

# PRIVATE MANAGEMENT OF PUBLIC SPACES: NONPROFIT ORGANIZATIONS AND URBAN PARKS

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*This Article argues that current nonprofit organization theories must be refined to account for the ways in which these organizations take responsibility for public spaces. Nonprofit organizations (“NPOs”) take responsibility in two ways that reduce the cost of monitoring their performance and, consequently, allow them to harness residual demand for the public good of public spaces, helping to create positive outcomes for these spaces. First, NPOs as single entities assume physical responsibility for public space in a way that contrasts strongly with the diffuse accountability of governmental managers and makes their performance easier to monitor. Second, NPOs centralize responsibility for the financial success of the public space in a way that both contrasts strongly with insulated civil servants and reduces the cost of monitoring the attainment of a critical mass of funding for the space. Taking responsibility also places the burden on the NPO, instead of on individuals outside the organization, to compile and communicate information about their operation for monitors. Private managers, therefore, are more accountable for their actions than governmental managers because they are more responsible and, thus, less costly to monitor. NPOs in Central Park and Bryant Park illustrate these principles.*

Introduction .....	180
I. Two Trends in the Private Management of Public Spaces .....	185
A. Business Improvement Districts .....	185
1. Characteristics and Functions .....	186
2. Commentary .....	188
B. Friends of the Park Groups .....	189
1. Characteristics and Functions .....	191
2. Commentary .....	192
II. The Insufficiency of Current Theories of NPOs .....	193
A. Public Goods Theory .....	194
B. Contract Failure Theory .....	196
C. A Synthesized Model .....	197
III. A Model for the Rise of Private Management of Public Spaces .....	198
A. Responsibility as a Value .....	199
B. A Refined Model .....	202
IV. Central Park .....	203

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A.	<i>The Rise of the Central Park Conservancy</i> .....	205
1.	<i>Management, Physical Condition, and Private Participation</i> .....	206
2.	<i>The Formation of the Central Park Conservancy</i> .....	209
B.	<i>The Operation of the Central Park Conservancy</i> .....	212
1.	<i>Ultimate Operational Control</i> .....	213
2.	<i>Restricted Donations</i> .....	221
C.	<i>Conclusion</i> .....	228
V.	<i>Bryant Park</i> .....	229
A.	<i>The Rise of the Bryant Park Restoration Corporation</i> ....	230
1.	<i>History and Status of the Park</i> .....	230
2.	<i>Formation of the Bryant Park Restoration Corporation</i> .....	230
B.	<i>Operation of the Bryant Park Restoration Corporation</i> ...	235
C.	<i>Conclusion</i> .....	239
VI.	<i>Policy and Legal Reforms</i> .....	240
A.	<i>Policy</i> .....	241
1.	<i>Proposal: Transfer Responsibility</i> .....	241
2.	<i>Proposal: Crowd Out Prevention</i> .....	246
B.	<i>Legal</i> .....	247
	<i>Conclusion</i> .....	251
	<i>Appendix</i> .....	253

## INTRODUCTION

Private organizations control an increasing number of urban public spaces. New York City's Central Park, for example, is managed by a private conservancy that counts only three government officials on its fifty-member governing board.<sup>1</sup> Bryant Park is perhaps the most extreme example of privatization within that city: the government leases the space to a private corporation that operates a revenue-producing business improvement district.<sup>2</sup> All told, private groups participate in the management of half of the seventeen hundred parks in New York City.<sup>3</sup> In Washington, D.C., similarly, business improvement districts manage the entire area between the White House and the Capitol, including the streets and the parks.<sup>4</sup> Malls and theme parks are also often managed by private entities.

<sup>1</sup> See CENT. PARK CONSERVANCY, ANNUAL REPORT 38-39 (2007) [hereinafter 2007 ANNUAL REPORT]; *infra* Part IV.

<sup>2</sup> See *infra* Part V.

<sup>3</sup> See Jennifer Steinhauer, *For Parks, It's Not Easy Getting Green; But a Push Is On to Interest Donors in Unused Spots*, N.Y. TIMES, May 21, 2004, at B1.

<sup>4</sup> See James F. Wolf, *Urban Governance and Business Improvement Districts: The Washington, DC BIDs*, 29 INT'L J. PUB. ADMIN. 53, 55-56 (2006).

This “privatization”<sup>5</sup> has generated criticism.<sup>6</sup> The manager of Central Park, for example, was severely criticized for refusing to allow a protest during the Republican National Convention, and instead protecting the grass of the Great Lawn.<sup>7</sup> Bryant Park’s management similarly has been criticized for commercializing its park by hosting fashion shows to raise revenue.<sup>8</sup> Shopping malls have been criticized for stifling free speech,<sup>9</sup> and theme parks and planned communities have been criticized for creating overly middle-class, or “Disneyfied,” environments.<sup>10</sup> Criticism is thus outcome-oriented and procedural: detractors believe that the management decisions with which they disagree stem from the perceived unaccountability of private management to public interest.<sup>11</sup>

Despite these criticisms, the trend toward private management of urban public lands and private ownership of public spaces in the form of malls and theme parks is credited with the revitalization of downtowns, neighborhoods, and the parks themselves. Historians have hailed the Central Park Conservancy (“CPC” or “Conservancy”), for example, as the long-awaited

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<sup>5</sup> Of course, many properties are in some sense “private,” and there is no strict dichotomy between public and private. This Article, nonetheless, uses the term to denote those aspects of public spaces — ownership or management — that deviate from the completely public model with respect to ownership and control.

<sup>6</sup> Criticism of private management cannot rest on First Amendment grounds, for several reasons. First, the Parks Department retains control of all event permits, particularly those regarding speech. Telephone Interview with Daniel A. Biederman, Chief Executive Officer of Bryant Park Restoration Corporation (Apr. 7, 2008) [hereinafter Biederman Interview] (describing how all free-speech requests are addressed by the Parks Department); Interview with Doug Blonsky, President of the Central Park Conservancy, in N.Y., N.Y. (Apr. 24, 2008) [hereinafter Blonsky Interview] (same). Of course, it may be the case that informal speech regulation occurs under private management, but this is no different than what Parks Department employees would do themselves if the Parks Department had more resources. Second, the courts ignore the role of the CPC. *See, e.g., Nat’l Council of Arab Ams. v. City of New York*, 478 F. Supp. 2d 480 (S.D.N.Y. 2007) (ignoring the role of the CPC, a named defendant, in denying a park permit and focusing solely on the Parks Department action).

<sup>7</sup> *See, e.g.,* Jennifer Steinhauer & Diane Cardwell, *A Week to Go, and Protesters Wonder: Keep It Legal, or Go for the Park?*, N.Y. TIMES, Aug. 23, 2004, at B1 (“The Central Park Conservancy runs Central Park and they’ve been very possessive about it,” said City Councilman Bill Perkins, who is in favor of letting United for Peace and Justice rally there. “In some years they’ve considered whether there is too much activity in the park because to them activity is a maintenance issue.”). *See generally* Whitney M. Smith, Comment, *The Right of Access to Public Forums: Does a Failure to Require the Least Restrictive Alternative Result in a Failure to Communicate?*, 36 SETON HALL L. REV. 627, 644 (2006) (discussing the protest in the context of general First Amendment law).

<sup>8</sup> *See* Douglas Martin, *Trying New Ways to Save Decaying Parks*, N.Y. TIMES, Nov. 15, 1994, at A1.

<sup>9</sup> *See* MARGARET KOHN, BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE 74, 76, 78 (2004).

<sup>10</sup> *See id.* at 85.

<sup>11</sup> *See infra* Parts I.A.2 and I.B.2. This Article does not engage in a detailed portrayal of this policy debate. Nor does it weigh in directly. Rather, as the next paragraphs indicate, this Article will address this criticism indirectly, through the lens of nonprofit organization theory.

“protector” of the park,<sup>12</sup> and the *Wall Street Journal* has complimented the renovated Bryant Park as the most “urbane” space in the city.<sup>13</sup>

All told, the rise of private management creates four categories of public spaces. First, there are spaces that are *publicly owned* and *privately managed*. Central Park and Bryant Park fall into this category: both are owned by New York City but primarily managed by private entities. These types of spaces are the focus of this Article. There are also, however, three other types. Many spaces, such as the National Mall, are *publicly owned* and *publicly managed*. Theme parks and some publicly used parks are *privately owned* and *privately managed*.<sup>14</sup> Finally, some spaces are *privately owned* and *publicly managed*. Several streets around Princeton University and the New Haven Green fit into this category.

Within the publicly owned, privately managed category (the one addressed in this Article), there are at least two sub-groups. Business improvement districts (“BIDs”) are financed largely by taxes on property owners in a district and are managed by a private entity<sup>15</sup> that spends these revenues on the public spaces in the district. “Friends of the park” groups, on the other hand, are financed largely by donations and participate in the management of public spaces, primarily parks, by funding improvements and maintenance. Both types of organizations usually take the nonprofit form.

The rise of BIDs has been oft studied.<sup>16</sup> In contrast, the rise of “friends of the park” groups has not been studied in either the general or legal literature. In fact, though friends groups have long existed — neighbors have often united to clean parks and Central Park has had private involvement throughout its history<sup>17</sup> — these organizations have not been studied by scholars interested in informal and nongovernmental organizations. In addition, the formalization of such private action into legally recognizable management roles — through contract or agreement — is a new development of the last few decades. Friends groups are, therefore, both historically understudied and an evolving phenomenon. One goal of this Article is to fill this gap — to document and explain the rise of friends groups, to analyze the roles they play in the management of our urban public spaces, to assess their performance, and to compare them with the other great development in pub-

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<sup>12</sup> The Conservancy “seems to be the long-awaited restorer and protector so avidly desired by the various Park betterment groups in the discouraging decades early in this century.” EUGENE KINKEAD, *CENTRAL PARK 1857–1995: THE BIRTH, DECLINE, AND RENEWAL OF A NATIONAL TREASURE* 137 (1990).

<sup>13</sup> Julia Vitullo-Martin, *The Private Sector Shows How to Run a City*, *WALL ST. J.*, May 20, 1998, at A13.

<sup>14</sup> Paley Park in New York City is also wholly private.

<sup>15</sup> Some states, such as Georgia, provide for joint public/private management. See Gökтуğ Morçöl & Ulf Zimmermann, *Community Improvement Districts in Metropolitan Atlanta*, 29 *INT’L J. PUB. ADMIN.* 77 (2006) (describing joint projects and planning between governments and BIDs).

<sup>16</sup> See, e.g., Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 *COLUM. L. REV.* 365 (1999).

<sup>17</sup> See generally *CENTRAL PARK ASS’N, THE CENTRAL PARK* (1926).

lic spaces, the BID. To do this, the Article will focus on case studies of the CPC and of the nearby BID for Bryant Park.

This Article's primary goal, however, is to theorize the rise and operation of private managers of public parks. The most obvious tool for this task is nonprofit organization ("NPO") theory. Surprisingly, legal and economic scholars have failed to harness the resources of NPO research to provide a theoretical account of the organizations that now manage our most important public parks and squares. This Article applies the insights of NPO scholarship to explain private management of public parks, first because these managers often take the nonprofit form and, more importantly, because NPO theory provides a useful framework in which to view interactions between governmental and nongovernmental actors. Other areas of scholarship will also contribute to this enterprise, including psychological and sociological research into altruism and donor behavior and economic research on the free-rider problem.

Although NPO theory provides the best tools for analysis, the most powerful model generated by NPO scholarship — formed by a synthesis of the two most prominent theories — needs to be extended to fully account for the formation and operation of private managers of public parks. This "synthesized model" explains, for example, why demand exists for services beyond what government currently provides, but it does not account for why citizens form nongovernmental organizations ("NGOs") to meet this demand instead of voluntarily contributing resources to the governmental programs they favor. Similarly, the synthesized model explains why, once an NGO is demanded, it often takes the form of an NPO, as opposed to a for-profit firm. However, the model does not explicitly account for how the NPO operates with respect to its donors.

This Article proposes an extension of the synthesized model based on the concept of responsibility. NPOs differ from other managers in that they take direct physical and financial responsibility for a public space. The new model, which this Article will call the "refined model," recognizes the important role that this taking of responsibility plays in the formation and operation of NPOs, thus improving upon current NPO theories. The taking of responsibility by NPOs is important because it reduces the cost of monitoring their performance. Consequently, the NPOs can more effectively harness residual demand for the public good of public spaces. Such harnessing ultimately allows them to create positive outcomes for these spaces by marshaling more resources.

NPOs take responsibility in two ways. First, they take physical control of the public space as single entities. In so doing, NPOs assume responsibility in a way that contrasts strongly with the diffuse accountability of governmental managers. This centralization of accountability matters because it makes NPOs easier to monitor than government with respect to the physical management of the space. Monitors can clearly trace accountability for outcomes.

Second, NPOs take over the funding of the space. In so doing, they become solely responsible for the financial success of the park in a way that contrasts strongly with insulated governmental civil servants. Centralization matters because it reduces the cost to donors of monitoring whether there is the critical mass of funds necessary for effectiveness. The donors need only monitor one budget to determine whether their contributions will be effective. Taking responsibility for fundraising also makes NPOs dependent on donors. This, in turn, places the burden of compiling and communicating information about the NPO's operation, which is crucial for monitoring, on the NPO, instead of on individuals outside the organization. Since insiders can more easily gather and disseminate the requisite information, this further reduces the cost of monitoring funding levels. Centralization and dependence together explain why NPOs negotiate with governments to prevent private donations from "crowding out," or replacing, public contributions<sup>18</sup>: such agreements further reduce the cost of monitoring NPO efforts to attain consistent funding and assure donors of the efficacy of their donations because they guarantee that donations increase total funding.

The refined model better explains NPO formation, operation, and funding. It also yields a counterintuitive result: private managers are *more* accountable than governmental managers because they are more responsible and, thus, less costly to monitor. They answer to interests other than their own more than government managers.

To provide evidence for the theoretical power of the refined model, this Article relies on case studies of the friends group for Central Park, the CPC, and of the nearby BID for Bryant Park, the Bryant Park Restoration Corporation ("BPRC").<sup>19</sup> These case studies depend on research into previously unanalyzed sources, including annual reports, tax forms, donor lists, and New York governmental documents. The Article also includes analysis of the heretofore-unexamined management agreements between these organizations and the City of New York. Finally, the Article utilizes interviews with key individuals in the formation and operation of these NPOs. Although these sources have not yet been discussed in published scholarship, they are critical to presenting an accurate picture of the organizations at issue.

This Article proceeds in several parts. First, as background, it provides an overview of BIDs and friends groups. It discusses their basic characteristics as organizations, trends concerning their prevalence, and common praise

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<sup>18</sup> The author is indebted to Professor Henry Hansmann for helping to make this point more explicit in this Article.

<sup>19</sup> This Article largely assumes that Bryant Park and Central Park are fair representatives of parks with a BID and a friends group, respectively. In the case of Bryant Park, this is a fair assumption: Bryant Park is not a particularly wealthy BID nor is its management of a park particularly unique. In the case of Central Park, however, the Conservancy is perhaps the model of a friends group, not the average case, at least for New York City. Central Park, however, is representative of the flagship parks of major cities across the United States. It is not implausible, therefore, to conclude that lessons can be drawn from a comparison of Bryant Park and Central Park.

and criticism. Second, the Article argues for the insufficiency of current NPO theories to theoretically account for the current trend of private management of public parks. Third, the Article proposes a refined model that better accounts for the formation and operation of friends groups and BIDs, based on the argument that the taking of responsibility reduces monitoring costs. Fourth, the Article provides case studies of the CPC and the BPRC. It discusses the formation of the private groups involved, their functions, and their successes and failures. These two Parts demonstrate the role that the taking of responsibility played in the formation and plays in the operation of these organizations, and will provide empirical support for the proposed model. These Parts also demonstrate that the legal form of the organization — BID or friends group — is less relevant than may be thought: in practice the two types of organizations perform substantially similar tasks and have substantially similar revenue sources despite their entirely different legal structures. Finally, the Article proposes several policy and legal reforms for NPO policy and law that follow from the analysis and case studies.

## I. TWO TRENDS IN THE PRIVATE MANAGEMENT OF PUBLIC SPACES

Two types of private involvement with public spaces are increasingly frequent. First, business improvement districts often manage commercially-oriented areas and the public spaces associated with them. These groups have been subject to scholarly scrutiny since the mid-1990s. Second, charitable organizations often participate in the management of parks and other public spaces. These groups are often entitled “Friends of X Park,” and this Article, therefore, calls them “friends groups.” This section briefly discusses the basic characteristics of each type of organization and common criticisms of their management of public spaces.

### A. *Business Improvement Districts*<sup>20</sup>

Business improvement districts have proliferated throughout the United States and the world over the past thirty-five years. First established in Toronto in 1970, the BID quickly entered the United States, taking root in New Orleans by 1975.<sup>21</sup> The institution began spreading in the 1980s<sup>22</sup> and has

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<sup>20</sup> The formative legal exploration of BIDs is Briffault, *supra* note 16. This section only seeks to highlight those qualities of BIDs most relevant for basic background and to update the reader as to new developments in the field. Briffault, for example, commented that there “is actually little hard evidence that BIDs have caused property values to rise” and that there is a dearth of other empirical work. *Id.* at 370 n.19. Some of these deficiencies have been remedied by scholars in urban studies and other fields since the publication of his article. See *infra* Part II.A.2.

<sup>21</sup> See LAWRENCE O. HOUSTOUN, JR., *BUSINESS IMPROVEMENT DISTRICTS* 7, 23–24 (1st ed. 1997).

<sup>22</sup> See Janet Rothenberg Pack, *BIDs, DIDs, SIDs, SADs: Private Governments in Urban America*, *BROOKINGS REV.*, Fall 1992, at 18.

since spread around the globe to the United Kingdom,<sup>23</sup> South Africa, Jamaica, Serbia, and Albania.<sup>24</sup> Approximately eight hundred BIDs likely exist worldwide, and half of them are located in the United States.<sup>25</sup>

### 1. *Characteristics and Functions*

Although BIDs vary in characteristics by jurisdiction and by constituency, they share several universal features. First, BIDs rely on taxes imposed on property owners in the district for revenue.<sup>26</sup> Second, BIDs are authorized by local law. BIDs, consequently, vary by state in terms of the formation process, functions, limits, powers, and even the size of the districts, and ultimately remain subject to governmental control. Third, BID formation often requires compliance with complex procedural requirements. In all jurisdictions, local property owners have significant say in whether a BID is formed.<sup>27</sup> Fourth, BIDs often deviate in voting rights from the principle of one-person, one-vote. They are governed by boards elected by the property owners in the district.<sup>28</sup>

BIDs perform five types of functions.<sup>29</sup> The priority a BID ascribes to each of these tasks depends on its size, location, and neighborhood.<sup>30</sup> First, they implement or oversee capital improvements, such as the renovation of plazas or the purchase of new planters. Second, BIDs conduct maintenance, including sanitation or minor repairs. Third, BIDs perform security opera-

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<sup>23</sup> See Martin Blackwell, *A Consideration of the UK Government's Proposals for Business Improvement Districts in England*, 23 PROP. MGMT. 194 (2005).

<sup>24</sup> See Lorlene Hoyt, *Importing Ideas: The Transnational Transfer of Urban Revitalization Policy*, 29 INT'L J. PUB. ADMIN. 221, 228 (2006); M. Steel & M. Symes, *The Privatisation of Public Space? The American Experience of Business Improvement Districts and Their Relationship to Local Governance*, 31 LOC. GOV'T STUD. 321, 322 (2005) [hereinafter Steel & Symes, *The Privatisation*]; Martin Symes & Mark Steel, *Lessons from America: The Role of Business Improvement Districts as an Agent of Urban Regeneration*, 74 TOWN PLAN. REV. 301, 302 (2003).

<sup>25</sup> See Hoyt, *supra* note 24, at 225 (identifying 398 non-U.S. BIDs); JERRY MITCHELL, BUSINESS IMPROVEMENT DISTRICTS AND INNOVATIVE SERVICE DELIVERY 15 t.2 (1999), available at <http://businessofgovernment.org/pdfs/Mitchell.pdf> (identifying 404 U.S. BIDs).

<sup>26</sup> See Briffault, *supra* note 16, at 368.

<sup>27</sup> Property owners will not always enthusiastically support a BID proposal, and some proposals fail. See generally Susanna Schaller & Gabriella Modan, *Districts Contesting Public Space and Citizenship: Implications for Neighborhood Business Improvement*, 24 J. PLAN. EDUC. & RES. 194 (2005).

<sup>28</sup> Not all BIDs are freestanding organizations like New York City's BIDs. See Paul R. Levy, *Paying for the Public Life*, 15 ECON. DEV. Q. 124, 129 (2001); Morçöl & Zimmermann, *supra* note 15, at 91 (describing joint projects and planning between governments and BIDs).

<sup>29</sup> See Briffault, *supra* note 16, at 394–414.

<sup>30</sup> See Jill Simone Gross, *Business Improvement Districts in New York City's Low-Income and High-Income Neighborhoods*, 19 ECON. DEV. Q. 174 (2005). It is useful to think of BIDs as coming in roughly three types: small community, main street, and downtown corporate. Other variants exist. See, e.g., Steel & Symes, *The Privatisation*, *supra* note 24, at 324 (describing churches that formed a BID to improve their parishes); Edward T. Rogowsky & Jill Simone Gross, *Managing Development in New York City: The Case of Business Improvement Districts*, in MANAGING CAPITAL RESOURCES FOR CENTRAL CITY REVITALIZATION 81, 85–87 (Fritz W. Wagner et al. eds., 2000).



tions, such as hiring security guards, buying equipment for the police, or even running the equivalent of misdemeanor courts.<sup>31</sup> Fourth, BIDs market the business district.<sup>32</sup> Fifth, BIDs perform outreach to individuals within the districts, including the homeless. These functions, of course, resemble local government functions, and there is an ongoing debate over whether to frame BIDs as governmental managers or institutional janitors.<sup>33</sup>

Several explanations for the rise of BIDs have been offered. Many attribute the rise of BIDs to changing social patterns in the latter half of the twentieth century.<sup>34</sup> Declining urban industry, the rise of the suburbs, and decentralization in government combined to put pressure on downtown businesses to adapt to the changing environment and removed the state as an agent for change, forcing downtowns to help themselves. Others emphasize that BIDs represent a shift towards New Urbanism, a movement that extols the importance of geographic centering and community solidarity.<sup>35</sup> Some scholars attribute the rise of BIDs to an increasing fiscal focus on the welfare state at the expense of traditional municipal services<sup>36</sup> or to declining federal aid to localities.<sup>37</sup> These explanations, of course, are not incompatible: in particular, the economic theories and the social theories can be mutually reinforcing. This Article relies on the public goods theory in NPO scholarship to provide a more theoretically rigorous model for the rise of BIDs. This theory suggests, consistent with the aforementioned theories, but with an emphasis on economic modeling, that higher demand for public services plays a crucial explanatory role.

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<sup>31</sup> Foreign BIDs are often more focused on security. See Göktuğ Morçöl & Patricia A. Patrick, *Business Improvement Districts in Pennsylvania: Implications for Democratic Metropolitan Governance*, 29 INT'L J. PUB. ADMIN. 137, 154 (2006); see also Lorlene Hoyt, *Planning Through Compulsory Commercial Clubs: Business Improvement Districts*, ECON. AFF., Dec. 2005, at 24, 26.

<sup>32</sup> See Jerry Mitchell, *Business Improvement Districts and the "New" Revitalization of Downtown*, 15 ECO. DEV. Q. 15 (2001) (arguing that marketing is the most important and most common function).

<sup>33</sup> Compare Levy, *supra* note 28, at 130 (emphasizing the entrepreneurial aspects of BIDs as general purpose governments), and Morçöl & Patrick, *supra* note 31, at 147 (describing the autonomy of Pennsylvania BIDs, which include courts), with Wolf, *supra* note 4, at 69–70 (arguing that D.C. BIDs implement, but do not make, policy). See also Jonathan B. Justice & Robert S. Goldsmith, *Private Governments or Public Policy Tools? The Law and Public Policy of New Jersey's Special Improvement Districts*, 29 INT'L J. PUB. ADMIN. 107, 130 (2006) (arguing that BIDs are a "tool" of New Jersey government); Jerry Mitchell, *Business Improvement Districts and the Management of Innovation*, 31 AM. REV. PUB. ADMIN. 201, 211 (2001) (arguing that BIDs are more supervisors and public servants than managers and innovators). BIDs may also, like governments, try to reach beyond their borders. See Jack W. Meek & Paul Hubler, *Business Improvement Districts in Southern California: Implications for Local Governance*, 29 INT'L J. PUB. ADMIN. 31, 48 (2006) (chronicling such a reach by California BIDs).

<sup>34</sup> See Steel & Symes, *The Privatisation*, *supra* note 24, at 322.

<sup>35</sup> See Mark S. Davies, *Business Improvement Districts*, 52 WASH. U. J. URB. & CONTEMP. L. 187, 213–15 (1997).

<sup>36</sup> See M.G. Lloyd et al., *Business Improvement Districts, Planning and Urban Regeneration*, 8 INT'L PLAN. STUD. 295, 300 (2003).

<sup>37</sup> See HOUSTOUN, *supra* note 21, at 15. But see *id.* at 15–16 (challenging both of these rationales).

## 2. Commentary

BIDs have generated substantial scholarly criticism from both empirical and theoretical perspectives. Scholars generally attribute the realization of the conditions that allow for revitalization of downtown areas to BIDs. At the same time, however, many scholars have criticized BIDs on the grounds that they eliminate accountability and foster inequality.

BIDs have undoubtedly affected downtown life in positive ways.<sup>38</sup> Several scholars have found BIDs reduce crime in their environs without simply shifting it to nearby neighborhoods.<sup>39</sup> Other research has found that BIDs increase property values<sup>40</sup> and residential populations.<sup>41</sup> Some scholars also have argued that BIDs provide a longer-term perspective on an area than local government,<sup>42</sup> and help to build social capital.<sup>43</sup> Many argue that BIDs are innovative and entrepreneurial in solving problems.<sup>44</sup> Based on these findings, several scholars have proposed making it easier to create BIDs or expanding the BID concept to other levels of society.<sup>45</sup>

At the same time, BIDs have been criticized in five ways. First, BIDs are criticized on accountability grounds because they operate on a basis other than one-person, one-vote, often exclude residents, and impose assessments without unanimous consent.<sup>46</sup> Second, some criticize BIDs as ineffi-

<sup>38</sup> The *New York Times* declared BIDs to be “one of the engines of New York City’s renaissance.” Editorial, *The Mayor vs. the BID’s*, N.Y. TIMES, Apr. 3, 1998, at A26. A report by the Brookings Institution listed BIDs as one of the twelve steps to “turning around downtown.” CHRISTOPHER B. LEINBERGER, BROOKINGS INST., TURNING AROUND DOWNTOWN (2005), available at [http://www.brookings.edu/reports/2005/03downtownredevelopment\\_leinberger.aspx](http://www.brookings.edu/reports/2005/03downtownredevelopment_leinberger.aspx). Newt Gingrich stated that “BIDs have often proved more effective than government.” Lloyd et al., *supra* note 36, at 308.

<sup>39</sup> See, e.g., Lorlene M. Hoyt, *Do Business Improvement District Organizations Make a Difference? Crime In and Around Commercial Areas in Philadelphia*, 25 J. PLAN. EDUC. & RES. 185 (2005) (chronicling decrease in crime in and around Philadelphia BIDs).

