

# THE FAILED PROMISE OF THE PUBLIC BENEFIT CORPORATION: A CASE STUDY OF THE METROPOLITAN TRANSPORTATION AUTHORITY

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\* Yale Law School, J.D. 2022. My thanks to Professor David Schleicher for his guidance and encouragement, and the editors of the Government Law Review for their invaluable feedback.

## INTRODUCTION

Can government be faster, flexible, and more efficient? This was the question that laid the foundation for the public authority, a type of corporate structure that exploded in popularity over the twentieth century.<sup>1</sup> Public authorities are a certain kind of public benefit corporation that seek to capture the efficiency and innovation of private companies and combine it with the needs of the public sector.<sup>2</sup> Authorities are especially utilized in highly regionalized and tightly regulated spaces where government agencies might find themselves trapped behind mounds of red tape.<sup>3</sup> Although certain kinds of authorities are useful in particular contexts, this paper argues those authorities are “fake” because they are essentially state-operated. It goes on to claim that these fake authorities are a threat to state legitimacy and stability when they operate in highly politicized environments because of the natural limitations of public authorities.

In America, new forms of corporate organizational structures emerge and grow popular all the time—a good example is the limited liability partnership,<sup>4</sup> and another, the “public authority.” Authorities are essentially specialized forms of public benefit corporations that take on bureaucratic roles.<sup>5</sup> Public authorities are defined as “corporate instruments of the State created by the Legislature to further public interests.”<sup>6</sup> They are unique in the sense that they straddle the line between being publicly and privately operated and have a wide range in terms of their impact.<sup>7</sup> Some, like the Metropolitan Transportation Authority (MTA), may control an immense operation within a state;<sup>8</sup> others, however, are

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<sup>1</sup> See Peter R. Nehemkis, Jr., *The Public Authority: Some Legal and Practical Aspects*, 47 YALE L.J. 14, 14 (1937); Jerome J. Shestack, *The Public Authority*, 105 UNIV. PA. L. REV. 553, 553 (1957).

<sup>2</sup> See Robert Gerwig, *Public Authorities in the United States*, 26 L. & CONTEMP. PROBS. 591, 591 (1961).

<sup>3</sup> Shestack, *supra* note 1, at 562.

<sup>4</sup> Deep Ray, *The Emergence of Limited Liability Partnerships*, NAT'L ACAD. OF LEGAL STUD. & RSCH. 1, 1 (2012).

<sup>5</sup> Although public authorities and public benefit corporations are not the same, this paper uses the terms interchangeably to refer to the MTA, which is both a public authority and public benefit corporation.

<sup>6</sup> *What Is a Public Authority?*, OFF. OF N.Y. ST. COMPTROLLER, <https://www.osc.state.ny.us/public-authorities/what-public-authority> [<https://perma.cc/GS8P-5FXU>].

<sup>7</sup> See Nehemkis, *supra* note 1, at 15.

<sup>8</sup> See N.Y. PUB. AUTH. LAW § 1263(1)(a)(1).

much smaller.<sup>9</sup> But perhaps the public authority's most significant characteristic is its ability to take on more debt than states and municipalities are constitutionally or statutorily authorized to.<sup>10</sup>

Much has been written about the benefit corporation's attested benefits.<sup>11</sup> Many have discussed the benefit corporation's limitations and flaws.<sup>12</sup> Few, however, have explained the danger of a certain kind of authority: ones that are essentially state-owned and operated but remain a legally distinct entity. This paper dubs these kind of authorities "fake authorities" and explains how they come to exist—generally through financial insolvency—and that they are especially dangerous when operating in highly politicized arenas (i.e., places where significant swathes of the electorate care about the authority and/or where taxes and subsidies make up a large portion of the authority's budget) because of the public authority's natural limited accountability and transparency requirements.

In this paper, I examine this argument through the context of the MTA, which controls most of New York's public transit system. Afterward, this paper will envision three possible paths forward to save the MTA and explain why reform is necessary for the MTA now, as opposed to later.

## I. PUBLIC AUTHORITIES AND THEIR HISTORY IN NEW YORK STATE

In New York State, public authorities can be organized in one of three ways: (a) through an act of the State legislature to establish an agency to operate for some particular purpose; (b) "by a permissive general statute" that creates an improvement authority in certain areas to accomplish a variety of purposes; or

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<sup>9</sup> See Nehemkis, *supra* note 1, at 15 (describing some of the other roles and duties of public authorities, including "bridge and tunnels, parks, marketing, public utilities, housing, . . . a health institution, a natural history planetarium, an industrial exhibit, a war memorial, and a sewerage authority.").

<sup>10</sup> *Id.* at 14.

<sup>11</sup> See, e.g., Shestack, *supra* note 1 at 553.

<sup>12</sup> See, e.g., Elizabeth Marcello, *Lawmakers Consistently Refuse to Hold Public Authorities Accountable*, COLUM. PUB. POL'Y REV. (Sept. 2019), <http://www.columbiapublicpolicyreview.org/2019/09/lawmakers-consistently-refuse-to-hold-public-authorities-accountable/> [https://perma.cc/VMA6-TPTB]; CITIZENS BUDGET COMM'N, NEW YORK'S PUBLIC AUTHORITIES: PROMOTING ACCOUNTABILITY AND TAMING DEBT (2006), [https://cbcny.org/sites/default/files/reportsummary\\_authorities\\_06012006.pdf](https://cbcny.org/sites/default/files/reportsummary_authorities_06012006.pdf) [https://perma.cc/TCN5-KYKA].

(c) “by a permissive general statute enabling the electorate” of a particular area “to incorporate as a public [benefit] corporation by vote.”<sup>13</sup>

New York State enjoys the use of public authorities much more frequently than most states and uses the incorporation by special act (option A) as its preferred formation method.<sup>14</sup> These incorporations are meant to carry out some specific purpose, such as operating and maintaining a bridge, park, public utility, house, et cetera.<sup>15</sup> New York State follows a standard pattern when creating public authorities under option A. First, authorities are “designated ‘public benefit corporations’” and granted either a limited or permanent corporate form.<sup>16</sup> Then, a series of technical steps are undertaken, of which most of the details are unimportant for the purpose of this paper.<sup>17</sup> However, one of the authority’s key powers emerges from these specialized moves. At the end of the incorporation tunnel, the authority will have the ability to take on debt without being limited by the statutory or constitutional cap that otherwise restricts most government entities.<sup>18</sup> In the wrong circumstances, public authorities that can utilize this power can be taken advantage of to circumvent the New York State Constitution’s requirement for voter approval on laws or measures that create debt.<sup>19</sup>

Besides this characteristic, public authorities have one more quality that, taken with their public sector focus, distinguishes them from any other type of organizational structure. Authorities have unelected boards, which means they can mostly avoid voter pressure.<sup>20</sup> In theory, these two qualities should work in tandem to create a nonpolitical, private-public agency that can borrow past a state’s debt cap without being limited by an electorate.<sup>21</sup> The

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<sup>13</sup> Nehemkis, *supra* note 1, at 14.

<sup>14</sup> See OFF. OF N.Y. ST. COMPTROLLER, PUBLIC AUTHORITIES BY THE NUMBERS 7 (2017), <https://www.osc.state.ny.us/files/reports/special-topics/pdf/pub-auth-num-2017.pdf> [<https://perma.cc/BW7K-9YXY>]; Stephen Fehr & Adam Levin, *Public Authorities: Essential to Services Though Some States Question Oversight*, PEW RSCH. CTR. (Apr. 4, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/04/04/public-authorities-essential-to-services-though-some-states-question-oversight> [<https://perma.cc/7NQF-JK5S>].

<sup>15</sup> Nehemkis, *supra* note 1, at 14–15.

<sup>16</sup> *Id.* at 15.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 15–16.

<sup>19</sup> See Marcello, *supra* note 12.

<sup>20</sup> See Nehemkis, *supra* note 1, at 15.

<sup>21</sup> See *id.* at 16.

agency's recusal from politics should afford it the independence necessary to make decisions that may benefit it in the long run but could be unpopular in the short-term—for example, a fare hike. Taken together, a perfectly operating public authority would work on public projects, be privately-operated and so attempt to be efficiently run, be unconstrained by voters, and make decisions that would most benefit the authority.

This idyllic vision of the public authority captured the imagination of the United States, and especially the State of New York.<sup>22</sup> In 1846, the New York State Constitution established debt limits to constrain the State's ability to raise funds to build infrastructure and provide essential services.<sup>23</sup> Almost immediately, New York State began creating public benefit corporations to avoid this requirement.<sup>24</sup> These entities could enter "contracts, acquire and dispose of real and personal property, sue and be sued, borrow money and issue evidences of indebtedness, fix rates and collect fees or charges for the use of facilities, and hire personnel."<sup>25</sup>

In 1938, several years after the first public authority in the country—the Port Authority—was created, the State of New York held a Constitutional Convention to examine its use of public authorities for the first time.<sup>26</sup> Thirty-two public authorities had been created since the Port Authority, and the Convention's delegates were concerned about how the public authority's debt powers could threaten State stability; most significantly, they were concerned that public authorities could be used to circumvent local debt caps and cause financial ruin.<sup>27</sup> At the Convention, the New York State Constitution was amended to add a few limits to the public authority structure.<sup>28</sup> Some of the most notable changes included: the legislature alone would be permitted to create public authorities that assumed debt and collected charges or fees; the State Comptroller would have the ability to supervise public

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<sup>22</sup> See Marcello, *supra* note 12.

<sup>23</sup> David Moss & Dean Grodzins, *Debt and Democracy: The New York Constitutional Convention of 1846*, HARV. BUS. SCH. 716-049, at 1, 15–17 (Feb. 2016).

<sup>24</sup> See *Newell v. People*, 7 N.Y. 9, 92–93 (N.Y. 1852) (case where the Court of Appeals found that the usage of a "Canal Revenue Certificate" to issue debt violated the constitutional debt limit).

<sup>25</sup> Shestack, *supra* note 1, at 554.

<sup>26</sup> Marcello, *supra* note 12.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

authorities' accounts; and public authority debts would never become an obligation of the State or local governments.<sup>29</sup> This last point is especially dramatic because it continued to distance government bodies from public authorities and would eventually make abusing fake authorities' debt power even more appealing.<sup>30</sup> Although the Convention had been held in response to concern raised about the popularity of public authorities, the years following the Convention nevertheless led to an increased use of authorities.<sup>31</sup>

The next two decades would mark an especially important chapter in the history of public authorities. New York State began to ramp up its use of public benefit corporations, and in 1956, the Temporary State Commission on Coordination of State Activities called public authorities "one of the most significant developments in modern governmental administration."<sup>32</sup> The Commission called attention to the dangerously high number of public authorities and warned of the authorities' consequences if not checked.<sup>33</sup> The Commission's final report noted that no one was able to determine or come up with an approximate number of the number of public authorities that existed, where they were, or what they did.<sup>34</sup>

In 1956, the Commission released recommendations for reform in the form of nine pieces of legislation; only two of those nine recommendations were actually passed and signed by the governor.<sup>35</sup> The two that went through, however, failed to curb the public authority's power.<sup>36</sup> "One bill increased the period of time the governor has to review Port Authority meeting minutes, and the other eliminated 13 of the 53 public authorities that had been created but did not set limitations on the creation of future authorities."<sup>37</sup> In other words, the 1956 public authority reforms were weak—and demonstrated that Albany was unwilling to step away from its comfortable reliance on the public authority.<sup>38</sup> Indeed, instead of facing new limits, public authorities across the

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<sup>29</sup> *Id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> Marcello, *supra* note 12.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See* Shestack, *supra* note 1, at 553, 555.

country were slowly growing in strength because of their flexibility and ability to take actions that formal government agencies could not.<sup>39</sup>

Public authorities unquestionably have uses. They are at their most effective when governments are aware of their own limitations and use authorities to work around them. For example, in New York, the Port Authority effectively manages a complex system of buses and trains within the otherwise tangled web of laws and regulations that would make a government agency completely ineffective.<sup>40</sup> In the right circumstances—namely, when an authority is independent and financially stable—public authority usage can optimize an otherwise unwieldy bureaucracy or cut through geographic and symbolic borders with ease.<sup>41</sup> These strengths, however, do not mean that public authorities are infallible.<sup>42</sup>

In the late twentieth century, many of New York's public authorities were helplessly in debt, unable to function without State aid, and also a critical component of the State's operations.<sup>43</sup> In the mid-1970s, one of New York's public authorities—the Urban Development Corporation—defaulted on its short-term debt.<sup>44</sup> This disaster led to the creation of the Public Authorities Control Board, whose mandate was to review the financing and construction of projects proposed by the eleven authorities that fell under its jurisdiction.<sup>45</sup> The Board, made up of five members, intended to be apolitical but would ultimately fail to fully steer

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<sup>39</sup> See *id.*

<sup>40</sup> See JAMESON W. DOIG, EMPIRE ON THE HUDSON: ENTREPRENEURIAL VISION AND POLITICAL POWER AT THE PORT OF NEW YORK AUTHORITY 3 (Colum. Univ. Press ed., 2001).

<sup>41</sup> See, e.g., CITIZENS BUDGET COMM'N, *supra* note 12, at 2, 6, 20–21.

<sup>42</sup> See, e.g., Nehemkis, *supra* note 1, at 14; Kennan El Khatib, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 155–56 (2015); Emil Ovbiagele, *The Rise of Benefit Corporations: Show Me The Money . . . And The Good*, MARQ. UNIV. L. SCH.: FAC. BLOG (Oct. 14, 2017), <https://law.marquette.edu/facultyblog/2017/10/the-rise-of-benefit-corporations-show-me-the-moneyand-the-good> [<https://perma.cc/MQ92-WD5H>]; Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1819–20 (2018); Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE. & ACCOUNTABILITY REV. 17, 18 (2014).

<sup>43</sup> See Marcello, *supra* note 12.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

clear of politics.<sup>46</sup> In 2019, Governor Andrew Cuomo considered blocking the appointment of a Queens Democrat Senator to the Board because of the Senator's opposition to Amazon building a headquarters in New York City.<sup>47</sup>

In 1990, Governor Mario Cuomo founded the Commission on Government Integrity to issue a report on public authorities.<sup>48</sup> The Commission called the public authority a type of "[u]nderground [g]overnment" or "shadow government" that performed essential and increasingly important tasks but were hidden away, unbeknownst to most of the world and unaccountable to the general public.<sup>49</sup> "The Commission found that . . . tracking the financial transactions of public authorities [was] challenging" and "made a number of recommendations for how public authority accountability and oversight could be improved."<sup>50</sup> Public authority reform entered and exited the public sphere for the next few decades, but New York State has yet to develop a real accountability framework in line with how most government agencies are regulated.<sup>51</sup> Comptroller Thomas DiNapoli performed an audit in the early and mid-2010s that revealed public authorities suffered from "lax contracting practices, loose expenditure controls and inadequate oversight."<sup>52</sup>

On their own, these issues of accountability and transparency would be enough to have a paper written about them. Indeed, many papers have discussed problems with public authorities and argued that their lack of transparency and accountability make them an economic risk for many states.<sup>53</sup> However, this paper's argument is more targeted. This paper argues that "fake authorities" like the MTA—which are financially unstable—run the risk of becoming corrupted quite easily in highly politicized

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<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> Marcello, *supra* note 12.

<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., CITIZENS BUDGET COMM'N, *supra* note 12, at 20 (explaining that New York State's authorities need "[i]mproved [a]ccountability with [b]etter [r]eporting" more in line with other agencies).

