. MAYOR’S OFF. OF MGMT. & BUDGET (June 30, 2023), <https://www.nyc.gov/assets/omb/downloads/pdf/adopt23-fpmod.pdf> [<https://perma.cc/DHR3-5AWZ>]; *The People’s Money (2022-2023)*, N.Y.C. CIVIC ENGAGEMENT COMM’N (Aug. 18, 2023), <https://www.participate.nyc.gov/processes/Citywidepb> [<https://perma.cc/H4NL-5GNE>]. The New York City Council allocates an additional \$30 million through a district-based PB program. See *Participatory Budgeting*, *supra* note 100.

216. See *LA County’s \$43 Billion Recommended Budget Is Unveiled*, CNTY. L.A. (Apr. 17, 2023), <https://lacounty.gov/2023/04/17/la-countys-43-billion-recommended-budget-is-unveiled> [<https://perma.cc/N32G-B6N7>]; *L.A. REPAIR Participatory Budgeting Launches*, *supra* note 101.

217. De Barbieri, *supra* note 22, at 1796; Foster & Glick, *supra* note 114, at 2024; Julian Gross, *Community Benefits Agreements*, in *BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS* 189, 190-95 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

implement community-based subunit programs out of animus or primarily to maintain their political dominance,²¹⁸ then arguably the resistant subunit is acting with fidelity towards the city by assisting it in achieving the objectives of service delivery and democratic participation. Moreover, city officials may, in good faith, oppose community-based subgroups on the grounds that their projects interfere with a centralized plan for similar services, implicate the city's budget in an unaffordable way, or are simply too difficult to implement. A CLT, for example, may wish to utilize properties that the city has obtained through tax-lien foreclosures, but cannot easily transfer because it cannot establish clear title. Criticisms that CBAs distort city spending and adversely affect development siting may reasonably induce officials to reject recommendations of CBA panels.²¹⁹

In sum, it is likely that some conflict will exist between community-based subunit priorities and policies and those of the city, though perhaps to a lesser degree than the infidelity one might expect between private-based subunits towards the city. In the next Part, I discuss ways to reduce infidelity among subunits, constituents, and the city generally. That discussion also demonstrates that the community-based subunit/city relationship presents a special case that may require different legal treatment than is appropriate to cure the gap between subunits and those whom they serve.

V. REDUCING THE GAPS AMONG SUBUNITS, CONSTITUENTS, AND CITIES

The preceding Parts contended that subunit managers will imperfectly exhibit fidelity to their constituents and to the city. More precisely, private-based units are more likely to reflect the interests of their constituents, whose objectives are relatively narrow and vulnerable to monitoring. Conversely, private-based subunits are less likely to reflect the interests of the city because their narrow interests can be inconsistent with broader city objectives. Community-based subunits have more difficulty reflecting the interests of their constituents, who confront challenges defining the subunit's objective or monitoring for compliance with it. However, community-based subdivisions are less likely to be engaged in activities that impose significant costs on the rest of the city. That relationship to the city is subject to the proviso that community-based subunits may be as interested in shifting decision-making authority away from traditional

218. See, e.g., Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. ON RACIAL & ETHNIC JUST. 1, 41-44 (2018) (discussing the challenges of community participation and adequate stakeholder representation).

219. See *supra* note 198 and accompanying text.

political actors as they are in obtaining specific services, which is likely to create a source of tension with city officials. One can represent the resulting degrees of fidelity among subunits, constituents, and the city as follows:

	Private-Based Subunits	Community-Based Subunits
High Fidelity	Constituent Interests	City Interests (with proviso)
Low Fidelity	City Interests	Constituent Interests

In this Part, I propose organizational reforms that would tend to increase the fidelity of subunits to constituents and cities. Although I have noted above that organizational characteristics do not explain the differences in subunit performance,²²⁰ institutional reforms have the capacity to improve performance, largely by increasing manager and member alignment or members’ ability to monitor—characteristics that do explain performance. I begin with those interactions in which fidelity is relatively low, that is, in the relationships between private-based subunits and their cities and between community-based subunits and their constituents. Situations in which fidelity is high obviously require less intervention. Nevertheless, at the end of this Part, I propose a more radical intervention to address what initially appears to be a situation of high fidelity: the relationship between community-based subunits and their cities. I call special attention to that situation because, where conflict does arise between community-based subunits and the city, there is a significant argument that the interests of the community should prevail. That argument is rooted in the role that community-based subunits play in achieving the city’s overriding objective of ensuring the delivery of public goods and opportunities for democratic participation. If subunits can provide essential benefits that the city has failed to afford to a subset of residents, then arguably the city should defer to subunit intervention notwithstanding nominal conflict with city policies. Doing so would provide both needed services and address the issue of political authority that underlies the proviso.