<sup>40</sup> See Ingrid Gould Ellen, Amy Ellen Schwartz & Ioan Voicu, *The Impact of Business Improvement Districts on Property Values: Evidence from New York City*, 8 BROOKINGS-WHARTON PAPERS ON URB. AFF. 1 (2007).

<sup>41</sup> See Eugenie Ladner Birch, *Having a Longer View on Downtown Living*, 68 J. AM. PLAN. ASS’N, Winter 2002, at 5.

<sup>42</sup> See Justice & Goldsmith, *supra* note 33 (arguing that BIDs better protect the long-term interests of an area, as opposed to the short-term interests of temporary tenants).

<sup>43</sup> See Lloyd et al., *supra* note 36, at 303–04.

<sup>44</sup> See, e.g., MITCHELL, *supra* note 25, at 9–10.

<sup>45</sup> See, e.g., Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 101–105 (1998) (discussing the concept of “Block Improvement Districts”).

<sup>46</sup> See Daniel R. Garodnick, Comment, *What’s the BID Deal? Can the Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 U. PA. L. REV. 1733, 1745 (2000); David J. Kennedy, Note, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 YALE L. & POL’Y REV. 283, 295 (1996); KOHN, *supra* note 9, at 85; Morçöl & Patrick, *supra* note 31, at 160 (discussing accountability generally and lack of government oversight); Göktuğ Morçöl & Ulf Zimmermann, *Metropolitan Governance and Business Improvement Districts*, 29 INT’L J. PUB. ADMIN. 5, 16 (2006); Steel & Symes, *The Privatisation*, *supra* note 24, at 328; see also Ian S. Tattenbaum, *Renewal for the 1990s: An Analysis of New York City Redevelopment Programs in Light of Title I of the Housing Act of 1949*, 6 N.Y.U. ENVTL. L.J. 220, 263 (1997). But see Brian R. Hochleutner, Note, *BIDs Fare Well: The Democratic Accountability of Business Improvement Districts*, 78

cient due to high administrative costs or as lacking in oversight due to inadequate assessment of performance.<sup>47</sup> Third, some BIDs have violated the rights of individuals.<sup>48</sup> Fourth, some scholars criticize BIDs for treating individuals only as consumers, in effect commodifying them.<sup>49</sup> Finally, BIDs are criticized for creating a two-tiered distribution of resources between those who are able to tax themselves more and those who are not.<sup>50</sup> Scholars decry the inequality, and the potential for class conflict,<sup>51</sup> resulting from the prominence of BIDs in well-to-do areas. Concerns about privatization permeate these critiques.

### B. *Friends of the Park Groups*

The involvement of friends groups in parks has also proliferated over the past several decades. These groups, unlike BIDs, have attracted little scholarly attention.<sup>52</sup> To be sure, the participation of private groups in the management of public parks is not new.<sup>53</sup> Private participation, however, has been increasing across the nation over the last several decades in response to budget cuts<sup>54</sup> and to citizens' taking initiative for managing their own spaces.<sup>55</sup> "Private partnerships," as one report on state parks summa-

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N.Y.U. L. REV. 374, 389–91 (2003); Wolf, *supra* note 4, at 61–62 (arguing that D.C. BIDs are accountable).

<sup>47</sup> See Gina Caruso & Rachel Weber, *Getting the Max for the Tax: An Examination of BID Performance Measures*, 29 INT'L J. PUB. ADMIN. 187, 215–16 (2006) (arguing that Chicago BIDs do not track their own performance well).

<sup>48</sup> See Heather Barr, *More Like Disneyland: State Action, 42 U.S.C. § 1983, and Business Improvement Districts in New York*, 28 COLUM. HUM. RTS. L. REV. 393, 399, 410–11 (1997) (chronicling the abusive wage practices involved in interactions with homeless individuals).

<sup>49</sup> See KOHN, *supra* note 9, at 88; Schaller & Modan, *supra* note 27, at 396. *But see* Davies, *supra* note 35, at 213 (arguing that rather than commodifying consumers, BIDs should be understood as creating a sense of place). These critics do not explain why city workers would necessarily make different decisions.

<sup>50</sup> See *Hearing Before the City of New York Comm. on Finance* (Sept. 12, 2002) (Testimony of Moshe Adler, Ph.D., Senior Economist, Fiscal Policy Institute), available at <http://www.columbia.edu/~ma820/Bids.testimony.html>; Steel & Symes, *The Privatisation*, *supra* note 24, at 323.

<sup>51</sup> See Schaller & Modan, *supra* note 27, at 406.

<sup>52</sup> The lone exception seems to be Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1, 3–4 (2004) (discussing the informal rights of park users in the takings context and noting that some groups constitute users with rights for takings purposes).

<sup>53</sup> See CENTRAL PARK ASS'N, *supra* note 17, at 61–73 (describing the role of the private group in Central Park).

<sup>54</sup> See John L. Crompton, *Forces Underlying the Emergence of Privatization in Parks and Recreation*, J. PARK & RECREATION ADMIN., Summer 1998, at 88, 92; Douglas Martin, *Clown Prince of the Emerald Empire*, N.Y. TIMES, Mar. 19, 2000, § 14, at 1 (characterizing the Giuliani administration as encouraging replacement of public with private money); Lucia Mouat, *Some Green in New York's Concrete*, CHRISTIAN SCI. MONITOR, July 31, 1992, at 7 (quoting the executive director of the Parks Council that groups form to compensate for budget cuts).

<sup>55</sup> See Douglas Martin, *A Critical Tour of the Empire: Battery Park to High Bridge . . .*, N.Y. TIMES, May 1, 1994, § 13, at 14 (chronicling the formation of a group entitled "Black Men Who Give a Damn").

rizes, “are a growing and important tool to help maintain parks and their natural treasures.”<sup>56</sup>

The thirty-year-old Central Park Conservancy is often considered the trendsetter among friends groups.<sup>57</sup> Neighbors of other parks within New York City have sought to follow its model. Those who live near Battery Park and Prospect Park, for example, formed friends groups in the mid-1990s.<sup>58</sup> The City itself has tried to apply the Central Park friends group model to other large parks, including Crotona and St. James in the Bronx, Marcus Garvey in East Harlem, Fort Greene in Brooklyn, and Baisley Pond in Queens, with varying success.<sup>59</sup> In 2002, the New York City Department of Parks and Recreation (“Parks Department” or “Parks”) began to focus on smaller parks as well.<sup>60</sup> The results are striking: from 2003 to 2004, another ten percent of the city’s seventeen hundred parks were adopted by friends groups, bringing the total to fifty percent.<sup>61</sup>

Numerous other localities have experienced similar trends and have also sought to emulate the Conservancy, or at least to harness the power of friends groups. For example, San Francisco experienced a tenfold increase, from eight to eighty, in the number of neighborhood groups working for local parks in the last few years of the twentieth century.<sup>62</sup> Boston,<sup>63</sup> Philadelphia,<sup>64</sup> Montreal,<sup>65</sup> and Washington, D.C.<sup>66</sup> have all adopted or considered

<sup>56</sup> HOLLY LIPPKE FRETWELL & KIMBERLY FROST, PROP. & ENV’T RESEARCH CTR., STATE PARKS’ PROGRESS TOWARD SELF-SUFFICIENCY 1 (2006), available at <http://www.perc.org/articles/article833.php>. See ALAN TATE, GREAT CITY PARKS 197 (2001) (noting “the trend in the United States towards private funding and private management of public parks”); PETER HARNIK, INSIDE CITY PARKS 11–12 (2000) (same).

<sup>57</sup> E.g., Douglas Martin, *From Botany to the Beatles at Park Conservancy*, N.Y. TIMES, Nov. 4, 1995, § 1, at 27 (quoting the New York City Parks Commissioner that “[t]he idea of private charitable support for a public park really began [with the Conservancy]”); *Private Dollars Revitalize Central Park*, NATION’S CITIES WKLY., Jan. 24, 2000, at 5 (describing the Conservancy as the “model” that others strive to follow).

<sup>58</sup> See Thomas J. Lueck, *Making Battery Park a Place to Linger*, N.Y. TIMES, May 9, 1998, at B3; Martin, *supra* note 55.

<sup>59</sup> See Barbara Stewart, *Neglected Gems Seek Angels for Renewal: Central Park-Like Rebirth is Sought for Other Parks*, N.Y. TIMES, Jan. 27, 2001, at B2.

<sup>60</sup> See Steinhauer, *supra* note 3.

<sup>61</sup> *Id.*

<sup>62</sup> Paul Van Slambrouck, *A Renaissance Among America’s Urban Parks*, CHRISTIAN SCI. MONITOR, June 26, 2000, at 3.

<sup>63</sup> See Edward L. Glaeser, *A Focus on Parks and Beaches*, BOSTON GLOBE, Aug. 3, 2007, at A13 (“Massachusetts’ strong tradition of philanthropy means that it can surpass New York in using private giving to improve parks.”); Anthony Flint & Raphael Lewis, *Leaders Open to State Funds to Assist Greenway Project*, BOSTON GLOBE, July 13, 2004, at B1 (describing a quasi-governmental conservancy for the Rose Kennedy Greenway); Anthony Flint, *City, Pike Seen Near Parks Plan: Dismantling of Artery Spurs Race for Role*, BOSTON GLOBE, Feb. 21, 2004, at A1 (chronicling the rejection of a BID for a conservancy for the Greenway); Editorial, *Common-Sense Stewardship*, BOSTON GLOBE, Aug. 21, 2006, at A10 (calling for conservancy-style management of the Boston Common).

<sup>64</sup> See Miriam Hill, *Seeking a Park’s Spark*, PHILA. INQUIRER, June 1, 2004, at A1 (chronicling Fairmount Park’s development); Larry Fish, *Friends Keep City Parks in Green: Groups of Volunteers Work to Pick Up Where Local Budgets Leave Off*, PHILA. INQUIRER, Apr. 26, 1998, at B1 (“In Philadelphia and elsewhere, as taxpayer funding for parks has withered, the solution has been to turn to local volunteers.”).

a formal friends group model for their flagship parks. The trend extends to the suburbs as well.<sup>67</sup>

Donations to friends groups have increased as well.<sup>68</sup> For example, the City Parks Foundation, a New York City-wide friends group, noticed a six percent increase in corporate donations in 2006, making the corporate sector the largest contributor for the first time.<sup>69</sup> Similarly, fifty New York City corporations signed up for volunteer events in 2005, a more than threefold increase over 2004.<sup>70</sup> The Vice President of the Project for Public Spaces, a well-known park advocate, calls these recent increases in donations a “renaissance” in parks.<sup>71</sup>

### 1. *Characteristics and Functions*

Friends groups come in a variety of forms, ranging from project-specific or ad hoc collections of individuals to organizations in contractual relationships with the owners of the public spaces. The best way to classify the groups is along a spectrum of formality.<sup>72</sup>

At one end of the spectrum lie “informally-organized” groups. These collections of individuals do not have an established organization. Rather, they assemble ad hoc for particular projects, such as park cleanups. In the middle of the spectrum lie “semi-formally-organized” groups.<sup>73</sup> These groups are arranged into a formal organization,<sup>74</sup> but lack official arrangements with park management. They tend to drive more of their own activity and participate in park decision making, but lack a formal role. The Brooklyn Park Moms, for example, organize local activities and initiate simple maintenance and planting projects through the auspices of the larger Parks

<sup>65</sup> See Peggy Curran, *A New View of the Mountain: Friends Seek Bigger Role*, GAZETTE (Montreal), May 28, 1998, at A3 (describing an increased role for Les Amis de la Montagne in administering Mount Royal Park).

<sup>66</sup> See Judy Scott Feldman, Editorial, *We Must Save America's Mall*, WASH. POST, Sept. 28, 2003, at B8 (calling for a conservancy for the Mall).

<sup>67</sup> See, e.g., Kate Stone Lombard, *A Friend of the Parks Reappears*, N.Y. TIMES, July 4, 2004, § 14WC, at 3 (describing a Westchester County friends group).

<sup>68</sup> Economists often express surprise that individuals donate, given the free-rider problem. This Article will discuss this point below. See discussion *infra* Part V.

<sup>69</sup> Miriam Kreinin Souccar, *Firms Give Greenbacks to City's Small Parks: Corporate Donors Find Fulfillment, More Bang for Buck in Improving Underfunded Space*, CRAIN'S N.Y. BUS., Apr. 10, 2006, at 26, 26.

<sup>70</sup> *Id.*

<sup>71</sup> Van Slambrouck, *supra* note 62.

<sup>72</sup> See Lehavi, *supra* note 52, at 3 (making a similar division based on the formality of the organization, not the agreement with the governmental unit); Stephen Mihm, *How Urban Green Spaces Got Greener*, N.Y. TIMES, Nov. 20, 2000, at F3 (noting differences among types of friends groups).

<sup>73</sup> The informal property rights in the park acquired by informal and semi-formal groups are the subject of a recent paper arguing that these groups should receive takings protections. See Lehavi, *supra* note 52.

<sup>74</sup> The group may or may not have obtained nonprofit status under 26 U.S.C. § 501(c)(3) (2006).

Council.<sup>75</sup> The Moms do not have a formal arrangement with the City, although the Parks Council does.<sup>76</sup> Finally, at the other end of the spectrum lie those groups that are both formally organized — with respect to officers, elections, and decision procedures — and in official agreements with the park managers. The CPC and the Prospect Park Alliance are the two most prominent examples.

Friends groups utilize three types of resources. First, they may raise private donations, either from neighborhood members or corporate sponsors.<sup>77</sup> Second, they may receive public money, either government grants or contract revenue.<sup>78</sup> Third, they may rely on the labor and time of their members.

## 2. Commentary

Friends groups are generally praised for their overall result,<sup>79</sup> the revitalization of parks, but criticized for their means. The praise arises in part from the recognition that private funds are necessary to supplement public funds.<sup>80</sup> While some criticize private groups for “reverse crowding out”<sup>81</sup> public funds,<sup>82</sup> many observers realize that without private monies, the parks would be in even worse disarray.<sup>83</sup>

At the same time, friends groups have been criticized in four primary ways. First, some observers criticize the privatization of the parks in itself,<sup>84</sup> perhaps because of the control perceived to be asserted by donors.<sup>85</sup> Second,

<sup>75</sup> See Lehavi, *supra* note 52, at 34–36.

<sup>76</sup> See *id.*; see also Martin, *supra* note 55 (describing a similar group of neighbors).

<sup>77</sup> See, e.g., Souccar, *supra* note 69 (describing the increase in corporate sponsorship).

<sup>78</sup> See Lehavi, *supra* note 52, at 34–35 (describing public grants of the Brooklyn Park Moms).

<sup>79</sup> See, e.g., KINKEAD, *supra* note 12, at 137; Vitullo-Martin, *supra* note 13.

<sup>80</sup> See Mihm, *supra* note 72 (noting that “urban park conservancies have become trusted adjuncts to municipal governments, making up budget shortfalls”).

<sup>81</sup> Reverse crowd out occurs when the private funds reduce government contributions.

<sup>82</sup> See Martin, *supra* note 54 (quoting Parks Council official’s criticism that “[t]he mayor’s constant message is that park maintenance, operations and programming should be increasingly dependent on private money”).

<sup>83</sup> See, e.g., Andrew L. Yarrow, *Private Money Is Keeping Central Park Healthy*, N.Y. TIMES, Oct. 29, 1990, at B3 (quoting Parks Commissioner Betsy Gotbaum as saying “[i]t irritates me when people criticize the Conservancy as elitist and privatizing” because “[i]t’s made it possible for more people to enjoy the park” and “I only wish I had more Conservancies for every big and mid-sized park”).

<sup>84</sup> See, e.g., Anemona Hartocollis, *For Parks in a Tangle, a Plan to Tame*, N.Y. TIMES, May 8, 2005, § 14, at 1; Thomas A. More, *From Public to Private: Five Concepts of Park Management and Their Consequences*, 22 GEORGE WRIGHT F. 12, 19 (2005); Bill Wade, *A New Tragedy for the Commons: The Threat of Privatization to National Parks (and Other Public Lands)*, 22 GEORGE WRIGHT F. 61 (2005). *But see* John Tierney, *Paying for Keeps*, N.Y. TIMES, Oct. 9, 1994, § 6, at 28 (arguing for the complete privatization of Central Park). See generally Sylvia LeRoy, *Beyond the Public Park Paradigm*, 22 GEORGE WRIGHT F. 33 (2005).

<sup>85</sup> See Beth Daley, *Public Parks Hunt Private Aid*, BOSTON GLOBE, Mar. 21, 2005, at A1 (quoting the president of a friends group that “[i]f we raise the money and beat the bushes, we want to have a say in what goes on”).

other observers note that giving certain individuals some control in the park creates class conflict, especially when gentrification occurs.<sup>86</sup> For example, one observer of Prospect Park has commented that the Prospect Park Alliance has taken steps, apparently unintentionally, that exacerbate racial tensions in the park through its resource allocation and park-activity decisions.<sup>87</sup> Third, some criticize what they view as excessive commercialization of the parks, stemming from advertising or revenue-producing enterprises.<sup>88</sup> Finally, and perhaps most commonly, the success of some parks groups is criticized on the grounds that it distracts public officials' attention from the problems in other parks, leading to the creation of a "two-tiered" park system of wealthy and poor parks.<sup>89</sup> Similar to the criticisms lodged against BIDs, many of these criticisms are the outworking of general concerns about privatization.

## II. THE INSUFFICIENCY OF CURRENT THEORIES OF NPOs

Theories of NPOs — why they form and how they operate — are relatively new to legal and economic scholarship on the organization of entities.<sup>90</sup> Despite the presence of NPOs and NPO-like entities throughout history, the foundational works — Burton A. Weisbrod's *Toward a Theory of*

<sup>86</sup> See Francine Cunningham, *Long Haul — New York's Green Heart*, INDEPENDENT (London), Oct. 31, 1998, at 25 ("However, not everyone feels equally welcome in all parts of [Central Park]. Puerto Rican and black working-class youths hold barbecues and play boomboxes around Harlem Meer at the northern end. White middle-class New Yorkers tend to gather at the southern end.").

<sup>87</sup> See SETHA LOW ET AL., *RETHINKING URBAN PARKS: PUBLIC SPACE & CULTURAL DIVERSITY* 60–67 (2005).

<sup>88</sup> See Kelly Kleiman, *Open Access vs. Donors' Influence*, CHRISTIAN SCI. MONITOR, Sept. 29, 2004, at 14 (commenting that some parks look like "a new kind of Logo Land"); Martin, *supra* note 8 (quoting a Parks Council official's criticism of concessions expansion for "'creating a danger that more and more of each park's acreage will be taken over by commercial activity'").

<sup>89</sup> See Blaine Heard, *Neighbors Give Central Park a Wealthy Glow*, N.Y. TIMES, Nov. 22, 1999, at A1 ("There is resentment . . . It is mostly about the rich people in Manhattan and how they can afford to make their park beautiful, and why won't the city put in the money to make our park nice, too.") (quoting anonymous Parks Department official); Barbara Stewart, *A Campaign to Elevate Green Space as an Issue*, N.Y. TIMES, Sept. 9, 2001, § 1, at 43 ("Central Park . . . made it very, very easy for politicians to ignore the other parks. And the nicer Central Park got, the worse the others got.") (quoting former CPC president Ira M. Millstein); see also James Bennet, *One Emerald Shines, Others Go Unpolished*, N.Y. TIMES, Aug. 30, 1992, § 1, at 35; Daley, *supra* note 85 (contrasting the state of privately-funded parks in Massachusetts with that of the many parks that have fallen into disrepair); Kleiman, *supra* note 88 (detailing private funding of and influence over Chicago's Millennium Park); Timothy Williams, *Report Assails Poor Upkeep in City Parks*, N.Y. TIMES, June 16, 2006, at B5 (contrasting "parks in poor and minority neighborhoods [that] are so poorly maintained that the neglect is tantamount to a civil rights issue" with "parks in wealthier areas [that] have increasingly become pristine"); Timothy Williams, *Study Criticizes Parks Department Management*, N.Y. TIMES, June 27, 2007, at B2 (describing "the latest analysis to suggest that city parks have devolved into a multi-tiered system").

<sup>90</sup> Charities were studied earlier. See C.E. Prevey, *Economic Aspects of Charity Organization*, 14 ANN. OF THE AM. ACAD. POL. & SOC. SCI. 1 (1899).

*the Voluntary Non-Profit Sector in a Three-Sector Economy*<sup>91</sup> and Henry Hansmann's *The Role of Nonprofit Enterprise*<sup>92</sup> — date only to the late 1970s and early 1980s. These articles accompanied the tremendous growth of the nonprofit sector in the post-World War II period.<sup>93</sup> Despite mixed empirical findings<sup>94</sup> and the addition of several new approaches to the scholarship,<sup>95</sup> NPO theory has coalesced around the two original approaches — Weisbrod's public goods theory and Hansmann's contract failure thesis.<sup>96</sup>

The problem with these approaches, however, is that they do not sufficiently explain the modern trend in NPOs towards the management of public resources. This Part first analyzes the two most prominent theories — Weisbrod's public goods approach and Hansmann's contract failure thesis. It then details an overarching model that synthesizes these theories, treating them as complementary. Finally, it argues that this synthesized model, while an advance over the isolated theories, still does not fully account for the modern management of public parks.

#### A. Public Goods Theory

Burton A. Weisbrod persuasively argues that nonprofit organizations satisfy unfulfilled demand for public goods.<sup>97</sup> Harnessing the insight of median voter theory that the government only acts to please the median voter,<sup>98</sup> Weisbrod reasons that when government action concerns the provision of a public good and all voters are not identical to the median voter, some voters will prefer more or less of the good than the government supplies.<sup>99</sup> Those voters who prefer more provision of the public good constitute residual de-

<sup>91</sup> Burton A. Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 171 (Edmund S. Phelps ed., 1975).

<sup>92</sup> Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

<sup>93</sup> See generally MAKING THE NONPROFIT SECTOR IN THE UNITED STATES: A READER (David Hammack ed., 1998).

<sup>94</sup> See *infra* Part II.A–B describing the public goods and contract failure theories.

<sup>95</sup> E.g., Christoph Badelt, *Entrepreneurship Theories of the Non-Profit Sector*, 82 VOLUNTAS 162 (1997) (describing entrepreneurial-approach theory and acknowledging additional contributions by Dennis Young); Avner Ben-Ner, *Nonprofit Organizations: Why Do They Exist in Market Economies?*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY 94 (Susan Rose-Ackerman ed., 1994) (describing the stakeholder approach); Lester M. Salamon & Helmut K. Anheier, *The Third Route: Government-Nonprofit Collaboration in Germany and the United States*, in PRIVATE ACTION AND THE PUBLIC GOOD 151 (Walter W. Powell & Elisabeth S. Clemens eds., 1998) (describing voluntary failure approach).

<sup>96</sup> See THE STUDY OF THE NONPROFIT ENTERPRISE vii (Helmut Anheier & Avner Ben-Ner eds., 2003) (“Weisbrod [and] Hansmann . . . continue to shape theoretical and conceptual efforts.”).

<sup>97</sup> See Weisbrod, *supra* note 91, at 181–83. See generally BURTON A. WEISBROD, THE NONPROFIT ECONOMY 25–31 (1988); BURTON A. WEISBROD, THE VOLUNTARY NONPROFIT SECTOR (1977).

<sup>98</sup> See Weisbrod, *supra* note 91, at 174.

<sup>99</sup> See *id.* at 175–76.



mand and, according to Weisbrod, NPOs arise to meet this demand.<sup>100</sup> Voters donate to the NPOs to increase the public good to their desired level.<sup>101</sup>

Weisbrod's public goods theory generates several testable hypotheses. First, it implies that more NPOs will exist in more heterogeneous communities because more voters will have preferences that diverge from the median voter.<sup>102</sup> The evidence cautiously supports this "heterogeneity hypothesis"<sup>103</sup>: comparative studies find, for example, that NPOs provide a higher market share of education services in more diverse countries.<sup>104</sup> Second, Weisbrod's theory implies that government spending on public goods will "crowd out" private contributions.<sup>105</sup> The evidence here is mixed: it appears that crowd out occurs, but not at the hypothesized dollar-for-dollar rate because donors receive other benefits from donating<sup>106</sup> — they are, in technical terms, "impure altruists" who donate for reasons other than altruism, such as social pressure or internal self-fulfillment.<sup>107</sup>

The public goods theory faces two limitations as a model for explaining the rise of NPOs. First, it does not explain the genesis of NPOs that provide private goods.<sup>108</sup> Commercial NPOs — those that sell services for revenue instead of soliciting donations — are particularly likely to provide private goods and are increasingly common, especially in the health care industry.<sup>109</sup> Second, Weisbrod's theory does not explain why NPOs, instead of for-profit firms, form to satisfy the residual demand.<sup>110</sup>

<sup>100</sup> See *id.* at 181–82. Weisbrod largely ignores the free-rider problem, in essence arguing that all donors are impure altruists who derive benefits from giving and do not care about free riding. There is some tension between this position and his later views on crowd out, but it is of little relevance for this Article.

<sup>101</sup> See *id.*

<sup>102</sup> See Bruce R. Kingma, *Public Good Theories of the Nonprofit Sector*, in *THE STUDY OF THE NONPROFIT ENTERPRISE*, *supra* note 96, at 58.

<sup>103</sup> See Estelle James, *The Private Provision of Public Services: A Comparison of Sweden and Holland*, in *THE NONPROFIT SECTOR IN INTERNATIONAL PERSPECTIVE* 31, 33 (Estelle James ed., 1989).

<sup>104</sup> See Estelle James, *Why Do Different Countries Choose a Different Public-Private Mix of Educational Services?*, 28 *J. HUM. RESOURCES* 571, 579 (1993); see also Cyril F. Chang & Howard P. Tuckman, *The Goods Produced by Nonprofit Organizations*, 24 *PUB. FIN. Q.* 25, 37 (1996) (finding that racially diverse communities produce more nonprofits); Susan Feigenbaum, *The Case of Income Redistribution: A Theory of Government and Private Provision of Collective Goods*, 8 *PUB. FIN. Q.* 3, 6 (1980) (finding that heterogeneity in income, education, and age increase the size of the nonprofit sector).

<sup>105</sup> See Kingma, *supra* note 102, at 55.

<sup>106</sup> See *id.* at 55–57. See generally Theodore Bergstrom et al., *On the Private Provision of Public Goods*, 29 *J. PUB. ECON.* 25 (1986).

<sup>107</sup> See, e.g., Robert McClelland, *Voluntary Donations and Public Expenditures in a Federalist System: Comment and Extension*, 79 *AM. ECON. REV.* 1291, 1295 (1989); Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 *J. ECON.* 701 (1996) (summarizing the literature).

<sup>108</sup> See Henry Hansmann, *Economic Theories of Nonprofit Organization*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 27, 29 (W.W. Powell ed., 1987).

<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

### B. Contract Failure Theory

Henry Hansmann provides a model that addresses this second limitation of Weisbrod's theory, regarding why NPOs, instead of for-profit firms, form to provide certain types of services.<sup>111</sup> Hansmann observes that in some situations consumers are unable to evaluate the quality of the goods they purchase.<sup>112</sup> In health care and education, for example, consumers lack the information, including knowledge of future outcomes, that is necessary to evaluate their options. In particular, consumers fear being swindled by goods or services providers who supply inadequate goods, the quality of which is unknowable without high cost. In these situations, the prohibition on NPOs against distributing profits to insiders of the organization, called the nondistribution constraint, provides some protection for consumers because it prevents a conflict between the NPO insider's financial interest and the quality of the goods provided.<sup>113</sup> Under the nondistribution constraint, the NPO insider cannot pocket any money he saves by improperly reducing the quality of the goods. In other words, Hansmann theorizes that the NPO form corrects for contract failure that arises because of asymmetric information and the corresponding opportunity to take advantage of consumers.