<sup>52</sup> Press Release, *DiNapoli: Pub. Authorities, Borrow and Spend Billions with Limited Transparency, Accountability*, OFF. OF N.Y. ST. COMPTROLLER (Jan. 12, 2017), <https://www.osc.state.ny.us/press/releases/2017/01/dinapoli-public-authorities-borrow-and-spend-billions-limited-transparency-accountability> [<https://perma.cc/TE7X-3MNN>].

<sup>53</sup> See, e.g., Kennan Khatib, *Comment: The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 181 (2015).



environments *because* of the issues of limited oversight and accountability noted above, which plague nearly all authorities.

Authorities like the MTA are “fake authorities” because they are *de facto* state operated. Public benefit corporations that are financially insolvent turn to state and city governments for money. When they do so in politicized environments, like New York State, these authorities grow dangerous because elected officials can leverage their power to manage their day-to-day functions without facing any of the equivalent consequences or responsibilities due to the authority’s naturally limited transparency and accountability requirements.<sup>54</sup> For example, elected officials can theoretically threaten to withhold funding or perform some other act that would risk an authority’s existence if something—like funneling money towards a side-project that the official can claim some responsibility for—is not done. If an authority chooses to call their bluff, the elected official can watch the authority struggle and blame its board for their poor decisions. In other circumstances, the elected official can also step in and take credit for an authority’s success when they help bring in money or aid to the agency.

To recap, public authorities can become “fake authorities” when they are financially insolvent and are forced to rely on government support to survive. This is especially dangerous in highly politicized environments where the public is invested in the authority or where the government provides a substantial amount of loans, taxes, or subsidies to the authority, because elected officials will end up wielding even more influence over the authority. These individuals, then, can utilize the authority’s natural power to circumvent local debt caps to support their other projects. The additional debt the authority takes on to support these works creates a feedback loop, forcing the “fake authority” to further rely on the government to survive. Because of the public authority’s natural lack of transparency and accountability requirements, elected officials can continue doing this without ever being held responsible for the authority’s shortcomings.<sup>55</sup> This corruption is significant on its own, but when done on a massive stage—like in the case of the MTA—everything is multiplied in impact. Because the MTA legally cannot and would not be allowed to default on its debt, given how important it is to the State and

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<sup>54</sup> See *id.* at 181–82.

<sup>55</sup> *Cf. id.*

City's economy, the State has even more leverage over the MTA which can only become more debt-ridden.<sup>56</sup>

The next few sections of this paper will seek to explain how the MTA came to be a "fake authority." This paper will argue that the MTA's twentieth-century financial situation and place in the tense New York City-New York State battleground contributed to this development by enveloping the early authority in a dangerous political climate. The MTA's history in later sections will provide some useful context for this argument. Afterward, this paper will explain where the MTA's fiscal stress comes from and how it relies on taxes to survive. After this paper lays out these arguments and explains that leaving the MTA as a fake authority is dangerous, it will turn to imagining what the MTA's options moving forward might look like.

This paper uses the MTA as its subject for a few reasons. COVID-19 has sped up the MTA's fracturing to the point that the public authority's problems are increasingly being displayed to the entire world.<sup>57</sup> The MTA's visibility and popularity make its consequences easy to understand, and its urgent situation makes for a practical example of what can happen to corrupt political authorities.<sup>58</sup>

## II. THE METROPOLITAN TRANSPORTATION AUTHORITY

New York City's transit system is broke, broken, and in dire need of assistance. But help is not coming any time soon—the COVID-19 pandemic essentially guarantees that, creating urgent fiscal and social crises across New York City and State.<sup>59</sup> For the past few decades, the MTA has functioned as a "public benefit corporation," which means that the government is *not* directly in charge of operating the public transit system.<sup>60</sup> Instead, responsibility falls upon an "authority" made up of private citizens, some appointed by elected officials and others brought in as

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<sup>56</sup> See Brian Chappatta, Opinion, *MTA Can't Go Bankrupt. So How Does It Survive?*, BLOOMBERG (June 29, 2020), <https://www.bloomberg.com/opinion/articles/2020-06-29/mta-can-t-go-bankrupt-so-how-does-it-survive-debt-and-bailouts> [https://perma.cc/T2X2-WRZK].

<sup>57</sup> See, e.g., Winnie Hu & Christina Goldbaum, *The Worst-Case Scenario: New York's Subway Faces Its Biggest Crisis*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/nyregion/nyc-mta-subway-coronavirus.html> [https://perma.cc/FCD6-MEFF].

<sup>58</sup> See *id.*; CITIZENS BUDGET COMM'N, *supra* note 12, at 2.

<sup>59</sup> See Hu & Goldbaum, *supra* note 57.

<sup>60</sup> CITIZENS BUDGET COMM'N, *supra* note 12, at 2, 4–5.

independent actors.<sup>61</sup> In certain circumstances, this structure would allow the authority to be independent and efficient. In the case of the MTA, the authority's lack of accountability to the public and the yoke of its massive debt led to corruption and mismanagement.<sup>62</sup> The MTA can be saved by turning ownership of it over to a publicly accountable, transparent government. If the problem is avoided for too long, it may forever be too late.

To the millions of immigrants, workers, and professionals who rely on New York City's transit, the buses and trains are more than just a mode of transport.<sup>63</sup> They are a way of life, a local cultural heritage, and even a social gathering place.<sup>64</sup> Over half of the city's residents take some form of mass transit to get to work,<sup>65</sup> and this commute is spent in close quarters with the art, smells, and people that make up New York. However—to the great dismay of the city's transit experts—the most well-known aspect of the municipality's trains and buses is not their expansiveness or history, but rather, their inefficiency.<sup>66</sup>

The transit system's ability to function properly has been in great peril since its genesis.<sup>67</sup> Overcrowding, politicking, and the inefficient distribution of funds has left New York rapid transit struggling to dig itself out of the hole it was born into.<sup>68</sup> Currently, the city's transit system is run by the MTA, but the MTA's structure is confusing and limits accountability.<sup>69</sup> Asking a New Yorker to direct their frustration with the MTA at any individual is impossible. A lack of accountability means that the city's rapid transit does not stand a chance at making substantive improvements. No one is held responsible for broken switches

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<sup>61</sup> *Id.* at 4.

<sup>62</sup> See COREY JOHNSON, LET'S GO: A CASE FOR MUNICIPAL CONTROL AND A COMPREHENSIVE TRANSPORTATION VISION FOR THE FIVE BOROUGHES 33, 38 (Mar. 5, 2019), [http://council.nyc.gov/wpcontent/uploads/2019/07/LetsGo\\_TransitReport\\_05.pdf](http://council.nyc.gov/wpcontent/uploads/2019/07/LetsGo_TransitReport_05.pdf) [perma.cc/36TC-PFH6] (report released by the former Speaker of the New York City Council).

<sup>63</sup> See Garry Pierre-Pierre, *Immigration Fosters Surge in Subway Use*, N.Y. TIMES (Feb. 11, 1997), <https://www.nytimes.com/1997/02/11/nyregion/immigration-fosters-surge-in-subway-use.html> [https://perma.cc/4FZJ-CEET].

<sup>64</sup> See JOHNSON, *supra* note 62, at 7.

<sup>65</sup> *Id.* at 13.

<sup>66</sup> See Connor Harris, *Overfunded, Underperforming: Despite What Governor Cuomo Says, the MTA Has More Than Enough Money*, CITY J. (Nov. 5, 2018), <https://www.city-journal.org/mta-budget-reform> [https://perma.cc/X7KS-XDWQ].

<sup>67</sup> See JOHNSON, *supra* note 62, at 33.

<sup>68</sup> *Id.* at 18.

<sup>69</sup> See CITIZENS BUDGET COMM'N, *supra* note 12, at 4–5.

causing delays, dirty trains, or bloated budgets.<sup>70</sup> Thus, officials are incentivized to use the MTA for their projects and to appeal to their constituents.<sup>71</sup>

Public authorities can control significant swaths of infrastructure. The MTA controls New York City's public transit, and ineffective rapid transit is more than a minor hassle.<sup>72</sup> A cumbersome and deficient MTA has a disparate impact on different socioeconomic classes.<sup>73</sup> Wealthier individuals can afford homes closer to their job, which significantly reduces commute time, or avoid the MTA altogether by either living within walking distance of their work or by owning a car.<sup>74</sup> Lower-income and outer borough residents, on the other hand, have no option but to ride the MTA.<sup>75</sup> Many New Yorkers take one, two, or even three trains or modes of transportation to get to their destination, drastically increasing the risk of some delay affecting their commute.<sup>76</sup> In 2018, the average New Yorker spent about twelve and a half days a year commuting to work, but outer borough residents—who make up roughly half of employed New Yorkers<sup>77</sup>—spent as many as thirty-one days out of the year traveling to and from their job.<sup>78</sup> This disparate commute time translates into wealthier students having more time to study at home than poorer ones, outer borough parents having less time to spend with their children than Manhattan-based ones, and the preservation of a cycle that favors the wealthy while disadvantaging the poor. By virtue of its existential role in New Yorkers' lives, an inefficient MTA harms social mobility, strains community bonds, and further divides a city already heavily stratified and segregated by race and income.<sup>79</sup>

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<sup>70</sup> See Marcello, *supra* note 12.

<sup>71</sup> See Brian M. Rosenthal et al., *How Politics and Bad Decisions Starved New York's Subways*, N.Y. TIMES (Nov. 18, 2017), <https://www.nytimes.com/2017/11/18/nyregion/new-york-subway-system-failure-delays.html>. [<https://perma.cc/AX3Z-47JQ>].

<sup>72</sup> See Nicole Gorton & Maxim L. Pinkovskiy, *Why New York City Delays Don't Affect All Riders Equally*, FED. RESRV. BANK OF N.Y., LIBERTY ST. ECON. (June 27, 2018), <https://libertystreeteconomics.newyorkfed.org/2018/06/why-new-york-city-subway-delays-dont-affect-all-riders-equally/> [<https://perma.cc/93AJ-DHSH>].

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See JOHNSON, *supra* note 62, at 12.

<sup>77</sup> See Gorton & Pinkovskiy, *supra* note 72.

<sup>78</sup> JOHNSON, *supra* note 62, at 12.

<sup>79</sup> See Eliza Shapiro, *Segregation Has Been the Story of New York City's*

In the following sections, this paper will demonstrate that many of the imagined benefits of structuring the MTA as a public benefit corporation have not borne out when assessed against the last seventy years. The ownership structure contributes to a poorly run and opaque MTA and has a chilling effect on accountability.<sup>80</sup> Though this inefficiency disproportionately harms low-income communities, its effects are felt by all.<sup>81</sup> The paper will briefly touch upon the benefits of a government-owned transit system, reimagining the MTA as either a state- or city-entity. Still, the focus of this paper remains on promises made and not realized by the MTA's current structure. Much of the restructuring math comes from former New York City Council Speaker Corey Johnson's *Let's Go* report, where he made a case for municipal control of the city's transportation.<sup>82</sup>

Three significant distinctions separate this paper's MTA analysis from Johnson's proposal. First, in discussing options moving forward, this paper acknowledges New York State's political reality, the feasibility concerns of Speaker Johnson's municipally controlled MTA, and considers the alternative of a state-run system and an "independent" board.<sup>83</sup> Second, the following sections will focus on the promised benefits of structuring the MTA as a public benefit corporation, many of which have never been realized. Finally, this paper will situate itself in current events, emphasizing the necessity of building a new version of the MTA *now*, instead of in the distant future. COVID-19 demonstrated the importance and fragility of New York City's trains and buses to the world, and it is essential to use that momentum to create an opportunity for reorganization.<sup>84</sup> The next section of this paper will cover a brief history of the MTA.

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*Schools for 50 Years*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/nyregion/school-segregation-new-york.html> [https://perma.cc/5KEK-6GMG].

<sup>80</sup> See Marcello, *supra* note 12.

<sup>81</sup> See *id.*

<sup>82</sup> See JOHNSON, *supra* note 62, at 12.

<sup>83</sup> See, e.g., Danielle Muoio Dunn, *Yang Wants to Control the Subway. Transit Experts Don't Think It's a Good Idea*, POLITICO (May 3, 2021, 1:25 PM), <https://www.politico.com/states/new-york/albany/story/2021/05/03/yang-wants-to-control-the-subway-transit-experts-dont-think-its-a-good-idea-1378954> [https://perma.cc/S6C6-78PH].

<sup>84</sup> See Hu & Goldbaum, *supra* note 57.

## III. HISTORY OF NEW YORK CITY MASS TRANSIT

A. *The Beginning And Dual Contracts*

The MTA's structural organization is difficult to pin down. Between its subsidiaries like the Long Island Railroad (LIRR) and affiliate agencies like MTA New York City Transit (NYCT), which runs the subway, it is not immediately obvious who is responsible for the MTA.<sup>85</sup> This is perhaps an intentional feature of its design. To understand the MTA's failures, it is essential to understand its origins and see how its structure came to be. New York City's transit system is inextricably tied together with housing, immigration, and the population of the city itself.<sup>86</sup>

Deciding when to begin a history of the city's transit is difficult because issues with the system date back to the early days of New York City. The MTA website's history of the city's mass transit begins in 1827.<sup>87</sup> In those days, cable-run trolleys, horses, and "els"—elevated railways that declared themselves up and down Ninth Avenue—made up New York's "mass transit."<sup>88</sup> There's no end to the fascinating stories from this time. Take, for example, Alfred E. Beach, who discreetly built a subway and garnered massive public support before looking to the Tammany Hall-controlled state legislature for funding.<sup>89</sup> Tammany loathed the idea of subways because mass transit would undermine their investments in horse railways, but elected officials had no choice but to help Beach or risk losing the popular vote (note that the link between state politics and public transit starts much before the public benefit corporation enters the scene).<sup>90</sup> The first official *subway system* opened in October 1904 as a response to New York City's burgeoning population, which is where this history of New York rapid transit begins, mostly due to the direct link this system has with the MTA of today.

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<sup>85</sup> See, e.g., METRO. TRANSP. AUTH., MTA CREATION AND STRUCTURE A-2, <http://web.mta.info/mta/compliance/pdf/MTA-Creation-Structure.pdf> [<https://perma.cc/CY9A-9BFE>].

<sup>86</sup> CLIFTON HOOD, 722 MILES: THE BUILDING OF THE SUBWAYS AND HOW THEY TRANSFORMED NEW YORK 6, 12 (John Hopkins Univ. Press Centennial ed., 2004).