A. Increasing Fidelity Between Private-Based Subunits and Cities

Start with the low level of fidelity that private-based subunits may exhibit towards city interests. One might predict that expanding the scope of private-based subunit decision makers raises the likelihood that managers will consider

220. See *supra* Section II.A.

the risk and extent of negative externalities.²²¹ For example, the CLT tripartite structure that includes a board of local elected officials and members of the local and general public could become a model for subunits generally.²²²

Expanding the relevant decision makers, however, entails risk to the utility of the subunit in two ways. First, recall that a key objective of private-based subunits is to permit constituents to satisfy idiosyncratic preferences for goods and services that the city does not provide to all residents. The very function of subunits, therefore, is often to privilege the interests of one group, especially if its constituents are willing to pay the related costs. Including decision makers who do not represent constituents with those preferences is likely to dilute the ability of the subunit to satisfy its constituents' preferences. Given the inherent ability of private-based subunits to impose adverse effects beyond their boundaries, the city's authorization of these entities implies a willingness to accept at least some of their associated costs.

Second, I have argued that private-based subunits are relatively faithful to their constituents because their limited objective facilitates an alignment of manager and constituent interests and monitoring. Organizational reforms that include public representatives in subunit decision-making are likely to expand the explicit objectives beyond the narrow goal of economic development. Doing so may enhance the democratic accountability of subunit managers and reduce adverse effects on the city.²²³ But it does so only by creating the conditions that are associated with low fidelity between managers and their constituents—vague and conflicting objectives and a reduced capacity to monitor. The trade-off may not be worthwhile unless potential negative externalities of subunit activity are significant or there exist few alternative constraints on subunit manager infidelity to the city.

Some alternative organizational reforms are plausible. At the extreme, cities retain authority to dissolve private-based subunits, though the low level of municipal supervision suggests that it would be rare for a city to deploy the nuclear option.²²⁴ Briffault suggests that BIDs should be subject to sunset and reauthorization provisions, which would induce city review at the time of renewal.²²⁵

221. Sheila R. Foster and Christian Iaione, for example, base their argument for governing the city as a commons on a multistakeholder approach that promotes collaboration among various interests. See FOSTER & IAIONE, *supra* note 6, at 61-68.

222. See *supra* notes 77-83 and accompanying text (discussing CLT management structure); Gross, *supra* note 32, at 155; see also Gross, *supra* note 32, at 142-43 (contending that BIDs that incorporate noncommercial members produce the most beneficial effects).

223. See, e.g., Stahl, *supra* note 187, at 975-76 (explaining the tension between BIDs and broader community needs for public spaces).

224. See Briffault, BIDs, *supra* note 22, at 456.

225. See *id.* at 458.

That requirement may be even more appropriate for a subunit such as an SZD, which is based on a perceived need to limit uses within the area to capture agglomeration benefits. The relationship between SZDs and the city becomes problematic when they entrench uses that have become obsolete from the city's perspective but are difficult to unwind, given the investment that established interests have made in preserving their privileged position.²²⁶ Sunset and reauthorization of such subunits would force the city to engage in a public calculation of the continuing propriety of restricting uses in the SZD. This would thereby provide a salient moment for groups interested in relaxing those restrictions to coalesce and lobby for their preferred position.

Sunset and reauthorization, however, involve the city in decision-making only at discrete times. An alternative institutional design that addresses the desire to have city interests represented without complicating the subunit's objectives would require subunits to have advisory boards composed of nonconstituents rather than to include those nonconstituents as managers. The existence of an advisory board would allow city representatives an opportunity to be heard in the deliberations of BID managers. It would also provide an informal mechanism for monitoring compliance with those interests on an ongoing basis rather than at a salient moment of reauthorization. Of course, advisory boards can be ignored, and the advisory board members' incentive to play such a role could be limited given their lack of decision-making authority. There has been some growth in the use of corporate advisory boards, though they tend to be used to introduce expertise rather than to expand the perspectives for corporate officials to consider.²²⁷ Ethics advisory boards, which might serve as a constraint on profit-maximizing firm behavior that imposes adverse effects, have a checkered history.²²⁸ At the very least, however, an advisory board creates a dedicated group whose nominal function is to introduce city concerns into conversations about the operation of private-based subunits and, thus, creates the possibility of publicizing the subunit's failure to consider those perspectives.

B. Increasing Fidelity Between Community-Based Subunits and Constituents

Turn next to the relationship between community-based subunits and constituent interests. The low fidelity nature of that relationship results from the

226. See Clayton P. Gillette, *Remote Work and City Decline: Lessons from the Garment District*, 15 J. LEGAL ANALYSIS 201, 224-26 (2023) (discussing the controversy over New York City's Special Designation for its Garment District).

227. See André Morkel & Barry Posner, *Investigating the Effectiveness of Corporate Advisory Boards*, 2 CORP. GOVERNANCE 4 (2002) (discussing trends in advisory board compositions).