Hansmann's contract failure theory, also called the "trust hypothesis,"<sup>114</sup> implies that consumer expectations matter: consumers must recognize information asymmetry and trust NPOs to alleviate the problem.<sup>115</sup> It also implies that reforms that alleviate the principal-agent problem in for-profit firms may decrease the appeal of NPOs.<sup>116</sup>

Like Weisbrod's public goods theory, this theory faces several limitations. First, it depends on several empirical propositions, including that the nondistribution constraint significantly affects internal NPO behavior, that NPO managers do not opportunistically exploit perceived trust, and that consumers rely on NPO status as an indicator of trustworthiness.<sup>117</sup> The empirical research is not conclusive on the validity of these assumptions.<sup>118</sup> Second, the contract failure theory does not explain why consumers do not turn to the government, which also faces the nondistribution constraint, as a trustworthy provider of services.

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<sup>111</sup> Hansmann, *supra* note 92.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> Andreas Ortmann & Mark Schlesinger, *Trust, Repute, and the Role of Nonprofit Enterprise*, in *THE STUDY OF THE NONPROFIT ENTERPRISE*, *supra* note 96, at 77, 77.

<sup>115</sup> *See* Hansmann, *supra* note 108, at 29–30.

<sup>116</sup> *See generally* Henry Hansmann, *A Reform Agenda for the Law of Nonprofit Organizations*, in *STIFTUNGSRECHT IN EUROPA 241* (Klaus J. Hopt & Dieter Reuter eds., 2001) (implying that proper enforcement of fiduciary duties as a way to address principal-agent conflicts makes for-profit firms more attractive).

<sup>117</sup> *See* Ortmann & Schlesinger, *supra* note 114, at 77.

<sup>118</sup> *See id.* at 77–78.

### C. A Synthesized Model

When combined, the public goods and contract failure theories provide a more holistic account of the rise of NPOs, complementing each other and together remedying some of the failures of each.<sup>119</sup> Public goods theory explains why demand for a nongovernmental service provider exists. Contract failure theory explains why this NGO will often take the form of an NPO instead of a for-profit firm. A two-step synthesized model emerges:

1. Excess demand for a public good prompts the formation of an NGO.
2. Contract failure prompts the NGO to form as an NPO.

Yet, despite its advantages, this model is still insufficient as an explanation of the rise of modern NPOs, especially NPOs that manage public spaces, in at least three ways. First, there is an underspecified gap between Steps One and Two. The model fails to explain why non-median voters do not give their funds to the government to supplement services, even though the government also operates under the nondistribution constraint. Governments accept donations of cash and in-kind contributions,<sup>120</sup> but few voters choose this path.<sup>121</sup>

To be sure, it could be argued based on the vast literature on “crowding out”<sup>122</sup> — when government funds displace private contributions — that donors fear “reverse crowding out” — when the private funds they donate to the government for a project reduce government contributions to the project — and thus refrain from donating to the government. But this argument ignores that the same “reverse crowd out” concerns also apply to donations to an NPO that, in turn, provides services for the government. The gap in the synthesized model regarding why donors give to the NPO and not the government directly remains undertheorized.

Second, the model does not account for any differences in management styles between governmental and nongovernmental entities. The case studies in this Article provide examples of how governments and NGOs behave differently — in particular, the NPOs in the case studies establish clearer lines of responsibility. The synthesized model, in other words, does not ex-

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<sup>119</sup> Hansmann discusses the complementarity of the models. See Hansmann, *supra* note 108, at 28.

<sup>120</sup> Parks departments are especially welcoming. See, e.g., N.Y. City Dep’t of Parks & Recreation, Support Your Park, [http://www.nycgovparks.org/sub\\_your\\_park/support](http://www.nycgovparks.org/sub_your_park/support) (last visited Jan. 2, 2010).

<sup>121</sup> In addition to the case studies below, see Renee A. Irvin & Patrick Carr, *The Role of Philanthropy in Local Government Finance*, 25 PUB. BUDGETING & FIN. 33, 34 (2005) (summarizing the small role private contributions play in government coffers).

<sup>122</sup> See, e.g., James J. Andreoni & A. Abigail Payne, *Do Government Grants to Private Charities Crowd Out Giving or Fund-raising?*, 93 AM. ECON. REV. 792, 793 (2003) (finding that government funds crowd out private contributions theoretically and empirically); Kingma, *supra* note 102, at 55 (summarizing literature that crowd out occurs but is less than dollar for dollar and thus concluding that government funds negatively affect charities).

plore or explain organizational forms that share the nondistribution constraint but differ in other ways.

Third, after Step Two, the synthesized model fails to explain perhaps the most salient feature of modern NPOs, especially those that manage public spaces: the restricted, or targeted, donation.<sup>123</sup> Donors often exclusively designate their contributions to particular purposes or projects. Contract failure theory posits that the nondistribution constraint solves the information asymmetry problem: NPOs can be trusted because they are so constrained. Restricted donations, however, are inconsistent with the view that donors can and do trust NPOs to act for them because of the nondistribution constraint.<sup>124</sup> To be sure, some donors may have very specific concerns, like a university's history department or a park's jogging path. But, often no such interests are discernible, such as when, for example, a donor funds one of many zone gardeners or buys one of many anonymous park benches. The point in these cases seems to be to trace the money trail. The tools exist within contract failure theory to extend it to cover internal NPO operations, but a refined model that goes beyond existing scholarship is needed to fully explain this phenomenon, as well as the other deficiencies outlined above.

### III. A MODEL FOR THE RISE OF PRIVATE MANAGEMENT OF PUBLIC SPACES

The previous section described three gaps in the existing synthesized model: it fails to explain why donors give to NGOs instead of the government, why NGOs operate differently than does the government, and why restricted donations are so prevalent. These three deficiencies arise because the existing synthesized model does not recognize that NPOs managing public spaces capitalize on the advantages of taking responsibility for those spaces.

The taking of responsibility reduces monitoring costs, which makes NPOs more attractive than governmental organizations. Responsibility is thus the answer to the first gap in the synthesized model. It also explains the second deficiency by showing how NPOs operate differently than government. To be more attractive than governmental organizations, NPOs must take responsibility better than governmental organizations. They do so through their operations. Finally, restricted donations create responsibility to donors, which explains why NPOs often rely so heavily on the practice.

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<sup>123</sup> In addition to the case studies below, see Karen W. Arenson, *When Strings Are Attached, Quirky Gifts Can Limit Universities*, N.Y. TIMES, Apr. 13, 2008, at 18, for a general discussion of restricted donations.

<sup>124</sup> Voluntary failure theory, which argues that the private sector is often a more flexible first responder to social problems, see Salamon & Anheier, *supra* note 95, does not help supply an answer to this or to the previous gap because in the public property context the government has already occupied the field and is instead being replaced by the voluntary sector. The voluntary failure theorists, furthermore, do not provide an account of why the private sector may provide a more optimal solution in the long term.

Without restricted donations, donors are less attracted to NPOs. NPOs use them, therefore, to entice donors.

This Part first describes in more detail how NPOs take responsibility. It then builds on the existing synthesized model to create a new refined model that better theorizes NPOs that manage public spaces.

#### A. *Responsibility as a Value*

The synthesized model lacks theoretical completeness in the public property context because it does not recognize that NPOs realize the value of responsibility. NPOs take responsibility in two ways that reduce the cost of monitoring their performance and, consequently, help to create positive outcomes for the public space with respect to funding and maintenance.

First, NPOs assume sole physical responsibility for the public space, becoming ultimately answerable for the success or failure of its management. NPO control makes it so that “the buck stops” with the NPO. This clear line of responsibility contrasts strongly with the diffuse accountability within governmental organizations. Bureaucratic divisions of power and barriers between civil servants and elected officials often make it difficult to ascertain who is responsible for a public park or resource and to foster the buy-in and personal engagement necessary to adequately manage the resource, as the case studies confirm. The NPO, on the other hand, becomes fully responsible for the resource as a single organization, serving as its manager, advocate, and protector. This centralization reduces the cost of monitoring the overseers of the public space because outsiders need only monitor one entity, thus avoiding repetitious inquiries by numerous organizations and eliminating the burden of determining who is responsible for what problem. This feature of NPOs makes donating to them more objectively attractive than donating to the government. This need to be more responsible also helps to explain the difference between NPO and government operation with respect to lines of accountability in physical management and maintenance.

This first method of taking responsibility, it should be noted, implies a limitation on the refined model. Most public goods cannot be assigned to one provider to supply, to the exclusion of other providers. Parks, however, are different: control can be exclusively assigned because the public good is physical. The ability to exclude other public goods contributors in the real property context may limit the refined model to NPOs that manage parks, or at least to NPOs that provide controllable public goods.<sup>125</sup>

Second, NPOs take responsibility for financing the spaces, becoming accountable for adequate funding. Such accountability creates dependence on donors. Donative NPOs are intimately connected to the donors who pro-

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<sup>125</sup> The public goods literature does not seem to acknowledge the difference between public goods for which provision may be exclusive and public goods for which provision cannot be exclusive. Any individual can open a school, but not everyone can manage the same park.

vide funding for projects. NPO managers who “pass the hat” are often personally acquainted with even mid-level donors and must answer to them directly when projects funded by the donors’ money fail. Similarly, NPOs that charge users must of necessity respond to user demands, as the case studies confirm. The contrast with government is, of course, a difference in degree, not kind. Bureaucrats and elected officials are also connected to taxpayers — spending and taxing are not wholly separate. There is, however, little personal connection between the individual taxpayer or user and the individual bureaucrat: there are no black-tie dinners for mid-level bureaucrats and average taxpayers to collect taxes. In short, taking responsibility creates dependence on donors that, in turn, creates an incentive for NPOs to pay attention to donors’ desires.

Such dependence incentivizes productive projects. Without success, the next donation may not be made or the next user may not use the space. This alignment of responsibility makes the job of monitors easier because it makes the goals of NPOs more transparent. Such dependence also imposes upon NPOs the cost of compiling information about their operation and communicating it outside the organization. This transfer of the burden of information gathering to the NPO — the entity that is likely best able to do it for the least cost — both reduces monitoring costs for outsiders, particularly donors, and increases the efficiency of the public goods system as a whole by reducing monitoring costs overall.

More importantly, taking sole responsibility for funding makes it easier for donors to monitor funding levels. Donors want their donations to be effective,<sup>126</sup> and to be effective, there must be a critical mass of donations or funding. To ensure a critical mass, donors will monitor those responsible for raising revenues. Centralizing this responsibility in one entity, instead of dividing it among a legislature, a park commissioner, a mayor, and park managers, among others, reduces monitoring costs, and this facilitates private donations.

Together, dependence on donors and centralization of responsibility explain why groups often seek agreements ensuring a level of government contributions: these agreements reduce the cost of monitoring reverse crowd out and funding levels. Dependence on donors incentivizes such agreements because they reduce the cost of monitoring about the efficacy of donations: they help to make clear whether there is a critical mass of funds such that their donation is effective or whether their donation is ineffective because it has crowded out public funds. Centralization of responsibility further explains why an agreement for ensuring public funding to an NPO reduces monitoring costs more than just a normal budgetary arrangement within government: an agreement with the one entity responsible for all of the funding means more to an individual monitoring the funding. Centralization of responsibility, of course, also gives the NPO an advantage in negotiating such

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<sup>126</sup> This is true regardless of whether they are pure or impure altruists.

an agreement over diffuse civil servants scrounging against each other for funds.

Restricted donations further realize responsibility by linking NPOs and donors to particular projects. By allowing themselves to be made responsible to particular donors for particular projects, NPOs further reduce monitoring costs, thus increasing their attractiveness with respect to governmental organizations even more. Restricted donations, in other words, are yet another way that NPOs make themselves responsible — with transparent lines of accountability — and thus attractive managers.

This responsibility-based refinement of the synthesized public goods/contract failure model suggests a counterintuitive implication: that a private manager of a public space is *more* accountable than a governmental manager because he is more responsible and, thus, less costly to monitor. This result contrasts strongly with a major criticism of private managers of public spaces. Critics of BIDs and friends groups fear that nongovernmental management effectively “privatizes” space, making it unresponsive to public needs.<sup>127</sup> This Article argues that, at the very least, a related proposition is as true: the proliferation of NPO managers suggests that governmental managers themselves are insufficiently responsive to public needs.

Two clarifications of this point bear mention. First, the argument is not that private managers are “better” managers than governmental managers. That may or may not be true, although the case studies below suggest that private managers can be successful managers. Rather, the argument is that the private manager is the more responsible manager, and that this responsibility reduces the cost of monitoring him, creating positive outcomes with respect to funding and maintenance. More specifically, private managers of public parks and squares are more responsible for two reasons: (1) private managers are easily blamed because their nongovernmental character makes it easy to trace responsibility to them,<sup>128</sup> and (2) private managers are motivated to obtain revenue through donations or user fees, which incentivizes them to provide services that are successful, obtain stable government funding levels without reverse crowd out, and, in the case of donative NPOs, provide information that indicates success to future donors.

Second, it is important to distinguish between management — the subject of this Article — and policymaking. The NPOs studied in this Article have, as the case studies confirm, the responsibility for managing their public spaces but do not have the power to unilaterally alter the policies governing these spaces. They cannot unilaterally set access policies, allow or prevent speech acts, or make major changes in the parks or squares.<sup>129</sup> To be sure, the difference between management and policymaking can be hazy. The point, however, is that the NPOs studied by this Article are responsible

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<sup>127</sup> See discussion *supra* Parts I.A.2, I.B.2.

<sup>128</sup> Entrepreneurial theories may also be relevant in determining why managers so readily accept such blame.

<sup>129</sup> See generally *infra* Parts IV–V.

for the implementation of services, not the higher-level policy decisions regarding whether to provide parks at all or to allow substantial park access.

### B. A Refined Model

The foregoing focus on responsibility as a value that reduces monitoring costs provides for two additions to the synthesized model. First, the previous section explains that voters do not attempt to increase the provision of public goods through donations to the government because monitoring costs in government are high. NPOs reduce monitoring costs by centralizing physical responsibility and being responsible for their own funding. Second, the previous section explains the phenomenon of restricted donations: they predominate because they further reduce monitoring costs. The refined model, therefore, has two new steps and a few other refinements:

1. Excess demand exists for further improvements to a public property that constitutes a public good.<sup>130</sup>
2. Excess demand is channeled towards forming an NGO because NGOs outperform government with respect to monitoring costs by taking responsibility for a space and its funding.<sup>131</sup>
3. Contract failures prompt the NGO to form as an NPO.<sup>132</sup>
4. The NPO operates with restricted donations because this additional revenue responsibility further reduces monitoring costs.<sup>133</sup>

The refined model has several implications. First, it provides a lens through which to examine how an NGO arises. Explicit focus on the taking of responsibility as a way to reduce monitoring costs suggests that government itself can recognize the responsibility challenges and, correspondingly, the monitoring-cost challenges that it faces and attempt reforms aimed at mitigating these problems, even perhaps forming a quasi-governmental organization like an NPO if helpful. It could also take steps to redress those problems in its own management, reducing the gap in attractiveness between itself and a potential NPO. Additionally, recognizing responsibility as a value generally supports the work of entrepreneurial theorists who focus on the individual's desire to shape institutions and correct social problems: giving individuals responsibility to manage resources furthers their en-

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<sup>130</sup> This step is consistent with the public goods theory Step One, with the specification that public property as a public good is at issue.

<sup>131</sup> This occurs by centralizing physical responsibility, preventing crowd out, and ensuring a critical mass of funding.

<sup>132</sup> Hansmann believes in the near universality of this step's explanatory power for donative nonprofits, which he calls the "strong form" of this theory. Henry Hansmann, *The Role of Trust in Nonprofit Enterprise*, in *THE STUDY OF THE NONPROFIT ENTERPRISE*, *supra* note 96, at 115, 118.

<sup>133</sup> Restricted donations also relate to the free-rider problem. *See infra* Part IV.B.2.



trepreneurial ambitions.<sup>134</sup> The model explains why entrepreneurs successfully obtain these opportunities. The case studies confirm the role of both of these phenomena.<sup>135</sup>

Second, the responsibility of NPOs to donors through donations or to users through user fees generally implies that the output of the NPOs will be shaped by donors or users, the most direct monitors. The case studies confirm this phenomenon. To be sure, NPOs, and all organizations, have always been dependent on contributors. The responsibility model, however, provides a link between this phenomenon and the formation of NPOs in the first place: responsibility to, or dependence on, contributors, a byproduct of taking responsibility for funding a space, incentivizes behavior that attracts donors. One such type of behavior is reducing the cost of monitoring the NPO, making it more attractive as a destination for donations.

The refined model is a theoretical advance over the synthesized model. The next two parts demonstrate that the facts fit the refined model. In particular, the Central Park Conservancy and the Bryant Park Restoration Corporation took physical and financial responsibility for their spaces — validating the new second step — and are responsible to restricted donations — validating the new fourth step.

#### IV. CENTRAL PARK

The formation of the Central Park Conservancy (“CPC” or “Conser-vancy”) nearly thirty years ago launched the modern era of Central Park.<sup>136</sup> This Part describes the rise of the CPC, the role it plays in Central Park, and its effectiveness. The discussion demonstrates that the Conservancy is an organization similar in function and revenue source to the Bryant Park BID described in Part V.

More importantly, however, this Part demonstrates that the Conser-vancy is, above all, typified by the way it has taken responsibility for Central Park. The CPC was formed to centralize responsibility for the park when

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<sup>134</sup> See Christoph Badelt, *Entrepreneurship in Nonprofit Organizations*, in *THE STUDY OF THE NONPROFIT ENTERPRISE*, *supra* note 96, at 139, 141.

<sup>135</sup> Of course, it is not just excess demand for public goods and entrepreneurial ambition or government kick-starting that yields an NGO. Rather, the free-rider problem regarding public goods, which could prevent successful NGO fundraising, *see infra* Part IV.B.2, must still be overcome. Impure altruism on the part of donors, who seek private goods in addition to the public goods generated by NGOs, is likely an important catalyst. The responsibility and monitoring-cost model, however, only explains why these organizations form and why donors do not simply give to the government. The monitoring costs reduced by NPOs are properly viewed as a barrier that prevents pure and impure altruists from successfully overcoming the free-rider phenomenon through donations to the government. The point is that the rate of impure altruism and its role in overcoming the free-rider problem is orthogonal to the primary argument of this Article.

<sup>136</sup> Some scholars liken the Conservancy’s reign to the era headed by Park Commissioner Robert Moses, which began in 1934, and the time of the Tweed Charter of 1870. *See* ROY ROSENZWEIG & ELIZABETH BLACKMAR, *THE PARK AND THE PEOPLE: A HISTORY OF CENTRAL PARK* 507 (1992).

governmental management was too diffuse to be accountable, a leadership problem that undoubtedly contributed to the park's physical and financial state in the late 1970s.<sup>137</sup> It is this lack of responsibility within government that explains why an NGO was attractive for meeting the residual demand predicted by Weisbrod's theory: monitoring costs for the government use and procurement of funds were high.<sup>138</sup> The CPC took responsibility in two ways that reduced the cost of monitoring Central Park performance. First, it took responsibility for the physical state of the park by serving as a unified management entity: it centralized park management. This development also generated improved management techniques, though as a result of the creation of a new entity, not the centralization itself. Second, the CPC took responsibility for stabilizing the financial state of the park by ensuring that donations would not decrease city funding and by centralizing accountability for procuring a critical mass of funding. These moves reduced the monitoring cost involved with avoiding reverse crowd out and attaining sufficient funding for donations to be effective, respectively. The CPC's ability to take responsibility was likely a necessary condition for its formation because it reduced the cost of monitoring the manager of Central Park. Such monitoring costs acted as a barrier to private contributions made directly to government.

Responsibility, once taken, must be maintained to keep monitoring costs lower than government. The CPC operates in two ways that preserve its responsibility. First, the CPC has sought and obtained increased control of the park. The government's consistent inability or unwillingness to take and centralize physical and financial responsibility for the park, or to assure that donations to the Parks Department were not offset by public spending reductions, explains why the CPC continually sought to expand its responsibility: it has been meeting residual demand in a way that continues to minimize monitoring costs. In other words, the increased responsibility of the CPC allows more of the residual demand to be met through donations in a way that keeps monitoring costs below government levels. The formation of the CPC is traceable to residual demand for a public good that could not be satisfied by government, because there was no guarantee that (or at least it was costly to monitor whether) government would efficiently use donated money to satisfy the residual demand. The growth of the CPC is similarly traceable to residual demand for a public good that could be satisfied neither by government nor by a smaller CPC, as neither could be guaranteed to use the money to satisfy the demand, or easily monitored as to whether they had done so. The trend towards increased responsibility is thus attributable to the combination of Weisbrod's theory and the addition of responsibility considerations in the refined model.

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<sup>137</sup> See *infra* Part IV.A.1.

<sup>138</sup> See *supra* Part III.B.

Of course, in order for this system to work, the CPC had to efficiently manage Central Park because the CPC was ultimately dependent on donors. A market-like feedback mechanism exists: in order to satisfy donors (and the City, which permitted increased responsibility), the CPC had to perform its current management tasks well and project that success. Successful management was a necessary condition for growth.

Second, the CPC continues to be characterized by its operational responsibility to its donors. Centralization of financial responsibility reduced the cost of monitoring overall funding levels. That reduction facilitated private donations because donors care about the efficacy of their donations and a critical mass of overall funding is crucial for such efficacy. Restricted donations also appear to drive operations in a way that expands on Hansmann's contract failure theory. Donors do not trust NPOs as much as predicted and use restricted donations to assuage their concerns. As described above, restricted donations reduce the monitoring costs for restricted donors, correspondingly reducing the asymmetric information problems that chill donations.

Restricted donations also help to explain how the CPC overcomes the free-rider problem. The impure altruism literature suggests that donors will give despite the free-rider problem if they obtain private as well as public goods for their donations. The lower cost of monitoring a restricted donation assists in this explanation: responsibility reduces the disincentive to refrain from donating for impure reasons because of inability to monitor the achievement of impure ends. In other words, reductions in monitoring costs through restricted donations eliminate a barrier for both pure and impure altruism.

This Part first documents the empirical evidence for this theorization of the formation of the CPC. It then discusses the evidence for this theorization of the operation of the CPC.

#### A. *The Rise of the Central Park Conservancy*

Constructed as a refuge from the proverbial huddled masses, Central Park opened in the mid-1800s as a "pastoral landscape" that would serve as a "distinctly harmonizing and refining influence upon the most unfortunate and most lawless classes of the city, an influence favorable to courtesy, self-control, and temperance."<sup>139</sup> The park, however, has often fallen short of this noble goal, even at times incubating disorder in the city before calls for reform prompted improvement. In particular, the park's status in 1980 — with respect to government management, physical condition, and private participation — provided the context of the need for and rise of the Conservancy. The contrast between management by government and management

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<sup>139</sup> ROSENZWEIG & BLACKMAR, *supra* note 136, at 131.

by the CPC demonstrates the importance of the CPC's assumption of responsibility.

The next section discusses the status of the park's management, physical condition, and private involvement before the formation of the CPC. The second section discusses how the CPC arose and how it took responsibility for the park in a way that reduced monitoring costs. Together, these sections demonstrate that the government's failure to take physical and financial responsibility for the park drove demand for additional services and that the CPC likely arose because, by assuming responsibility, it was able to provide such services with lower monitoring costs than the government.

### 1. *Pre-CPC Management, Physical Condition, and Private Participation*

By 1980, the time of the CPC's formation, Central Park was physically deteriorated. Repeated budget cuts and limited, haphazard private involvement had spawned a dangerous, unkempt park. Above all, however, the park suffered from a lack of leadership.

Several characteristics of park management undermined centralized leadership. First, no one individual or entity within the Parks Department was truly in charge of the park.<sup>140</sup> The Parks Commissioner, a political appointee in charge of all parks and recreation in New York City, in theory presided over the park, but no one individual or entity was responsible for day-to-day affairs.<sup>141</sup> Furthermore, no unified and exclusive budget existed for the park.<sup>142</sup> Funds for projects and maintenance were withdrawn from the general Parks Department fund.<sup>143</sup> There was no clear way to determine the amount spent on the park or the city resources — labor and equipment — it consumed. As Ira Millstein, the Chairman of the CPC from 1991 through 1999 and a board member since its formation, summarized, there was “no accountability whatsoever for the budget or the staff.”<sup>144</sup> Additionally, the capital construction and maintenance divisions of the Parks Department did not communicate, so large but difficult-to-maintain projects were completed.<sup>145</sup> The park, in other words, lacked administrative accountability. This decentralization also denied the park a budgetary advocate to negotiate funding levels with the City.

Second, maintenance accountability at the staff level was weak or non-existent.<sup>146</sup> Parks Department maintenance workers were organized into work crews that circulated throughout the parks system on a daily basis ac-

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<sup>140</sup> Interview with Henry Stern, N.Y. Parks Comm'r, 1983–1990, 1994–2002, in N.Y., N.Y. (Apr. 3, 2008) [hereinafter Stern Interview].

<sup>141</sup> Interview with Ira Millstein, Chairman of the Cent. Park Conservancy, 1991–1999, in N.Y., N.Y. (Apr. 24, 2008) [hereinafter Millstein Interview].

<sup>142</sup> Stern Interview, *supra* note 140.

<sup>143</sup> *Id.*

<sup>144</sup> Millstein Interview, *supra* note 141.

<sup>145</sup> *Id.*

<sup>146</sup> Blonsky Interview, *supra* note 6.

ording to requests for maintenance.<sup>147</sup> This system fostered excessive socialization and low productivity.<sup>148</sup> The incredible geographic dispersion of any crew's work product also prevented effective assessment of their work performance. The seniority system imposed by the union reinforced this problem.<sup>149</sup> The park's employees, in other words, lacked any sense of accountability, and their superiors, due to their own unaccountability, had little incentive to correct the problem. The cost of monitoring performance was high even inside the organization.

Of course, the 1970s were not the first period of decline. After the fanfare of Central Park's creation, the pristine space had quickly deteriorated through the late decades of the nineteenth and early decades of the twentieth century.<sup>150</sup> Threatened by technological developments like the automobile on the one hand, and hampered by political ineptitude, infighting, and partisan squabbles on the other, the park suffered from inadequate maintenance and funding.<sup>151</sup> As one historian summarizes:

Macadam roadways and footpaths were broken. Furnishings and ironwork — fences, benches, and playground equipment — were rotting and rusted. Lawns were scuffed or unmown. Many trees were dead or dying; almost all were improperly pruned. Statues and monuments were dirty and vandalized . . . .<sup>152</sup>

The 1934 appointment of Robert Moses as Parks Commissioner launched the park's first period of revitalization. Moses displaced the political machine clogging the park's operation and thoroughly refurbished the park.<sup>153</sup> He also introduced outdoor recreational elements previously absent from the park, including the Zoo, nineteen playgrounds, twelve ballfields, and Wollman Rink.<sup>154</sup> Renovation, restoration, and construction often relied on federal money from Depression-era programs: Moses was able to bypass the normal politics of New York City to hire workers and fund improvements in a leadership style some termed "autocratic."<sup>155</sup>

Moses retired in 1960, however, and the park once again fell into decline. Overuse of the facilities for concerts, rallies, and sit-ins, and fiscal maltreatment during tight budget years, combined to undermine the park's attractiveness for both passive and active recreation. Benches were broken, ballfields were overgrown, crime was higher, and usership was lower. The

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See KINKEAD, *supra* note 12, at 93.