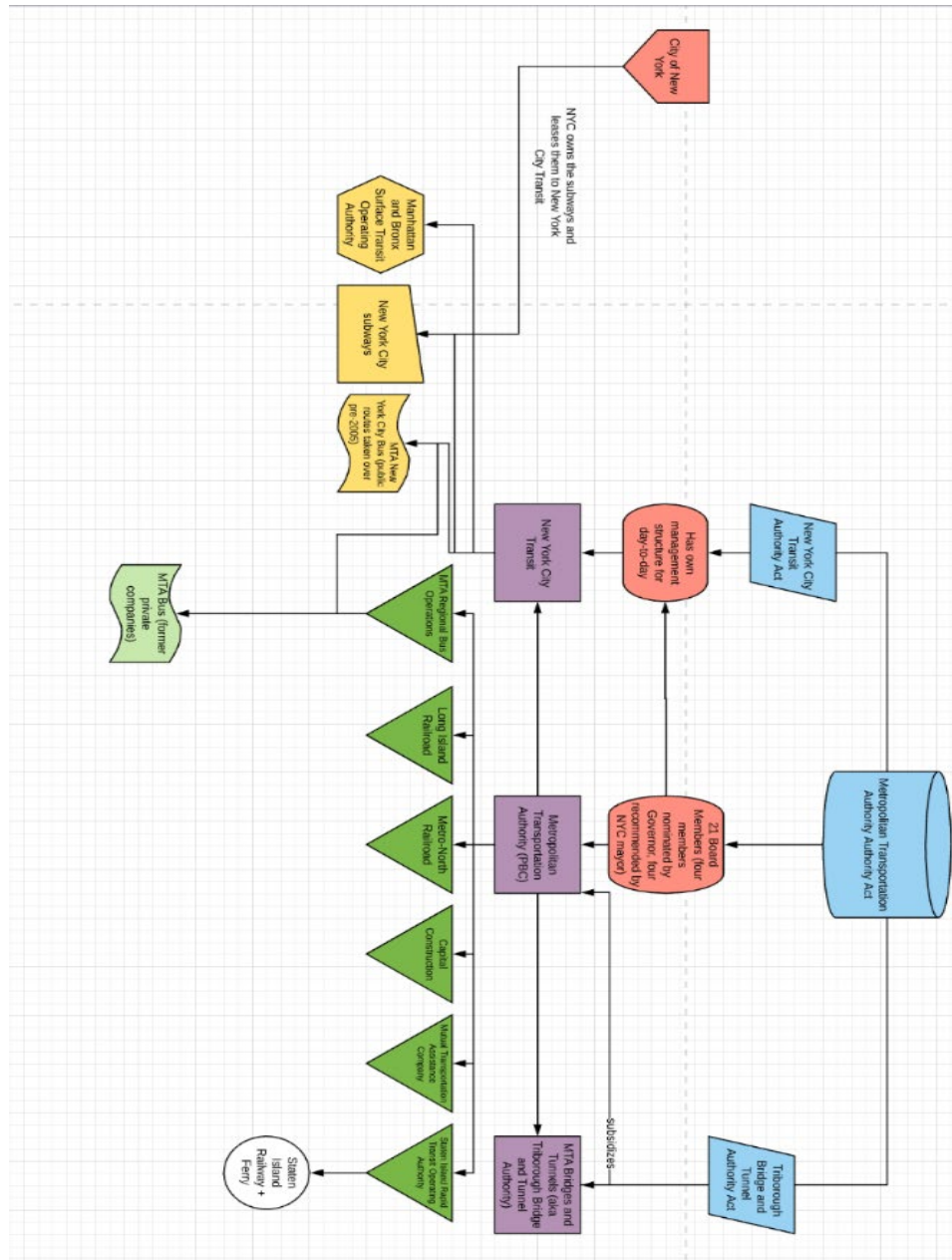
<sup>87</sup> *New York City Transit – History and Chronology*, METRO. TRANSP. AUTH., <http://web.mta.info/nyct/110Anniversary/history.htm> [<https://perma.cc/5SEE-R7DH>].

<sup>88</sup> See HOOD, *supra* note 86, at 37, 48–49.

<sup>89</sup> Oliver E. Allen, *New York's Secret Subway*, AM. HERITAGE'S INVENTION & TECH. (Winter 1997), <https://www.inventionandtech.com/content/new-york%E2%80%99s-secret-subway-1> [<https://perma.cc/QP9W-SNYY>].

<sup>90</sup> HOOD, *supra* note 86, at 43, 47.

Figure 1 – Diagram of MTA's Structure and Enabling Legislation



The Interborough Rapid Transit Company (IRT) was constructed in response to New York City's nineteenth-century population and economy booms.<sup>91</sup> This upswing led to development in a few concentrated areas, mostly downtown Manhattan. Eventually, wealthier New Yorkers began to look to escape the crowds by heading to the north of the island, leaving immigrants and less affluent citizens behind in the more congested spaces.<sup>92</sup> The upper-class, however, still needed ways to get downtown conveniently. The IRT was launched in 1904 as a partnership between New York City's private and public sectors (similar to the future public benefit corporation).<sup>93</sup> The company operated a 9.1-mile long subway consisting of twenty-eight stations from City Hall to 145th Street and Broadway.<sup>94</sup> The business model was unique. The city would finance the construction of the system, but the stations and lines would be constructed, managed, and run by private companies.<sup>95</sup>

The new IRT subway was successful, but conflict sprung up almost immediately.<sup>96</sup> Progressive reformers wanted to build new lines to help move immigrants from crowded slums to the outer boroughs.<sup>97</sup> At the time, over two-thirds of New York City's population lived in tenement housing where "[t]he average three-room apartment often had as many as ten people" and "where twenty people could share a single toilet."<sup>98</sup> At the time, Manhattan housed over two million people—"more people resided on this small, twenty-three-square-mile island than in thirty-three of the nation's forty-six states."<sup>99</sup> The city's reformers recognized the growing population as unsustainable and responded by pushing for diffusion. Instead of meeting these demands, the IRT refused to build additional lines, took over its only competitor, and exerted pressure over the city with its monopoly powers.<sup>100</sup>

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<sup>91</sup> *Id.* at 13–14.

<sup>92</sup> *Id.* at 39–40.

<sup>93</sup> *Id.* at 14.

<sup>94</sup> CNN Editorial Research, *Metropolitan Transportation Authority Fast Facts*, CNN, <https://edition.cnn.com/2013/10/31/us/mta-new-york-city-transit-fast-facts/index.html> [<https://perma.cc/BY24-ZMW9>].

<sup>95</sup> PETER DERRICK, *TUNNELING TO THE FUTURE: THE STORY OF THE GREAT SUBWAY EXPANSION THAT SAVED NEW YORK* 35–37 (N.Y.U. Press ed., 2001).

<sup>96</sup> *See id.* at 2, 5.

<sup>97</sup> *See id.* at 4.

<sup>98</sup> *Id.* at 3.

<sup>99</sup> HOOD, *supra* note 86, at 6.

<sup>100</sup> *Id.* at 14.



After long political battles and negotiations,<sup>101</sup> the Dual Contracts were signed in 1913.<sup>102</sup> Under the new plan, the city would finance construction of new lines and hand control of operations to the IRT and Brooklyn-Manhattan Transit Company (BMT) (then the Brooklyn Rapid Transit Company) for forty-nine years.<sup>103</sup> The first subway line may have been built for the wealthy to distance themselves from the poor, but the second—the BMT—could ostensibly be linked to humanitarian concerns. Even today, it is easy to connect lines and the surrounding neighborhoods to the populations they were intended to serve. The average income of northern Manhattan, which the IRT was built to serve, is vastly different from the average household income in Woodside, Corona, or Jackson Heights in Queens (where a few of the BMT's new stations were built).<sup>104</sup>

The Dual Contracts changed New York City. New York doubled its existing track mileage.<sup>105</sup> The New York City subway expanded to become bigger than all other rapid transit systems in the world.<sup>106</sup> The number of trains that could operate in one direction per hour rose from 352 to 851.<sup>107</sup> The size of the network was “awe-inspiring,” though the system was far from perfect; the two separate networks were managed by competing companies and charged separate fares, and there were hardly any connections between the lines, since neither company wanted to lose passengers to the other.<sup>108</sup> Nevertheless, the subways connected New York City and forever transformed it.

New pockets of communities emerged alongside the new lines and stations throughout Brooklyn, the Bronx, and Queens.<sup>109</sup> These pockets transformed the demographics of New York City by deconcentrating the city's population from Manhattan to the outer boroughs.<sup>110</sup> Between 1910 and 1940, the population of the city

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<sup>101</sup> *See id.* at 137–50.

<sup>102</sup> *Id.* at 15.

<sup>103</sup> *Id.* at 155.

<sup>104</sup> *See City and Borough Data*, FURMAN CTR., <https://furmancenter.org/stateofthecity/view/citywide-and-borough-data> [<https://perma.cc/74X7-G8Y7>] (income data available under “demographics” by borough and neighborhood).

<sup>105</sup> DERRICK, *supra* note 95, at 221.

<sup>106</sup> *Id.*

<sup>107</sup> HOOD, *supra* note 86, at 159.

<sup>108</sup> *Id.* at 159–60.

<sup>109</sup> *See id.* at 178.

<sup>110</sup> *Id.* at 179.

increased by fifty-six percent, but the number of people who lived in Manhattan actually fell by nineteen percent.<sup>111</sup> Like reformers had hoped, the dual systems enabled New Yorkers to move out of Manhattan and into new areas. The subways' role in decentralization cannot be overstated—by 1925, ninety-one percent of all city residents lived within a half mile of a rapid transit railway.<sup>112</sup> People were moving out along the paths of the IRT and BMT lines.<sup>113</sup> The exodus of working-class residents to the outer boroughs translated into a shift of the subway's patronage.<sup>114</sup> Originally built for the wealthy, the subway increasingly was being used by the city's lower- and middle-class populations.<sup>115</sup>

The financial assumptions underpinning the Dual Contracts were undermined when World War I increased the cost of labor and construction materials.<sup>116</sup> The subway faced immense challenges throughout the 1920s, with operating costs being the main fight in its political battles.<sup>117</sup> Confronted with a severe financial crisis during World War I and afterward, the transit systems desperately needed to change their financing strategy.<sup>118</sup> Elected officials were concerned that given the transit systems' ridership, an adjustment of the popular five-cent fare would affect their votes, thus refusing to allow the dual lines to increase the price of a ride.<sup>119</sup> These battles were a small hint of what was yet to come—New York City's transit system has always been political, even when subways were run by private businesses.

### *B. Unification*

World War I changed transit across America, and New York City was not immune from this impact. The war brought rampant inflation and financial difficulties to the nation, crippling industries and families.<sup>120</sup> Railroads were devastated on a number

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> HOOD, *supra* note 86, at 179.

<sup>114</sup> *See id.* at 180.

<sup>115</sup> *Id.*

<sup>116</sup> JOHNSON, *supra* note 62, at 21.

<sup>117</sup> *See id.*

<sup>118</sup> *See id.*

<sup>119</sup> *Id.*

<sup>120</sup> *See* HOOD, *supra* note 86, at 182.

of fronts.<sup>121</sup> Not only were transit companies forced to hike fares, abandon trackage, defer maintenance, and delay the purchase of new stock, but they were also forced to come face-to-face with their greatest rival to date: automobiles.<sup>122</sup> Cities and states across the country chose to allocate space and make policies that favored the popular American car.<sup>123</sup> In the midst of this great mechanical duel, the IRT and BMT suffered greatly.

The two systems faced many of the same problems that other railroads did. The biggest problem was the increase in expenses: the prices of coal and steel doubled and tripled respectively, while the cost of brake shoes shot up 150%.<sup>124</sup> But while the rest of the nation's mass transit lines could try adapting to the circumstances through fare adjustment, the IRT and BMT were locked into their five-cent fare thanks to stipulations in the Dual Contracts.<sup>125</sup> The five-cent fare, which played a huge role in popularizing rapid transit for the City's immigrants and workers, could not match the systems' expenses.<sup>126</sup> Financial stress was not helped along by the nickel's depreciation in value or by a pre-war expansion in track mileage that entailed expensive maintenance.<sup>127</sup> The fare was also fixed, rather than adjusted based on the distance, so passengers could literally ride from one end of the city to another for five cents.<sup>128</sup> "From 1917 to 1921 the Interborough's annual net income plunged more than [fifty] percent, to approximately \$4.5 million."<sup>129</sup>

Although the five-cent fare has been criticized for its grave effects on the transit system, affordable rapid transit made adequate living conditions a realistic possibility for millions of working-class New Yorkers.<sup>130</sup> A fixed, low fare bolstered opportunities for economic mobility, and helped more people experience and contribute to the culture that made New York City so famous.

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<sup>121</sup> *Id.* at 182–83.

<sup>122</sup> *Id.* at 183.

<sup>123</sup> *Id.* at 183–84.

<sup>124</sup> *Id.* at 181.

<sup>125</sup> *Id.* at 182.

<sup>126</sup> HOOD, *supra* note 86, at 179–82.

<sup>127</sup> *Id.* at 182.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> JOHNSON, *supra* note 62, at 21.

Though the IRT and BMT had to deal with their own unique challenges, they also were able to avoid some of the problems that afflicted other rapid transit companies throughout the country. For example, New York City's subways never had to compete with automobiles for street space. This marked a point of divergence between the City's rapid transit and other North American municipalities like Chicago and Los Angeles, which were turning away from their street railways in order to invest in cars.<sup>131</sup> Instead, New York City chose to consider an even more ambitious project for their subways: expansion and unification.

In 1924, the State of New York created the Board of Transportation to empower "the city of New York to build and operate the Independent Subway System (IND)."<sup>132</sup> The IND was the first city-run subway service. The system, however, was not designed to compete with the IRT and BMT.<sup>133</sup> Instead, it was made to be physically compatible with the existing lines, allowing for the possibility that it could eventually expand into them.<sup>134</sup> The State also mandated that the "[c]ity system be self-sustaining."<sup>135</sup> Under Mayor John F. Hylan's direction, IND construction went forward and the subways continued to move towards unification despite resistance from the IRT and BMT, who preferred to operate their own lines.<sup>136</sup> During Mayor Hylan's tenure, the five-cent fare came to occupy a cult-like status within the city.<sup>137</sup> Mayor Hylan once called the "five-cent fare . . . the cornerstone of the edifice which we call New York City."<sup>138</sup> Politics continued to reign.

On December 14, 1940, the last IND subway finally finished construction under the leadership of Mayor Fiorello La Guardia.<sup>139</sup> Unlike Mayor Hylan, Mayor La Guardia had an "ambivalent attitude toward mass transit"<sup>140</sup> that was not helped along by the prominent city planner Robert Moses.<sup>141</sup> Moses's distaste for mass

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<sup>131</sup> HOOD, *supra* note 86, at 183–84.

<sup>132</sup> ANDREW J. SPARBERG, *FROM A NICKEL TO A TOKEN: THE JOURNEY FROM BOARD OF TRANSPORTATION TO MTA 1* (Fordham Univ. Press Empire State ed. 2015).

<sup>133</sup> JOHNSON, *supra* note 62, at 21.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> HOOD, *supra* note 86, at 210–12.

<sup>137</sup> *Id.* at 197.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 212–13.

<sup>140</sup> SPARBERG, *supra* note 132, at 1.

<sup>141</sup> Emily Nonko, *Robert Moses and the Decline of the NYC Subway System*, CURBED N.Y. (July 27, 2017 2:30 PM), <https://ny.curbed.com/2017/7/27/15985648/nyc->

transit was so great that he infamously developed the Jones Beach overpass with low clearances to ensure that public buses would not be able to pass under them.<sup>142</sup> Despite the La Guardia administration's indifference towards mass transit, Mayor La Guardia recognized his own precarious position in elected office.<sup>143</sup> He understood that the majority of New York households did not own an automobile in the 1940s, and thus valued the subways (and its cheap fare).<sup>144</sup> Additionally, La Guardia knew that a reorganization of the subways was necessary in order to save the city's finances.<sup>145</sup> At the time, New York City was in debt "nearly equal to that of the [existing] forty-eight states combined."<sup>146</sup> Under his management, subway unification pressed forward.

Mayor La Guardia's unification plan had three major elements.<sup>147</sup> The first was his commitment to the five-cent fare.<sup>148</sup> The second was that some government body should control the subways and the els, a departure from prior reorganization proposals that suggested power sharing between the government and industry.<sup>149</sup> The third component was Mayor La Guardia's belief in a subway that was self-sustaining *even with* the five-cent fare.<sup>150</sup> Over a twelve-day period in June 1940, the city purchased the IRT and BMT via municipal bonds, becoming the sole owner and operator of all New York City subway and elevated lines.<sup>151</sup> Unification of the BMT and IRT with the enjoining city-owned IND created what was then, and still is, the largest transit system in North America, comprised of 250 miles of subway and elevated lines.<sup>152</sup> The five-cent fare survived the June 1940 changes—though it would not for much longer.<sup>153</sup>

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subway-robert-moses-power-broker [<https://perma.cc/M39Q-F54K>].