228. See, e.g., Annette E. Clark, *Ethics2: The Ethics of Bioethics in the Biotechnology Industry*, 3 SEATTLE J. SOC. JUST. 311, 317-21 (2004) (discussing private ethics advisory boards).

relatively vague and potentially conflicting objectives for community-based subunits, reduced incentives to monitor, and low use of voice by constituents to complain about subunit deviation from constituent interests. The combined effect of those features is to reduce constituent presence and effectiveness in governance of the subunits.

For some community-based subunits, one organizational reform to increase monitoring would entail raising the personal stakes for constituents. Private-based-subunit constituents have incentives to monitor because they provide financial support for subunit activity. The fact that constituents pay dues or higher taxes to defray the cost of benefits that their subunits presumably confer induces constituents to ensure that they are receiving value in excess of their payments. By and large, community-based subunits are funded through the city budget (as in the case of PBs), philanthropies (as in the case of CLTs), or private entities (as in the case of CBAs). At least some community-based subunits, however, have formal members who could pay dues to finance activities. A CLT, for example, could charge residents within its jurisdiction to offset some of the related costs of operating the CLT. A CBA could assess those residing in the area and benefiting from its activity by an amount related to the increased value of their properties or tenancies. As in the case of BID dues, these amounts could be collected by the city and treated as tax items. The objective would not be to offset the full costs of the community-based subunit, a result that would be incongruous given the low-income nature of the improved community. Rather, the justification for fees would be to provide constituents with the same skin in the game that induces BID members to monitor BID managers who allocate subunit funds.

Community-based subunits such as CBAs and PBs also face minimal monitoring because they are short-term, ad hoc entities whose managers are not subject to the reputational constraints that attend repeat play.²²⁹ It is possible, however, to alter their organizational structure in a manner that provides these entities with a longer lifespan. For example, while the Detroit Municipal Code requires the creation of a separate neighborhood advisory council for each eligible CBA project, the relevant council does not dissolve after the execution of an agreement. Rather, it remains in place during the construction of the project to monitor and report on compliance with the agreement.²³⁰ Neighborhood-council members, therefore, can develop reputations for their willingness to enforce agreements and are vulnerable to the use of voice by constituents who are adversely affected by noncompliance. CBAs could achieve even greater permanence, and thus more robust reputations subject to monitoring, if they consisted of two groups: a permanent membership that participated in any negotiation of

229. See, e.g., *supra* text accompanying notes 127-129.

230. See DETROIT, MICH., MUN. CODE ch. 12, art. VIII, § 12-8-3(g) (2023).

an agreement that the city undertook, and an ad hoc group drawn from the impacted area. Inclusion of the former group would create long-term managers who develop reputations subject to monitoring and induce the introduction of considerations that short-term managers might otherwise eschew.

Low levels of alignment, monitoring, and voice also raise the risk that one set of interests will become entrenched in the community-based subunit's operation. That concern might support imposing term limits on those who serve on boards or restrictions on the number of proposals that a particular individual or group can make in PB processes. But those restrictions may deprive community-based subunits of expertise. Better checks on entrenchment—at least where formal boards are involved—might include supermajority requirements or staggered elections. Supermajority requirements are controversial because, although they prevent an entrenched simple majority from dominating decision-making, they permit a discrete minority of voters to forestall action and hold up the majority to obtain idiosyncratic benefits.²³¹ Staggered elections are controversial in corporate settings, with some literature suggesting that they entrench directors and managers.²³² In contrast, other literature suggests that they promote value creation by committing the firm to long-term projects and bonding it to the relationship-specific investments of its stakeholders.²³³ For community-based subunit boards that invest in long-term infrastructure and housing, such as CLTs, consistency of objectives and lack of vulnerability to takeover by insurgent groups may be a positive. In that case, designing governance structures akin to staggered boards that discourage rapid transitions in objectives may be desirable.

C. *Increasing Fidelity Between Community-Based Subunits and the City: The Equal Services Doctrine*

The analysis in Section IV.B suggested that community-based managers will have a high level of fidelity to city interests. That is less a consequence of community-based-subunit agreement with the city's pursuit of its interests than of the limited capacity of community projects to impose broad negative effects on the city and the limited resources of community-based subunits to capture city decision-making.²³⁴ The result is that, notwithstanding high fidelity between

231. See, e.g., Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 MICH. L. REV. 809, 812–13, 818 n.42 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013)).

232. See, e.g., Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783, 787 (2009).

233. See, e.g., K.J. Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Long-Term Firm Value, Revisited*, 126 J. FIN. ECON. 422, 423–24 (2017).