<sup>151</sup> See *id.* See generally ROSENZWEIG & BLACKMAR, *supra* note 136.

<sup>152</sup> KINKEAD, *supra* note 12, at 104–05. One historian wrote that by 1934 the "lawns, unseeded, were expanses of bare earth, decorated with scraggly patches of grass and weeds, that became dust holes in dry weather and mud holes in wet. . . . The once beautiful Mall looked like the scene of a wild party the morning after. Benches lay on their backs, their legs jabbing at the sky." ROBERT CARO, *THE POWER BROKER* 334 (1975).

<sup>153</sup> See KINKEAD, *supra* note 12, at 103–04.

<sup>154</sup> See ROSENZWEIG & BLACKMAR, *supra* note 136, at 439–504.

<sup>155</sup> *Id.* at 463.

fiscal crises of the 1970s further exacerbated the existing problems as park budgets were slashed along with the city budget.<sup>156</sup> Funding for the heavy maintenance required to recover from public events could no longer be sustained.<sup>157</sup>

Private participation at the time was largely ineffective. New private groups began to organize around the mission of rebuilding the park, and older groups renewed their efforts in the late 1960s and 1970s, but these organizations lacked coordination and efficiencies of scale. The result was haphazard fundraising, volunteering, and criticism of park management, although not without limited success. In 1966, for example, Henry Hope Reed and other prominent New Yorkers formed Friends of Central Park, a preservation group that lobbied for fewer public events and more maintenance.<sup>158</sup> The Friends of Central Park combined with other groups, such as the Central Park Task Force, the Central Park Community Fund, and the Parks Council, to work to raise money for projects in the park, such as the 1972 restoration of the Bow Bridge.<sup>159</sup>

Private groups also exercised some power over park management. Most prominently, a group of middle-class mothers contributed to the downfall of Commissioner Moses by protesting the location of a new parking lot for the restaurant Tavern on the Green. While Moses eventually outmaneuvered the protesters by bulldozing at night, the controversy generated *New York Times* editorial coverage and weakened the Commissioner's political power.<sup>160</sup> Similarly, the Central Park Task Force and the Central Park Community Fund exercised power through their mobilization of funds and labor for cleanup and repairs.<sup>161</sup>

Of course, private involvement in Central Park was not new. By 1912, vocal supporters of New York parks had joined together to advocate through the Parks and Playground Association.<sup>162</sup> Similarly, on the eve of the Depression, the Central Park Association, perhaps the most prominent of the pre-Conservancy groups, formed "to stimulate and aid the City of New York to restore Central Park to life and vigor, and then keep it as a public trust, to keep it for the benefit of those living and those to come."<sup>163</sup> One historian counts nearly fifty groups that have formed since the 1920s to resuscitate Central Park,<sup>164</sup> or at least to protect particular areas from degradation, as in

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<sup>156</sup> See *id.* at 501-02.

<sup>157</sup> See *id.*

<sup>158</sup> *Id.* at 498.

<sup>159</sup> See KINKEAD, *supra* note 12, at 120.

<sup>160</sup> See *id.* at 110; ROSENZWEIG & BLACKMAR, *supra* note 136, at 481-83.

<sup>161</sup> See KINKEAD, *supra* note 12, at 138.

<sup>162</sup> See ROSENZWEIG & BLACKMAR, *supra* note 136, at 393 n.47; *Mass Meeting Call to Defend the Park*, N.Y. TIMES, June 14, 1912, at 10.

<sup>163</sup> KINKEAD, *supra* note 12, at 115. See also ROSENZWEIG & BLACKMAR, *supra* note 136, at 426.

<sup>164</sup> See KINKEAD, *supra* note 12, at 116.

the case of the Fifth Avenue Association of Fifth Avenue residents and property owners seeking to protect their neighborhood.<sup>165</sup>

Even during the regime of strong-willed Commissioner Moses, private groups played a role in the park's management and development. Moses relied on one of the largest concentrations of wealth in the world, the neighbors of the park, for funding. Promising naming rights for new facilities on the east side of the park, Moses convinced wealthy Fifth Avenue residents to donate large sums. Kate Wollman, a stockbroker's daughter, donated six hundred thousand dollars in 1949 for what became Wollman Rink.<sup>166</sup> Private donations also funded the Lasker swimming pool, two new boathouses, several playgrounds, and the Delacorte Theater.<sup>167</sup>

Yet, though private involvement existed in the 1960s and 1970s, in the late 1970s no one entity coordinated, and in fact often no one even approved, private participation in the park's affairs. Moses' efforts to involve private resources, furthermore, did not generate established mechanisms to harness volunteer labor or donated funds. Donations generally went into the park's overall operating fund. In other words, friends of the park could not count on the efficacy of their contributions — monetary or in-kind. The costs of monitoring the manager and his use of private funds could not be higher.

In short, by the end of the 1970s, the park lacked a responsible leader. Poor management, lack of advocacy for public support, and non-coordination of private support contributed to its decline. The conditions were ripe for a strong leader to advocate for the park and coordinate private involvement, harnessing donations and improving outcomes by reducing monitoring costs for donors.

## 2. *The Formation of the Central Park Conservancy*

The CPC formed in 1980 to centralize responsibility for the park and, in so doing, it ameliorated the leadership problem largely by reducing the cost of monitoring the leaders. Centralization of responsibility gave residual demand for a better park an outlet that could be trusted and easily monitored to use money for the intended purpose. Before funds from the residual demand could be collected, however, responsibility for the park needed to be centralized on two problematic fronts, operations and revenues, as described above. The CPC's first acts, unsurprisingly, were to obtain assurances that it would have power in the park and that there would be no reverse crowding out of public funds.<sup>168</sup>

On the first front, Parks Commissioner Gordon Davis and Mayor Edward Koch took several steps to formalize private involvement in the park. First, they appointed Elizabeth Barlow Rogers, an Olmsted scholar and the

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<sup>165</sup> See ROSENZWEIG & BLACKMAR, *supra* note 136, at 427.

<sup>166</sup> *Id.* at 485.

<sup>167</sup> *Id.*

<sup>168</sup> The CPC survived where others failed because it took steps to centralize responsibility. The Conservancy was able to do so because it was accepted by government.

executive director of the active Central Park Task Force, as administrator of Central Park.<sup>169</sup> While Rogers technically reported to the Parks Commissioner, the Conservancy took over paying her salary after her first year. Rogers was the driving force behind the master plan for rebuilding Central Park and ultimately behind the formation of the CPC itself.<sup>170</sup> Her control of the master plan signified that a unitary entity would be responsible for the park's direction, and her ambition for the formation of the CPC signaled her desire to stabilize revenues as well. In other words, her appointment centralized responsibility for the park in one entrepreneur.<sup>171</sup> The monitors' attention could be focused on her.

The mayor, Commissioner Davis, and now Rogers also worked to form the Conservancy.<sup>172</sup> They tapped William Beinecke, a retired executive whose retirement home adjoined the park, as Chairman of the Board for the new organization.<sup>173</sup> Announced in December of 1980,<sup>174</sup> the Board quickly outgrew its publicly proclaimed modesty to merely "assist in the physical restoration of the park and to bring about improvements in its maintenance and security."<sup>175</sup> Soon it embraced the task of running the organization, working with Rogers on concessions, design, horticulture, maintenance, and event permits.<sup>176</sup> Beinecke helped select thirty-four individuals of power and influence for the Board of Trustees. He drew from the boards of the Central Park Task Force and Central Park Community Fund to leverage past experience in public-private Central Park partnerships. The Board also included corporate executives of Fortune 100 companies, former Parks Department officials, nonprofit employees, and three city officials: Rogers, Parks Commissioner Davis, and the Manhattan Borough President.<sup>177</sup> These individuals implicitly backed the new organization with their personal reputations, a departure from the unaccountability of diffuse and anonymous civil servants. Shortfalls in funding could be easily attributed by the monitors, particularly when the trustees themselves personally solicited funds from the donating monitors.

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<sup>169</sup> See ROSENZWEIG & BLACKMAR, *supra* note 136, at 510.

<sup>170</sup> See *id.* at 512.

<sup>171</sup> It is possible that different individuals had different visions for the CPC. Rogers's vision, however, won out, partly due to the force of her will.

<sup>172</sup> See KINKEAD, *supra* note 12, at 137-39; ROSENZWEIG & BLACKMAR, *supra* note 136, at 507. The city's fiscal crisis was undoubtedly a strong motivating factor, see *id.* at 501-02, as was Mayor Koch's trust of Parks Commissioner Gordon. E-mail from Mayor Ed Koch to author (Apr. 15, 2008, 11:22:31 EST) (on file with author).

<sup>173</sup> Doug Blonsky and Ira Millstein also credit George Soros and Richard Gilder, two wealthy New Yorkers, for prodding the CPC off the ground. Blonsky Interview, *supra* note 6; Millstein Interview, *supra* note 141.

<sup>174</sup> KINKEAD, *supra* note 12, at 138.

<sup>175</sup> Grace Glueck, *Mayor Koch Sets Up Conservancy for Central Park*, N.Y. TIMES, Dec. 14, 1980, at 100 (quoting Beinecke on the CPC's mission).

<sup>176</sup> Millstein Interview, *supra* note 141.

<sup>177</sup> The list notably included the president of Misericordia Hospital, the chairman of Revlon Inc., the managing director of Morgan Stanley, the president of Dean Witter Reynolds Inc., the chairman of Bristol-Myers Company, and the provost of Columbia University. Glueck, *supra* note 175 (listing all the members).



On the second front, the CPC also moved to ensure funding. Most importantly, Beinecke procured a letter from the mayor assuring donors that private contributions would not “reverse crowd out” public funds.<sup>178</sup> The CPC, in essence, acted as a negotiator for the private individuals who would fear reverse crowd out if they contributed their own resources to increase the level of the public good of Central Park. The letter and other similar printed assurances were of critical value in fundraising because they could be shown to potential donors.<sup>179</sup> No longer would donors fear crowd out of government funds.

The Board, of course, also was tasked with raising funds from corporations, foundations, and private individuals.<sup>180</sup> In addition to the committees created to oversee the management of the park, Beinecke also created a forty-four person Founders Committee composed of wealthy individuals particularly willing to financially support the Conservancy, including Jacqueline Kennedy Onassis, Mrs. Vincent Astor, and Paul Newman.<sup>181</sup> This move created a large donor base in itself and assured donors that the organization would have the “critical mass” of funds necessary to be successful.<sup>182</sup> In other words, Beinecke and his fellow fundraisers became responsible for the park’s funding. No longer would the park depend on city government and its black-box budget process in which everyone and no one was responsible for park budget cuts.

Eventually, the CPC would obtain official agreements that formalized both of these initial moves — reverse crowd out protection and minimum funding protection.<sup>183</sup> These agreements further reduced the cost of monitoring city funding levels by establishing clear expectations for city funding that were easy to police, unlike the effort required to unwind the budgetary lobbying tangle.

In short, the CPC formed in order to take responsibility for the park’s management and financing away from the city government. The centralization of responsibility reassured residual demand of the efficacy of its donations to this public good by reducing the cost of monitoring donations and, therefore, allowed the organization to emerge to support the park. This history is consistent with the new Step Two in the proposed refined model: an NPO arose in order to assure that donations to the public good would be

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<sup>178</sup> See KINKEAD, *supra* note 12, at 140–41.

<sup>179</sup> Millstein Interview, *supra* note 141.

<sup>180</sup> Grace Glueck, *A Conservancy Will Seek Private Central Park Aid*, N.Y. TIMES, Aug. 16, 1980, at 23.

<sup>181</sup> See KINKEAD, *supra* note 12, at 139.

<sup>182</sup> See *id.*

<sup>183</sup> See Memorandum of Understanding Between the Central Park Conservancy and City of New York Parks & Recreation, signed March 31, 1993 [hereinafter CPC MOU] (on file with the Harvard Law School Library); Agreement Between the Central Park Conservancy and City of New York Parks & Recreation, signed Feb. 11, 1998 [hereinafter CPC Agreement] (on file with the Harvard Law School Library).

used effectively as part of a critical mass of funding and would not simply replace public funds.<sup>184</sup>

Beinecke's efforts produced a quick start-up: in its first eighteen months, the fledgling organization was able to raise over two million dollars and fund long-term planning studies for the park.<sup>185</sup> The CPC also began to perform maintenance work and restore the park.<sup>186</sup> This new era began as a striking contrast of grandeur and humility: a private fundraising organization founded by New York City elites operated out of the basement of a Parks Department building next to stored lawn chemicals.<sup>187</sup>

### B. *The Operation of the Central Park Conservancy*

The Conservancy did not remain as humble in function as it began in office space or fundraising supplication. Over the next three decades, the CPC raised nearly four hundred million dollars.<sup>188</sup> The annual budget now numbers approximately thirty-seven million dollars.<sup>189</sup> It renovated nearly every portion of the park, including the Great Lawn, the Reservoir, and the Harlem Meer. While it originally employed ten workers,<sup>190</sup> it now employs over three hundred.<sup>191</sup> It runs visitor programs, summer concerts, and fundraising events that bring thousands to the park, which now records an annual usership of twenty-five million,<sup>192</sup> nearly double the 1980 figure. The Conservancy, furthermore, manages Central Park on a daily basis through its contractual arrangement with the City.<sup>193</sup> This agreement formalized the CPC's ultimate responsibility for the park.<sup>194</sup> The days of a fledgling organization ended long ago.

The two phenomena that led to the CPC's formation — taking physical and financial responsibility from city government and preventing city replacement of public with private funds — have also characterized its opera-

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<sup>184</sup> See *supra* Part III.B.

<sup>185</sup> See KINKEAD, *supra* note 12, at 141. See generally CENT. PARK CONSERVANCY, ANNUAL REPORT (1984) [hereinafter 1984 ANNUAL REPORT] (describing early activities).

<sup>186</sup> See KINKEAD, *supra* note 12, at 139.

<sup>187</sup> The first office for the Central Park Administrator was in the basement of the Arsenal next to the pesticides. See Barbara Stewart, *College President to Lead Central Park Conservancy*, N.Y. TIMES, Dec. 1, 2000, at B6 (quoting Elizabeth Barlow Rogers on her first office). The announcement of the successful formation of the Conservancy appeared on page one hundred of the *New York Times*. Glueck, *supra* note 175.

<sup>188</sup> See CENT. PARK CONSERVANCY, CENTRAL PARK CONSERVANCY AT A GLANCE (2008), available at [http://www.centralparknyc.org/site/DocServer/Central\\_Park\\_Conservancy\\_at\\_a\\_Glance.pdf?docID=582](http://www.centralparknyc.org/site/DocServer/Central_Park_Conservancy_at_a_Glance.pdf?docID=582).

<sup>189</sup> See 2007 ANNUAL REPORT, *supra* note 1, at 24–25.

<sup>190</sup> See KINKEAD, *supra* note 12, at 140.

<sup>191</sup> See 2007 ANNUAL REPORT, *supra* note 1, at 40–41.

<sup>192</sup> *Id.* at 3.

<sup>193</sup> CPC MOU, *supra* note 183; CPC Agreement, *supra* note 183. See also Douglas Martin, *Private Group Signs Central Park Deal to Be its Manager*, N.Y. TIMES, Feb. 12, 1998, at A1; James Barron, *Sweeter Deal for Managing Central Park*, N.Y. TIMES, Apr. 30, 2006, § 1, at 36 (describing renewal of contract).

<sup>194</sup> Millstein Interview, *supra* note 141.

tion. The next section discusses the Conservancy's ascendance to complete operational control over the park and explains how this trend is consistent with the phenomena explaining the CPC's formation. This explanation is premised on the success of the CPC in its management of the park — attracting and retaining donors requires success — and, consequently, this Article briefly presents the evidence of the CPC's success. The second section discusses the role of restricted donations and how, because they reduce monitoring costs, they both extend Hansmann's contract failure thesis to the internal dynamics of NPOs for pure altruists concerned about the trustworthiness of NPOs, and overcome the free-rider problem for impure altruists concerned about securing private gain from their donations.<sup>195</sup>

### 1. *Ultimate Operational Control*

The CPC has become the agent ultimately responsible for all operations in the park. The previous section described how the CPC's formation marked a radical shift to centralization of responsibility for the park, which provided a safe outlet for residual demand for the public good of Central Park. This section continues this story: the Conservancy has acquired more managerial control over time, eventually formalized in agreements. Its pattern of expenditures and substantial anecdotal evidence confirm this ultimate responsibility. The development of the CPC after its formation parallels the theory that the creation of an agent physically and financially responsible for the park allows for the harnessing of residual demand by reducing monitoring costs: the CPC's development further reduced monitoring costs.

Over the course of the mid-1980s, the Conservancy provided more and more services in the park and, consequently, gained greater responsibility for park operations. Its arrangement with the City was formalized in a Memorandum of Understanding in 1993 and a Management Agreement in 1998.<sup>196</sup> These agreements, however, were more codifications of current practice with small additional concessions to the CPC than revolutions in themselves,<sup>197</sup> so it is appropriate to look to the most recent agreement, from 1998, as representative of the CPC's operations throughout much of its history.<sup>198</sup>

The 1998 agreement evidences the CPC's ultimate responsibility for the park. Recognizing that the CPC "has undertaken substantial responsibility for the maintenance, repair, public programming, and capital improvements in Central Park, and has provided funds for the costs associated there-

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<sup>195</sup> Weisbrod assumes away the free-rider problem. See Weisbrod, *supra* note 91, at 181–82.

<sup>196</sup> CPC MOU, *supra* note 183; CPC Agreement, *supra* note 183.

<sup>197</sup> Millstein Interview, *supra* note 141; Blonsky Interview, *supra* note 6; E-mail from Mayor Ed Koch to author, *supra* note 172. See Lehavi, *supra* note 52, at 24–26 (arguing that norms can be established informally and then codified into legal rights).

<sup>198</sup> See Millstein Interview, *supra* note 141; Blonsky Interview, *supra* note 6.

with,"<sup>199</sup> the agreement states that the "CPC shall provide . . . services specified for maintaining and repairing Central Park,"<sup>200</sup> including cleaning, snow removal, landscape maintenance, and repairs.<sup>201</sup> The agreement does not require that any city workers be employed in the park,<sup>202</sup> and it provides the CPC with joint appointment power over the Administrator of Central Park, an official in the Parks Department hierarchy.<sup>203</sup> The City further indicated transfer of ultimate responsibility for the park to the Conservancy by designating the CPC as the entity responsible for recognizing and alleviating hazardous conditions that arise in the park: it is the CPC that "shall promptly institute appropriate measures to protect the public from harm."<sup>204</sup> The Parks Department, in other words, gave day-to-day responsibility to the CPC.<sup>205</sup>

The management agreement also evidences the CPC's role as financial intermediary for the park's donors, a negotiator with the City to prevent the donors' contributions from crowding out public dollars. The CPC, after much negotiation, obtained several advantageous provisions. First, it acquired, for the first time, a share of the concession revenue from the park.<sup>206</sup> The agreement specified that fifty percent of all revenues above six million dollars would return to the CPC.<sup>207</sup> No longer would the City take into its general fund the revenue generated by the park.<sup>208</sup> Rather, the donors were and are able to keep the returns of their contributions. Doug Blonsky, the Central Park Administrator at the time, summarizes this reasoning: it "was inappropriate for the Conservancy to be the one responsible for the increase in concession revenue and then for the City to take that revenue away into the general budget."<sup>209</sup>

Second, the CPC obtained a guaranteed contribution on the part of the City.<sup>210</sup> The agreement provided that each year, if the CPC raised five million dollars, then the Parks Department would contribute one million dollars.<sup>211</sup> The Parks Department also promised to match at a fifty percent rate all contributions over five million dollars up to a maximum of one million dollars more.<sup>212</sup> Third, the CPC obtained a partial guarantee against decreases in park funding.<sup>213</sup> The Parks Department promised not to reduce the

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<sup>199</sup> CPC Agreement, *supra* note 183, at 1.

<sup>200</sup> *Id.* § 1, at 2.

<sup>201</sup> *Id.* § 3, at 3–5.

<sup>202</sup> *See id.* § 19(E), at 18. *Cf. id.* § 3(C), at 6 (noting that city employees are not *precluded* from performing services under the Management Agreement).

<sup>203</sup> *See id.* § 19(A), at 17.

<sup>204</sup> *Id.* § 4, at 7; *id.* § 6, at 7.

<sup>205</sup> Stern Interview, *supra* note 140.

<sup>206</sup> CPC Agreement, *supra* note 183, § 11, at 10.

<sup>207</sup> *Id.*

<sup>208</sup> Millstein Interview, *supra* note 141; Blonsky Interview, *supra* note 6.

<sup>209</sup> Blonsky Interview, *supra* note 6.

<sup>210</sup> *See* CPC Agreement, *supra* note 183, § 11, at 9–10.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *See id.* § 8, at 8.

funding allocated to city personnel working in the park by more than any percentage reduction in the overall Parks budget.<sup>214</sup> In other words, CPC revenue raising would not reverse crowd out Central Park government revenues directly — only a downturn in Parks's overall budget would do so.<sup>215</sup>

The agreement, to be sure, did not cede all control to the Conservancy or completely prevent crowding out. The Conservancy must, of course, conform to applicable law,<sup>216</sup> as enforced by the City's Landmarks Preservation Commission and other similar entities.<sup>217</sup> It must also conform to Parks Department standards for the design of park improvements.<sup>218</sup> The Parks Department also retains control over major changes in the park. The agreement, for example, provides for Parks Department review of all projects over twenty-five thousand dollars<sup>219</sup> and the CPC must also solicit three bids for projects between twenty-five hundred dollars and twenty-five thousand dollars.<sup>220</sup> Additionally, the CPC must submit its annual budget to the Parks Commissioner for approval.<sup>221</sup> As described above, the City can reduce its contribution to the CPC budget by reducing the budget of the entire Parks Department. Finally, the City retains a veto over the appointment of the Central Park Administrator.<sup>222</sup>

These formal limitations, however, are less of a restriction on CPC operations in practice than a literal reading suggests. As an initial matter, legal restrictions in the form of environmental, landmark, and sanitation regulations apply equally to all managers, including the government. These restrictions, therefore, cannot be regarded as methods of control by the Parks Department. In fact, the CPC may be less restricted than the Parks Department with respect to these types of external regulations. One Parks Commissioner confided in the mid-1980s that "[t]he Conservancy can be freer of constraints [than the Parks Department], so we're using [the Conservancy] to accelerate the planning process."<sup>223</sup>

The other restrictions provide for the appearance of control by Parks, but in practice do little to constrain the CPC. Parks Department review of projects over twenty-five thousand dollars and the three-bid requirement for projects between twenty-five hundred and twenty-five thousand dollars, for example, miss all projects below twenty-five hundred dollars,<sup>224</sup> which in-

<sup>214</sup> *Id.*

<sup>215</sup> The agreement provided the CPC with a right to terminate the agreement if the city did not meet its financial obligations. *See id.* § 23, at 26–27.

<sup>216</sup> First Amendment protections do not differ under the CPC's reign. *See supra* note 6.

<sup>217</sup> *See* CENT. PARK CONSERVANCY, ANNUAL REPORT 6 (1998); *see also* Christopher Gray, *STREETSCAPES: The Central Park Tennis House; A Neo-Classical Structure in an Unstructured Setting*, N.Y. TIMES, Oct. 4, 1987, § 8, at 14.

<sup>218</sup> *See* CPC Agreement, *supra* note 183, § 5, at 7.

<sup>219</sup> *Id.* § 28(B)–(C), at 30–32.

<sup>220</sup> *Id.* § 28(B), at 30–31.

<sup>221</sup> *Id.* § 3(B), at 5–6.

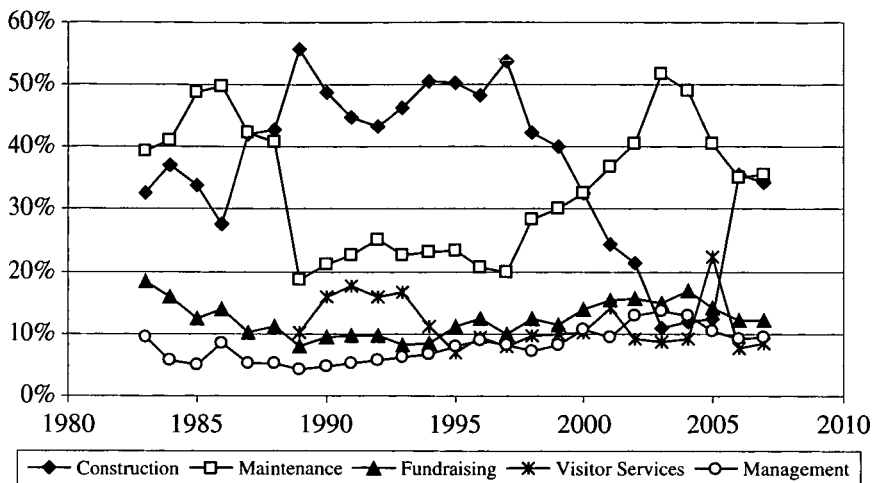
<sup>222</sup> *Id.* § 19(A), at 17.

<sup>223</sup> Susan Heller Anderson, *The Region: The Private Greening of Central Park*, N.Y. TIMES, Aug. 2, 1987, § 4, at 6.

<sup>224</sup> *See* CPC Agreement, *supra* note 183, § 28(B), at 30.

cludes nearly all maintenance work and many small restorations.<sup>225</sup> And the three-bid requirement is waivable. In general, the CPC can purchase equipment without asking for bids,<sup>226</sup> it does not need formal approval for most projects, and its revenue decisions are not reviewed by a higher authority.<sup>227</sup> The Parks Department, furthermore, has never disapproved the CPC's budget nor vetoed the CPC's choice of the Central Park Administrator,<sup>228</sup> despite great variations in the budget regarding the percentage of funds devoted to different types of expenditures (as shown in Figure 1) and the numerous changes, especially recently, in occupation of the post.

FIGURE 1. PERCENTAGE EXPENDITURES BY TYPE<sup>229</sup>



Another aspect of the relationship between the CPC and the Parks Department provides the CPC with even more de facto responsibility for the park's management, especially for preventing reverse crowd out. As the source of funds for nearly all park projects,<sup>230</sup> the CPC is the first mover.<sup>231</sup> It plans and proposes while the City may only accept or reject.

<sup>225</sup> Millstein Interview, *supra* note 141; Blonsky Interview, *supra* note 6.

<sup>226</sup> See, e.g., *City Hoping for Private Operation of Parks*, N.Y. TIMES, Oct. 15, 1980, at B1.

<sup>227</sup> The Conservancy's Vice President for Development, for example, quickly implemented a credit card rewards program to benefit the Conservancy after the idea was suggested to her by the Vice Chairman. Millstein Interview, *supra* note 141; Blonsky Interview, *supra* note 6.

<sup>228</sup> Millstein Interview, *supra* note 141; Blonsky Interview, *supra* note 6.

<sup>229</sup> Data compiled by author from CPC Annual Reports. See 1984 ANNUAL REPORT, *supra* note 185, through 2007 ANNUAL REPORT, *supra* note 1. Percentages, as opposed to absolute expenditures, provide for a clearer contrast.

<sup>230</sup> See *infra* Appendix accompanying note 454 (demonstrating that almost all projects are completed without city funds, which are denoted by circles).

<sup>231</sup> Stern Interview, *supra* note 140 (commenting that the Parks Department never came into conflict with the Conservancy with respect to operations); Millstein Interview, *supra* note 141 (same).