<sup>142</sup> *Id.*

<sup>143</sup> HOOD, *supra* note 86, at 226.

<sup>144</sup> *Id.* at 227.

<sup>145</sup> *Id.* at 229.

<sup>146</sup> *Id.* at 228.

<sup>147</sup> *Id.* at 229.

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

<sup>149</sup> HOOD, *supra* note 86, at 229–30.

<sup>150</sup> *Id.* at 230–31.

<sup>151</sup> JOHNSON, *supra* note 62, at 22.

<sup>152</sup> *Id.*

<sup>153</sup> THE CITY OF NEW YORK BOARD OF TRANSPORTATION, FINANCIAL AND STATISTICAL REPORT OF NEW YORK CITY'S TRANSIT SYSTEM SINCE JANUARY 1ST, 1946 80 (1949) (comparing receipts from five-, seven-, and ten-cent fares).

*C. Post-Unification, D-Day, And The Public Benefit Corporation*

Unification initially seemed like a success.<sup>154</sup> The private lines, which struggled so much on their own,<sup>155</sup> were more effective when operated in unison. World War II led to ridership increase and restrictions on private automobiles.<sup>156</sup> At the end of the Board of Transportation's first year of operating, they had generated a surplus of nearly thirty million dollars.<sup>157</sup> However, a combination of inflation distorting the actual state of finances, and the developing face of the city post-war, would force the transit system to deal with a whole other issue: long-term funding.<sup>158</sup>

At the end of World War II, America was changing. The war in Germany forced Americans to reckon with race and inequality, the nation's population boomed, and in the midst of this, automobiles were ever-increasing in popularity and transforming how people traveled.<sup>159</sup> President Eisenhower would soon sign the Federal Highway Act, dedicating twenty-five billion dollars to building highways across the nation.<sup>160</sup> In New York, Robert Moses rose to the height of his power and worked to mold the city into his vision of modernism.<sup>161</sup> Public transit was on its way out. New York City's subway and bus lines struggled in this era, becoming crowded, dangerous, and unreliable.<sup>162</sup> The city operated the subway at a loss, and the cultural perception of the subway system became that it was for poor people.<sup>163</sup>

In 1948, the struggling Board of Transportation made the then unfathomable decision to increase the transit fare.<sup>164</sup> The five-cent fare, which had allowed enabled poor New Yorkers to take advantage of the city for so many years, was gone.<sup>165</sup> The dime

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<sup>154</sup> JOHNSON, *supra* note 62, at 21–22.

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

<sup>156</sup> *Id.* at 22.

<sup>157</sup> *Id.*

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

<sup>159</sup> *Id.*

<sup>160</sup> JOHNSON, *supra* note 62, at 22.

<sup>161</sup> See Nonko, *supra* note 141.

<sup>162</sup> Nadav Gavrielov, *The Subway Fare Rises on April 21. It Could Be Worse: One Year It Doubled*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/nyregion/mta-fare-hike.html> [<https://perma.cc/HNR4-7XT7>].

<sup>163</sup> HOOD, *supra* note 86, at 218.

<sup>164</sup> JOHNSON, *supra* note 62, at 22.

<sup>165</sup> *Id.*

replaced the nickel until it too was ousted in 1953, and so forth.<sup>166</sup> To give an idea of how important an affordable fare was to New Yorkers, Edward and Rosa Kaufman, German Jews who fled Nazi persecution, “regarded the *five-cent subway fare* [as] an unaffordable luxury and often walked forty or fifty blocks . . . to avoid paying for the IRT.”<sup>167</sup> In the early 1940s, a report assessed the impact of raising the fare to seven-and-a-half cents on a typical working-class family.<sup>168</sup> It found that in a typical, single-income household, the cost would amount to one percent of gross income—a significant amount to spend on local travel when the average annual earning for this group was only \$1,500.<sup>169</sup> Despite these reports and stories, the fare went up anyway on a day known colloquially as “D-Day” or “Dime Day.”<sup>170</sup>

The next major step in the transit system’s history was the formation of the public benefit corporation, also known as a public authority. Authorities were not a new concept in New York state—for example, in 1857, New York had created the Metropolitan Police District as an authority-like entity to escape the corruption of Tammany Hall.<sup>171</sup> Lawyer Paul Windels was the driving force behind the transfer of public transit ownership from the city to the authority.<sup>172</sup> He had overseen the formation of the Port Authority and admired how public authorities maximized utility and increased workflow efficiency, and believed that solving the spending problem of the subway and buses would require more than a fare increase.<sup>173</sup> He thought the system needed a public authority that would make decisions on its behalf and take power away from what he viewed as a highly politicized city.<sup>174</sup> Windels thought many of the issues that the transit system faced could be tied back to its municipal ownership.<sup>175</sup>

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

<sup>167</sup> HOOD, *supra* note 86, at 216 (emphasis added).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 216–17.

<sup>170</sup> Gavrielov, *supra* note 162.

<sup>171</sup> HOOD, *supra* note 86, at 248.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 250.

Windels campaigned for a new transportation authority and easily won the support of a number of organizations.<sup>176</sup> Public support grew when the subway continued to experience failures throughout the late 1940s and early 1950s.<sup>177</sup> The fare increase had not been enough.<sup>178</sup> In 1950, the transit system operated at a deficit of \$1.2 million.<sup>179</sup> By 1952, it had lost \$24.8 million dollars.<sup>180</sup> After being lobbied by powerful businesses, Republican Governor Thomas E. Dewey also began pushing for Windels's public authority.<sup>181</sup> Governor Dewey argued that the subway would no longer be forced to compete for scarce resources, that the authority would be independent and business-like, and that passenger service would improve.<sup>182</sup> On March 20, 1953, in response to many of these arguments, the New York City Transit Authority (NYCTA) was born.<sup>183</sup>

From private control, to municipally-owned, to authority-operated, New York City's subways and buses experienced many ownership structures since their beginning. Although power had formally transferred to a board with the advent of the authority, the Governor and Mayor retained some say as to who could actually be on this NYCTA board.<sup>184</sup> Nevertheless, though the state and city were not totally separate from the NYCTA, significant changes still impacted the public transit system because of the laws governing public authorities.<sup>185</sup> For example, New York City was limited to contributing no more than \$5 million per year unless otherwise authorized by the Mayor.<sup>186</sup> Additionally, laws allowed the NYCTA to incur debt and costs under its own name, which circumvented local debt caps and was "not [] payable by the city."<sup>187</sup> Immediately after taking control of the lines, the NYCTA raised fares to fifteen cents.<sup>188</sup>

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<sup>176</sup> *Id.* at 250–52.

<sup>177</sup> HOOD, *supra* note 86, at 250–52.

<sup>178</sup> *Id.* at 251.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 251–52.

<sup>183</sup> HOOD, *supra* note 86, at 252.

<sup>184</sup> See JOHNSON, *supra* note 62, at 23.

<sup>185</sup> *Id.*

<sup>186</sup> N.Y. PUB. AUTH. LAW § 1203(1)(b)(i) (2021); see JOHNSON, *supra* note 61, at 24.

<sup>187</sup> N.Y. PUB. AUTH. LAW § 1203(1)(b)(i) (2021); JOHNSON, *supra* note 61, at 24.

<sup>188</sup> JOHNSON, *supra* note 62, at 24.



Robert Moses criticized the authority's formation, believing that the subway would not generate enough revenue on their own to sustain NYCTA.<sup>189</sup> He would eventually be proven right that the NYCTA would be unsustainable, even if he failed to fully grasp why.<sup>190</sup> The reasons were not just monetary. The NYCTA was created partially because elected officials no longer wanted responsibility for the subway.<sup>191</sup> The transit behemoth was expensive, but attaching one's name to legislation that sought to raise fares meant signing their own political death warrant.<sup>192</sup> It was essential, but slow and ineffective.<sup>193</sup> It was dirty, overcrowded, and smelled.<sup>194</sup> There were a million issues to deal with, and no politician wanted to devote their career to fighting to fix them. Rather than solving the transit system's issues, the authority became the scapegoat for all the transit system's problems.<sup>195</sup> The NYCTA continued to exacerbate problems—except now, only the authority could be held accountable for them.<sup>196</sup>

The final chapter in the transit system's ownership history happened in 1966, during Mayor John Lindsay's first term in office.<sup>197</sup> The Transit Workers Union went on strike, and although Lindsay settled with them, he recognized that the NYCTA had and would have funding issues.<sup>198</sup> He proposed merging the authority with the Triborough Bridge and Tunnel Authority (TBTA), which, through toll revenue, had become one of the City's most powerful agencies.<sup>199</sup> Moses (who controlled the TBTA) protested, but he was quickly overruled by Governor Rockefeller, who was intent on creating a regional transportation authority.<sup>200</sup> Rockefeller and William Ronan, the first chief of the MTA, took control of the bankrupt commuter railroads in Westchester County and Long

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<sup>189</sup> HOOD, *supra* note 86, at 252.

<sup>190</sup> *Id.* at 253.

<sup>191</sup> *Id.*

<sup>192</sup> See SPARBERG, *supra* note 132, at 59–60.

<sup>193</sup> See JOHNSON, *supra* note 62, at 23.

<sup>194</sup> See Alon Levy, *The Real Reason New York City Can't Make The Trains Run on Time*, VOX (July 11, 2017, 9:30 AM), <https://www.vox.com/policy-and-politics/2017/7/11/15949284/new-york-subway-crisis> [<https://perma.cc/5YLM-4E7B>]. See also JOHNSON, *supra* note 62, at 23.

<sup>195</sup> See JOHNSON, *supra* note 62, at 23–24.

<sup>196</sup> See *id.* at 24.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See *id.* at 24, 31.

<sup>200</sup> *Id.*

Island,<sup>201</sup> and then successfully merged TBTA with NYCTA to create the MTA.<sup>202</sup> By eliminating the TBTA, Rockefeller had seized some of the city's most profitable assets, incorporated them under the public benefit corporation, and then left the City with just three of the nine seats on the MTA's board.<sup>203</sup>

#### *D. From Then To Now*

William Ronan, the first chief of the MTA, announced "Program for Action" in 1968.<sup>204</sup> The plan called for aggressive upgrades and building projects for the city's subway and public transit lines.<sup>205</sup> Program for Action's objectives, however, were overly optimistic. Even with state funding, the MTA did not bring in enough revenue to ultimately make these projects feasible.<sup>206</sup> From 1969 to 1970, the subway's deficit rose from \$70 million to \$120 million, partially due to an overcommitment to these expensive—albeit important—projects.<sup>207</sup> Just four days into the new decade, the transportation authority was forced to raise its fare to thirty cents.<sup>208</sup>

At around the same time, New York City struggled.<sup>209</sup> All around the country, but especially so in New York, mostly white, middle-class families fled cities and into the suburbs in a process known as "white flight."<sup>210</sup> The communities left behind—intentionally made up of brown, Black, and immigrant populations through the process of redlining—were left with severe urban decay.<sup>211</sup> Cities, in turn, resorted to urban renewal projects, which

<sup>201</sup> JOHNSON, *supra* note 62, at 24.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 24, 33.

<sup>204</sup> *Id.* at 24.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> JOHNSON, *supra* note 62, at 24.

<sup>208</sup> Mark S. Feinman, *The New York Transit Authority in the 1970s*, NYCSUBWAY.ORG (Nov. 19, 2002), [https://www.nycsubway.org/wiki/The\\_New\\_York\\_Transit\\_Authority\\_in\\_the\\_1970s](https://www.nycsubway.org/wiki/The_New_York_Transit_Authority_in_the_1970s) [https://perma.cc/X5UT-G65T].

<sup>209</sup> JOHNSON, *supra* note 62, at 24.

<sup>210</sup> Damaris Pichardo, *The Subway System in the 1970s-80s*, SETON HALL UNIV., <https://blogs.shu.edu/nyc-history/subway-system-1970-1980s/> [https://perma.cc/T8EM-42GV]levy; JOHNSON, *supra* note 62, at 24.

<sup>211</sup> Pichardo, *supra* note 210; RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY ON HOW OUR GOVERNMENT SEGREGATED AMERICA* vii-xv (2017) (overview of the intentionality behind redlining); Katharine Schwab, *The Racist Roots of "Urban Renewal" and How It Made Cities Less Equal*, FAST CO. (Jan. 4, 2018), <https://www.fastcompany.com/90155955/the-racist-roots-of-urban-renewal-and-how-it-made-cities-less-equal> [https://perma.cc/YEX3-].

bulldozed through redlined low-income neighborhoods and caused homelessness, in order to attract affluent individuals.<sup>212</sup> These actions had consequences. In the 1970s, New York City experienced crime at unprecedented levels.<sup>213</sup> Murder, drugs, and theft rates skyrocketed, and the subway—which had seen much of its prosperity arise from the train lines’ purported safety<sup>214</sup>—experienced a decline in ridership and fare revenue. “[B]y the 1980s, over 250 felonies were being committed per week in the subway.”<sup>215</sup> Graffiti became a way for New Yorkers to express their frustration with how issues were being handled in the city, and subway cars became art exhibits.<sup>216</sup> Many riders, however, were “terrified” about the state of the city and its subways.<sup>217</sup>

The 1970s were a difficult period of time for New York City, New York State, and the MTA. In the 1980s, however, the MTA underwent a period of major success, partly because it was able to begin issuing bonds for much-needed funding.<sup>218</sup> Over the course of the next few decades, the MTA was able to make major improvements to their subway that helped it function and survive.<sup>219</sup> The authority even eventually refused to send trains out that were not externally clear of graffiti.<sup>220</sup>

The man behind these vast subway improvements was Richard Ravitch.<sup>221</sup> A graduate of Columbia University and Yale Law School, Ravitch was not an expert on subways or transit; he was, however, an expert on people, power, and how to make things happen.<sup>222</sup> Throughout the mid-twentieth century, he became adept at “exploiting ‘the vast field of government housing policy, an interconnected web of programs, incentives, and subsidies from

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<sup>212</sup> *See id.*

<sup>213</sup> Pichardo, *supra* note 210.

<sup>214</sup> HOOD, *supra* note 86, at 179–80.

<sup>215</sup> Pichardo, *supra* note 210 (citation omitted).

<sup>216</sup> *Id.*

<sup>217</sup> Laur Lewis Neal, *Criminals and Culture Makers*, DISSENT MAG. (Summer 2014), <https://www.dissentmagazine.org/article/criminals-and-culture-makers> [<https://perma.cc/V8H7-7P9N>].

<sup>218</sup> PHILIP MARK PLOTCH, *LAST SUBWAY: THE LONG WAIT FOR THE NEXT TRAIN IN NEW YORK CITY* 108, 114–15 (2020).

<sup>219</sup> *Id.* at 121.

<sup>220</sup> *Id.* at 119.

<sup>221</sup> *See* Nicole Gelinas, *Lessons from a Transit Savior*, POLITICO (May 08, 2014, 5:00AM), <https://www.politico.com/states/new-york/albany/story/2014/05/lessons-from-a-transit-savior-080025> [<https://perma.cc/24XU-DT6S?type=image>].