234. See *supra* notes 199–201 and accompanying text.

community-based subunit managers and the city, there may be discrete areas in which conflict arises. A CLT may wish to develop affordable housing in an area that the city has zoned for commercial development. A CBA committee may negotiate to keep big-box stores out of an area to preserve mom-and-pop retailers, notwithstanding that zoning permits the former.²³⁵

As in the case of managing conflict between private-based subunits and the city, one might seek a mechanism to ensure that community-based subunits at least consider, if not defer to, city interests. Since community-based subunits already suffer from a vaguer, more flexible set of objectives, perhaps adding the perspective of the city poses less of a threat than it does to the cohesive set of interests that private-based subunit constituents share. On the other hand, strengthening incentives for managers to consider city interests complicates any effort to monitor community-based managers to ensure they are serving constituents.

In this Section, I advance a stronger claim that the interests of community-based subunits should prevail over those of the city when certain conflicts arise. That conclusion seems counterintuitive for two reasons. First, subunits presumably are designed to advance rather than diverge from the city agenda. Second, in the absence of an explicit constitutional or statutory carve-out, centralized governments generally prevail over their decentralized units where policies conflict.²³⁶ Nevertheless, permitting community-based subunits to prevail over conflicting city policies may ultimately assist the city in satisfying its obligations to provide residents with an appropriate level of municipal services.

1. *The Limited Supremacy of Decentralized Entities*

Centralized deference to decentralized units makes sense where the latter can perform a function with lower transactions costs or agency costs than the former

235. See RAGHURAM RAJAN, *THE THIRD PILLAR: HOW MARKETS AND THE STATE LEAVE THE COMMUNITY BEHIND* 306 (2019).

236. See, e.g., Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship*, 106 *GEO. L.J.* 1469, 1495 (2018) (assessing the emergence of punitive state statutes to circumscribe local authority); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 *VA. L. REV.* 1347, 1347 (1997) (assessing circumstances in which decentralized units of government prevail over legislation enacted by centralized governments). The Tenth Amendment to the United States Constitution, which reserves to the states those powers not delegated to the federal government is only one example. See, e.g., CAL. CONST. art. XI, § 5; COLO. CONST. art. XX, § 1. As another example, the German Basic Law grants the federal government jurisdiction over specified areas and limits the right of individual states, or *Länder*, to legislate in these areas to “only when and to the extent that they are expressly authorised to do so by a federal law.” Grundgesetz [GG] [Basic Law] art. 71, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [<https://perma.cc/9RBG-GV3P>].

would incur. If a subunit is simply doing what the city would otherwise do for itself at a higher cost, then the objectives of the subunit and the city are in lock-step. But the standard hierarchy between centralized and decentralized entities entails that the city can prevent the subunit either from diverging too broadly from the city's baseline level of service or from imposing negative effects on residents who are not part of the subunit. If, for example, a BID desired to increase private policing within the district and the city concluded that doing so would require additional policing in other areas, the argument that the BID's decision should prevail over the city's denial appears weak.

The rationale for city supremacy over subunits dissipates, however, where the latter are better agents of the city's objectives than the city itself. This is not just in the sense of the subunit enjoying a cost advantage but in the sense that the subunit is well positioned to fulfill a municipal function that the city fails to satisfy. Even where such a situation exists, subunit supremacy may founder because subunits cannot point to statutory or constitutional language that grants them supervening authority. I am not aware of any situation in which a state or city has offered municipal subunits the explicit capacity to prevail over the city's ordinances in the event of a conflict.

2. *The Equal Service Provision Doctrine and the Role of Community-Based Subunits*

Notwithstanding the assumption that a city can exercise plenary power over its subunits, I argue in this Section that the common law doctrine that requires cities to provide equal services to all residents justifies city deference to community-based subunit activities. That is because, although the doctrine is consistent with cities' function as the provider of local public goods, cities frequently undersupply services, particularly to disadvantaged neighborhoods. Cities may escape liability for failure to comply with the doctrine because its parameters are relatively vague and the bases for redressing discrimination are relatively narrow. But if cities do not satisfy the mandate, whether due to uncertainty about its strictures or to political and practical constraints on compliance, they should concede to alternative providers who propose to fill the gap. Community-based subunits arguably play that very role.

The absence of explicit authority for subunits to prevail over host cities may explain why, in the above example of the BID, a private-based subunit stands on weak ground in its effort to realize its preferences. There is, however, a plausible difference when community-based subunits propose policies that conflict with those of the city. A CLT, for example, may wish to expand affordable housing in an area where the city prefers gentrification and additional tax revenues. To understand that difference, consider subunits' roles in assisting the city to achieve

its objectives. The BID-policing example involves efforts to augment the default level of city services, with the incremental costs borne by the BID's constituents. The premise of private-based subunits is that allowing such action satisfies the preferences of those who pay for the services. In theory, allowing BID or TIF constituents to satisfy their preferences encourages them to remain in the subunit and generate economic benefits for the city without subsidy from or substantial adverse effects on nonconstituents.²³⁷ But cities retain discretion over how to encourage economic development and when to subordinate that objective to alternative goals that the city might appropriately adopt. For example, advocates of economic development might wish to attract employers by creating a TIF to fund additional infrastructure and amenities in an established neighborhood that houses relatively poor residents. Nevertheless, the city might desire to retain the historic character of the neighborhood, even at the cost of forgoing additional tax revenues. It would be peculiar if a subunit that pursued economic development could override the city's exercise of its discretion to prioritize an alternative objective.