Much like the individual Senator who fears that his rejection of a presidential nominee will lead to the nomination of a less attractive one or the reduction of benefits to his state,<sup>232</sup> the Parks Department is pushed to approve projects for fear that the CPC will next propose a less attractive one or, worse yet, stop proposing them at all. Parks Commissioner Henry Stern's justification of his support of a tennis center for which the Conservancy had raised two and a half million dollars is a textbook example of dependence on the first mover:

I want it because the Conservancy — the people who are spearheading the renewal of the park — wants it. I don't want to make the yes or no decision which will antagonize the Conservancy or the community. The Conservancy was founded to raise private money for public goals. If elected officials are opposed, what can we do?<sup>233</sup>

Regardless of any formal rights over projects the City may conceivably exercise, the CPC retains broad control over maintenance. It was, for example, the Conservancy and not the Parks Department that instituted the revolutionary "zone gardener" system in the park, in which gardeners are assigned complete responsibility for particular areas, instead of traveling throughout the park on an assignment-by-assignment basis.<sup>234</sup> This innovation has been followed by numerous other parks and has revolutionized, with vast improvements, the maintenance of Central Park.<sup>235</sup> The Parks Department had no hand in this innovation. In fact, the Conservancy leaders surprised the city workers one morning with a chart outlining the "zones" of the park and assigning individuals to them.<sup>236</sup>

Nor should the power to avoid city workers be underestimated. Non-city workers lack power to object to CPC initiatives on employment grounds. The CPC benefits from having the power to establish its own meritocracy separate from the union's seniority system, to fire employees at will, and to reassign employees to different tasks without significant process.<sup>237</sup> As Rogers commented soon after the formation of the Conservancy, an "in-

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<sup>232</sup> See Akhil Reed Amar & Vikram David Amar, *The Ground Rules of the Appointments Game: Understanding the Structure of Nominations and Confirmations*, FINDLAW'S WRIT, Jan. 11, 2002, <http://writ.news.findlaw.com/amar/20020111.html>.

<sup>233</sup> ROSENZWEIG & BLACKMAR, *supra* note 136, at 520.

<sup>234</sup> See CENT. PARK CONSERVANCY, ANNUAL REPORT 8–9 (1995) [hereinafter 1995 ANNUAL REPORT]; Beth Wade, *Central Park: If You Can Maintain It There . . .*, AM. CITY & COUNTY, Apr. 1, 1998, [http://americancityandcounty.com/mag/government\\_central\\_park\\_maintain](http://americancityandcounty.com/mag/government_central_park_maintain).

<sup>235</sup> See Leslie McGuire, *A Zone of Perfection: Buffalo Olmsted Parks Conservancy*, LANDSCAPE SUPERINTENDENT & MAINTENANCE PROF., Feb. 2006, <http://www.landscapeonline.com/research/article/6316>; Carli Smith, *Parks Recognizes the Success of Its Seasonal Staffers*, DAILY PLANT (N.Y. City Dep't of Parks & Recreation, New York, N.Y.), Sept. 27, 2005, available at [http://www.nycgovparks.org/sub\\_newsroom/daily\\_plants/daily\\_plant\\_main.php?id=19679](http://www.nycgovparks.org/sub_newsroom/daily_plants/daily_plant_main.php?id=19679).

<sup>236</sup> Blonsky Interview, *supra* note 6.

<sup>237</sup> *Id.*

competent bureaucracy and a nonproductive union" were impediments to successfully maintaining the park in the early days of the CPC.<sup>238</sup> Both the current Central Park Administrator and former Chairman of the Board echo this view: they criticize the comparative weakness of city workers regarding productivity.<sup>239</sup>

At the same time, the CPC imposes restrictions on itself. It involves in decision making the five community planning boards adjacent to the park in what it calls a "community review process."<sup>240</sup> CPC leaders also meet consistently with local groups.<sup>241</sup> The Central Park Administrator, for example, has met every month for twenty-five years with a group of birdwatchers after the CPC accidentally cut down some habitat trees.<sup>242</sup> In this sense, the CPC is acting like a governmental manager.

The addition of a responsibility step to the synthesized NPO model accounts for the CPC's striving for ultimate responsibility for the management of the park and its efforts to negotiate financial guarantees. Much like the formation of the CPC itself, both were driven by residual demand for the public good of Central Park. The ultimate physical responsibility assures donors that their donations are used for the most needed park operations and not just for those projects the CPC is allowed to undertake. If the donors trust the CPC, they can presume their donations are effective. If they are skeptical, ultimate responsibility makes it easier for donors to monitor the effectiveness of the CPC's behavior because it prevents the CPC from passing blame to areas beyond its responsibility. Financial agreements and centralization of responsibility, similarly, guarantee to donors that they can, at low cost, monitor whether their contributions crowd out public funds or go to waste due to the lack of a critical mass of funds. The CPC, in other words, through taking more and more physical and financial responsibility and assuring the efficacy of donations, continues to solve the problems of government that prevented direct private donations to the public fisc in the first place.

Trends in donations reinforce the importance of these actions by the CPC. After the signing of both agreements, donations to the CPC increased more than normal, as evidenced by Figure 2. While other variables may account for this trend, the trend is nonetheless consistent with the view that more responsibility paralleled donor demand for low monitoring costs: the

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<sup>238</sup> Wolf Von Eckardt, *The Greening of Central Park; The Revival of Central Park*, WASH. POST, May 2, 1981, at F1.

<sup>239</sup> Millstein Interview, *supra* note 141; Blonsky Interview, *supra* note 6. Unions are currently trying to organize the CPC's workers. *Id.*

<sup>240</sup> Blonsky Interview, *supra* note 6. See ROSENZWEIG & BLACKMAR, *supra* note 136, at 521.

<sup>241</sup> See CENT. PARK CONSERVANCY, ANNUAL REPORT 7 (1990). See also KINKEAD, *supra* note 12, at 159 (chronicling the organization of birdwatchers through the Central Park Precinct Community Council); ROSENZWEIG & BLACKMAR, *supra* note 136, at 513 (chronicling the constraining influence of criticism by the Friends of Central Park).

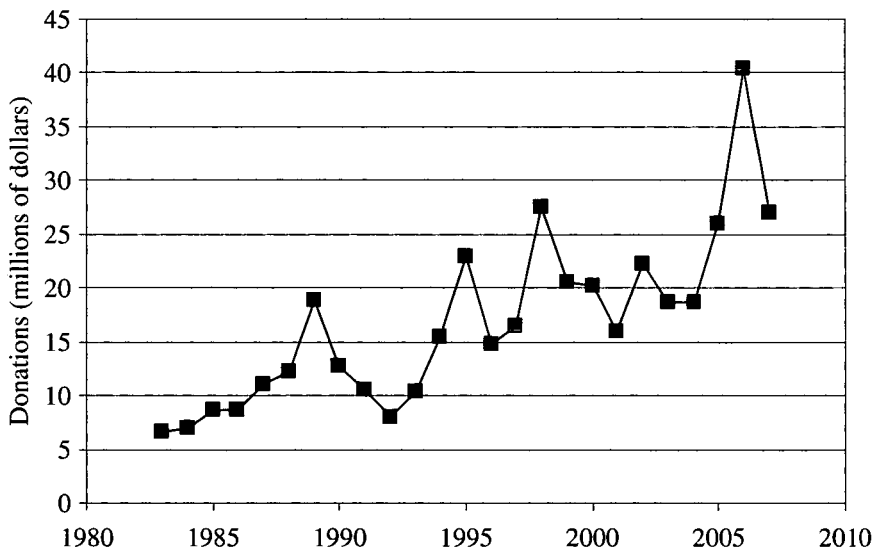
<sup>242</sup> Blonsky Interview, *supra* note 6.



agreements signified that such responsibility was attained and financial efficacy assured.

Of course, the overall success of the CPC as a manager is crucial to the CPC's success as a fundraiser, or in the terms of the NPO model, as an outlet for residual demand.<sup>243</sup> To put it simply, without management success, the CPC fails as a responsible agent for the park and donors will not feel comfortable giving to the CPC, regardless of reduced monitoring costs. Statistical evidence confirms the widespread perception that the CPC, praised as a "new form of government" by former Parks Commissioner Henry Stern,<sup>244</sup> is a successful manager.<sup>245</sup>

FIGURE 2. DONATIONS<sup>246</sup>



Usership provides the best assessment of the Conservancy's management because it is an evaluative measurement.<sup>247</sup> Usership has consistently increased during the CPC's operation. The overall number of users has increased from fourteen million in 1989 to twenty-five million in 2007.<sup>248</sup> The

<sup>243</sup> This point assumes informed donors.

<sup>244</sup> Martin, *supra* note 57.

<sup>245</sup> Crime data does not contradict this positive story. Crime in the Central Park precinct, which includes all of and only Central Park, decreased 73.64% between 1990 and 2008, approximately the same percentage decrease as New York City experienced overall (77.64%). Compare Police Dep't, City of N.Y., CompStat, Vol. 16, No. 52: 22nd Precinct (Dec. 27, 2009) (on file with the Harvard Law School Library), with Police Dep't, City of N.Y., CompStat, Vol. 16, No. 52: Citywide (Dec. 27, 2009) (on file with the Harvard Law School Library).

<sup>246</sup> Data compiled by author from CPC Annual Reports. See 1984 ANNUAL REPORT, *supra* note 185, through 2007 ANNUAL REPORT, *supra* note 1. Amounts are in 2008 dollars.

<sup>247</sup> It is important to distinguish between evaluative measurements and outputs.

<sup>248</sup> Compare CENT. PARK CONSERVANCY, ANNUAL REPORT 14 (1989), with 2007 ANNUAL REPORT, *supra* note 1, at 3.

usership of particular programs has similarly increased. The number of individuals who utilize the visitor center, for example, has increased from two hundred thousand in 1988 to a stable figure of five hundred thousand in recent years,<sup>249</sup> peaking at eight hundred thousand in 1999.<sup>250</sup>

Economic data confirms the story that usership statistics outline. According to a recent study, the revitalization of Central Park has provided a one billion dollar economic lift to the city.<sup>251</sup> Real estate value increases<sup>252</sup> traceable to the revitalization of the park amount to \$18.2 billion.<sup>253</sup> In particular, real estate values at the north end of the park have increased 175%.<sup>254</sup> Since real estate is taxed, the Central Park Administrator has rightly observed that “private monetary giving is creating public revenues.”<sup>255</sup>

The financial security of the park also confirms the success of the CPC. Expenditures have increased in real terms throughout the CPC’s history despite fluctuating revenues, in contrast to the wide swings in expenditures under government funding.<sup>256</sup> The increase in donations, both in terms of the amount of money and in terms of the number of individuals, also provides a good indicator of the success of the Conservancy because it is reasonable to presume that donors monitor their money. Donations, of course, have been increasing, and the number of restricted donations, or untrustworthy contributions, have been decreasing.<sup>257</sup> The number of entities contributing also has increased, from approximately twelve thousand in 1988 to over forty thousand in 2007.<sup>258</sup> All told, the evidence is consistent with the conclusion that the CPC is a successful manager, one that inspires confidence in individuals to take advantage of the CPC’s lower monitoring costs for their donations.

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<sup>249</sup> Compare CENT. PARK CONSERVANCY, ANNUAL REPORT 8 (1988) [hereinafter 1988 ANNUAL REPORT], with CENT. PARK CONSERVANCY, ANNUAL REPORT 5 (2002).

<sup>250</sup> CENT. PARK CONSERVANCY, ANNUAL REPORT 5 (1999). The number of students visiting the park for educational programs also has increased, albeit much more modestly, from eight thousand to ten thousand. Compare 1988 ANNUAL REPORT, *supra* note 249, with CENT. PARK CONSERVANCY, ANNUAL REPORT 11 (2002). Nonetheless, student usership did spike to thirty thousand in the mid-1990s. CENT. PARK CONSERVANCY, ANNUAL REPORT 14 (1994).

<sup>251</sup> Blonsky Interview, *supra* note 6.

<sup>252</sup> See Anup Malani, *Valuing Laws as Local Amenities*, 121 HARV. L. REV. 1273, 1274 (2008) (arguing for the use of real estate values as a means of evaluating laws).

<sup>253</sup> Blonsky Interview, *supra* note 6. See also APPLESEED, VALUING CENTRAL PARK’S CONTRIBUTIONS TO NEW YORK CITY’S ECONOMY 4, 9 (2009), available at <http://www.appleseedinc.com/reports/centralpark-may2009.pdf> (noting \$17.7 billion in added market value from the “Central Park effect” in 2007, and observing that this figure is probably greater in 2009).

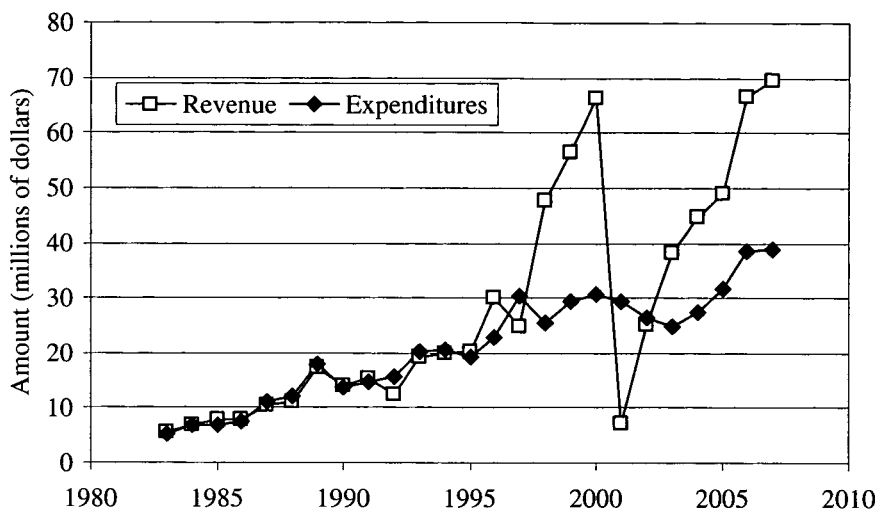
<sup>254</sup> Blonsky Interview, *supra* note 6. See also APPLESEED, *supra* note 253, at 13 (noting increase in value of 115% in 2007).

<sup>255</sup> Blonsky Interview, *supra* note 6.

<sup>256</sup> See *infra* Figure 3 accompanying note 259. It is important to note that shortfalls and excess revenue carry over from year to year and some excess revenue is devoted to increasing the endowment.

<sup>257</sup> See *id.*; *supra* Figure 2 accompanying note 246.

<sup>258</sup> See 1988 ANNUAL REPORT, *supra* note 249, at 2.

FIGURE 3. EXPENDITURES AND REVENUES<sup>259</sup>

## 2. *Restricted Donations*

The CPC relies on restricted donations. These restrictions affect project selection. The importance of restricted donations can be explained by extending Hansmann's contract failure theory to the internal dynamics of NPOs. This section first describes how restricted donations work in the CPC, and then explains how they are consistent with, but extend, Hansmann's theory. Research on impure altruism also indicates that the restriction of donations helps to overcome the free-rider problem.

Donations come in two varieties: restricted and unrestricted. Restricted donations are pledged by donors to a particular purpose through a formal agreement.<sup>260</sup> The CPC complies with New York not-for-profit corporation law and sets aside restricted funds in a separate account.<sup>261</sup> Common purposes include permanent projects, such as the restoration of a statue or the creation of a plaza, and recurring expenditures, such as the payment of a zone gardener's salary or the funding of an educational program. The percentage of restricted donations generally has decreased.<sup>262</sup> In 1987, over seventy percent of donations were restricted.<sup>263</sup> In 2007, by contrast, less

<sup>259</sup> Data compiled by author from CPC Annual Reports. See 1984 ANNUAL REPORT, *supra* note 185, through 2007 ANNUAL REPORT, *supra* note 1. Amounts are in 2008 dollars.

<sup>260</sup> E-mail from Doug Blonsky, Cent. Park Administrator and President of the Cent. Park Conservancy, to author (Apr. 24, 2008, 08:01:08 EST) (on file with author).

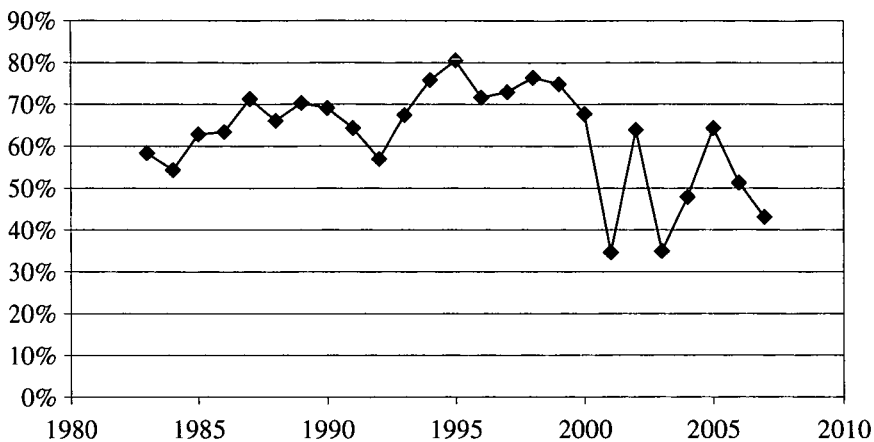
<sup>261</sup> See N.Y. NOT-FOR-PROFIT CORP. LAW § 513(b) (McKinney 2009) (detailing requirement of separate account); *id.* at § 522 (detailing allowable uses for the fund and exceptions to restrictions).

<sup>262</sup> See *infra* Figure 4 accompanying note 268.

<sup>263</sup> See CENT. PARK CONSERVANCY, ANNUAL REPORT 22 (1987).

than forty-five percent of donations were restricted.<sup>264</sup> The trend is complicated by the increased restriction in the mid-1990s, but this exception can be explained by the parallel increase in new construction during the mid-1990s<sup>265</sup> because funds for new construction tend to be raised with particular projects in mind. The early CPC's practice of breaking down construction and maintenance expenditures by type of revenue stream — restricted or unrestricted — confirms this intuition.<sup>266</sup> The percentages of these types of expenditures from restricted funds increased during the renovations of the mid-1990s.<sup>267</sup>

FIGURE 4. RESTRICTED DONATION PERCENTAGE<sup>268</sup>



The Conservancy may be trying to counter its image as an organization controlled by elites by encouraging more unrestricted donations. One Central Park administrator, “disput[ing] the perception that the swells [of rich donors] have gained undue influence over the park’s personality,” parried that a “solid body” of donors give \$35 to \$1000.<sup>269</sup> Pressing the point perhaps too far, she emphasized that “[e]ven kids with lemonade stands raise pennies and give us the pennies,” and concluded that “[i]t’s a misconception that it’s only rich people [giving to the Park].”<sup>270</sup> Such rhetoric in response to charges of elitism is not unique. For example, a few years earlier

<sup>264</sup> See 2007 ANNUAL REPORT, *supra* note 1, at 25.

<sup>265</sup> See 1984 ANNUAL REPORT, *supra* note 185, through 1995 ANNUAL REPORT, *supra* note 234.

<sup>266</sup> Construction revenues are overwhelmingly restricted in the reports for these years. See *id.*

<sup>267</sup> See 1988 ANNUAL REPORT, *supra* note 249, through 1995 ANNUAL REPORT, *supra* note 234.

<sup>268</sup> Data compiled by author from CPC Annual Reports. See 1984 ANNUAL REPORT, *supra* note 185, through 2007 ANNUAL REPORT, *supra* note 1.

<sup>269</sup> Alex Williams, *Is ‘Keep Off the Grass’ Elitist?*, N.Y. TIMES, Aug. 29, 2004, § 9, at 8.

<sup>270</sup> *Id.*

two CPC leaders wrote a letter to the editor of the *New York Times* characterizing the donor base as diverse and anonymous, without controlling influence or designs on power:

The vast majority of donors to the Central Park Conservancy do *not* give because their windows face the park or because they desire social status. Most are *just* individual and corporate New Yorkers who give money and volunteer services, *large and small*, to ensure that Central Park is safe and beautiful.<sup>271</sup>

Close analysis of the CPC annual reports themselves also arguably suggests an increasing practice of not publicizing donor involvement, at least in the 1990s. In the 1988 annual report, for example, nearly every one of the dozens of projects described was credited to a donor.<sup>272</sup> By the late 1990s, however, references to donors were rarer.<sup>273</sup> That trend has changed back very recently,<sup>274</sup> perhaps due to declining revenue in the economic downturn.

Yet, despite public efforts to the contrary, the Conservancy remains dependent on its restricted donors. Restricted donations continue to constitute a significant percentage of Conservancy funds. While the share of restricted donations has declined from the sixty-three percent twenty-year average in recent years, restricted contributions nonetheless have constituted approximately fifty percent of donations since 2000.<sup>275</sup> The recent improvements in lighting in the south end of the park, for example, were financed primarily by the Central Park South Improvement Corporation, a private group of residents.<sup>276</sup> This dependency in part stems from the fact that fundraising is easier when a donor can be shown “something to look at.”<sup>277</sup>

Restricted donations affect Conservancy expenditures. The annual reports indicate that in the prime building years of 1988 through 1995, over

<sup>271</sup> A.J.C. Smith & Ira M. Millstein, Letter to the Editor, *New Yorkers Give, for a Park That Shines*, N.Y. TIMES, Nov. 25, 1999, at A36 (emphases added).

<sup>272</sup> See 1988 ANNUAL REPORT, *supra* note 249.

<sup>273</sup> See CENT. PARK CONSERVANCY, ANNUAL REPORT (1998); CENT. PARK CONSERVANCY, ANNUAL REPORT (1999).

<sup>274</sup> See 2007 ANNUAL REPORT, *supra* note 1 (listing a donor after most projects).

<sup>275</sup> See CENT. PARK CONSERVANCY, ANNUAL REPORT (2000) through 2007 ANNUAL REPORT, *supra* note 1.

<sup>276</sup> For other examples of restricted donations in practice, see, for example, Denny Lee, *Park Plan Ruins Romance, Critics Say*, N.Y. TIMES, Sept. 25, 2003, at B3. See also Geraldine Fabrikant & Shelby White, *Noblesse Oblige . . . With Strings*, N.Y. TIMES, Apr. 30, 1995, § 3, at 1 (“Interviews with some of the mega-billionaires who top the Forbes magazine list of America’s richest people, and an analysis of the activities of their charitable foundations, indicate that they generally take the same approach to doling out their money as they did in amassing it: they drive tough bargains.”); Anne Raver, *Cherishing Landscapes as Living Art*, N.Y. TIMES, Nov. 30, 1995, at C1 (“They have a donor, and he wants to make a new statement.”); Stephanie Strom, *Big But Not Easy*, N.Y. TIMES, Nov. 15, 2004, at F1 (“More than ever before, donors are tying strings to their gifts and pulling them hard to ensure that their dollars do exactly what they want them to do.”). Of course, the percentage of restricted donations, as opposed to the amount, has declined.

<sup>277</sup> Millstein Interview, *supra* note 141.

seventy percent of construction was funded by restricted donations.<sup>278</sup> This trend indicates that the construction performed by the Conservancy was closely tied to the desires of the donors. To be sure, donors could be convinced by the CPC to support certain projects, instead of the reverse. The evidence, consequently, only strongly suggests, but cannot prove, responsiveness to donor concerns.

The correlation between the concentration of projects and the residences of donors also suggests responsibility to donors in project selection. Anecdotally, the Conservancy is reputed to have been slower to restore the northern portions of the park, near Harlem, than the more southern and eastern areas.<sup>279</sup> An analysis of the donations for projects described in the annual reports supports this assessment.<sup>280</sup> Twenty-nine projects north of Ninety-seventh Street<sup>281</sup> were described in the annual reports, but nine, or thirty-one percent, of these were funded by city dollars. If the projects associated with the Conservatory Garden, a popular leisure-class destination, are excepted, then the City paid for almost half of the Upper Park projects (nine of twenty-two). And none of the private funds were contributed before 1993, excepting the Conservatory Garden. On the contrary, over 145 projects south of Ninety-seventh Street were described in the annual reports and only twenty of these, or thirteen percent, were funded by city dollars. In short, south of Ninety-seventh Street approximately 3.15 projects per street were donated and less than one in seven projects used city funds, while north of Ninety-seventh Street approximately 2.07 projects per street were donated and approximately one in four used city funds. These figures are exacerbated if the Reservoir is used as the dividing line. North of Ninetieth Street, thirty-eight projects, or 1.9 per street, were donated and thirty-seven percent of these (fourteen) used city funds, while south of Ninetieth Street one hundred and thirty-six projects, or 3.45 per street, were donated and eleven percent of these (fifteen) used city funds. To be sure, more points of interest in the park lie further south. The point, however, is that the Conservancy disproportionately spent its dollars in the areas of the park surrounded by the wealthiest residents, those who donate.<sup>282</sup>

If the Conservancy's donors are generally wealthy neighbors of the park, it would come as no surprise that restricted donation projects concen-

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<sup>278</sup> See 1988 ANNUAL REPORT, *supra* note 249, through 1995 ANNUAL REPORT, *supra* note 234. In fact, from 1990 to 1995, the annual percentage was well over eighty-five percent. See *id.*

<sup>279</sup> See Anderson, *supra* note 223. Millstein claims that it is not hard to raise money for the northern end, see Millstein Interview, *supra* note 141, but construction allocation does not confirm this account.

<sup>280</sup> See Appendix, *infra* accompanying note 454.

<sup>281</sup> Ninety-seventh Street is an appropriate line because of the road at this location dividing the Upper Park from the Reservoir area.

<sup>282</sup> The residents living around Central Park inhabit some of the most expensive real estate in the world. In 1990, for example, the 262 structures surrounding the park were worth \$2.5 billion in total. By contrast, all the property in Manhattan was worth \$40 billion. KINKEAD, *supra* note 12, at 227.

trate in the wealthy areas.<sup>283</sup> The Conservancy itself believes its donors are wealthy neighbors: it has asserted that eighty percent of its donations come from twenty percent of the donors and that hundreds of these donors live within a block of the park.<sup>284</sup> The Conservancy has also moved to tap groups and individuals located close to the park. It quickly created a Central Park Perimeter Association in 1986 to raise money from residents of the surrounding blocks.<sup>285</sup> By the mid-1990s, it had secured donations from seventy percent of the buildings rimming the park.<sup>286</sup>

And, as with many charities, the vast majority of the Conservancy's donations originate from a handful of extremely wealthy donors. For example, in 1988, 159 donors contributed over eighty percent of the nearly seven million dollars in donations.<sup>287</sup> The remaining twelve thousand donors, including individuals, corporations, and foundations, contributed a little over a million dollars, or about a hundred dollars per person.<sup>288</sup> Similarly, in 2000, approximately sixty donors contributed well over two-thirds of the sixteen million dollars in donations.<sup>289</sup> These revenue data portray the CPC as funded by wealthy donors who target, or restrict, their donations to particular projects. The point has been put more colloquially by one Parks Department official, who responded to the Harlem community's complaint about neglect of the northern end of the park by confiding that "people with money don't live near there."<sup>290</sup>

The prevalence of restricted donations requires an extension of Hansmann's theory of contract failure. Hansmann argues that NPOs, as opposed to for-profit firms, form because individuals want to make sure that they obtain quality for their donations, and the nondistribution constraint assures that goal.<sup>291</sup> The restricted donation trend suggests that individuals want to further direct their donations even within the NPO to obtain the

<sup>283</sup> Obviously, the correlation may raise issues of inequality, but these are beyond the scope of this Article. What is most relevant is that the correlation of donor location and project location confirms the theory this Article proposes.