<sup>222</sup> *See id.*

federal, state, and local governments.”<sup>223</sup> He learned to play subsidies off each other.<sup>224</sup> In the 1970s, he was tapped to save the Urban Development Corporation—mentioned earlier as the first New York State public authority to truly collapse—and did so by “standing up to the banks, placing an unfiled bankruptcy petition before each of the city’s major bankers until they blinked.”<sup>225</sup>

Ravitch was asked to lead the MTA in 1979.<sup>226</sup> He did so by being strategic, playing powerful people against each other.<sup>227</sup> When he took over, Ravitch was shocked to learn that the MTA was “rapidly disintegrating” and sought to save the system through a permanent government subsidy.<sup>228</sup> He began by requesting that a state senator ask Ravitch at his confirmation if Ravitch would be willing to raise the fare—a hard-to-dodge political question with an obviously unpopular answer.<sup>229</sup> When asked, Ravitch simply stated that without another source of money, he would *have* to raise fares, which would have enraged the Governor who had both appointed him and promised his voters that there would be no fare hike.<sup>230</sup> But this move got Ravitch the money he needed and demonstrated something significant: when the MTA has succeeded, it has been because of politically savvy chairmen or (as will be noted later with Andy Byford) large figures who have enough clout to demand things of the legislature and Governor. Without one of these individuals in charge, the MTA is easily forgotten until politically convenient for others.

The MTA is still one of the least effective and worst-run transit systems in the entire world.<sup>231</sup> After Ravitch stepped down, things began to deteriorate again. Governor George Pataki began to create a culture of “disinvestment”<sup>232</sup> around the MTA that survives to this day. Governor Pataki “eliminated State subsidies for the system,” reduced funding, and forced the MTA “to rely entirely on fares, tolls, and revenue from” certain “taxes and fees.”<sup>233</sup> Today, the subway system does not generate a profit that

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<sup>223</sup> *Id.* (quoting RICHARD RAVITCH, *SO MUCH TO DO: A FULL LIFE OF BUSINESS, POLITICS, AND CONFRONTING LEGAL CRISES* 22–23 (2014)).

<sup>224</sup> Gelinas, *supra* note 221.

<sup>225</sup> *Id.*; *supra* text accompanying note 44.

<sup>226</sup> *Id.*

<sup>227</sup> *See id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Gelinas, *supra* note 221.

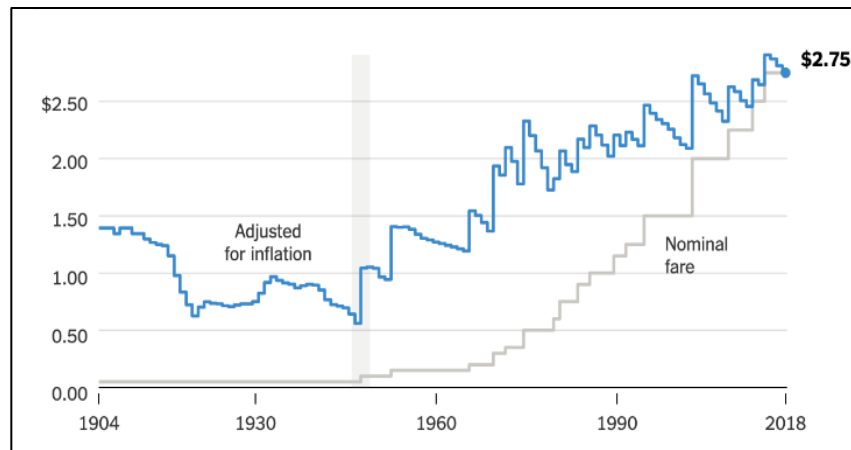
<sup>231</sup> *See* Levy, *supra* note 194.

<sup>232</sup> JOHNSON, *supra* note 62, at 25.

<sup>233</sup> *Id.*

can be used for improvements.<sup>234</sup> In fact, fares barely cover the salaries of its employees.<sup>235</sup> The authority fights with union contractors, deals with age-old signal systems, and manages station repairs on a shoestring budget.<sup>236</sup> To make matters worse, a significant portion of the MTA's budget goes to its own debt and elected officials who redirect funds into their own projects, with former Governor Cuomo being one of the worst offenders.<sup>237</sup> For example, the MTA was forced to bail out multiple state-run ski resorts in 2016.<sup>238</sup> Statistics, unearthed by a New York Times article, demonstrated what so many already know: the city's mass transit system is falling apart, and there is no one taking responsibility.<sup>239</sup> Nominal fares have consistently gone up since the subway was first created, but performance has continued to steeply decline.<sup>240</sup>

Figure 2: Cost of a Subway Ride in New York City, 1904-2018<sup>241</sup>



<sup>234</sup> *See id.*

<sup>235</sup> PLOTCH, *supra* note 218, at 5.

<sup>236</sup> *Id.*

<sup>237</sup> *See* Rosenthal et al., *supra* note 71.

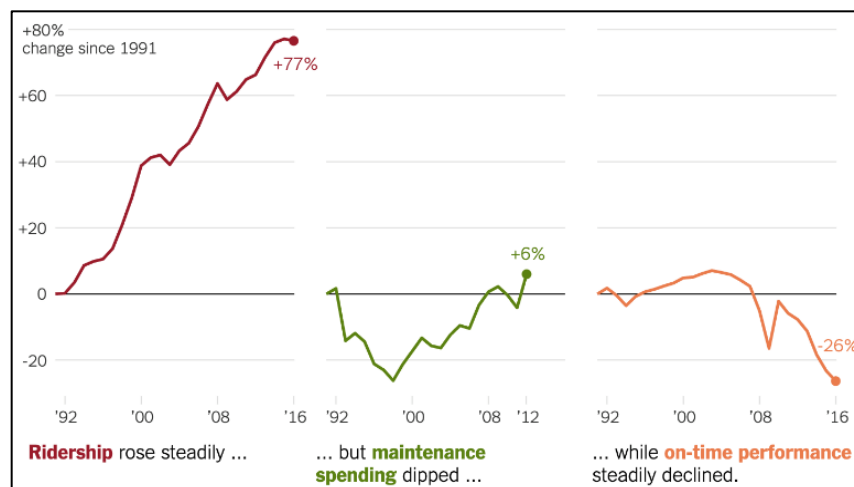
<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Gavrielov, *supra* note 162.

Figure 3: MTA Ridership, Maintenance, and On-Time Performance, 1992-2016<sup>242</sup>



In 2017, Governor Cuomo was forced to declare a state of emergency for the MTA because of reliability and crowding problems on the trains and buses.<sup>243</sup> Cuomo's "Subway Action Plan" and MTA Chairman Andy Byford's "Save Safe Seconds" plan seemed to bring the MTA back from the brink of collapse: in early 2019, over 80% of trains arrived within five minutes of their scheduled time.<sup>244</sup> However, COVID-19 has aggravated the transit system's precarious financial and ridership situation because New Yorkers have been forced to mostly stay home.<sup>245</sup> Over 90% of the ridership has disappeared, and expenses took a hit, but the subway still runs (nearly 24/7), employees still need to be paid, and trains

<sup>242</sup> Rosenthal et al., *supra* note 71.

<sup>243</sup> Emma G. Fitzsimmons, *Cuomo Declares a State of Emergency for New York City Subways*, N.Y. TIMES (June 29, 2017), <https://www.nytimes.com/2017/06/29/nyregion/cuomo-declares-a-state-of-emergency-for-the-subway.html> [<https://perma.cc/J8DW-PB88>].

<sup>244</sup> See Vincent Barone, *Subway On-Time Performance Hits 6-Year High as MTA Reorganization Looms*, AMNY (July 12, 2019), <https://www.amny.com/transit/subway-on-time-performance-1-33726030/> [<https://perma.cc/T43D-35SS>].

<sup>245</sup> Hu & Goldblau, *supra* note 57.

and stations require thorough cleanings every day.<sup>246</sup> The transit authority has faced struggles with the pandemic's reopening timeline, leading MTA officials to make emergency requests for billions of dollars in federal aid.<sup>247</sup> Although government assistance and the sales tax and congestion-pricing plan will benefit the MTA, they do not eliminate the underlying issues.<sup>248</sup> The MTA operates as a piggy bank for the rest of the State—it is essentially state-owned, and state agencies are supposed to be accountable to the public.<sup>249</sup> Public authorities are not.<sup>250</sup> The MTA, then, is a fake authority that has the qualities of a real one—limited oversight and accountability, with expansive debt powers. A restructuring is needed to help the transit system confront the issues that have undermined it for most of its existence.

The next section will examine the original arguments for developing the MTA as a public benefit corporation.

#### IV. THE PAST: ARGUMENTS FOR THE MTA AS A PUBLIC BENEFIT CORPORATION

Public benefit corporations—also known as public authorities—are unique entities. They function like private corporations, with boards of directors appointed by elected officials, but maintain responsibility over some public good (for example, postal services; electrical power; bridges and highways; and housing).<sup>251</sup> Though public benefit corporations share a number of characteristics with government agencies, they are exempt from many of the state and local regulations that otherwise police government bodies.<sup>252</sup> These unique features enable public benefit corporations to, in theory, be apolitical and flexible in a way that government agencies cannot be. In the twentieth century, when these corporations were at their most popular, public benefit corporations were viewed as a melding of the private and public

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<sup>246</sup> *See id.*

<sup>247</sup> *Id.*

<sup>248</sup> *See id.*

<sup>249</sup> *Mission Statement of the Authorities Budget Office*, AUTHORITIES BUDGET OFF., [https://www.abo.ny.gov/abo/about\\_mission.html](https://www.abo.ny.gov/abo/about_mission.html) [<https://perma.cc/YGB2-KCQH>].

<sup>250</sup> CITIZENS BUDGET COMM'N., *supra* note 12, at 4.

<sup>251</sup> *Id.* at 2, 4.

<sup>252</sup> *See* Nehemkis, *supra* note 1, at 14; *What is a Public Authority?* *supra* note 6; *see also* Shestack, *supra* note 1, at 553.

sector to provide efficient services to the public that would otherwise be slowed down by politics and bureaucracy.<sup>253</sup>

In New York State, one of the most consequential powers of public benefit corporations is their ability to issue their own debt without being constrained by the debt limits written into the New York State Constitution.<sup>254</sup> In theory, this means that public benefit corporations can operate like quasi-private corporations that should be able to take risks, innovate, and cut costs while increasing efficiency. However, not every public benefit corporation ends up being profitable. Even efficiency and side-stepping red tape cannot make an endeavor become profitable if it does not naturally generate revenue. Public benefit corporations are now responsible for most of New York State's debt.<sup>255</sup>

Just thirteen years after the unified systems placed New York City's transit system squarely in control of New York City, the State took that control away.<sup>256</sup> Governor Dewey, and his Republican-led legislature, saw the writing on the wall with both the subway's physical and fiscal condition, and sought to modernize the system.<sup>257</sup> Paul Windels, a former assistant counsel for the Port Authority from 1930 to 1933, suggested creating a public authority to solve the issue of transit spending which would end direct municipal operation of the New York City mass transit system.<sup>258</sup>

Windels' admiration of public authorities came from his work with the Port Authority of New York, which was organized in 1921, and was the culmination of a deal struck by New Jersey and New York.<sup>259</sup> It presided over an area within twenty-five miles of the Statue of Liberty, a region which "had to be administered by a public authority because" of the number of counties, cities, towns, and other localities that fell within this space.<sup>260</sup> Any ordinary bureaucratic agency would have to struggle to cross this regulatory landscape, but a public authority was flexible enough to

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<sup>253</sup> See Nehemkis, *supra* note 1, at 14; see also Shestack, *supra* note 1, at 553–55.

<sup>254</sup> Nehemkis, *supra* note 1, at 14 ("Where constitutional or statutory debt limits preclude further borrowing, the authority provides a municipality with a convenient credit base without exceeding the debt limit or placing an undesired burden upon the taxpayer.").

<sup>255</sup> CITIZENS BUDGET COMM'N, *supra* note 12, at 6.

<sup>256</sup> See Nehemkis, *supra* note 1, at 15–17.

<sup>257</sup> See HOOD, *supra* note 86, at 252.

<sup>258</sup> *Id.* at 248–49.

<sup>259</sup> See *id.*

<sup>260</sup> *Id.* at 248.



do so. After gaining control of the Holland Tunnel's revenues and becoming fiscally independent, the Port Authority was a monument to what a public authority could be.<sup>261</sup>

Advocates for a transit authority claimed that the authority's board of directors would be "buffered from day-to-day politics" and "would be able to operate transit services more efficiently than the city by eliminating unnecessary services, taking a harder line on unions, reducing political patronage, and setting an appropriate fare."<sup>262</sup> State Republicans hoped that the authority would "manage the system like a private enterprise," thus eliminating the need for public contribution altogether.<sup>263</sup>

Interestingly, the Port Authority was conceived during the Progressive Era to escape the political corruption of the time, but the transit system's reorganization movement was starkly opposed by leftists and liberals who saw this drastic reconfiguration of the city's subway and buses as threatening the very foundation of what made the system so powerful for the working- and lower-class.<sup>264</sup> They worried that the fare would increase, the transit system would be unresponsive to the needs of those with less political capital, and there would be little accountability in the organizing structure.<sup>265</sup> But Windels did not care about the unpopularity of his ideas—in fact, the popularity contest of politics was one of the reasons he wanted public transit to become a public authority issue.<sup>266</sup> He wanted to take transit "out of politics."<sup>267</sup> Because Mayor La Guardia was ambiguous on the matter and business groups supported Windels' campaign, defenders of a publicly owned subway system had a difficult time fighting against the reorganization.<sup>268</sup>

New York City's subways are a political abnormality. At the time the subway's organizing structure was being fought over, the City had the only major subway system not located in a nation's capital city.<sup>269</sup> Because of this, unlike metros in London, Paris, and Tokyo, New York City's subway did not receive the national

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<sup>261</sup> *See id.*

<sup>262</sup> PLOTCH, *supra* note 218, at 45.

<sup>263</sup> *Id.*

<sup>264</sup> *See* HOOD, *supra* note 86, at 252.

<sup>265</sup> *See id.* at 248.

<sup>266</sup> *See id.* at 249.

<sup>267</sup> *Id.* at 250.

<sup>268</sup> *See id.*

<sup>269</sup> *Id.*

attention or corresponding funding that helped these other systems thrive and press forward past tough times.<sup>270</sup> Instead, through the 1940s and 1950s, New York City's subway system had to depend on cash-strapped state and local governments to survive.<sup>271</sup>

There was one more reason that proponents pushed for the MTA's transition into a public authority: regionalism. Many public authorities like the MTA were not just instituted to avoid debt limits, but to combine regional entities that cross city and district lines. The Port Authority, for example, was designed to be a regional, issue-specific government agency across states.<sup>272</sup> Public authority supporters thought the MTA—or NYCTA at the time—would be able to control several cross-regional entities like the Long Island Railroad and Metro-North more easily than a municipal government.<sup>273</sup> Governments have a hard time operating across state and city lines because they usually need to ask for special permissions from other localities, and they essentially provide a free resource to that other state or town.<sup>274</sup> In theory, the MTA would be able to circumvent these problems.

The arguments for a publicly-owned transit system are clear then—instead of forcing an expensive and burdensome system onto a state and city that was not allocated requisite national resources, give it to an “authority” that could cross jurisdictional lines and act like a private corporation that aims to maximize revenue and efficiency. By doing so, Windels argued the process would simultaneously be removed from the political sphere.<sup>275</sup> These were the benefits that Windels outlined, and this was the argument that led to the transit system's public authority: the New York City Transit Authority (NYCTA).<sup>276</sup>

Rewinding to 1949, however, there was one critic whose voice was a bit louder than the shouts of the union organizers and beleaguered laborers who feared the transition to a public

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<sup>270</sup> See HOOD, *supra* note 86, at 250.

<sup>271</sup> *Id.* at 251.