On the other hand, community-based subunits generally do not seek to increase services for their constituents above the city's default level. Rather, those subunits seek to raise constituents' services to that default level. The literature on community-based subunits systematically refers to their deployment as increasing resources for underserved or disadvantaged areas of the city.²³⁸ That distinction is not simply relevant to normative issues of equity; it also implicates community-based subdivisions' relationship with the city that authorizes them.

The legal obligations that cities have towards their residents – and that subunits are presumably organized to pursue – include what Briffault has described as the “not often judicially enforced” doctrine of equal service provision.²³⁹ The doctrine requires that a city provide to all residents on an equal basis any service it offers to any resident. It derives from longstanding mandates that grantees of monopolies, common carriers, and businesses clothed with a public interest must serve all potential customers in a nondiscriminatory fashion.²⁴⁰ In the absence of legal intervention, monopolists and the other covered businesses would be able to provide or charge for services in a manner that deviated significantly from the result that would obtain in a well-operating market. Municipalities, of

237. Briffault, *TIF*, *supra* note 22, at 66 (“TIF enables local governments to pursue what is often the principal local development goal – increased tax base.”).

238. *See, e.g.*, FOSTER & IAIONE, *supra* note 6, at 80-101.

239. Briffault, *supra* note 2, at 524.

240. *See* Gardner v. Providence Tel. Co., 49 A. 1004, 1006-07 (R.I. 1901); CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY* 194-226 (1986).

course, similarly qualify as monopolists insofar as they provide services that are not readily obtainable through market transactions because of their nature as public goods.²⁴¹

The equal services doctrine facilitates the efficient provision of municipal services in two ways. First, a locality signals its distinctive character through the quantity and quality of public goods it offers at a particular tax rate. It thereby permits current and prospective residents to conduct a low-cost assessment of the attractiveness of the locality relative to alternative jurisdictions. The strength of that signal depends on uniform delivery of services across the municipality. The signal becomes noisier and the cost for prospective residents to search for potential places of residence increases significantly if a city, having signaled its willingness to provide a service, subsequently discriminates among residents in the quality or quantity of that service.²⁴² Second, optimal residential sorting requires a level of knowledge and mobility that is unattainable to large numbers of prospective residents. Thus, if a municipality fails to serve some of its residents notwithstanding its signal to the contrary, those who are underserved are unlikely to have either the resources or the information necessary to obtain substitutes from an alternative community or to migrate to a more hospitable jurisdiction.

The equal services doctrine ameliorates these obstacles to signaling and optimal sorting by ensuring uniform delivery of services and reducing costs of identifying which services residents will receive. A primary function of municipalities is to compensate for failures of the market to provide desired goods and services and to displace monopoly providers who would differentiate among customers. The equal services doctrine implicitly recognizes that it would be anomalous to permit municipalities to provide services in a manner that replicates the very same discrimination they were expected to alleviate.²⁴³

The common law roots of the equal services doctrine liberate it from the constraints of constitutional equal protection claims, which have historically failed

241. See, e.g., Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1101 (1977) (“The Court’s emphasis in *National League of Cities* on the service-providing role of states and municipalities, a role they were created (or at least are now expected) to fill and one which is not ordinarily filled by the federal government, distinguishes federal intervention in that area from federal intervention intended to assure that states and municipalities perform a role *not* unique to them, that of protecting federal constitutional rights.”).

242. See Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946, 959-60 (1987) (reviewing HAAR & FESSLER, *supra* note 240).

243. *Id.* at 958-60; see ROBERT L. LINEBERRY, EQUALITY AND URBAN POLICY: THE DISTRIBUTION OF MUNICIPAL PUBLIC SERVICES 43 (1977); *Bair v. Mayor of Westminster*, 221 A.2d 643, 645 (Md. 1966); *Veach v. City of Phoenix*, 427 P.2d 335, 337 (Ariz. 1967).

to reduce disparities based on race or class.²⁴⁴ Nevertheless, Briffault's reference to the parsimonious use of the doctrine is certainly correct. Courts have largely restricted the doctrine's application to situations in which individuals who pay similar taxes receive widely disparate services or the city denies to some residents services that it makes available to others. The few cases in which courts have intervened tend to involve residents of newly annexed areas who contend that they are underserved relative to longstanding city residents²⁴⁵ or cities that appear to be discouraging lower-income residents by depriving them access to basic services available to wealthier residents.²⁴⁶