<sup>284</sup> Heard, *supra* note 89. See ROSENZWEIG & BLACKMAR, *supra* note 136, at 523 (quoting a benefactor commenting that "[i]n the real estate field . . . it's just smart business for us to try and improve the quality of life in the city where we have our major holdings"); TATE, *supra* note 56, at 145 (noting that the high edge-to-area ratio has helped property values and, therefore, donations); William Neuman, *In an East Village Co-op, The Famous Stick Together*, N.Y. TIMES, Apr. 17, 2005, § 11, at 2 (describing how a new apartment building bordering the park will contribute one hundred thousand dollars to the Conservancy).

<sup>285</sup> See ROSENZWEIG & BLACKMAR, *supra* note 136, at 515.

<sup>286</sup> 1995 ANNUAL REPORT, *supra* note 234, at 11. This figure, of course, does not account for the individuals who give in their own name instead of, or in addition to, as a part of their buildings. The Conservancy recently reported donations from 115 buildings. Perimeter Association, [http://www.centralparknyc.org/site/PageNavigator/womenscommittee\\_PerimeterAssociation](http://www.centralparknyc.org/site/PageNavigator/womenscommittee_PerimeterAssociation) (last visited Jan. 2, 2010) (on file with the Harvard Law School Library).

<sup>287</sup> Calculated by author based on analysis of 1988 CPC Annual Report. See 1988 ANNUAL REPORT, *supra* note 249.

<sup>288</sup> See *id.*

<sup>289</sup> Calculated by author based on analysis of 2000 CPC Annual Report. See CENT. PARK CONSERVANCY, ANNUAL REPORT (2000).

<sup>290</sup> Anderson, *supra* note 223.

<sup>291</sup> See *supra* Part II.B.

quality they seek.<sup>292</sup> The nondistribution constraint is not enough, contrary to Hansmann's theory, to satisfy donors. In other words, donors want to control which project they donate to, and they do not trust the NPO to refrain from using their contributions for other less worthy projects. Consequently, they restrict the donation to eliminate their need to monitor internal NPO spending, undoubtedly a difficult or impossible task.

In essence, restricted donors seek, through their restrictions, to create NPOs within the NPO. These "mini"-NPOs are constrained from distributing their revenues to purposes outside their small scope. This theorization is consistent with the formation, on occasion, of individual incorporated entities to raise funds for certain projects.<sup>293</sup> Restricted donations, therefore, are critical for the attraction of contributions to an NPO because they help to reduce monitoring costs for donors. Of course, insofar as donors do not properly perceive the quality of projects, restricted donations may lead to ineffective allocations of donations.

Impure altruism research also teaches that restricted donations may be critical to NPO funding in a less positive way, by solving the free-rider problem with private interest. Donors may seek to specifically direct their donations for several reasons. They may feel that the project they select is the most efficient use of their funds. These are the pure altruists.<sup>294</sup> Hansmann's approach must be extended to account in NPO theory for the restricted donation behavior of pure altruists, as discussed in the preceding paragraph.

The correlation of donors and projects, however, suggests that impure altruism is at least in part explanatory: donors can more easily derive tangible or intangible benefits<sup>295</sup> from and monitor their donations to nearby projects. A vast literature confirms the prevalence of impure altruism.<sup>296</sup> Studies show that donors receive "warm glow" from their donations — they "feel" better when giving.<sup>297</sup> One study argues that these psychological ben-

<sup>292</sup> Impure altruists have other goals, as discussed below.

<sup>293</sup> The Grand Army Plaza renovation is an example of the formation of such an organization.

<sup>294</sup> The literature uses the term "pure altruist" to refer to those who care only about the public good. This definition also means that the pure altruist will not give if the public good is secured through government funding or others who do not free-ride. See Rose-Ackerman, *supra* note 107, at 713 (criticizing this nomenclature for its discord with common sense). I use the term impure altruism in the common sense way, to denote private benefit only, not "warm glow." For this Article, therefore, pure altruists may obtain psychological benefits for themselves and yet remain pure.

<sup>295</sup> Ira Millstein also notes that there is an important social element to the fundraising, as well as an emotional element due to love of the park. Millstein Interview, *supra* note 141.

<sup>296</sup> This literature is interdisciplinary. See generally Richard Cornes & Todd Sandler, *The Comparative Static Properties of the Impure Public Good Model*, 54 J. PUB. ECON. 403 (1994); Ernest Fehr & Urs Fischbacher, *The Nature of Human Altruism*, 425 NATURE 785 (2003); Jane Allyn Piliavin & Hong-Wen Charng, *Altruism: A Review of Recent Theory and Research*, 16 ANN. REV. SOC. 27 (1990).

<sup>297</sup> See James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm Glow Giving*, 100 ECON. J. 464 (1990) (coining the term "warm glow"). For examples of more recent studies confirming the warm glow hypothesis, see, for example, Heidi Crumpler & Philip J. Grossman, *An Experimental Test of Warm Glow Giving*, 92 J. PUB. ECON. 1011 (2008), finding donation rates of twenty percent, and David C. Ribar & Mark O. Wilhelm,



efits are strongest when donors can bundle their donations towards a particular project.<sup>298</sup> This type of impure altruism is not necessarily socially harmful. But, of course, donors receive private benefits when their contributions increase their social standing<sup>299</sup> or property value. As the economic literature notes, private benefits from donations can overcome the free-rider problem.<sup>300</sup>

In this sense, restricted donations may play a crucial but potentially troubling role in the funding of NPOs, in which private interest dominates public interest.<sup>301</sup> Whether restricted donations should be viewed as primarily positive — as a way for pure altruists to reduce monitoring costs, encouraging donations — or potentially problematic — as a way for impure altruists to secure rents — depends on the proportion of pure and impure altruists in the donor base. It also depends on the accuracy of pure altruists in their evaluation of the quality of projects and the balancing of the ineffectiveness created, if any, by impure altruists prioritizing private over public interest against the possibility of there being too few pure altruists to overcome the free-rider problem.

The CPC management's efforts to reduce the dependency on restricted donations provide an interesting countermove. Management has downplayed the level of restricted donations in the annual reports,<sup>302</sup> sought to establish a fully funded endowment,<sup>303</sup> turned to investment revenue,<sup>304</sup> and increased city funding.<sup>305</sup> All of these moves attempt to increase managerial autonomy from donors. Yet they are not justified, as management sometimes asserts, by financial insecurity — the level of donations is not merely consistent but consistently increasing at the same rate and at a rate equivalent to expenses.<sup>306</sup> The fear underlying the attempt to create a Central

*Altruistic and Joy-of-Giving Motivations in Charitable Behavior*, 110 J. POL. ECON. 425 (2002), finding that joy-of-giving motivates donors on an international scale.

<sup>298</sup> Brian Duncan, *A Theory of Impact Philanthropy*, 88 J. PUB. ECON. 2159, 2159 (2004) (“[A] donor prefers to target his or her contribution at a specific good.”).

<sup>299</sup> See William T. Harbaugh, *The Prestige Motive for Making Charitable Transfers*, AM. ECON. REV., May 1998, at 277, 277; see also E. Allan Farnsworth, *Promises to Make Gifts*, 43 AM. J. COMP. LAW 359 (1995); Manfred Milinski, Dirk Semmann & Hans-Jürgen Krambeck, *Donors to Charity Gain in Both Indirect Reciprocity and Political Reputation*, 269 PROC. ROYAL SOC. LONDON B 881 (2002).

<sup>300</sup> See Rose-Ackerman, *supra* note 107, at 713. Social pressure also helps. See Martha Kropf & Stephen Knack, *Viewers Like You: Community Norms and Contributions to Public Broadcasting*, 56 POL. RES. Q. 187 (2003); James Andreoni, *Toward a Theory of Charitable Fund-Raising*, 106 J. POL. ECON. 1186, 1186 (1998) (arguing that “leadership givers,” such as board members, are critical to fundraising efforts).

<sup>301</sup> This is a point where Weisbrod's theory, which assumes that donors will donate to public goods despite the free-rider problem, is weak, but can be easily corrected by highlighting the individualized economic benefits of restricted donations and the other types of private benefits from donating, such as increased social standing. See *supra* Part II.A.

<sup>302</sup> See *supra* text accompanying notes 272–274.

<sup>303</sup> Blonsky Interview, *supra* note 6.

<sup>304</sup> The dependence on investment revenue explains the revenue downturn in 2001. See CENT. PARK CONSERVANCY, ANNUAL REPORT 15 (2002); *supra* Figure 3 accompanying note 259.

<sup>305</sup> Contract revenue was also secured to supplement donations. Martin, *supra* note 193.

<sup>306</sup> See *supra* Figure 2 accompanying note 246.

Park BID in the 1990s has proven unfounded.<sup>307</sup> This battle between restricted donations and managerial control has two possible explanations. It may demonstrate that the CPC is not immune, despite its NPO nondistribution constraint and restricted donations, to principal-agent problems — agents do not like to be easily monitored. Alternatively, it may suggest that the CPC has now sufficiently overcome the free-rider problem through social pressure so as to not need the restricted donation carrot, and that management has concluded that restricted donations so ineffectively allocate resources due to misvaluation of quality by pure altruists or prioritization of private interest by impure altruists that they are not worth collecting when the free-rider problem is already overcome without them. The truth may be a combination of both.

### C. Conclusion

This case study demonstrates that the CPC took responsibility for the park in several ways and that these moves reduced the cost of monitoring the management of Central Park. First, the CPC took responsibility for the physical and financial management of the park and for assuring that public funding would not decrease due to private donations. It replaced a park government system of diffuse accountability and budgetary instability. This contrast between centralized and diffuse oversight explains the formation of the NPO and why donors did not simply give to the government. Centralization reduced the high monitoring cost for donating to the public good directly through the government and provided a low monitoring cost alternative for residual demand for the public good. Second, the CPC increasingly took responsibility for management of the park and operated through restricted donations in a way responsible to its contributors. These moves allowed the CPC to continue to serve as the outlet for residual demand for the public good of Central Park<sup>308</sup> and to further assure purely altruistic donors — without imposing high monitoring costs — that their donations would not reduce public monies and would fund only the projects they viewed as high quality.

The evidence, therefore, is consistent with the two new steps in the refined model. The CPC formed, so the refined model predicts, because it took responsibility for the park with respect to physical and financial management and prevented reverse crowding out of public funds. This move reduced monitoring costs, which can be a strong barrier to private funding of

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<sup>307</sup> See Ira M. Millstein, Letter to the Editor, *Let Neighborhoods Tax Themselves to Rescue Their Parks*, N.Y. TIMES, Feb. 4, 1995, § 1, at 18; Editorial, *Saving the City's Backyards*, N.Y. TIMES, Jan. 25, 1995, at A20. Of course, a BID may increase revenues, although the evidence suggests that such assessments would crowd out public funds. See *supra* note 122 and accompanying text (describing crowd out literature).

<sup>308</sup> It also may have tapped into the residual demand for parks in general, if two-tier critics are correct about private as well as public financing. See *supra* note 89 and accompanying text.

government or private managers. The CPC, in fact, did take responsibility for the park and, as one of its first moves, sought assurances that no crowding out would occur. These CPC attitudes continued with the operation of the park. The refined model also predicts that the CPC would remain responsible to its donors and that the Hansmann contract failure theory would extend into the NPO. The restricted donation phenomenon for pure altruism supports this step — restricted donations further reduce monitoring costs. Restricted donations, of course, also help to explain the overcoming of the free-rider problem in a world of impure altruism.

## V. BRYANT PARK

The modern era of Bryant Park began with the rise of the Bryant Park Business Improvement District approximately twenty years ago. This Part discusses the rise of the Bryant Park Restoration Corporation (“BPRC”) as the manager of the BID, the role the BPRC plays in Bryant Park, and its effectiveness in that role. This discussion reveals that the BPRC is fundamentally similar to the CPC in function and revenue — both NPOs, after all, manage public parks.

More importantly, this Part highlights both the formation of the BPRC as a donative NPO like the CPC and its transformation into a commercial NPO. In its formation and early stages, the BPRC relied on contributions — assessments and donations — from the surrounding community. As the organization aged, however, it shifted its dependence to market-based revenues such as user fees and rental income.

The refined model can explain the formation and early practice of the BPRC, when it had significant donative elements. Like the CPC, the BPRC’s taking of physical and financial responsibility from the government reduced the cost of monitoring contributions to the public good of Bryant Park. Taking physical responsibility reduced the monitoring costs for management quality, and taking financial responsibility reduced the monitoring costs for donation efficacy. This reduction encouraged residual demand to be channeled towards the BPRC.

The model has less obvious explanatory power regarding the BPRC’s later commercial NPO phase. Ultimately, though, this Part demonstrates that a commercial NPO merely substitutes one type of responsibility — to the market — for another type of responsibility — to the donors. Responsibility is still the key concept; only its object (at Step Four of the refined model) differs. Thus, the following analysis suggests that the important distinction between the BPRC and the CPC in organizational form is not that the former is a BID while the latter is a friends group, but rather that the former is now a commercial NPO, beholden to the market, while the latter is a donative NPO, beholden to donors.

### A. *The Rise of the Bryant Park Restoration Corporation*

#### 1. *History and Status of the Park*

Bryant Park began as a potter's field in 1823, a state to which it had returned by the mid-twentieth century. The park was erected in the style of an English square in the latter part of the nineteenth century, before the nearby New York Public Library was completed in 1911.<sup>309</sup> The park quickly fell into disuse and decline, even becoming the dumping ground for the earth displaced by the subway in the 1930s.<sup>310</sup> As the *New York Times* summarized, the park by that time had become an "inadequately maintained disaster."<sup>311</sup>

Parks Commissioner Robert Moses renovated the park upon taking office in 1934.<sup>312</sup> Consistent with prominent park philosophy at the time, the renovations generally reduced visibility, increased shade, and decreased access in an effort to make the park into a refuge from the city.<sup>313</sup> The consequences, however, were disastrous. Insufficient funding exacerbated the natural security problems arising from the poor lighting, limited visibility, and scarce entrances of the Moses renovation. In the 1970s, thirteen rapes and one hundred fifty robberies occurred on average each year in the park.<sup>314</sup> Usership declined to one thousand people at the peak lunchtime hour, one-fifth of the capacity of the space, and female usership, an indicator of the safety of the park, declined from forty-two percent of users in the early 1970s to twenty-nine percent of users in 1979.<sup>315</sup> Calls for the park's closure were frequent. The police department, in fact, began closing the park with barricades at nine o'clock at night in 1973.<sup>316</sup> The Parks Department consistently threatened to abandon the facility unless volunteers from the community came forward.<sup>317</sup> Although the volunteers stayed home, the park stayed open despite its poor state. In short, by the late 1970s, the park was underfunded and poorly maintained, and private involvement was minimal.

#### 2. *Formation of the Bryant Park Restoration Corporation*

The BPRC formed in 1980, centralizing management and revenue-raising responsibility for the park into an NPO.<sup>318</sup> Public officials moved to

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<sup>309</sup> ALEXANDER GARVIN & GAYLE BERENS, *URBAN PARKS AND OPEN SPACE* 45 (1997).

<sup>310</sup> See *id.* at 46; Bryant Park, Bryant Park Is Born, <http://www.bryantpark.org/history/bryant-park-born.php> (last visited Jan. 2, 2010) (on file with the Harvard Law School Library).

<sup>311</sup> Editorial, *Restoring Bryant Park*, N.Y. TIMES, Jan. 23, 1928, at 20.

<sup>312</sup> GARVIN & BERENS, *supra* note 309, at 45-46.

<sup>313</sup> See *id.*

<sup>314</sup> TATE, *supra* note 56, at 30.

<sup>315</sup> *Id.*

<sup>316</sup> J. WILLIAM THOMPSON, *THE REBIRTH OF NEW YORK CITY'S BRYANT PARK* 21 (1997).

<sup>317</sup> *Id.*

<sup>318</sup> See Certificate of Incorporation of Bryant Park Restoration Corporation, Jan. 10, 1980 (on file with the Harvard Law School Library). The organization was renamed Bryant Park Corporation in 2006.

form the BPRC just as they had moved to form the CPC. Here, however, the original motivation was less direct. The Rockefeller Brothers Fund refused to support the renovation of the adjacent library unless the park was renovated. In response, the Chairman of the Library, Andrew Heiskell, hired a twenty-six-year-old Harvard Business School graduate, Daniel Biederman,<sup>319</sup> and formed the BPRC to take responsibility for the park.<sup>320</sup> A BID was formed to partially fund the BPRC.<sup>321</sup>

The BPRC completely renovated the park, pursuant to a management agreement with the City.<sup>322</sup> The restoration cost over seventeen million dollars and was funded by a combination of public, charitable, and private investment sources. Approximately half of the funding came from the City, while the other half came from the private sector.<sup>323</sup> New York City contributed nearly six million in capital funds, grants and donations yielded three million, district assessments yielded one million, and the rest came from bank loans (four million) and, surprisingly, private venture capital investment (four million).<sup>324</sup> Notably, the BID model did not itself provide enough funding for start-up renovations: public and private sources were necessary supplements.

The BPRC acted in two ways that are consistent with the refined model's focus on responsibility and allowed it to reduce monitoring costs and become more attractive than government. First, the BPRC obtained full management and financial control of the park. Second, the BPRC obtained assurances regarding city contributions to the park. These two acts parallel the CPC's formative moves. The BPRC's story, however, is more compli-

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<sup>319</sup> The renown of the BPRC CEO, Daniel Biederman, contributes to the centralization of responsibility for the park. Known as the "Mayor of Midtown," Daniel Biederman at one time headed the Grand Central Partnership and the BPRC, two pivotal local government organizations. Biederman's ability and willingness to take personal responsibility for the park, including personally resisting unions and City Hall, supplement the responsibility BPRC bears due to its budgetary control. See Sam Roberts, *Metro Matters; Cleanup Drive with a Heart Alters Midtown*, N.Y. TIMES, Nov. 30, 1989, at B1.

<sup>320</sup> TATE, *supra* note 56, at 26–27. The details of this organization — officers, elections, and procedures — will be described in this section. The new organization soon garnered city approval to build new entrances, repair paths and lighting, restore the park's monuments, renovate the closed restrooms, and open two restaurant pavilions and four concession kiosks. It also incorporated the library's need to expand by allowing the creation of stacks under the park's great lawn. See GARVIN & BERENS, *supra* note 309, at 50 (noting that this problem almost ended the renovation).

<sup>321</sup> See Certificate of Incorporation of Bryant Park Management Corporation § 3, June 1, 1983 (on file with the Harvard Law School Library) (establishing organization to receive assessed funds); Certificate of Amendment of the Certificate of Incorporation of the Bryant Park Restoration Corporation § 4, Nov. 16, 1983 (on file with the Harvard Law School Library) (amending BPRC charter to allow it to receive BID funds from Bryant Park Management Corporation). The BID runs between Fortieth and Forty-second Streets between Fifth Avenue and the Avenue of the Americas.

<sup>322</sup> Management Agreement for Bryant Park Between the City of New York and Bryant Park Restoration Corporation, signed July 29, 1985 [hereinafter BP Agreement] (on file with the Harvard Law School Library).

<sup>323</sup> See GARVIN & BERENS, *supra* note 309, at 56; Mouat, *supra* note 54.

<sup>324</sup> See GARVIN & BERENS, *supra* note 309, at 56.

cated: as a BID, its private contributions were more like mandatory taxes than voluntary donations.

The BPRC entered into an agreement with the City in 1985 to obtain full physical and financial control of the park.<sup>325</sup> The agreement, after recognizing the past fundraising success of the BPRC and its nonprofit status,<sup>326</sup> granted the BPRC “the exclusive license and privilege to operate and manage the Park” as a public park.<sup>327</sup> It tasked the BPRC with “maintain[ing] the Park in good, clean and orderly condition,” including performing sanitation, landscaping, maintenance, and security functions.<sup>328</sup> The 1985 agreement also provided the BPRC with complete independence from the City in employment of workers for the park.<sup>329</sup> Daniel Biederman, the BPRC CEO, confirms that this freedom has been critical to the BPRC’s management of Bryant Park because, in his experience, union projects consistently go over budget and past deadline.<sup>330</sup> The BPRC may also propose rule changes for the park.<sup>331</sup> In short, the City passed ultimate responsibility for the park to the BPRC.

To be sure, the City retained some control. For example, the City still has to approve all “major” projects and retains approval power for the BPRC budget.<sup>332</sup> These powers, however, are somewhat misleading. Most approvals of BPRC projects are now handled summarily at the staff level<sup>333</sup> and the first mover advantage<sup>334</sup> also protects BPRC independence. Similarly, the BPRC retains the right to reduce services if the Parks Department rejects its budget;<sup>335</sup> the BPRC’s budget has, unsurprisingly, never been rejected. The first mover advantage also reinforces the BPRC’s ability to threaten reduced services.<sup>336</sup> As the BPRC is the primary caregiver for the park, overseers have to be careful not to anger it.

The BPRC has employed a great deal of entrepreneurial flexibility in its exercise of this responsibility. For example, to avoid the restrictions associated with union labor, including cost, the BPRC constructed “temporary”

<sup>325</sup> BP Agreement, *supra* note 322. See also Letter from Adrian Benepe, Parks Comm’r, to Daniel A. Biederman, CEO of BPRC, Renewal of Agreement for Five Years, June 8, 2007 (on file with the Harvard Law School Library); Letter from Jeremy Waldrup, Ass’t Comm’r, Dep’t of Small Bus. Servs., to Daniel A. Biederman, CEO of BPRC, Renewal of Agreement for Five Years, July 12, 2007 (on file with the Harvard Law School Library). It should be noted that the management agreement has not been renegotiated, but simply renewed, despite changes such as the city’s contribution, because of transaction costs. Biederman Interview, *supra* note 6.

<sup>326</sup> BP Agreement, *supra* note 322, at 1–2.

<sup>327</sup> *Id.* § 3, at 7.

<sup>328</sup> *Id.* § 8, at 17–18.

<sup>329</sup> See *id.* § 16, at 26.

<sup>330</sup> Biederman Interview, *supra* note 6 (recounting how a New York Public Library joint project for sidewalks ran out of money due to union mismanagement).

<sup>331</sup> BP Agreement, *supra* note 322, § 13, at 21.

<sup>332</sup> *Id.* § 15, at 23–26.

<sup>333</sup> Biederman Interview, *supra* note 6.

<sup>334</sup> See *supra* note 231 and accompanying text.

<sup>335</sup> See BP Agreement, *supra* note 322, § 6, at 12.

<sup>336</sup> Biederman Interview, *supra* note 6.

kiosks that remained for several years.<sup>337</sup> Similarly, it was able to quickly change the kiosk operators when they were found to be ineffective.<sup>338</sup> It created a special no-smoking section to make the park more attractive for mothers with children.<sup>339</sup> Perhaps most creatively, it deployed mobile chairs in the French café style to make the park seem more accessible<sup>340</sup> and deployed hawks to combat the pigeon problem.<sup>341</sup> It has also discouraged visits by those individuals Biederman views as “unsavory” by preventing washing in the restrooms and sleeping on mats in the park.<sup>342</sup> All of these steps are consistent with managerial flexibility and control.<sup>343</sup>

The BPRC also secured significant funding stability for the park in the 1985 agreement. First, the agreement requires the City to pay two hundred and fifty thousand dollars annually to the BPRC.<sup>344</sup> Pursuant to a contemporaneous arrangement, the BPRC also receives BID assessments from the city coffers. And the 1985 agreement guarantees that the City will make up any temporary shortfall the BPRC faces.<sup>345</sup> Second, the agreement requires the City to maintain the same level of police and fire protection: BID funds do not crowd out city dollars in that regard. The BPRC has the right to terminate the agreement if the City defaults on these obligations.<sup>346</sup>

The Bryant Park Management Corporation (“BPMC”) charter also provides contributors with control over the spending of funds, much like the restricted donation arrangements in the CPC.<sup>347</sup> The charter creates four classes of voters: property owners, commercial tenants, residential tenants, and BPMC officers.<sup>348</sup> The first class, property owners, is guaranteed a majority on the Board of Directors,<sup>349</sup> which is justified by their financial interest. To be sure, Board supervision is not perfect: the Board only meets two

<sup>337</sup> THOMPSON, *supra* note 316, at 24–25.

<sup>338</sup> See Terry Pristin, *Bryant Park Agency Replaces Kiosk Operators*, N.Y. TIMES, Feb. 22, 2002, at A3.

<sup>339</sup> Ron Scherer, *No Smoking Out Here. This Is a Park*, CHRISTIAN SCI. MONITOR, June 15, 2001, at 1.

<sup>340</sup> See GARVIN & BERENS, *supra* note 309, at 51–52 (quoting sociologist William H. Whyte stating that “[m]ost of the time they don’t move [the chairs] more than a few feet, but somehow it’s a declaration of independence”).

<sup>341</sup> John Ratcliffe & Sheila Flanagan, *Enhancing the Vitality and Viability of Town and City Centres: The Concept of the Business Improvement District in the Context of Tourism Enterprise*, 22 PROP. MGMT. 377, 390 (2004).

<sup>342</sup> Biederman Interview, *supra* note 6.

<sup>343</sup> The use of movies, fashion shows, music, food kiosks, and other measures are also, of course, other evidence of entrepreneurial creativity.

<sup>344</sup> The BPRC later waived this provision due to bureaucratic restraints on the funds. Biederman Interview, *supra* note 6.

<sup>345</sup> See BP Agreement, *supra* note 322, § 7, at 15.

<sup>346</sup> See *id.* § 7, at 16; *id.* § 22, at 36.

<sup>347</sup> While the Bryant Park Management Corporation (“BPMC”), which receives the BID assessments, is technically a different NPO than the BPRC, they are commingled in officership and operation, and in fact produce consolidated financial statements. See, e.g., Bryant Park Restoration Corporation & Bryant Park Management Corporation, Consolidated Financial Statements (June 30, 2007) (on file with author).

<sup>348</sup> See Certificate of Incorporation of Bryant Park Management Corporation, *supra* note 321, § 7, at 4–5.

<sup>349</sup> See *id.* § 8, at 5–6.

times a year for approximately one hour each time.<sup>350</sup> The Board's ultimate authority to withhold funds from the BPRC nonetheless provides assurances that assessments will be used to further the interests of the contributors of the assessments.<sup>351</sup>

These two developments are consistent with Steps One, Two, and Four of the refined model, involving the existence of residual demand, its channeling toward an NGO, and the NGO's use of restricted donations, respectively. A residual demand for the public good of Bryant Park existed, as the model predicts, but was frustrated by the impossibility of ensuring that contributions to the City would go to Bryant Park and be used effectively — the allocation and quality of city services was too costly to monitor. The BPRC's assumption of responsibility for the park ensured contributors that their contributions — here primarily in the form of BID assessments — would go to Bryant Park, and it also allowed them to monitor the quality of performance more easily by centralizing the responsibility for the park's status in one entity.<sup>352</sup> Likewise, the BPRC's success in obtaining assurances of city contributions in turn assured the contributors that the BID assessments and other contributions would not reverse crowd out public dollars, but instead would reach the critical mass needed to be effective. This move made it easier for contributors to monitor funding levels and to apportion responsibility for inadequate funding. Together, these developments reduced the cost of monitoring the BPRC below that of monitoring the government, encouraging the BID's formation. Control of the Board by property owners, moreover, is consistent with Hansmann's contract failure approach and the impure altruism phenomenon described above.<sup>353</sup> This direct control by owners also reduces monitoring costs.