<sup>272</sup> See W. Russell Tylor, *Regionalism in Practice*, 44 AM. J. SOCIO. 379, 382 (1938) (quoting THE PORT OF N.Y. AUTH., THE PORT OF NEW YORK AUTHORITY: A MONOGRAPH 9–10 (Rogers, Kellogg & Stillson eds., 1936), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015073739248&view=1up&seq=1&skin=2021> [<https://perma.cc/7W68-EHCP>]).

<sup>273</sup> See HOOD, *supra* note 86, at 163, 252.

<sup>274</sup> See Tylor, *supra* note 272, at 382 (quoting THE PORT OF N.Y. AUTH., *supra* note 271, at 9–10).

<sup>275</sup> HOOD, *supra* note 86, at 249–50.

<sup>276</sup> *Id.* at 252.

authority.<sup>277</sup> That critic was Robert Moses.<sup>278</sup> Moses, at that point a sixty-year-old man and veteran of the New York political machine, argued that the subway would not generate enough revenue “to be genuinely independent”—a theory that now seems to have been prescient.<sup>279</sup> There is much that can be said about Moses’ contributions to making the MTA as ineffective and terrible as it is today—but his criticism was legitimate, no matter its ulterior motive.<sup>280</sup> His argument did not deter the movement, however, and in 1953 Governor Dewey signed the bill converting the transit system into a public authority.<sup>281</sup>

But the transit system’s problems were not solved by this transition, and new ones would emerge quickly, and continue to build upon one another. Paul Windels’ plan only served to aggravate the financial situation of the rapid transit system.<sup>282</sup> In the next section, this paper will address the problems with Windels’ promises, what New York City’s rapid transit systems look like today, and why the public benefit corporation failed to meet the challenges of the late twentieth and early twenty-first centuries.

#### V. THE PRESENT: WHAT DOES THE PUBLIC BENEFIT CORPORATION ACTUALLY LOOK LIKE?

What happened when the public benefit corporation formed? What does the MTA look like now? Did the promises of an apolitical, private model of public transit pan out the way Windels expected they would? The answer, as anyone who has taken a ride on the MTA in the last few decades can say confidently, is a resounding no—but why?

The MTA’s transition to a public authority was a failure. The MTA faces financial crisis after financial crisis,<sup>283</sup> corruption,<sup>284</sup> a

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<sup>277</sup> See *id.*

<sup>278</sup> *Id.*

<sup>279</sup> See *id.*

<sup>280</sup> See *id.* at 253.

<sup>281</sup> HOOD, *supra* note 86, at 252.

<sup>282</sup> *Id.* at 253.

<sup>283</sup> See David C. Lester, *Facing Worst Financial Crisis in Its History, MTA Outlines Proposed 2021 Budget and Four-Year Financial Plan*, RY. TRACK & STRUCTURES (Nov. 19, 2020), <https://www.rtands.com/passenger/facing-worst-financial-crisis-in-its-history-mta-outlines-proposed-2021-budget-and-four-year-financial-plan/> [https://perma.cc/XJ8W-WV7M]; Rosenthal et al., *supra* note 70.

<sup>284</sup> See Clayton Guse, *MTA Inspector General Releases Report Following*

lack of accountability,<sup>285</sup> and cannot keep functioning the way it presently is. This section will analyze the two biggest issues that came out of the transition to the public authority and delve into why the public authority caused some of these problems to bubble up. These problems are real, uncontested issues that afflict the MTA, and in doing so, harm the lives of millions of New Yorkers who rely on the MTA as their primary mode of transport to socialize, work, and live.

First, however, a brief history of the NYCTA public benefit corporation in the 1960s and 1970s. In those decades, “inflation, rising operating costs, and decreasing ridership” due to safety risks and the popularization of the automobile dramatically reduced the transit system’s income and left the NYCTA with an immense operating deficit.<sup>286</sup> The transit system was essentially put in an impossible situation: “its revenues could not cover the system’s operating costs, let alone pay the cost to replacement equipment and pay off the debt associated with building and consolidating the subways.”<sup>287</sup> Because the public authority-transit system started off on the wrong foot, it was never even given a chance to see if it could actually succeed independently. Instead, it was forced to rely on subsidies from the state and city governments, which led to them increasingly having influence over how the transit system should operate, without facing any pushback from the system’s failures.<sup>288</sup>

Continuing into the latter twentieth century and early twenty-first century, the subway continued to deteriorate.<sup>289</sup> Ridership fell as more New Yorkers drove and “took to the highways,” and the fare had to be raised ten times over the course of less than forty years to even give the transit system a hope of survival.<sup>290</sup> In the

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*Fraud*, N.Y. DAILY NEWS (July 10, 2019), <https://www.nydailynews.com/new-york/ny-mta-inspector-general-report-fraud-release-20190710-e7vrqdm5kvep7cghtwvh625qgu-story.html> [<https://perma.cc/MP3W-TQ9Q>] (highlighting MTA employee overtime abuse, conflicts of interest, and corruption from 2017 to 2019).

<sup>285</sup> See Tom Wroblewski, *The MTA’s Real Problem Is a Lack of Accountability*, NEWSDAY (Dec. 3, 2018, 2:00 PM), <https://www.newsday.com/opinion/commentary/mta-problems-accountability-1.24182359> [<https://perma.cc/N3E6-DAFZ>] (arguing that since MTA board members are appointed by various government officials they are not accountable to voters).

<sup>286</sup> HOOD, *supra* note 86, at 253–54.

<sup>287</sup> PLOTCH, *supra* note 218, at 45.

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

<sup>289</sup> See JOHNSON, *supra* note 62, at 25–27, 29–30.

<sup>290</sup> HOOD, *supra* note 86, at 254.

1930s and 40s, 90% of the subway trains ran on schedule.<sup>291</sup> By 1983, “on-time performance” had dropped to 70%.<sup>292</sup> Before then-Governor Cuomo stepped in with his emergency powers in 2018, the subway hit a record low of “58.1 percent of all weekday trains arriving at stations on time.”<sup>293</sup> “The average distance a subway car traveled between breakdowns dropped from 34,294 miles in 1964 to 9,000 miles in 1984.”<sup>294</sup>

While some of these problems are beginning to be tackled—former Governor Cuomo’s state of emergency helped the MTA hit an 80%-on time mark for several months in a row<sup>295</sup>—they are temporary, stopgap measures. The emergency powers fail to resolve the underlying issues of the MTA because no Governor has the power to easily fix the problems that lie at the core of the public benefit corporation, namely a lack of transparency and accountability.<sup>296</sup>

The brightest spot in the MTA’s recent history was under Andy Byford’s leadership when he took over in 2018.<sup>297</sup> Byford, a British public transport expert, stepped into the biggest spotlight in the world and succeeded in ways that few ever had.<sup>298</sup> “Train Daddy,” as was his nickname, improved on-time rates to 80% (from their previous rate of 58%) and had fewer trains break down during his tenure than before.<sup>299</sup> However, two years into his term, Byford stepped down.<sup>300</sup> Clashes between him and Governor Cuomo had grown too tumultuous, as each figure independently wanted credit for the subway’s successes.<sup>301</sup> According to Byford’s coworkers,

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> Winnie Hu, *New York Subway’s On-Time Performance Hits New Low*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/nyregion/new-york-subways-on-time-performance-hits-new-low.html> [<https://perma.cc/J6V7-56V2>].

<sup>294</sup> HOOD, *supra* note 86, at 254.

<sup>295</sup> See Sam Mehmet, *On-Time Performance for MTA New York’s Subway Increases by 20 Percent*, INTELLIGENT TRANSP. (Jan. 23, 2020), <https://www.intelligenttransport.com/transport-news/95094/on-time-performance-for-mta-new-yorks-subway-increases-by-20-per-cent/> [<https://perma.cc/XVL3-AYUL>].

<sup>296</sup> See CITIZENS BUDGET COMM’N, *supra* note 12, at 2.

<sup>297</sup> See Rebecca Liebson, *Why Andy Byford, N.Y.C. Subway Leader, Left*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/nyregion/andy-byford-mta.html> [<https://perma.cc/KS3D-FRMD>].

<sup>298</sup> *See id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

“Mr. Cuomo felt that Mr. Byford . . . did not understand the governor’s role as the elected official most responsible for the subway.”<sup>302</sup> Reminiscent of how Ravitch was one of the few chairmen capable of fixing the subway, the MTA has only done well when shrewd figures who can take the heat of a political battle step into leadership roles. Otherwise, the MTA has *de facto* been operated by others, who have varying stakes in the transit system.

Today, the political culture “render[s] the authority incapable of responding to . . . fiscal crisis[es].”<sup>303</sup> The public benefit corporation was sold as an apolitical creature, but New York City’s political machine laughed in the face of that designation. The NYCTA/MTA’s insulation from standard government channels means that nobody is held accountable for failures or successes, which led to a twentieth-century movement towards watering down commitment to the NYCTA/MTA. Why bother investing in something without any return, namely in voters? That is why some of the NYCTA/MTA’s most successful initiatives were ones that were short-term, actionable commitments with final results (a redesigned train, an upgraded station, and the graffiti-free subway movement in the 1980s).<sup>304</sup> Additionally, the exclusion of the general public and interest groups from effectively lobbying led to a cultural shift.<sup>305</sup> The NYCTA/MTA began to stop being considered a public or civic enterprise, and people stopped trying to make improvements; the transit system was left to rot.<sup>306</sup>

One factor that contributes to the MTA’s financial struggles is its funding structure, tied to its origins in regionalism.<sup>307</sup> The MTA relies on the combined revenue sources of both urbanites and city residents because it crosses city lines.<sup>308</sup> This means that it is subject to the whims of the legislature’s revenue and tax plans.<sup>309</sup>

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<sup>302</sup> *Id.*

<sup>303</sup> Jose Martinez, *How the MTA Spent Millions on a Cuomo Cost-Cutting Effort That Spurred a Worker Shortage*, THE CITY (Oct. 20, 2021, 3:39 PM), <https://www.thecity.nyc/2021/10/20/22737080/mta-spent-millions-on-cuomo-plan-subway-bus-delays> [<https://perma.cc/X6KF-G9QG>].

<sup>304</sup> See Damaris Pichardo, *The Subway System in the 1970s-80s*, TLTC BLOG: HIST. OF N.Y.C., <https://blogs.shu.edu/nyc-history/subway-system-1970-1980s/> [<https://perma.cc/2B83-TZY4>].

<sup>305</sup> HOOD, *supra* note 86, at 254.

<sup>306</sup> *Id.*

<sup>307</sup> See *MTA Operating Budget Basics*, METRO. TRANSP. AUTH., <https://new.mta.info/budget/MTA-operating-budget-basics> [<https://perma.cc/2YY5-KFNE>]; *supra* text accompanying note 290.

<sup>308</sup> See METRO. TRANSP. AUTH., *supra* note 307.

<sup>309</sup> See *id.*

However, when this paper eventually discusses options moving forward, regionalism will be the best counterargument to a fully municipal MTA. What happens to lines like the Metro-North and Long Island Railroad that cross city and state lines? It is unclear if they can be funded without contribution from non-city residents.

The other problematic aspect of the MTA's public authority structure—perhaps the most direct tie it has to politicization—is its reliance on taxes.<sup>310</sup> Most public authorities rely on revenue to survive or are exclusively operated through the State as money holders, but the MTA is different; it is theoretically an altogether separate entity from the State.<sup>311</sup> However, what is legally true is not always factually true, and there is no better example than in this case. Whereas the Triborough Transit Authority had money from bonds, the MTA pulls in a substantial portion of its budget from dedicated taxes (37% in 2019), with revenues making up even less.<sup>312</sup>

In other words, the MTA's governance structure does not fit its financing structure. Public authorities were intended as a means to escape public scrutiny and avoid reliance on local residents', counties', and cities' taxes to survive;<sup>313</sup> the MTA depends on them anyway—if it did not have taxes and subsidies coming in, it would lose nearly half of its operating budget.<sup>314</sup> The seemingly independent MTA ends up relying on others to survive, meaning that these actors get to have a bigger say in how the MTA is operated and can pull funding when they need to, thus eroding the MTA's independence.<sup>315</sup> Of course, the MTA is technically too important to let fail, and it would never be allowed to default on its loans, so it grows more and more dependent on the state, cities, and counties to function.<sup>316</sup> At the same time, the public authority structure builds in an artificial layer of separation between the

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<sup>310</sup> See *id.*; *supra* text accompanying note 271.

<sup>311</sup> See METRO. TRANSP. AUTH., *supra* note 307; *Dedicated Subsidies and How They Work*, METRO. TRANSP. AUTH. (last updated Oct. 15, 2019), <https://new.mta.info/budget/dedicated-taxes> [<https://perma.cc/X5VS-BAL7>].

<sup>312</sup> See N.Y.C. INDEP. BUDGET OFF., TROUBLE AHEAD, TROUBLE BEHIND: THE IMPACT OF DECLINING DEDICATED TAX REVENUE ON MTA FINANCES (July 2020), <https://ibo.nyc.ny.us/iboreports/trouble-ahead-trouble-behind-the-impact-of-declining-dedicated-tax-revenue-on%20-mta-finance-fiscal-brief-july-2020.pdf> [<https://perma.cc/V53T-CSW6>]; METRO. TRANSP. AUTH., *supra* note 307.

<sup>313</sup> See CITIZENS BUDGET COMM'N, *supra* note 12, at 3.

<sup>314</sup> See METRO. TRANSP. AUTH., *supra* note 307.

<sup>315</sup> See JOHNSON, *supra* note 62, at 34.

<sup>316</sup> See *id.*

state and the MTA, consequently allowing the Governor to appoint whoever they would like to the MTA's board.<sup>317</sup> The MTA's situation, thus, is a legal fiction: it is, in every way but formally, a state agency.

This legal fiction might only be problematic in some instances, but in the case of the MTA, it becomes downright dangerous. As outlined previously, the MTA is one of New York City's most significant public utilities.<sup>318</sup> Though this paper has focused on race and income issues, New York City's bankers, Upper East and West Sides, and wealthiest neighborhoods would also be significantly impacted by a failing MTA without accountability, which is what happens when there is a faux legal structure in place.<sup>319</sup>

Real life examples of this legal fiction are plentiful. For example, former Governor Cuomo and the legislature sometimes "raid[ed]" the MTA's budget or bailout funds sent to help the MTA in order to provide funding for other projects that might have a more direct impact on their voter base.<sup>320</sup> In 2020, transit advocates "warn[ed]" that the MTA's dedicated revenue stream . . . which include[s] gas taxes, sales taxes and corporate franchise taxes collected in MTA-served counties—could wind up going into the state's general fund."<sup>321</sup> Also, the New York State Division of Budget warned "that 'aid-to-localities reductions that will need to be taken in this Financial Plan may materially and adversely affect the financial position of the MTA, the City of New York, and other localities.'"<sup>322</sup> Advocates have long "demand[ed]" that anticipated funds from congestion pricing and a taxi surcharge "go directly to the MTA instead of being subject to the normal budget appropriation process," where money can be siphoned off and directed elsewhere.<sup>323</sup> These problems are all tied to issues related to public authorities broadly: a lack of transparency and limited accountability.

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<sup>317</sup> *See id.*

<sup>318</sup> *See id.* at 7–8.

<sup>319</sup> *See id.*

<sup>320</sup> *See* Dave Colon, *Transit Watchdogs: Raiding MTA Taxes Will Threaten a Federal Bailout*, STREETSblog (Apr. 30, 2020), <https://nyc.streetsblog.org/2020/04/30/transit-watchdogs-raiding-mta-taxes-will-threaten-a-federal-bailout/> [https://perma.cc/A7K3-2ASE].