The infrequent use of the equal services doctrine is understandable from an administrative perspective. Perhaps more robust use has collapsed on the difficulty of defining the requisite criteria of "equality" necessary to satisfy the mandate. Compliance with the equal service mandate depends on contestable claims about whether equality references individual services, bundles of services, or proportions of the local budget. City officials who desire to attract relatively wealthy residents to increase the tax base have incentives to favor definitions of equality that look at budgets holistically rather than on a service-by-service basis. Relying on equalizing services across the board would instead likely mean reducing services below the level desired by mobile, wealthy residents whom the city wishes to retain.

There seems little reason to doubt the continuing relevance of Robert P. Inman and Daniel L. Rubinfeld's conclusion from forty-five years ago that unequal provision of municipal services survives judicial investigation simply because

244. See HAAR & FESSLER, *supra* note 240, at 231-33, for a discussion of the common law roots of the doctrine. For examples of the limited use of the equal protection doctrine to secure equal municipal services, see, for example, *Alexander v. Chicago Park District*, 709 F.2d 463, 467-68 (7th Cir. 1983); *Ammons v. Dade City*, 594 F. Supp. 1274 (M.D. Fla. 1984), *aff'd*, 783 F.2d 982 (11th Cir. 1986); *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1459 (E.D. Wis. 1993), *aff'd*, 41 F.3d 1510 (7th Cir. 1994); *Johnson v. City of Arcadia*, 450 F. Supp. 1363, 1379 (M.D. Fla. 1978); and *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986).

245. See, e.g., *Ammons*, 594 F. Supp. at 1281-83, 1287.

246. *Compare Steeplechase Vill., Inc. v. Twp. of Egg Harbor*, No. A-0831-05T50831-05T5, 2006 WL 2000032, at *2, *6 (N.J. Super. Ct. App. Div. July 19, 2006) (per curiam) ("The Township acknowledges that it collects trash from all other residential users in the community, including those consisting of single family homes as well as apartments. It gives no reason for refusing to collect from mobile home parks except that the service is already being provided by the mobile home park owners, as it has been for decades . . . [A] municipality that chooses to provide trash collection service cannot engage in invidious discrimination in choosing the classifications within the community to whom the service is offered."), with *Mount Prospect State Bank v. Vill. of Kirkland*, 467 N.E.2d 1142, 1145 (Ill. App. Ct. 1984) ("No fundamental right to garbage collection exists, and mobile home park owners are not among the 'suspect' classes recognized by the courts. . . . With such a large number of mobile homes existing on plaintiff's property, it is reasonable to conclude that the refuse collection needs of this property would vary significantly from the needs of other residents of the village." (citation omitted)).

“there are still a large number of upper income families who are unconstrained in their decision where to locate and in their ability to purchase differing levels of local public services.”²⁴⁷ Local officials, therefore, might plausibly claim to have satisfied the mandate by dedicating an equal proportion of the municipal budget to different neighborhoods but for different services—supporting more frequent street cleaning in wealthier neighborhoods but more publicly funded daycare centers and healthcare in less wealthy areas.²⁴⁸ Plaintiffs’ claims that they have received unequal services, on the other hand, typically focus on different levels of specific services that the city has provided to wealthier neighborhoods. In *Beal v. Lindsay*, for example, New York City conceded that the conditions of parks in the plaintiffs’ neighborhood were substandard by comparison to parks in wealthier neighborhoods.²⁴⁹ Nevertheless, the city successfully fended off an equal protection claim by demonstrating that it invested significant funds in the substandard parks only to have improvements degraded by vandalism. “Equality” for the court meant equality of inputs, while the plaintiffs contended that legal equality was achievable only through equal outputs.²⁵⁰

Moreover, strict application of the doctrine often yields to practical considerations. The conclusions of one court in denying claims that public-infrastructure discrepancies reflected racial discrimination complicate common law claims of unequal service provision as well:

In this case, a series of events unconnected to the racial considerations required the Board to make a large number of choices relating to type of infrastructure, method of payment, costs, geographic considerations, among other considerations, in deciding which infrastructures would be prioritized. The parties present a long history and explanation of funding requirements, shortfalls in county budgets, restrictions on funding, infrastructure deficiencies and planning and related problems. State-wide changes in financial resources of local entities impacted funding for infrastructure. The County’s actions can be explained by a myriad of

247. Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1748 (1979). Inman and Rubinfeld estimated at the time they were writing that “families with \$10,000 yearly incomes receive, on average, 25% more in [city] services than families with \$5,000 incomes, while a family with a \$20,000 yearly income receives an additional 25% more than the \$10,000 income family.” *Id.* at 1675.