The CPC and the BPRC differ in one important respect: the BPRC formed as a BID, which imposes mandatory assessments on contributors, while the CPC formed as a voluntary charity, which supplicates for funds. In practice, this legal distinction does not make much of a difference because of the role of the CPC Board. By accepting a Board position, board members promise to contribute significant sums to the CPC — and pledge their reputations by doing so.<sup>354</sup> These donations, therefore, are no less mandatory than contributions to the BPRC, although the constraints are social, not legal.

Nonetheless, the BID/non-BID distinction remains. The different types of property owners in the two areas — residences surround most of Central

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<sup>350</sup> Biederman Interview, *supra* note 6.

<sup>351</sup> E-mail from Mayor Ed Koch to author, *supra* note 172 (“The Conservancy approach and the BIDs are not the same, but have a similar goal of community control of an area, park or locality so as to provide services not provided by the city in accordance with community decisions and community dollars raised by those participating with the city budget providing a maintenance of effort.”).

<sup>352</sup> This assurance undoubtedly helped to assure a favorable vote on the BID. Biederman Interview, *supra* note 6.

<sup>353</sup> See *supra* Part II.B.

<sup>354</sup> See Andreoni, *supra* note 300 (discussing the importance of “leadership givers”).



Park, while businesses surround most of Bryant Park — may explain the difference, as it may be that commercial landowners are more likely to free-ride than residential landowners, especially when residents have organized into cooperatives. Social pressure and “warm glow” joys may not hold as much sway for the stereotypically cold-hearted businessperson.<sup>355</sup> Relatedly, it may be that businesses are more likely to be impure altruists, and thus more at home in a BID — either because of psychological attachment to fee-for-service principles or because rents are easier to obtain — while residents are more likely to be, or seek to be, pure altruists, more at home in a friends group. The research on impure altruism, meanwhile, suggests that the explanation may be that the small size of Bryant Park prevents restricted donations.<sup>356</sup>

In the end, the reasons why a BID forms or fails to form do not matter much, nor does the presence or absence of a BID. After all, a BID is voluntary like a friends group in the sense that it must be voted into existence by a supermajority of landowners,<sup>357</sup> even if property-owner control is more important than altruism as an explanation for why the free-rider problem can be overcome for BIDs. The point is that both types of organizations — BID and non-BID — serve as outlets for residual demand for a public good when they obtain assurances that contributions — mandatory or voluntary — will be used by a manager physically and financially responsible for the park and will not be used to crowd out government funds. Both BIDs and non-BIDs thus fit well into the refined model.

### *B. Operation of the Bryant Park Restoration Corporation*

Bryant Park has transformed itself from a donative NPO to a commercial NPO. This transition stretches the refined model proposed by this Article. That model as currently conceived does not predict or explain such a shift because current NPO theories focus on donative NPOs. But that is not to say that the concept of responsibility or the refined model lack relevance. Quite the contrary: a commercial NPO manifests responsibility, but to market forces, not donor desires. And just as responsibility to donors increases accountability for donative NPOs, so responsibility to the market increases accountability for commercial NPOs. The only difference is the means by which the NPOs are held accountable. For donative NPOs, donors monitor through restricted donations. For commercial NPOs, monitoring is done by the market, which incentivizes effective management. In other words, Step Four of the refined model can be fulfilled by market forces as well as restricted donations.

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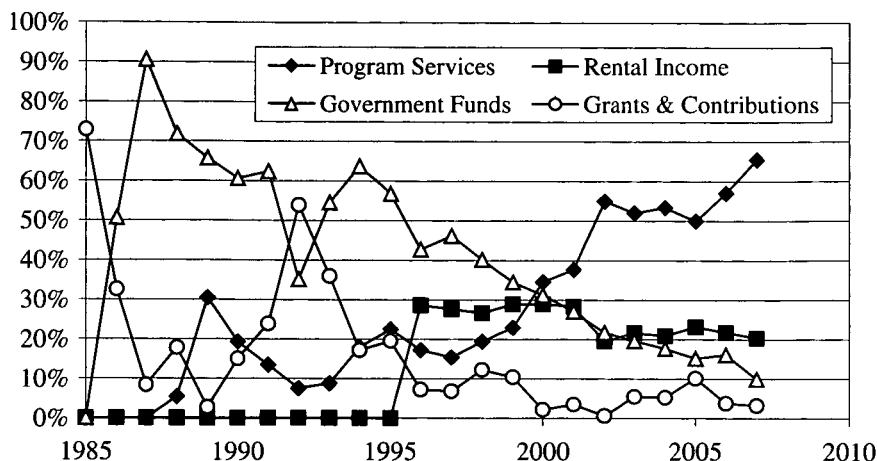
<sup>355</sup> Vast literatures exist on the free-rider problem and the psychological elements of charity, but neither is conclusive in this regard.

<sup>356</sup> See *supra* Part III.

<sup>357</sup> Biederman Interview, *supra* note 6 (recalling that property owners supported the project, with the exception of one large landholder).

Over time, the BPRC's revenues have become market-based, as opposed to contribution-driven.<sup>358</sup> In 1987, government funds — BID assessments and contributions — accounted for over ninety-eight percent of revenue. When the park reopened in 1992, government funds still accounted for forty percent of revenue. In 2007, by contrast, government funds accounted for only ten percent of revenue and had been replaced by program services, largely usage fees and concessions. These market-based funds accounted for about ten percent of revenue when the park opened but nearly seventy percent in 2007.<sup>359</sup>

FIGURE 5. PERCENTAGE REVENUES BY TYPE<sup>360</sup>



The refined model as currently described does not account for this later stage of the BPRC. Now that most of the BPRC's revenues stem from the provision of private goods — concessions, rental income, and events — Weisbrod's public goods theory is largely inapplicable. The refined Step Two is similarly silent. Hansmann's contract failure approach may still account for why the City prefers an NPO to a for-profit firm, even if only for public relations efforts, but the approach, which relies on consumer knowledge of the NPO form, does not seem applicable to the kiosk renter or hungry parkgoer. The refined model, in other words, is limited to donative NPOs, and the BPRC is no longer primarily donative.<sup>361</sup>

<sup>358</sup> See *infra* Figure 5 accompanying note 360.

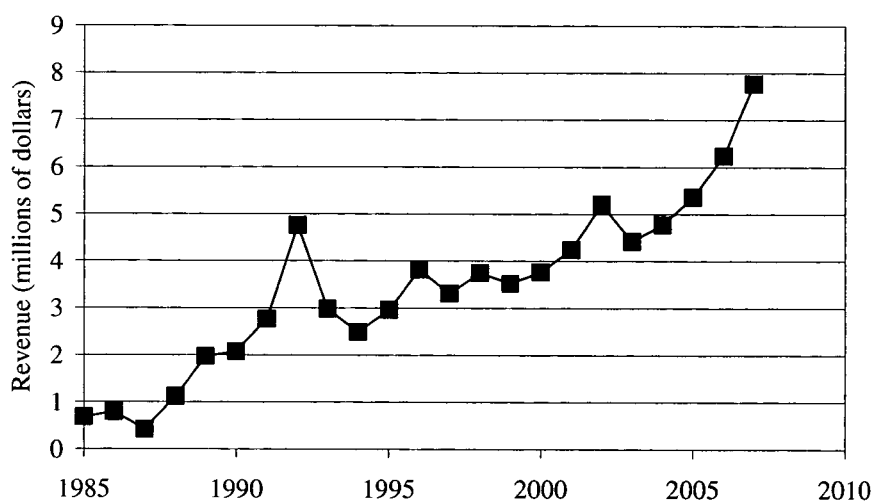
<sup>359</sup> See *id.* The BPRC has also not pursued a remedy for the city's withdrawal of its promised two hundred and fifty thousand dollar annual contribution. Biederman Interview, *supra* note 6.

<sup>360</sup> Data compiled by author from Consolidated Financial Statements of the Bryant Park Restoration Corporation and Bryant Park Management Corporation between 1985 and 2007. See generally Bryant Park Restoration Corp., Bryant Park Revenues (Feb. 14, 2008) (on file with the Harvard Law School Library) (providing chart with consolidated data). Percentages displayed do not include interest income and other miscellaneous revenue sources.

<sup>361</sup> The cost of monitoring may be reduced for a commercial NPO insofar as monitors believe consumer demands are an effective driving force in commercial action.

But that does not mean that the focus on responsibility is not useful as an explanatory tool. The shift from donative to commercial NPO has added a new type of responsibility for the BPRC: management is now accountable to the market for its moves.<sup>362</sup> If it makes a misstep, revenues will suffer. By most accounts, the BPRC management has been successful.<sup>363</sup> For example, the BPRC has experienced consistent revenue growth.<sup>364</sup> Consistent revenues provide an important indicator of success because the largest components of revenues — user fees, concessions, and rents — depend on the attractiveness of the park.<sup>365</sup> The number of requests to hold events in Bryant Park also has vastly increased over the course of the BPRC's management. In the early 1990s, the BPRC received five or six requests a year. By the end of the 1990s, management received ten requests per day.<sup>366</sup>

FIGURE 6. TOTAL REVENUE<sup>367</sup>



<sup>362</sup> This dependence is consistent with Daniel Biederman's pro-market philosophy that "government money makes you lazy." Biederman Interview, *supra* note 6.

<sup>363</sup> One renowned park scholar calls the revitalized Bryant Park "an object lesson in the patient, persistent and professional application of sound business principles in the public realm." TATE, *supra* note 56, at 31. See also WILLIAM C. THOMPSON, JR., COMPTROLLER, REPORT TO THE MAYOR AND CITY COUNCIL ON CITY COMPTROLLER AUDIT OPERATIONS, FISCAL YEAR 2001, at 33 (2002); Glenn Collins, *A Resplendent Park Respite, Mosaic Tiles Included*, N.Y. TIMES, Apr. 4, 2006, at B5 (quoting Parks Commissioner Benepe complimenting the park's revitalization of restrooms); Vitullo-Martin, *supra* note 13.

<sup>364</sup> See *infra* Figure 6 accompanying note 367.

<sup>365</sup> Some private contributions exist. For example, the entrances are decorated with ornate pedestals and globes donated by a private donor. A Gertrude Stein bust was contributed to the park, and the William Cullen Bryant sculpture was restored in part with private donations. GARVIN & BERENS, *supra* note 309, at 52-53.

<sup>366</sup> TATE, *supra* note 56, at 28.

<sup>367</sup> Data compiled by author from Consolidated Financial Statements of the Bryant Park Restoration Corporation and Bryant Park Management Corporation between 1985 and 2007 (on file with the Harvard Law School Library). See generally Bryant Park Restoration Corp., Bryant Park Revenues, *supra* note 360. Amounts are in 2008 dollars.

Other measures confirm the market-based account of successful management. Usership has increased. In the late 1970s, peak lunchtime usership settled around one thousand individuals, or one-fifth of the calculated capacity.<sup>368</sup> In the 2000s, usership at the peak lunch hour has been well over four thousand individuals, or nine hundred individuals per acre, making the park “the most densely used public space on the planet.”<sup>369</sup> Average “dwell time” is over one hour.<sup>370</sup> Upon reopening of the park in the early 1990s, the percentage of female users quickly increased to forty-three percent in 1995<sup>371</sup> and has stabilized at approximately fifty percent since then.<sup>372</sup> Users also have conveyed feelings of safety in user surveys.<sup>373</sup> In fact, over six hundred thousand visitors (three hundred per hour at peak times) use the once-closed restrooms each year.<sup>374</sup>

The BID’s constituents also paint a positive picture.<sup>375</sup> Eighty-eight percent of the businesses and residents surveyed in 2001 believed that “conditions in the Park had greatly improved over the past ten years,” and ninety percent believed that “the BID’s role was very important in continuing the Park’s improvement.”<sup>376</sup> The constituents, furthermore, believed that the BID had made security and sanitation improvements: eighty percent stated that “security had significantly improved over the past ten years” and eighty-six percent affirmed that the “cleanliness of the streets and sidewalks had improved over the last ten years.”<sup>377</sup>

Changes in the real estate market lead to the same conclusion of success. Leasing rates around the park increased sixty percent in the early years of its reopening, and rents increased forty percent over the first three years after renovation.<sup>378</sup> A recent study confirms that office buildings around Bryant Park are now outperforming — in terms of leasing rates, asking rents, tenant quality, property value, and credit profile — other buildings in similar areas.<sup>379</sup> Bryant Park also has become something of a brand name.

<sup>368</sup> TATE, *supra* note 56, at 30.

<sup>369</sup> Alan Feuer, *A Park Cleans Up Its Act (Gum Removal Aside)*, N.Y. TIMES, Oct. 20, 2006, at B2.

<sup>370</sup> *Id.*

<sup>371</sup> Donlyn Lyndon et al., *Bryant Park, New York City Submitted by Hardy Holzman Pfeiffer Associates, New York*, PLACES, Fall 1998, at 10, 12, available at <http://escholarship.org/uc/item/8nj734p1>.

<sup>372</sup> Calculated by author based on daily user counts provided by the BPRC. See Bryant Park Patron Counts, 1996-2007 (compiled Nov. 2007) (on file with the Harvard Law School Library); see also Feuer, *supra* note 369; Nicholas Paumgarten, *Girl Counter*, NEW YORKER, Sept. 3, 2007, at 42.

<sup>373</sup> See THOMPSON, *supra* note 363, at 33 (describing user survey).

<sup>374</sup> Collins, *supra* note 363.

<sup>375</sup> E-mail from Mayor Ed Koch to author, *supra* note 172 (“[B]oth [BIDs and friends groups] entities were effective, successful, cooperative and needed.”).

<sup>376</sup> THOMPSON, *supra* note 363, at 33.

<sup>377</sup> *Id.*

<sup>378</sup> See GARVIN & BERENS, *supra* note 309, at 54.

<sup>379</sup> See NEW YORKERS FOR PARKS/ERNST & YOUNG, ANALYSIS OF SECONDARY ECONOMIC IMPACTS RESULTING FROM PARK EXPENDITURES 16 (2007). For example, asking rents increased from \$35 to \$75 per square foot in Bryant Park but only \$29.50 to \$49 in Times Square. *Id.* at 43.

Several buildings, including a hotel and a bank, have been renamed after the square.<sup>380</sup> This trend confirms that Bryant Park has become attractive as a location for businesses. It is also consistent with studies generally concluding that the New York City BIDs increase property values.<sup>381</sup>

The decrease in crime in Bryant Park is not inconsistent with this analysis. In the 1970s an average of one hundred fifty robberies occurred per year in the park. Murders were committed in the park in 1976 and 1977. Between 1991 and 1997, however, the park saw less than one felony per year.<sup>382</sup> In fact, the New York Police Department reduced officer presence in Bryant Park in the mid-1990s because such staffing was seen as wasteful.<sup>383</sup>

In short, responsibility to the market instead of to donors, due to the shift to a commercial NPO and the corresponding shift from responsibility to donors to responsibility to the market, has not harmed Bryant Park. On the contrary, the responsibility of the management to the market appears to provide another potential formula for success. The market is itself another potential monitor, making concern for monitoring costs superfluous at this stage of the BPRC.

### C. Conclusion

This case study demonstrates that the BPRC took responsibility for the park in two ways that reduced monitoring costs. It took responsibility both for physical and financial management of the park and for assuring that public funding would not decrease due to private contributions. The contrast in management style between the BPRC and government explains the formation of the NPO and suggests why donors did not simply give more to the government: monitoring costs are lower for the centralized NPO. The evidence, therefore, is consistent with the new Step Two in the refined model. The BPRC formed, as the refined model predicts, because it took responsibility for the park with respect to physical and financial management and prevented crowding out of public funds. In fact, as one of its first legal acts, the BPRC obtained an agreement that no reverse crowding out would occur.

These moves made the monitoring of performance and funding levels less costly because the proverbial black boxes of city management and funding were eliminated from the mix. With only one entity responsible for performance and fundraising, monitoring costs shrank, making the NPO attractive enough for the BID to be launched. Once in operation, however, the BPRC became a commercial, as opposed to donative, NPO. The model does not account for these types of NPOs because they generally provide private, not public, goods. However, the evidence shows that market-based

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<sup>380</sup> Christopher Gray, *An Enduring Strip of Green in an Ever-Evolving City*, N.Y. TIMES, Apr. 22, 2007, § 11, at 8.

<sup>381</sup> See Ellen et al., *supra* note 40, at 29.

<sup>382</sup> TATE, *supra* note 56, at 30.

<sup>383</sup> *Id.*

responsibility can work and has worked to revitalize Bryant Park, serving as its own type of monitoring of NPO performance and fundraising.

The case study thus suggests not only a strong similarity between the CPC and the BPRC with respect to the refined NPO model, but also that the important difference between the CPC and the BPRC is not the presence of a BID — and the mandatory contributions it entails — but rather whether a donative or commercial NPO manages the park. That latter distinction shapes the type of mechanism through which responsibility flows. Donative NPOs are responsible to donors and their desires for effective management, while commercial NPOs are responsible to users and to market forces that incentivize effective provision of services.

## VI. POLICY AND LEGAL REFORMS

Proposals to reform NPO law are common,<sup>384</sup> even though the study of NPOs themselves is a recent phenomenon.<sup>385</sup> In fact, many of the proposals for reform of NPO law predate the first significant scholarly treatments of NPOs.<sup>386</sup> But NPO scandals in the 1990s<sup>387</sup> and the post-September 11th donation crisis<sup>388</sup> recently have drawn attention again to problems in the NPO sector and to potential legislative reforms.

Existing proposals tend to be directed either to all NPOs or to a traditional sector, such as health care or education. Reformers rarely direct attention toward NPOs that manage public property, which is not surprising considering the similar dearth of scholarly attention.<sup>389</sup> Reformers' attempts are also often focused on commercial NPOs, the most problematic of the NPO varieties because of its similarity to the for-profit form.

This Part seeks to remedy these deficiencies in existing proposals. It proposes two possible reforms of NPO policy and law rooted in the responsibility-based refined model. Although these reforms are based on analysis of donative NPOs that manage public property — the subject of this Article

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<sup>384</sup> See *infra* Part VI.B.

<sup>385</sup> See *supra* text accompanying notes 90–96 (discussing main theories that stem from the late 1970s and early 1980s).

<sup>386</sup> Compare Weisbrod, *supra* note 91 (dating from 1975), with MODEL NONPROFIT CORP. ACT (1952).

<sup>387</sup> In one notable instance, the United Way was criticized for excessive travel expenses incurred by executives. See *The PM Annotated Investigative Report on United Way of America*, PHILANTHROPY MONTHLY, Dec. 1991, at 38–39. In another, Hale House was investigated for mismanagement. See Terry Pristin, *Facing Scrutiny, President of Hale House Will Resign*, N.Y. TIMES, May 8, 2001, at B3.

<sup>388</sup> The American Red Cross collected well over half a billion dollars after September 11th with implied promises of donations to the affected families, but then controversially attempted to use much of the money for long-term projects. See Tara Burghart, *Red Cross Disbursing 9/11 Funds: Prompt, Fair Use of Gifts Promised*, HOUSTON CHRON., Feb. 1, 2002, at A8; Reynolds Levy, *It's Hard to Be Charitable About This Breach of Trust*, WASH. POST, Dec. 9, 2001, at B2.

<sup>389</sup> The scholarship on BIDs is an exception to this trend, but BID scholars have not drawn on NPO theory.

— they could apply outside of this context to the same extent that the refined model so applies.<sup>390</sup> That is to say, it is not necessarily the case that there are beneficial reforms that are exclusive to donative NPOs that manage public property. Nor should these reforms blindly be endorsed nationwide. Rather, they are primarily directed to states, in part because the only existing federal law regarding NPOs is tax law, and in part because localities likely differ regarding features of their public property and the sociolegal apparatuses associated with such lands.

The responsibility-based model implies that policy and law should foster situations in which NPOs that manage public property can reduce monitoring costs by taking responsibility. Doing so would allow residual demand for public goods to channel itself into an effective NPO. The case studies suggest three methods through which NPOs can best take responsibility: obtaining physical and financial control of the park, preventing reverse crowd out of public funds, and harnessing the advantages of restricted donations. The first section of this Part discusses the policy reform implications of seeking to encourage the first two methods. The second section of this Part discusses the legal reform implications of the important role that can be played by restricted donations.

### A. Policy

As a matter of policy, state and local governments that desire successful NPO sectors should seek to promote opportunities for NPOs to reduce monitoring costs for contributions to public goods by taking responsibility for public spaces. This Article has chronicled two possible areas for this taking of responsibility: physical and financial control of public property and prevention of reverse crowd out. NPOs that have control of a park (or, more generally, ultimate physical and financial responsibility for the provision of the public good at issue) are better able to satisfy donors — without imposing high monitoring costs — that donations will not be wasted on “make-work” without the critical mass necessary for improvement. Similarly, NPOs that negotiate with governments to prevent private donations from reverse crowding out public funds assure donors that their funds will be efficaciously deployed.

#### 1. Proposal: Transfer Responsibility

These two aspects correspond directly to two policy proposals. First, governments should attempt, when possible, to transfer control of parks, or other public goods, to NPOs in management agreements, memoranda of understanding, or other legal documents.<sup>391</sup> This transfer helps to reduce moni-

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<sup>390</sup> An important factor is the excludability of control of the public good. See *supra* text accompanying note 125.

<sup>391</sup> This is not to say high-level policy decisions should be transferred.

toring costs and thus to spur the collection of residual demand. The agreements between the CPC and New York City are instructive in this regard. These documents helped the CPC to fundraise because the fundraisers could point to a document giving the CPC authority to spend the donation, responsibility for fundraising a critical mass to improve the park, and assurances against reverse crowd out.<sup>392</sup>

One caveat is important: governments need to make sure that they transfer responsibility only to those NPOs that can succeed. Residual demand for a public good must exist in order for the NPO to be able to garner enough resources. And the NPO must have the ability to capture this demand. In other words, transferring responsibility will work best when there is established demand for the public good beyond government-provided levels and when an NPO is sufficiently organized to provide an outlet for this demand. The more informal the NPO, the less likely it is to have the resources to fundraise, keep accounts, and organize successful projects. Informality also can undermine the reduction of monitoring costs from centralization of responsibility in an NPO. Of course, NPOs and transfers of responsibility both come in different sizes, so that a government may be able to transfer responsibility for small matters, such as complete control of one geographic area in a large park, to a small NPO.

Several objections commonly discussed within the BID literature and media coverage of friends groups can be made against this proposal for increasing private responsibility for urban parks. The responsibility-based model of this Article provides a more theoretically grounded response than that of current defenders of the NPOs.

First, critics object to what they view as the undemocratic and unaccountable ways in which groups like the CPC and the BPRC make decisions. The CPC, for example, has been criticized for exercising the power of a city agency without the electoral check of political appointees and for capitulating to donors who have demanded influence because of their donations.<sup>393</sup> Similarly, critics of the BPRC have questioned whether the park's neighbors, instead of the BID, should control the park.<sup>394</sup> And critics have raised democracy concerns about the internal voting process of the BPRC,

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<sup>392</sup> Millstein Interview, *supra* note 141.

<sup>393</sup> See Joyce Purnick, *2-Inch Letters Stir a Big War in the Park*, N.Y. TIMES, Nov. 28, 1996, at B1 (arguing that the CPC lacks the democratic checks on elected officials); Yarrow, *supra* note 83 (commenting that the CPC is unaccountable); see also Daley, *supra* note 85 ("If we raise the money and beat the bushes, we want to have a say in what goes on," said Mike Ryan, president of the Friends of the Middlesex Fells Reservation north of Boston."). But see Hochleutner, *supra* note 46; Barron, *supra* note 193 ("We believe the conservancy has made substantial improvements to the park," said David Liston, the chairman of Community Board 8, on the Upper East Side. "We also believe the conservancy has become increasingly responsive to the community board."").

<sup>394</sup> See Douglas Martin, *Tax Proposed to Maintain Central Park*, N.Y. TIMES, Jan. 20, 1995, at B1 ("Who owns the parks?" Mr. Breslau asked. "Is it everyone or the immediate surrounding neighborhood?").



which privileges property owners over residents and tenants,<sup>395</sup> even though no court has ever struck down a BID for violation of the principle of one-person, one-vote.<sup>396</sup>

Relatedly, critics object to the management decisions that groups like the CPC and the BPRC make, fearing “privatization” of the park. In particular, critics condemn the Conservancy’s protection of the Great Lawn from uses that, though traditional, may harm it,<sup>397</sup> for hosting beach volleyball tournaments and movies in the park,<sup>398</sup> for strictly following only an Olmsteadian vision,<sup>399</sup> for exacerbating racial tensions based on park use,<sup>400</sup> and for giving preference to the demands of donors.<sup>401</sup> Similarly, critics condemn Bryant Park for hosting fashion shows and other revenue producing events that close the park to the public and for increasing commercial signage in the park.<sup>402</sup> Some of this criticism of management decisions is unfair because parks departments with adequate public resources would act similarly: the criticism is not about privatization but action. Yet, many critics insist that there is a difference between public and private management, even after controlling for the amount of action in the park.

These two types of concerns also animate the public trust doctrine. Originating in ancient law,<sup>403</sup> the public trust doctrine regulates what governments can do with certain public resources, such as waterways, beaches, and,

<sup>395</sup> See generally Briffault, *supra* note 16, at 431–46 (describing voting by property ownership).

<sup>396</sup> See, e.g., *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92 (2d Cir. 1998) (rejecting one-person, one-vote challenge).

<sup>397</sup> See Steinhauer & Cardwell, *supra* note 7 (“‘The Central Park Conservancy runs Central Park and they’ve been very possessive about it,’ said City Councilman Bill Perkins . . .”). But see Glueck, *supra* note 180 (promising non-privatization); Caitlin Murphy, *Big Apple Gets Greener: The Private Sector Has Reformed the City’s Abandoned Parks*, FIN. TIMES, Feb. 26, 2005, at 6 (“The quasi-privatization of the parks has not created much of a stir.”).

<sup>398</sup> See Rick Lipsey, *A Woman’s Vision and Dream Turns Central Park ‘Green,’* CHRISTIAN SCI. MONITOR, Nov. 26, 1996, at 13 (chronicling self-criticism by new CPC leader about hosting a volleyball tournament and a movie premiere in the park).

<sup>399</sup> See Yarrow, *supra* note 83 (criticizing the commitment to an Olmsteadian vision).

<sup>400</sup> See Cunningham, *supra* note 86 (“However, not everyone feels equally welcome in all parts of [Central Park]. Puerto Rican and black working-class youths hold barbecues and play boom-boxes around Harlem Meer at the northern end. White middle-class New Yorkers tend to gather at the southern end.”).

<sup>401</sup> See Kleiman, *supra* note 88; Martin, *supra* note 193 (fearing commercialization).

<sup>402</sup> As one article noted:

In the past few months, Bryant Park has played host to Fashion Week, sponsored by Olympus; summer movies underwritten by HBO; a concert series put on by ABC; and a book fair supported by The New York Times. Much of the eight-acre park is currently occupied by a privately operated holiday market and by an ice-skating rink sponsored by Citi. Each sponsor generally pays a rental fee and is allowed to post its corporate name as part of the event.

Timothy Williams, *In Bryant Park’s Rebirth, Some Chafe at Growing Corporate Presence*, N.Y. TIMES, Dec. 5, 2005, at B1. See also Kleiman, *supra* note 88 (commenting that some parks look like “a new kind of Logo Land”).