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* (citation omitted).

<sup>323</sup> *Id.*



*A. Transparency*

As a public benefit corporation, the MTA is absolved of many of the transparency requirements—fiscal and otherwise—that most other government agencies are required to abide by.<sup>324</sup> Some argue that there are minimum expectations for what authorities should be expected to report.<sup>325</sup> For example, it would be valuable to know the MTA’s current “financial condition and recent financial results”; its “multi-year financial plan”; its “[c]apital assets,” “recent changes” to them, and “planned expenditures”; and “[a]ctivities and accomplishments” (also known as “performance measurement”).<sup>326</sup>

In his report on the MTA and its future, former New York City Council Speaker Johnson commented on the MTA’s “lack of fiscal transparency.”<sup>327</sup> He noted that “political pressures around taxes, fares, and vested interests” have closed off dialogue about the actual “level of funding needed to reliably operate the City’s transit system.”<sup>328</sup> Without this open conversation, demands for capital costs are usually “addressed by forcing the MTA to self-finance . . . without actually providing long-term funding streams adequate to cover the debt.”<sup>329</sup> This situation, then-Speaker Johnson remarked, leads to “the short-term appearance of addressing fiscal needs while ignoring the long-term ramifications on service delivery.”<sup>330</sup> We are beginning to see the long-term ramifications today.

The lack of fiscal transparency is harmful because the MTA’s capital program is mostly debt-funded (52%),<sup>331</sup> while thirty years ago this share was under a third, and is only expected to grow.<sup>332</sup> Meanwhile, the MTA’s operating budget continues to increase every year, rising 64% between 2002 and 2017.<sup>333</sup> “[D]ebt service

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<sup>324</sup> See CITIZENS BUDGET COMM’N, *supra* note 12, at 17.

<sup>325</sup> See *id.* at 8.

<sup>326</sup> *Id.*

<sup>327</sup> JOHNSON, *supra* note 62, at 37.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> See *id.*

<sup>332</sup> *Id.*

<sup>333</sup> JOHNSON, *supra* note 62, at 38.

was the highest contributing factor to the increase in operating expenses” as the MTA was forced to reckon with debt it took on earlier.<sup>334</sup>

Reports are not compiled in the manner or timeline that they should be, and so most of the public remains unaware of how staggeringly in debt the MTA is.<sup>335</sup> The MTA is actually more fiscally transparent than most authorities, but politics still plays a role in obfuscating facts and harming the MTA’s ability to make independent decisions in its own best interest. For example, “[t]he MTA Board is required to submit two five-year capital program plans”—which make up the bulk of the MTA’s spending—to the Capital Program Review Board.”<sup>336</sup> The Board has “no option to modify the plan, only to reject it outright,” and New York City has limited say in these projects.<sup>337</sup> This “Board has provided a venue allowing politicians to advance other funding priorities and pet projects” by threatening to reject plans that do not incorporate certain key features (like funding a program unrelated to the MTA).<sup>338</sup> Capital spending plan rejections would lead to unreasonable delays that no New Yorker would be able to blame on any single elected official, and so the cycle continues. Speaker Johnson outlined a few egregious examples in his report:

In 1987, Norman J. Levy, a Nassau County Republican and the Review Board representative for the Senate majority leader, vetoed the plan because he favored a greater funding allocation to the commuter rail lines.

In 1996, Assemblywoman Catherine T. Nolan, representing Assembly Speaker Sheldon Silver, vetoed changes to the plan. At the heart of the dispute was an effort by Assembly Democrats to force MTA Chairman, E. Virgil Conway to negotiate with them over the contents of a future capital program.

In 1999, Senate Majority Leader Dean Skelos vetoed the first budget proposal for the 2000-2004 capital plan because a comparable plan for funding highways had not been proposed yet.

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<sup>334</sup> *Id.*

<sup>335</sup> MORRISON & FOERSTER LLP, REPORT OF FINDINGS AND RECOMMENDATIONS FOR THE METROPOLITAN TRANSPORTATION AUTHORITY: OVERTIME POLICIES AND PROCEDURES IV (2019).

<sup>336</sup> JOHNSON, *supra* note 62, at 38.

<sup>337</sup> *Id.* at 38–39.

<sup>338</sup> *Id.* at 39.

In 2005, both State Legislature Review Board members vetoed the plan. Reports suggested that dissatisfaction with the spending plan had nothing to do with the MTA, but instead centered on whether to pay union-rate wages to nonunion workers on other State-funded projects.

In 2008, Assembly Speaker Sheldon Silver sent a letter to the MTA threatening to veto the plan if the Fulton Street Transit Center was not included. A month later, the MTA released its 2008-2013 Capital Plan, including funding for the project [at] Fulton Street.<sup>339</sup>

Though perhaps politics should be expected to play a role in any large project that requires mass funding, the ease with which politics can cleanly enter and exit a supposedly “independent” agency is cause for major concern.

In 2006, a report by the Citizens Budget Commission about New York’s public authorities called attention to some of the common deficiencies that public authorities deal with when they are insufficiently independent.<sup>340</sup> First, the report noted that a culture of “[p]atronage-like decisions” can emerge, where the public authority board’s appointing official “may seek more direct accountability than is appropriate” for a public authority.<sup>341</sup> They may give additional weight to certain factors like personal or partisan loyalty, and the person selected may believe that it is either their obligation or in their best interest to reflect the preferences of the appointing official rather than their personal judgment.<sup>342</sup>

Second, the report noted that there may be an “erosion of professionalism among senior staff” when a Board has insufficient independence.<sup>343</sup> Knowledgeable observers note that concern for political accountability among board members has led to the departure of highly skilled staff.<sup>344</sup> Their replacements can be less competent and more willing to conduct patronage votes.<sup>345</sup> Indeed, senior staff appointments are sometimes expected to be cleared

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<sup>339</sup> *Id.* at 39 (citations omitted).

<sup>340</sup> *See* CITIZENS BUDGET COMM’N, *supra* note 12, at 10.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

with elected officials who appoint the board members.<sup>346</sup>

Both issues—patronage-like decisions and an erosion among professional staff—have affected the MTA. In a New York Times article, Richard Ravitch confirmed (from personal conversations) that Governor Cuomo appointed board members who took directions from him and his staff.<sup>347</sup> The former Governor directly stepped in to influence the selection of senior MTA managers, and officials have stated that they reported to him on many issues.<sup>348</sup> The lines, the article found, were “often blurred among the governor, his staff and senior M.T.A. leadership.”<sup>349</sup>

Third, the report argues that perhaps the most harmful consequence of insufficient independence is that it can create poor policy decisions, such as inappropriate time frames for strategic decisions.<sup>350</sup> In other words,

whether it is the amount and timing of a mass transit fare increase, the location of a power plant or transmission line, or the value of a subsidy necessary to retain or recruit a large employer, [decisions] should be separated from the electoral cycle and based on longer-run considerations than the impact on voter decisions in the next election.<sup>351</sup>

### *B. Accountability*

In the context of the MTA, accountability speaks to holding individuals responsible for the Authority’s successes and failures. This paper has mentioned the frustration of everyday New Yorkers who use the MTA but are unable to direct their anger or disappointment at any individual. Most people know nothing about the enigmatic “Board,” and those who spend the time researching will find themselves sorely disappointed to learn that the individuals on this Board are, supposedly, immune to political pressure. Resigned to their fate of a permanently incapable MTA, those individuals might find themselves surprised to see the

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<sup>346</sup> See CITIZENS BUDGET COMM’N, *supra* note 12, at 10.

<sup>347</sup> Richard Ravitch, *New York’s Subways Need an Independent M.T.A.*, N.Y. TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/opinion/new-yorks-subways-mta.html> [<https://perma.cc/A37Q-6LLA>].

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> CITIZENS BUDGET COMM’N, *supra* note 12, at 10.

<sup>351</sup> *Id.*

former governor took credit for a recent transit success.<sup>352</sup>

Public authorities can issue much more debt than a state agency can.<sup>353</sup> In theory, this makes sense. Authorities should have the means and capability to pay off these debts and it is not nearly as dangerous to have a public authority in debt as it is to have an important component of the government in dire straits. However, when the public authority makes up an important component of public life, this is not always the case. The MTA does not generate enough revenue to support itself, and it would never be allowed to default on its loans because its failure would spell absolute disaster for New York City and State.<sup>354</sup>

When state officials aggressively use authorities to circumvent the constitutional limits on state government debt, they threaten the very existence of the authority itself.<sup>355</sup> Debt makes up an immense part of the MTA's operating budget and can lead to lower borrowing limits and constrains the Authority's future.<sup>356</sup> Politicians "can spend in the short-run on projects for which they get credit from the electorate, while passing most of the costs on to future taxpayers who have no say in the decision,"<sup>357</sup> but taxpayers will live with the MTA and its limitations forever. For example, this is how the MTA has some of the most expensive construction projects in the world, consistently exceeding their expected costs.<sup>358</sup>

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<sup>352</sup> *Governor Cuomo Announces MTA Testing Solar-Powered Kiosks with Real-Time Service Information*, GOVERNOR.NY.GOV (Apr. 22, 2014), <https://www.governor.ny.gov/news/governor-cuomo-announces-mta-testing-solar-powered-kiosks-real-time-service-information> [<https://web.archive.org/web/20150112035300/https://www.governor.ny.gov/news/governor-cuomo-announces-mta-testing-solar-powered-kiosks-real-time-service-information>].

<sup>353</sup> Nehemkis, *supra* note 1, at 14 ("Where constitutional or statutory debt limits preclude further borrowing, the authority provides a municipality with a convenient credit base without exceeding the debt limit or placing an undesired burden upon the taxpayer.").

<sup>354</sup> Chappatta, *supra* note 56.

<sup>355</sup> *See*, Marcello, *supra* note 12; CITIZENS BUDGET COMM'N, *supra* note 12, at 11–13.

<sup>356</sup> Brian Chappatta, *MTA Maxed Out Its Fed Credit Line. So Now What?*, BLOOMBERG (Dec. 14, 2020), <https://www.bloomberg.com/opinion/articles/2020-12-14/new-york-mta-maxed-out-its-fed-credit-line-so-now-what> [<https://perma.cc/5UWV-2T5A>].

<sup>357</sup> CITIZENS BUDGET COMM'N, *supra* note 12, at 11.

<sup>358</sup> Rosenthal et al., *supra* note 71.

It is worthwhile to recognize that when blame is pointed towards an elected official, it is oftentimes the Mayor or the City Council because the MTA is usually seen as a city entity.<sup>359</sup> But the City has less power over the MTA than New York State, because of power and budget differentials. In addition, the Board's composition has changed over the years to slowly dilute the power of the City's vote, even though New York City is most impacted by MTA changes.<sup>360</sup>

Thus, the MTA has a problem with accountability that stems from its initial funding problems. These problems feed into each other. Politicians can use the MTA's budget for their own benefit without facing consequences.<sup>361</sup> Similarly, the MTA's tax-reliant structure contributes to a lack of accountability because it is impossible to tell who, specifically, is underfunding it.<sup>362</sup>

If there should be any overwhelming political voice in the MTA, many would argue that it should be the City's—but its voice is perhaps the most diluted of them all.<sup>363</sup> The public authority as an independently-run agency only works if it truly is independent. Limited accountability to the public might be good for an agency that truly functions without governmental involvement, but in the case of the MTA, it provides an easy way for elected officials to reap the rewards of a successful project without suffering any of the costs.<sup>364</sup>

#### VI. THE FUTURE: WHAT ARE THE ALTERNATIVES TO THE CURRENT LEGAL FORM?

Many of the issues of the MTA are rooted in its massive debt. Could raising fares solve its problems? Unfortunately, there is no panacea so simple. The MTA's fares in recent years have risen faster than inflation, and New York's subway riders "already pay a higher share of operating expenses than transit riders in nearly every other US city."<sup>365</sup> The MTA's problems will not be solved

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<sup>359</sup> J. David Goodman, *Angry About Subway Delays? De Blasio Says Blame Cuomo, and Vice Versa*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/nyregion/de-blasio-cuomo-subway-delays.html> [<https://perma.cc/F6UP-FLLJ>].

<sup>360</sup> JOHNSON, *supra* note 62.

<sup>361</sup> Rosenthal et al., *supra* note 71.

<sup>362</sup> *Id.*

<sup>363</sup> JOHNSON, *supra* note 62.

<sup>364</sup> Rosenthal et al., *supra* note 71.

<sup>365</sup> PLOTCH, *supra* note 218, at 6.

with money alone—they can only be truly fixed with a radical re-understanding of how the transit system should operate. A question with a similar premise might be leveled to this paper's argument broadly: can the MTA be saved by a series of smart fiscal choices? Though refinancing might be able to save the MTA temporarily, there is no guarantee of even that short-term relief and it certainly could not fix the MTA forever. The connections and political influence that have corrupted the MTA are too deep-rooted, and the reliance on state and city subsidies too familiar. Only a structural reorganization can provide real change.

When people demand accountability for the MTA's failures, fingers are sometimes pointed at the Governor and Mayor, who quickly re-direct blame to others—shadowy figures known as “chairmen” who sit on boards and are so inaccessible and powerless they may as well be spectral. At the same time, politicians seem to be ready to swoop in and take credit for the MTA's successes and victories.<sup>366</sup> These successes come about precisely because politicians want to invest in victories they can take credit for, and that becomes even more obvious when examining where MTA improvements concentrate: not century-old switches that cause frequent delays, but visible projects like modern-looking trains and buses and beautiful stations.<sup>367</sup> These beautification projects, though an important part of improving the overall MTA, do not actually help the trains and buses run more effectively.<sup>368</sup> Enhancing and modernizing a public transit system without first addressing the transit itself is bound to lead to failure.

The problems are numerous but glaring. The MTA as a public benefit corporation does not have enough money or political capital to function in a political city and state.<sup>369</sup> It is unaccountable and

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<sup>366</sup> See, e.g., *Governor Cuomo Unveils Design of Reimagined MTA Subway Cars and Details Ambitious Plan to Enhance Subway Station*, GOVERNOR.NY.GOV (Jul. 18, 2016), <https://www.governor.ny.gov/news/governor-cuomo-unveils-design-reimagined-mta-subway-cars-and-details-ambitious-plan-enhance> [<https://web.archive.org/web/20200329074905/https://www.governor.ny.gov/news/governor-cuomo-unveils-design-reimagined-mta-subway-cars-and-details-ambitious-plan-enhance>].

<sup>367</sup> See Dan Rivoli, *NYC Subway Relies On Decades-Old, Outmoded Signals, Switches and Track Equipment*, N.Y. DAILY NEWS (May 22, 2017), <https://www.nydailynews.com/new-york/nyc-subway-relies-decades-old-outmoded-signals-switches-article-1.3184666> [<https://perma.cc/Z94E-2YBF>].

<sup>368</sup> See *id.*

<sup>369</sup> JOHNSON, *supra* note 62, at 50.

far from transparent.<sup>370</sup> No one is trying to solve these issues because politicians benefit by only taking credit for the MTA's wins and blaming others for its failures. Former Speaker Corey Johnson advocated for a city-run MTA precisely because having this sort of organizational structure would change who is responsible for what, allowing New Yorkers to hold their government accountable for something that affects so many of these voting individuals' lives every day.<sup>371</sup> That is not to say a municipally controlled public transit system would immediately fix every problem, but it has clearly defined strengths over the status quo.