248. *See id.*

249. 468 F.2d 287, 288-91 (2d Cir. 1972).

250. *Id.* at 290-91.

community and planning concerns having nothing to do with the ethnicity.²⁵¹

At the extreme, satisfaction of the equal services mandate under conditions in which there is underlying socioeconomic inequality could lead to the perverse result that the municipality would underserve all residents, but wealthier residents could obtain higher levels through privatized supplements.²⁵²

In the face of continuing inequality, however, underenforcement of the equal services doctrine does not imply that it is without value or force. As Professor Lawrence Gene Sager wrote in the context of underenforced constitutional norms, “[T]here is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.”²⁵³ Indeed, one of Sager’s core examples of underenforcement involved the Supreme Court’s denial of an equal protection claim to invalidate state financing of public schools through property taxes, leading to the inevitable disparity of education funding among school districts.²⁵⁴ Justice Powell’s opinion in that case relied on the Court’s institutional limitations rather than on the content of equal protection to justify judicial refusal to recognize a constitutional violation.²⁵⁵ However, the practical impediments to realizing equal protection in school funding did not entail the inability to achieve greater levels of equality, as evidenced by at least somewhat successful state-level litigation to reduce the effects of local inequalities of resources.²⁵⁶ Similarly, the practical impediments to full implementation of the equal services doctrine do not entail cities’ immunity from its requirements. To the contrary, those impediments may impose on cities an obligation to deploy alternatives that are less vulnerable to those same obstacles.

251. *Comm. Concerning Cmty. Improvement v. City of Modesto*, No. CV-F-04-6121, 2007 WL 2204532, at *12 (E.D. Cal. July 30, 2007), *aff’d in part, rev’d in part, vacated in part, and remanded*, 583 F.3d 690 (9th Cir. 2009). *But see* *Travaini v. Maricopa Cnty.*, 450 P.2d 1021, 1023 (Ariz. Ct. App. 1969) (concluding that a city could not deny a property holder within the city the ability to connect to the city sewer system, notwithstanding that the connection would overburden the system).

252. *See* HAAR & FESSLER, *supra* note 240, at 244; *cf.* LINEBERRY, *supra* note 243, at 186-88 (discussing the hypothetical implications of “the conjunction of a relatively egalitarian public sector and a distinctly inegalitarian private sector”).

253. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

254. *See id.* at 1218.

255. *See id.* (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41, 43-44 (1973)).

256. *See* Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 500-04 (2014).

Enter community-based subunits. Underserved communities may suffer from a lack of affordable housing opportunities, insufficient employment opportunities, or deficient infrastructure less because of racial animus than because cities face practical, budgetary, and political constraints that interfere with efforts to equalize services.²⁵⁷ Neighborhood resistance within relatively wealthy areas serves as a major deterrent to developers who might otherwise invest in affordable housing and to politicians who fear electoral redress.²⁵⁸

Community-based CLTs, on the other hand, promote affordable housing and provide the attendant public goods, public spaces, and amenities.²⁵⁹ Similarly, private negotiation of CBAs may obligate developers to make available benefits and services that are politically infeasible for city officials to implement, such as employment guarantees for community residents, infrastructure improvements within the developed area, or the inclusion of affordable housing within the development. In short, these community-based subunits do for the city what the city has failed to do for itself. They help cities strive towards an ideal – albeit unattainable – application of the equal services doctrine. Just as fiscal control boards may promote municipal fiscal stability because they can disregard politically powerful forces with impunity,²⁶⁰ so too may private negotiators extract concessions from private developers that the city prefers but could not obtain. Similarly, PBs may allocate funds towards projects that the city could not otherwise fund without satisfying competing demands for equivalent expenditures.

Additionally, even if community-based-subunit activity does not directly equalize service levels in an underserved community, it may do so indirectly by increasing the political capacity of those communities and advancing the democracy-enhancing objective of local government. To the extent that unequal service provision is a function of the limited political influence of underserved

257. Of course, some of those difficulties may derive from practices that relegated minority neighborhoods to areas of the city less readily susceptible to high levels of service.

258. See, e.g., Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. AFFORD. HOUS. & CMTY. DEV. L. 78, 79, 81-83 (2002); GLAESER, *supra* note 52, at 260-64.

259. See DeFilippis, Stromberg & Williams, *supra* note 68, at 764-65. That is not to deny the desirability of expanding affordable-housing options throughout the city. It is only to admit that in the face of political pressures and practical difficulties that frustrate the siting of affordable housing, community-based activity may at least provide some additional options for disadvantaged families.