<sup>403</sup> See Michael Seth Benn, Comment, *Towards Environmental Entrepreneurship: Restoring the Public Trust Doctrine in New York*, 155 U. PA. L. REV. 203, 207 (2006).

in some jurisdictions, parks.<sup>404</sup> Generally, governments must use public resources for the public benefit,<sup>405</sup> although the details of public trust doctrine are matters of state law.<sup>406</sup> In New York, for example, courts ask whether the new use of a public space is a park or non-park use.<sup>407</sup> In *Friends of Van Cortlandt Park v. City of New York*, consequently, the New York courts struck down the construction of a water treatment plant underneath Van Cortlandt Park that would close parts of the park for several years on the grounds that it would disrupt park use.<sup>408</sup> If a new use is not a park use in New York, then legislative authorization by the state is required to validate the use, which is a formidable obstacle for management flexibility.<sup>409</sup>

Paying attention to responsibility, as the refined model does, suggests that criticizing private management for, in the well-established language of public trust doctrine, forsaking the public benefit is inappropriate. Without NPO management, residual demand for public goods could not be harnessed due to monitoring-cost barriers facing donors considering gifts to the government. The choice is not between fully-funded government management and NPO management but between government management at the median voter level and NPO management at the residual demand level (with the median voter level assured against reverse crowd out). For the park advocate who desires more parks funding, tapping residual demand for parks is a positive development in accordance with the public interest.

To be sure, problems could arise if NPO management takes steps to meet residual demand that actually reduce the level of public good below that of the median voter government level through poor physical management of the park or poor financial management of government money. This claim, however, is implausible for the two parks in this Article: Central Park and Bryant Park were simply in too poor of a physical and financial state for it to be plausibly maintained that NPO management has in any way reduced the level of public good from the parks. Even if such claims are possible for other parks, the answer to this problem is for government to screen parks for whether NPO management is appropriate and to put government oversight systems in place, not to reject NPO management of public parks per se. Both the CPC and the BPRC are limited in important ways by the Parks Department. Such restrictions may be necessary for successful NPO management.

Furthermore, there is also an important sense in which NPOs are accountable. By definition, they are more capable of being monitored at lower

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<sup>404</sup> See, e.g., *Williams v. Gallatin*, 128 N.E.2d 121 (N.Y. 1920) (applying public trust doctrine to park).

<sup>405</sup> See e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 478 (1970).

<sup>406</sup> See *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (noting that "there is no universal and uniform law upon the subject").

<sup>407</sup> *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050 (N.Y. 2001).

<sup>408</sup> *Id.* at 1054.

<sup>409</sup> See *id.* at 1052.

cost, a crucial point for good governance. Accountability to the public interest may be better served by lower monitoring costs than by the presence of voting constituents, especially when the measure of success is relatively uncontroversial, like park safety. Additionally, NPOs are responsible to important groups: donors (for donative NPOs) and users (for commercial NPOs). Although these populations are not coterminous with the general population, it is fairly plausible that donative NPOs with large donor bases of small-time donors, who donate because they use the park, and commercial NPOs with many small-time users, obtain a proper perspective on the public interest and popular opinion through their own operative modes. The forty thousand donors who donated to the CPC in 2007 create a very large sample size. Even if these groups differ in significant ways from the public at large, it is not clear that park managers should be more accountable to the abstract public than those who care most about or most use the parks. That topic, however, is beyond the scope of this Article.

This Article's response to the criticism thus focuses on increasing the public good desired by residual demand. This move also suggests a problem with the public trust doctrine: a disconnect between actual public good and legally cognizable public use. At least in New York, courts look to how the park is used.<sup>410</sup> The CPC and the BPRC readily pass this use test because of compliance with explicit provisions in their management agreements and oversight by the Parks Department,<sup>411</sup> although the BPRC's common practice of closing the park for weeks for private events raises some concerns.<sup>412</sup> Hypothetically, however, one can imagine a NPO that takes a different tack to park management. A Bryant Park manager, for example, could decide, due to a lack of resources, to close the park entirely, or entirely except for lunchtime. The former, and possibly the latter, would certainly violate the park use test of New York courts.<sup>413</sup>

The problem with this result is that this closure would actually advance the public good in the neighborhood, including the public good from the park, because of the negative externalities associated with an open but ill-maintained park. Closing the park entirely or for most of the time reduces the problems of drugs, crime, and loitering in the neighborhood and in the park itself, assuming spillover. Yet the public trust doctrine has no way to account for an increase in the public good associated with the park despite a non-park use — here closure — of the park. A public-good, as opposed to park-use, test, therefore, may be more appropriate.

Second, numerous critics have argued that the CPC and the BPRC further the creation of a public space regime marked by severe inequality.<sup>414</sup>

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<sup>410</sup> See *supra* notes 407–09 and accompanying text.

<sup>411</sup> See *supra* Parts IV–V. Perhaps this explains why no lawsuits have been filed on this issue.

<sup>412</sup> See *supra* Part I.

<sup>413</sup> See *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050 (N.Y. 2001).

<sup>414</sup> Donors, of course, fear that private funds will replace public funds in a reverse crowding out.

Many commentators observe that these organizations increase the funding for particular public spaces, which often lie in wealthier areas, without a similar increase in other areas.<sup>415</sup> Furthermore, many argue, the resulting success of these premier public spaces gives public officials reason to ignore the run-of-the-mill public spaces, actually *decreasing* the funding to these spaces.<sup>416</sup>

The responsibility-based model's response to this first point is based on the benefits of harnessing residual demand: it cannot be helped that some neighborhoods have higher demand for parks as evidenced through their willingness to make monetary or in-kind donations. Nor is it necessarily problematic for different areas to prioritize different public goods at different levels.<sup>417</sup> The point regarding distraction of public officials raises large issues beyond the scope of this Article. Insofar as government leaders are not responsive to true public opinion regarding funding for parks, the problem is with elections, not the management of parks.

## 2. *Proposal: Crowd Out Prevention*

Governments also should, when possible, enter into agreements with NPOs regarding the reverse crowd out of public funds with private donations. These agreements help to reduce monitoring costs for government funding levels by clarifying government duties. They also complement the transfer of financial responsibility to NPOs described above, which reduces monitoring costs by centralizing responsibility for ensuring a critical mass of funding in one entity. The CPC and the BPRC models are ideal here: the government promises to provide a stable level of funds and the NPO promises to raise more funds and provide services. Significantly, these two agreements give the NPOs the option to terminate their management upon government default. This remedy gives weight to the contractual promises of the government: it provides the NPO with leverage to threaten withdrawal of services.<sup>418</sup> And it does not corruptly "sell out" to special interests, at least not any more than a normal government contractual arrangement.

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<sup>415</sup> See Martin, *supra* note 8 (citing the fear of creating a two-tiered system); Souccar, *supra* note 69 ("The grass remains greener at the city's major parks."); see also sources cited *supra* note 89.

<sup>416</sup> See Hartocollis, *supra* note 84 ("But the money the city has saved through privatization has not been reinvested into needy parks."); Martin, *supra* note 193 (noting that some were "worried about whether the growing reliance on private money for parks would hurt parks in poorer neighborhoods"); Stewart, *supra* note 89 (quoting Ira M. Millstein, former CPC president). It is not clear whether this assertion is true because the cause of budget decreases is hard to evaluate.

<sup>417</sup> Furthermore, it may be the case that, as former Parks Commissioner Henry Stern comments, there are simply too many parks to fund appropriately and, given the choice between adequate funding for one or inadequate funding for all, it is better to make sure that one is adequately funded. Stern Interview, *supra* note 140. But social equality issues raise larger concerns, of course.

<sup>418</sup> Such arrangements do not improperly bind the legislature, for the government is often a contracting party.

Other policies may be appropriate. The CPC and the BPRC, for example, have benefited from their independence from the city workforce and from city procurement systems. Insofar as the law is unclear on this point,<sup>419</sup> it would benefit NPOs for government actors, such as parks departments, to clarify interactions between cities and NPO infrastructure. Similarly, both organizations have benefited from positive relationships between city officials and long-term NPO leaders, which can be fostered by formal cooperation policies as well as by informal means.

### B. Legal

Legal reforms regarding the regulation of NPOs have generally focused on improving accountability to the public interest, particularly with respect to the problem of corruption in NPO management.<sup>420</sup> The responsibility-based model also highlights the importance of accountability. This section argues that increasing disclosure of projects undertaken with restricted donations improves responsibility because it further reduces monitoring costs. The section first briefly discusses the existing legal regime. Then it addresses other proposals to enhance responsibility and outlines a disclosure-based approach.

NPO law generally parallels corporate law.<sup>421</sup> Like for-profit directors, NPO directors have duties of care, loyalty, and obedience under the laws of most states.<sup>422</sup> Nonprofit corporation statutes also often include other corporate governance regulations, such as reporting requirements<sup>423</sup> and board restrictions. NPO law, however, differs in two important respects from traditional corporate law. First, NPOs are regulated indirectly by the IRS through tax law, not through other federal government means.<sup>424</sup> Second, the enforcement of NPO law rests almost exclusively with state attorneys general.<sup>425</sup> Most states deny standing to donors or other interested parties to enforce fiduciary duties.<sup>426</sup> Those states that allow member<sup>427</sup> or director<sup>428</sup>

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<sup>419</sup> Biederman Interview, *supra* note 6.

<sup>420</sup> See Denise Ping Lee, Note, *The Business Judgment Rule: Should It Protect Nonprofit Directors?*, 103 COLUM. L. REV. 925 (2003).

<sup>421</sup> Some have criticized this parallel, especially after Sarbanes-Oxley. See Lumen N. Mulligan, *What's Good for the Goose Is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 MICH. L. REV. 1981, 1996 (2007).

<sup>422</sup> See James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 232 (2003) for a general discussion. A leading casebook in this area that provides a good summary of these duties is JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* (3d ed. 2006). A compilation of the law on fiduciary duties, which varies by state, can be found in MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION* 514–17 tbl.3 (2004).

<sup>423</sup> See Fishman, *supra* note 422, at 239.

<sup>424</sup> For a broad overview, see generally FREMONT-SMITH, *supra* note 422, at 238–300.

<sup>425</sup> For a general discussion, see Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400 (1998).

<sup>426</sup> For a general discussion, see Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183 (2007).

standing either do not require that NPOs have members<sup>429</sup> or do not address the obstacles to intra-board suits.<sup>430</sup>

Many overarching legal reforms have been aimed at the ineffectiveness of state attorneys general — due to resource constraints or unwillingness to act — regarding enforcement of the fiduciary duties of NPO directors.<sup>431</sup> Scholars have proposed several solutions, including federalizing regulation,<sup>432</sup> creating independent charity agencies,<sup>433</sup> empowering audit committees,<sup>434</sup> encouraging for-profit regulation,<sup>435</sup> and fostering industry self-regulation.<sup>436</sup> All of these reforms suffer the flaw of imposing overarching regulatory schemes likely to burden the NPO sector with increased costs and bureaucratic hurdles.<sup>437</sup> And it is unclear why these new agents would not suffer from the resource problems and agency capture that currently affect state attorneys general.<sup>438</sup> Others have proposed changes to the fiduciary duties<sup>439</sup> or to board membership,<sup>440</sup> but these reforms suffer similar flaws.

Perhaps the most popular reform in this vein is to grant more individuals — donors, beneficiaries, and third-parties — standing to challenge NPO

<sup>427</sup> See, e.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 623 (McKinney 2009) (granting standing to members with five percent of the voting power).

<sup>428</sup> See, e.g., CAL. CORP. CODE § 5142 (West 2005).

<sup>429</sup> E.g., N.Y. NOT-FOR-PROFIT CORP. LAW § 601 (McKinney 2009) (providing that Type B corporations, the type for most public charities, need not have members).

<sup>430</sup> See Gary W. Jenkins, *The Powerful Possibilities of Nonprofit Mergers: Supporting Strategic Consolidation Through Law and Public Policy*, 74 S. CAL. L. REV. 1089, 1120 (2001) (“[T]he chances are slim of a dissident director emerging and willing to take on the onerous task of bringing suit against his or her colleagues.”).

<sup>431</sup> See Lee, *supra* note 420, at 933. This is not a new problem. See James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 669 (1985) (noting that in the 1970s only eight states had attorneys assigned to enforcement against and regulation of charities).

<sup>432</sup> See FREMONT-SMITH, *supra* note 422, at 461.

<sup>433</sup> See Joel L. Fleishman, *Public Trust in Not-for-Profit Organizations and the Need for Regulatory Reform*, in PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA 172, 187 (Charles T. Clotfelter & Thomas Ehrlich eds., 1999) (proposing a federal agency); Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 434 (1960) (proposing state agencies); see also Fishman, *Improving Charitable Accountability*, *supra* note 422, at 272 (proposing a slightly different charity commission).

<sup>434</sup> See Karyn R. Vanderwarren, Note, *Financial Accountability in Charitable Organizations: Mandating an Audit Committee Function*, 77 CHI.-KENT L. REV. 963, 976 (2002).

<sup>435</sup> See Geoffrey A. Manne, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 224, 229 (1999).

<sup>436</sup> See Peter Swords, *Nonprofit Accountability: The Sector's Response to Governmental Regulation*, 25 EXEMPT ORG. TAX REV. 413, 413 (1999).

<sup>437</sup> See Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631, 637 (1998) (arguing that “harsh” new regulation would “almost certainly have counterproductive effects”).

<sup>438</sup> See Fishman, *Improving Charitable Accountability*, *supra* note 422, at 268.

<sup>439</sup> See Lee, *supra* note 420; Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893 (2007).

<sup>440</sup> Other scholars have proposed placing more insiders on the boards. See Peggy Sasso, *Searching for Trust in the Not-for-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability*, 50 UCLA L. REV. 1485, 1539 (2003).

management through fiduciary duty suits.<sup>441</sup> This move, scholars argue, would increase enforcement of fiduciary duties without imposing another agent on the system. Yet there are two problems with this proposal. First, as its longevity suggests, at this point it is somewhat unrealistic as a reform.<sup>442</sup> That this reform may require the awarding of attorneys' fees, and thus the creation of an NPO plaintiff's bar, in order to overcome the litigation costs facing individual donors<sup>443</sup> makes it even less likely to succeed because of sustained opposition from NPOs. Second, the arguments against such standing make a strong case that it is normatively unappealing for donors to challenge NPO actions that further the public good.<sup>444</sup> Such ex post evaluation of an NPO's actions appears to legitimate the impure altruism that society is willing to accept but not encourage. And lawsuits, of course, are expensive.

Instead of these large burdensome reforms, a smaller proposal tailored to the need for NPOs to be responsible to their donors offers significant advantages. The case studies and refined model suggest that the restricted donation phenomenon is an important part of NPO functioning. The possibility of restricted donations helps to explain the funding levels of NPOs because it reduces monitoring costs. Restricted donations also contribute to NPO accountability because they restrict NPO management's actions. These restrictions, however, can be hard to monitor for the small donor.

To ameliorate this problem, NPOs should have to disclose what they do with restricted funds in public documents, such as annual reports.<sup>445</sup> The report for each restricted account should include, perhaps by quoting the gift document, the purpose for which the funds were donated and the specific expenses paid by the fund. Once an account runs out of funds, no reports need issue any longer. These public account reports would allow the public and, more importantly, all donors to monitor the NPOs' use of restricted funds without high monitoring costs. NPOs currently seem to have little incentive to so disclose for the small donor because donors have not been able to unite to demand such a reform. This proposal will help NPOs to further harness residual demand, here in the form of small donations.

This proposal also has the advantage of furthering the goal of accountability sought by the above proposals — self-dealing or violations of the nondistribution constraint may be easier to catch if more is disclosed — without the disadvantage of increased burdens on the NPO sector or lack of

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<sup>441</sup> See Hansmann, *supra* note 116, at 261–62.

<sup>442</sup> The proposal was made at least as early as Henry Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 608–13 (1981).

<sup>443</sup> Hansmann, *supra* note 116, at 262.

<sup>444</sup> See FREMONT-SMITH, *supra* note 422, at 324–26.

<sup>445</sup> NPOs must disclose much of their financial information to the federal government, but these are general requirements. *E.g.*, 26 U.S.C. § 6104 (2000); Treas. Reg. § 301.6104 (2002). One scholar has proposed a securities-like disclosure regime, but her priority is conflicts of interest and self-dealing transactions. See Nina J. Crimm, *A Case Study of a Private Foundation's Governance and Self-Interested Fiduciaries Calls for Further Regulation*, 50 EMORY L.J. 1093, 1189 (2001).

political and practical feasibility.<sup>446</sup> NPOs, presumably, already track the funds in these separate accounts in order to comply with state law regarding restricted donations and to inform a subset of such donors of the use of their funds; formatting these internal documents for external publication should not prove too burdensome.

Privacy concerns for donors do not doom this proposal for several reasons. First, donors can donate anonymously if they want to hide their identities or, perhaps more embarrassingly, the connection between themselves and any private good emanating from their chosen project. Second, many donors are already mentioned in annual reports, either in connection with a particular project or in a donor list. These donors should not have an objection to further discussion in another section of the annual report. Third, the books of NPOs are generally subject to public inspection, so that changing the form of availability is not legally material.

Several objections may be launched against this proposal. First, it could be argued that disclosure without a remedy — without broadening standing — is useless. For NPOs, however, especially NPOs with enough financial resources that deviation from stated purposes matters on a societal level, there is an important reputation effect. Large NPOs are repeat players in the market for donations. Improving information about their behavior is the best way to sanction them for missteps because it permanently affects their profile. Technology is a great resource in this context, as it can quickly disseminate negative or positive information about NPOs.<sup>447</sup> The high-profile board members of many NPOs will assist in this respect because of their attention to their own reputations as fundraisers. To be sure, NPOs can fabricate the reports, but fraud is a problem with all reporting requirements.

Second, it may be objected that restricted donations are a phenomenon that ought not to be further encouraged with disclosure, just as they ought not to be encouraged with greater donor standing. Restricted donations can be seen as normatively unappealing because they represent impure altruism, which society should not encourage because of moral<sup>448</sup> or economic<sup>449</sup> reasons, and because they create dead-hand control.<sup>450</sup> The appropriate response to this criticism is twofold. First, restricted donations are not necessarily the result of impure altruism because, as the responsibility-based model predicts and the case studies confirm, they form a key part of NPO financing due to their ability to reduce monitoring costs. Both pure and

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<sup>446</sup> Reporting requirements already exist at the state and federal levels. *See, e.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 621 (McKinney 2009) (requiring annual reports); *see also* FREMONT-SMITH, *supra* note 422, at 65–67.

<sup>447</sup> *See* Fishman, *Improving Charitable Accountability*, *supra* note 422, at 270.

<sup>448</sup> Insofar as society seeks to encourage goodness, impure altruism should be discouraged and selfless altruism encouraged.

<sup>449</sup> *See* George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102, 1154–55 (2004) (arguing from an economic perspective that “[e]ach donor has the incentive to restrict her own gift . . . [so] too many donations may be restricted”).

<sup>450</sup> *See id.* at 1157–58 (discussing “limited flexibility” in cy pres doctrine).



impure altruists care about monitoring their donations. Even if all restricted donations stem from impure altruism, the tradeoff would not be between pure and impure altruism but rather between impure and less pure altruism. Second, restricted donations do not necessarily further dead-hand control because NPOs are free to reject restricted donations and because the cy pres doctrine,<sup>451</sup> which most states accept,<sup>452</sup> ameliorates any problems stemming from changing conditions.<sup>453</sup>

A third objection is that if disclosure for small restricted donors were effective at harnessing more residual demand, NPOs would already do it. A species of the economist's argument that a twenty-dollar bill is never on the ground because someone would have already picked it up, this argument suffers from a similar flaw, ignoring the imperfections of the market for donations. NPO managers seek not only donations but also easier jobs, and restricted donations make management harder by imposing constraints (and paperwork and liaising) on behavior. Additionally, capturing residual demand is a long-run benefit, while compiling reports is a short-run cost. In short, the public interest is different from the interest of NPO managers. Mandatory disclosure, therefore, is both a viable and socially-optimizing legal reform.

#### CONCLUSION

Incorporating responsibility into a refined model for NPOs improves upon the current theories of NPO formation and operation, at least in the case of public property that generates public goods. This Article demonstrated, through case studies of two of the most prominent private managers of public parks, that the taking of responsibility reduces monitoring costs. These NPOs became physically and financially responsible for the park and responsible to their revenue sources — donors or users. Both of these phenomena helped the NPOs to harness residual demand and succeed in revitalizing their parks. The privatization of responsibility for the park and responsibility to private donors has, therefore, the counterintuitive effect of producing positive public outcomes and accountability. The law, consequently, should consider policy and legal reforms that foster the ability of NPOs to take responsibility, thereby reducing monitoring costs for donors seeking to donate to public goods.

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<sup>451</sup> Under the cy pres doctrine, courts reform impossible objectives commanded by testators or settlors to a possible objective that is as consistent as possible with the original intention.

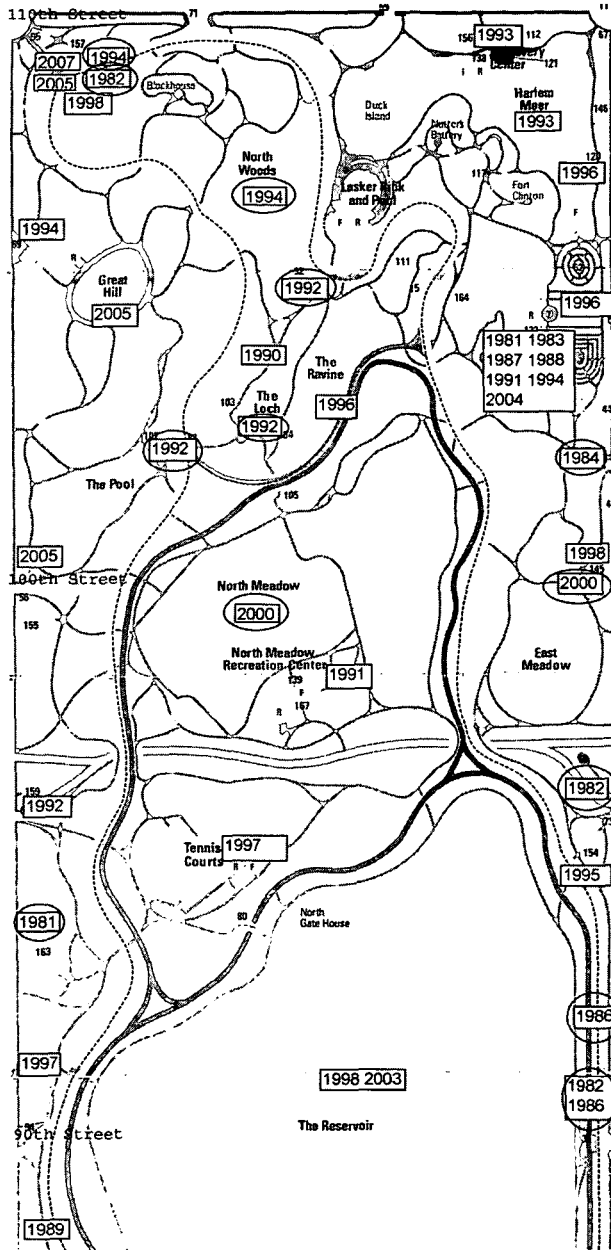
<sup>452</sup> See FREMONT-SMITH, *supra* note 422, 512–13 tbl.2 (listing state statutes on cy pres doctrine).

<sup>453</sup> Cy pres doctrine raises its own issues. See generally Mehmet Bac, *Restricted Charitable Donations and the 'Cy Pres' Doctrine*, 14 EUR. J. L. & ECON. 15 (2002) (discussing incentives created by and tradeoffs of cy pres doctrine); John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375 (2005).

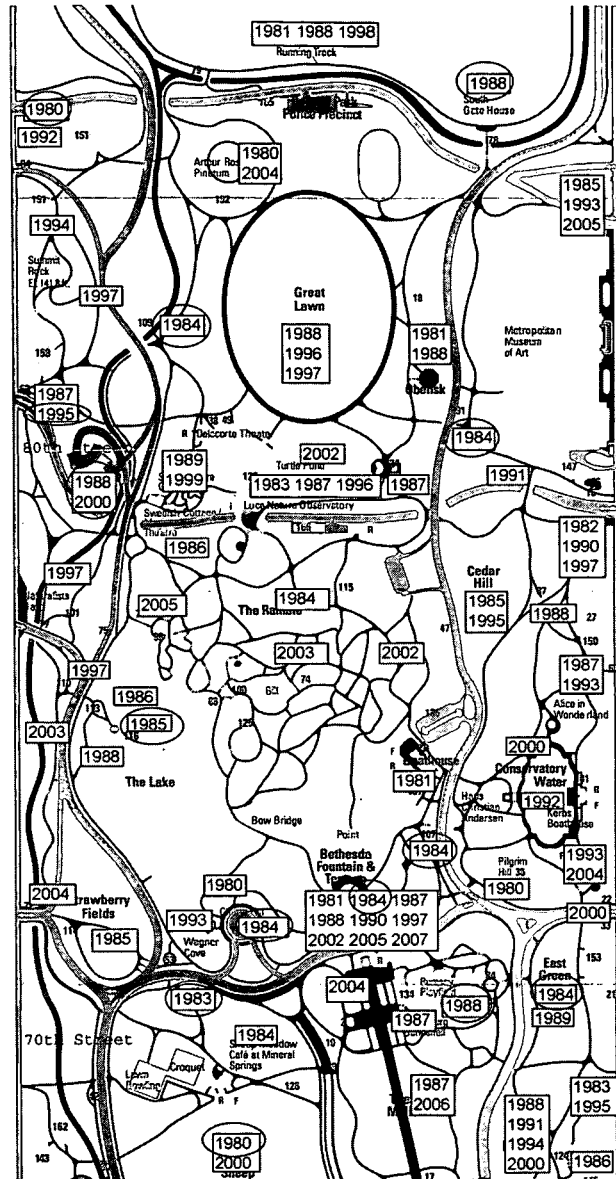
Several types of questions arise in light of these conclusions. First, what types of situations lend themselves to donative or commercial nonprofits? In other words, can a donative nonprofit work in a less-than-wealthy location? If not, local governments may want to consider encouraging commercial nonprofits. Second, what type of responsibility-securing agreement with a local government works best to give physical and financial responsibility to the NPO? In other words, should local governments lease their parks out, contract for the management of their parks, or enter into traditional public-private partnerships? Finally, do donors and users approximate the public interest, so that NPOs do not fall prey to the elitism objection? In other words, do pure and impure altruism on such a large scale have negative public effects? These questions all deserve further empirical research.

Private management of public spaces has existed since the first group of neighbors traveled into their local park to pick up litter, prune plants, and build structures. The institutionalization of the relationships between private groups and public authorities into more formal agreements — even contracts or leases in some cases — is, however, a newer development, and it appears to be an increasing trend in the revitalization of our downtrodden spaces. Deciding which groups are best able to manage our public spaces, therefore, becomes critically important to ensuring that these spaces continue to serve the multitude of functions our society demands. Exclusive public management has led to decline, but too much private involvement raises legitimate fears of sacrificing public values. Revitalization of our urban public spaces will depend on finding the proper mix between public and private, and that mix will vary for each locality and likely for each public space. New York's experience with Central Park and Bryant Park, and NPO theory according to the refined model do, however, demonstrate that private management is, at the very least, theoretically coherent and capable of success.

APPENDIX<sup>454</sup>



<sup>454</sup> Boxes with the year of the project inside denote projects funded by donors. Circles denote city-funded projects. The map was compiled by the author using the timeline in the twenty-fifth anniversary annual report, see CENT. PARK CONSERVANCY, ANNUAL REPORT



(2005), and the individual annual reports, *see* 1984 ANNUAL REPORT, *supra* note 185, through 2007 ANNUAL REPORT, *supra* note 1.