260. See Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1435-36 (2014) (indicating how fiscal control boards may take stabilizing measures that are politically infeasible for elected officials).

communities,²⁶¹ the explicit efforts of community-based subunits to provide opportunities for civic participation serves as a corrective—subunit involvement could readily spill over into broader constituent interaction with city officials. Indeed, that spillover effect is precisely what Rahman and Simonson seek to obtain from the general principle of community control. They maintain that their focus is on “contestation from populations and communities that have historically had a reduced voice in generating reigning ideas about how to govern and how to distribute state resources, including local services such as policing and housing.”²⁶² In that way, community-based subunit engagement to equalize municipal services both addresses the city’s objective of satisfying resident preferences and potentially reconciles generally high subunit fidelity to the city with the proviso that the allocation of political authority is a source of low fidelity.

As opposed to private-based subunits that assist the city when it permits augmentation of the default level of municipal services, therefore, community-based subunits assist the city in fulfilling its legal obligation to provide a baseline of equal service to all residents. By compensating for the practical or political difficulties that cities themselves face in delivering services on an equal basis, community-based subunits can create results that more closely approximate the allocation of resources we would see if the city could perfectly implement the equal services doctrine.

The role of community-based subunits in assisting the city to meet its legal obligations has implications for the relationship between the two entities when specific policies conflict. Community-based subunit efforts to favor affordable housing over economic development, for example, seek to subordinate city authority to its own. Again, the traditional relationship between the centralized city and its subunits suggests that the city prevails in the event of such conflict. Perhaps the fact that the community-based subunit is raising substandard services *to* rather than *beyond* the default level matters for the proper resolution of that conflict. The equal services doctrine may not satisfy the condition of a textual predicate such as the Tenth Amendment or a home-rule provision to permit a decentralized entity to prevail over a centralized one. But a lower-level obligation that implies deference when a decentralized entity compensates for the failures

261. The lack of political representation in the delivery of local public goods was a key element of the court’s intervention to equalize services in the classic case of *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff’d*, 461 F.2d 1171 (5th Cir. 1972) (en banc) (per curiam). Shaw, Mississippi was a town of 1,500 Black and 1,000 White residents. *Id.* at 1288. Despite their numerical majority, only one Black resident served on the city council at the time of the court’s decisions. See *Hawkins*, 461 F.2d at 1174. Black residents suffered substantial disparity of services in street paving, sewage treatment, water delivery, fire hydrants, street lighting, and other basic municipal services. *Hawkins*, 437 F.2d at 1288.

262. Rahman & Simonson, *supra* note 27, at 690.

of the city may achieve a somewhat analogous outcome. For example, an obligation that required the city to grant greater latitude to community-based subunit policies or to take only a “soft look” that justifies overriding the subunit only when the city’s conflicting policy is substantial would create an appropriate balance between the city and its subunits.²⁶³

One might find a claim to allocate greater authority to community-based subunits misplaced in light of the argument that these subunits lack relative fidelity to their constituents.²⁶⁴ But that ignores the ability to take measures that increase fidelity by reducing misalignment of interests and improving incentives for constituent monitoring.²⁶⁵ Moreover, the claim of relative infidelity is just that—relative. Some divergence between representatives and those represented is inevitable.²⁶⁶ Thus, the inability to eliminate it does not mean abandoning efforts to realize community preferences on which there is some consensus. Given that community-based subunits are likely to be faithful agents of the city that impose few negative externalities, allowing these subunits greater latitude to serve the overall objectives of the city by prevailing in limited conflicts is unlikely to impose significant harm on constituents of either community-based subunits or the city.

CONCLUSION

Subunits have the potential to achieve the objectives of the city that hosts them—both service delivery and democratic participation—at lower costs than if the city undertook those same efforts. The extent to which subunits accomplish that goal depends on the fidelity of subunit managers, but managers’ incentives reduce the likelihood that subunits will exhibit fidelity to their constituents or to the city. Those incentives and the corresponding levels of fidelity vary with subunits that are private-based or community-based. The former are more likely than the latter to serve constituent interests, but the inverse is true with respect to serving city interests.

Changes in the institutional design and governance of private-based and community-based subunits may reduce infidelity. But where the city has failed

263. Hence, the city would do the opposite of the “hard look” doctrine that requires administrative agencies to demonstrate that they took a “hard look” at the underlying questions of policy and fact before setting policies. See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761 (2008).

264. See, e.g., *supra* Sections III.B.1.b, III.B.2.b.

265. See *supra* Section V.B.

266. Cf. Rahman & Simonson, *supra* note 27, at 724 (“The point here is not that there is an abstract ideal structure to representative bodies, but rather that design choices and the individual leaders involved can play a large role in making bodies more or less powerful.”).

to provide equal services to an area served by a community-based subunit, that subunit's intervention to remedy the city's substandard level of service may be precisely what legal obligations permit. Allowing community-based subunits significant latitude to implement their policies, notwithstanding conflict with city policies, may best achieve the service provision and participatory objectives for which cities are created.