In this section, this paper will discuss alternatives for the MTA as it presently exists. This paper imagines what a city-run MTA looks like; the benefits of this system; the limits and feasibility concerns of transitioning to municipal control; and what an alternate, state-run system would look like. It will also briefly touch upon the idea of an independent MTA.<sup>372</sup>

#### A. *Envisioning a City-Run MTA*

In 2019, then-New York City Council Speaker Corey Johnson outlined his bold proposal for a city-run MTA in a report titled *Let's Go: A Case for Municipal Control and a Comprehensive Transportation Vision for the Five Boroughs*.<sup>373</sup> Transit advocates were mostly pleased—Andrew Yang endorsed the plan while campaigning for Mayor<sup>374</sup>—but some found the report's timing distasteful. Danny Pearlstein, a policy director at a grassroots public transit movement, said that “[w]e’ve worked for years to demonstrate that [the MTA] is Cuomo’s MTA, that the MTA is in fact run by the state and controlled by the governor. We’re at the point now where that’s been acknowledged. Now the challenge is to get funding out of the state.”<sup>375</sup>

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<sup>370</sup> *Id.* at 7–8.

<sup>371</sup> *Id.*

<sup>372</sup> See Ravitch, *supra* note 347.

<sup>373</sup> JOHNSON, *supra* note 62.

<sup>374</sup> Mark Hallum, *Andrew Yang Pitches City Control of Subways and Money in New Yorker's Pockets*, AMNY (Jan. 14, 2021), <https://www.amny.com/news/andrew-yang-pitches-city-control-of-subways-and-money-in-new-yorkers-pockets/> [https://perma.cc/M64F-FXR9].

<sup>375</sup> Dana Rubinstein & Joe Anuta, *Speaker Seeks Control of New York City's Transportation Destiny, Though Some Say His Timing is Off*, POLITICO (Mar. 5, 2019, 4:16 PM), <https://www.politico.com/states/new-york/albany/story/2019/03/05/speaker->



Johnson's plan called for the establishment of the "BAT"—Big Apple Transit. The BAT, Johnson said, would be in charge of New York City's transit systems, including the New York City Transit Authority (which controls the subway); the MTA Bus Company; and the city's bridges and tunnels.<sup>376</sup> The MTA would become a distinct entity that controlled only transit systems that crossed state and city lines, including the Long Island Railroad and the Metro-North.<sup>377</sup> Johnson's report addressed many of the regionalism problems that originally led to the public authority structure by leaving some parts of the MTA in their public authority state, handing some properties to the State, and turning others into fully municipally-operated projects.<sup>378</sup>

One of the biggest issues with the current structure of the MTA is the Board, which is divided in such a way that the actors most affected by the MTA's operations—the ones representing New York City—have very little say in what happens to the MTA.<sup>379</sup> Thus, Johnson envisioned a new Board where the Mayor would appoint a majority of the members and the chair of the BAT Board.<sup>380</sup> He called for the five Borough Presidents and the Public Advocate to each have one appointment, though each of these should have "one half of a vote to keep the size of the Board manageable."<sup>381</sup> Johnson went on to argue that these Board Members should be, "at a minimum," city residents; regular BAT users; and unelected officials.<sup>382</sup> His proposal called for Board Members being subject to annual financial disclosure requirements and approval by the City Council, but not be subject to term limits.<sup>383</sup>

Johnson argued that his proposed changes would make the New York City transit system more responsive to its constituents.<sup>384</sup> He argued that a Board made up of members who look like New York

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seeks-control-of-new-york-citys-transportation-destiny-though-some-say-his-timing-is-off-889629 [https://perma.cc/P5DH-EL5K].

<sup>376</sup> JOHNSON, *supra* note 62, at 35.

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

<sup>378</sup> *Id.* at 35–36.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> JOHNSON, *supra* note 62, at 35–36.

<sup>383</sup> *Id.* at 36.

<sup>384</sup> *Id.* at 35.

City—spanning across income, race, and sex—would better represent the interests of New Yorkers than an unaccountable public authority.<sup>385</sup>

The former Speaker also explained why the continued reliance on debt funding poses a problem for an agency like the MTA.<sup>386</sup> In 2018, concerns relating to debt caused one of the “Big Three” credit rating agencies to lower its credit rating for the MTA twice that year.<sup>387</sup> This credit rating has the potential to reduce the MTA’s future borrowing capacity, or raise its interest rates to levels that may create a debt so looming that there is no hope it could ever be paid off.<sup>388</sup>

In addition to responsiveness, representation, and fiscal soundness, *Let’s Go* explains why a municipally controlled MTA attacks the transparency and accountability critiques of the current public benefit corporation structure.<sup>389</sup> First, Johnson called for increased transparency by reforming the “Capital Program Review Board,” which presently gives the State an additional layer of power over New York City (the Mayor’s representative to this Board has less power than the Governor’s and State Leaders’ representatives).<sup>390</sup> This Board, which oversees the MTA’s spending on capital projects, creates a power-sharing measure that “obfuscates accountability.”<sup>391</sup> A new board—modeled after the city’s water system—would provide a transparent budgetary and oversight process, allow for a standalone bonding process, and ensure that the public transit system becomes self-funded through fares, tax subsidies, and government aid.<sup>392</sup>

The second major issue with the MTA that Speaker Johnson tried to address is accountability.<sup>393</sup> Municipal control of the MTA solves most of this problem by forcing politicians to put their elections and careers up as collateral, but Johnson outlined other plans—like the water system-modeled Capital Program Review Board—to increase accountability at every level of the system.<sup>394</sup>

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<sup>385</sup> *Id.*

<sup>386</sup> *See id.* at 37–38.

<sup>387</sup> *Id.* at 38.

<sup>388</sup> JOHNSON, *supra* note 62, at 38.

<sup>389</sup> *See id.* at 39.

<sup>390</sup> *Id.* at 38.

<sup>391</sup> *Id.*

<sup>392</sup> *See id.* at 39.

<sup>393</sup> *See id.* at 33.

<sup>394</sup> JOHNSON, *supra* note 62, at 39.

Back during the Dual Contracts-era, elected officials were loath to move away from the immensely popular five-cent fare even when the MTA floundered for cash.<sup>395</sup> Municipal control of the MTA may or may not have trouble with this sort of political battle. In some ways, elected officials might be uncomfortable just like they were back in the 1920s to vote for immensely unpopular policies, even if they are necessary. On the other hand, the Dual Contracts allowed elected officials to shield themselves from the success and failures of the MTA because private corporations technically ran the lines.<sup>396</sup> There would be no such barrier in this world of municipal control. Every New York City official would live and die by the efficiency of the public transit system.

Johnson's report is long and thorough, and goes into subjects like an Oversight Board; a mobility czar; and reduced cost for commuters who demonstrate need.<sup>397</sup> But the bigger question is how this shift to a city-run MTA would actually happen. After all, as this paper has already outlined, the MTA already holds an incredible amount of debt. These loans would not disappear if the city took over the MTA. Johnson addressed this problem by proposing to keep the existing MTA around long enough to finish servicing its current debt.<sup>398</sup> Fares, tolls, and certain dedicated taxes would first go to the legacy MTA to service that debt before coming to BAT and the commuter railroads.<sup>399</sup> In the future, BAT and commuter railroads would issue bonds, rather than the MTA.<sup>400</sup> Though this theory makes sense, it is unclear how long this debt would take to pay off, and whether it would be feasible for the newly established BAT to pump millions of dollars towards paying off debt while also seeking to improve service and the overall transit system. Mass Transit Magazine imagines many of the financial liabilities that would need to initially be overcome before being able to realize the true potential of a city-run MTA:

Regaining total control comes with a number of financial liabilities. City Hall will have to negotiate with both the governor and State Legislature over how much of the MTA's \$40 billion long-term debt and billions more in employee pension, health insurance and other

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<sup>395</sup> *Id.* at 22. See *supra* Part III.A.

<sup>396</sup> HOOD, *supra* note 86, at 180–84.

<sup>397</sup> JOHNSON, *supra* note 62, at 35–37.

<sup>398</sup> *Id.* at 42–43.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

liabilities come with the package. NYC would also inherit a series of union contracts and work rule agreements. The city would need to develop a plan for turning over management for billions in hundreds of ongoing capital improvement projects that are already under way. Don't forget current purchases for several thousand new subway cars and buses. A significant portion of the \$12 billion for capital funded projects contained dozens of grants from the Federal Transit Administration that would have to be transferred from MTA to NYC. This would involve the de-obligation and re-obligation of funding contained in active grants from MTA to NYC. There would also have to be an update to the MTA Federal Transit Administration Bi Annual Certification for thousands of federally funded assets currently being maintained by the MTA to NYC. This document is submitted every two years and certifies that any asset worth over \$5,000 is being properly maintained and remains in active transit service. All of these assets have to meet their promised useful life.<sup>401</sup>

The other arguably just-as-important issue is that New York State remains the *de facto* ruler of the MTA—and there's no reason for the Governor to give up this power. For example, in early 2019, then-Governor Cuomo threatened to hold up \$7.3 billion earmarked for the MTA to push lawmakers to pass policies that he wanted, like congestion pricing.<sup>402</sup> In a separate incident, the Governor threatened to hold back a fare increase in the MTA as punishment for the MTA's slow movement on service improvements.<sup>403</sup> This action benefited Cuomo immensely; in one fell swoop, he came off as an MTA advocate, appealed to his base by coming off as anti-fare raise, while he himself was one of the major reasons why the MTA was slow to improve its service.<sup>404</sup>

Johnson did not outline a plan for the city to recapture the MTA, and the reason why is obvious: because it is not yet politically feasible. When Andrew Yang, who endorsed Johnson's plan, was asked how he expected to wrest control of the MTA, he responded that as a new Mayor, you can usually make a few big demands out

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<sup>401</sup> Larry Penner, *Who Really Controls the New York Metropolitan Transportation Authority?*, MASS TRANSIT MAG. (Jun. 12, 2020), <https://www.masstransitmag.com/management/blog/21141947/who-really-controls-the-new-york-metropolitan-transportation-authority> [https://perma.cc/CM9G-JVU8].

<sup>402</sup> Dan Rivoli, *Cuomo Threatens to Take MTA Money Hostage in Budget Battle with Lawmakers*, NY DAILY NEWS (Jan. 16, 2019), <https://www.nydailynews.com/new-york/ny-metro-cuomo-mta-congestion-pricing-20190116-story.html> [https://perma.cc/GB4M-5C82].

<sup>403</sup> JOHNSON, *supra* note 62, at 38.

<sup>404</sup> *Id.*

of Albany, and this would be one of them.<sup>405</sup> This response garnered criticism<sup>406</sup> because it seemed to demonstrate a fundamental misunderstanding of how New York politics worked and also frustrated the hopes of municipal-control advocates who hoped that Yang would have a better idea of how to implement the platform than Speaker Johnson did. There is some hope that the new Governor Kathy Hochul may be more amenable to this plan, but her attitude towards mass transit is still to be seen.<sup>407</sup> Without a strategy, the other alternative to municipal control of the MTA is state control.

*B. Alternatively Envisioning a State-Run MTA*

A state-run MTA has less written about it than a city-run MTA, and for good reason. The biggest benefit a state-run MTA has over municipal control is that it is a probably more realistic. Otherwise, municipal control of the MTA dominates state control. Subway activists who want change are willing to take this dramatic step down from the most ideal scenario to get anything accomplished. The fight for the last decade by activists like Danny Pearlstein<sup>408</sup> has not been to develop a municipal framework for MTA control, but instead demonstrate to the public that New York State is the true owner of the MTA, and thereby establish accountability through public awareness.<sup>409</sup>

What would a state-run MTA look like? By eliminating the public benefit corporation and making it clear that Albany controls the MTA, the two biggest issues with the public benefit corporation—limited transparency and accountability—would be solved. Politicians would be held responsible for control of the MTA (hereinafter “STA” or State Transportation Agency), and government transparency standards would force the STA’s financial records to be on public display. But a few issues stand in

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<sup>405</sup> Ross Barkan (@RossBarkan), TWITTER (Jan. 14, 2021), <https://twitter.com/RossBarkan/status/1349744869514862594> [<https://perma.cc/PZP5-8YPV>].

<sup>406</sup> Ross Barkan (@RossBarkan), TWITTER (Jan. 14, 2021), <https://twitter.com/RossBarkan/status/1349779930717020161> [<https://perma.cc/62LB-VZ8V>].

<sup>407</sup> See Harry Parker, *Transportation Organizations See Ally in Hochul*, AMNY (Aug. 11, 2021), <https://www.amny.com/news/transportation-orgs-see-ally-in-hochul/> [<https://perma.cc/6UZH-XQVY>].

<sup>408</sup> Rubinstein & Anuta, *supra* note 375.

<sup>409</sup> *Id.*

the way of this plan and would arise from this transfer of power.

First and foremost, it seems unlikely in the first place that Albany would want to ever take control of the MTA. Why do so, when they essentially are in control now and can shift accountability to the intangible “Board” and faceless “MTA”? Perhaps public pressure could force the hand of the State, but it’s unlikely that the normal course of events would cause this sequence to occur.

But envisioning a world where, for whatever reason, the State takes control of the MTA, several consequences are likely. First, though some might claim that a transfer to state ownership might make municipal ownership possible in the future, it is equally as likely that the opposite occurs: with the State now formally in control of the STA, the Governor and the legislature have no reason to ever turn the transportation systems over to the city. Though the State would of course take flak for poor decisions and mistakes, New York City makes up a sizable portion of New York State’s politics and the Governor would be reluctant to give up such a massive bargaining chip for no other reason than to offload blame and some cost to the city.

Next, the threats levied against the City would only increase. With such a massive entity in their jurisdiction, the State could threaten to withhold funds at ever-increasing rates and slash funding whenever they needed to. Though New York City does make up a critical number of votes in local state elections, the reliably Democrat-voting city poses no real threat to a sitting Governor endorsed by the Democratic Party and the Governor and legislature could use this assured voting bloc to siphon money away from the STA and into other projects.<sup>410</sup>

The State has greater funding than the city,<sup>411</sup> which if used prudently could help the STA pay off its debts and modernize quicker than New York City could on its own. Additionally, New York City needs to cut through three levels of bureaucracy to transform the MTA, because it is subject to city, state, and federal

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<sup>410</sup> *Party Affiliation Among Adults in New York*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/state/new-york/party-affiliation/> [https://perma.cc/6BP4-SWWU].

<sup>411</sup> See *Open Budget*, N.Y. STATE, <https://openbudget.ny.gov/overview.html> [https://perma.cc/LJ92-9H34]; *The Recovery Budget: Mayor de Blasio Releases the Executive Budget for Fiscal Year 2022* (Apr. 26, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/307-21/the-recovery-budget-mayor-de-blasio-releases-executive-budget-fiscal-year-2022> [https://perma.cc/98F4-4RK9].

regulations. The state faces less bureaucracy and red tape. Additionally, this type of ownership structure is most like what already exists, suggesting that there would be fewer questions on transition and how to split up the MTA as it presently exists.

*C. An Independent MTA*

Some critics of a city-run MTA argue that it is unlikely.<sup>412</sup> They claim that the proposal ignores the regional nature of our transportation system and places the legislature's responsibility of enacting regional taxes to fund the system in great danger.<sup>413</sup> In other words, a city-run MTA faces the danger of becoming a city-funded subway that is subject to complex rules that frustrate the effective management of other city agencies. Some of these same critics, when pressed about what they imagine a better MTA to look like, call for a truly independent MTA.<sup>414</sup> This suggestion is mostly unrealistic in the current political climate.

What would allow for a truly independent MTA—a true authority, in other words? How, exactly, do we turn a system that is held together by century-old switches, decades-old trains and rail lines, and immense debt into an independent authority that might be free of elected officials' whims? For now, the question seems impossible to answer. The MTA is too far in debt, too broken down, and too connected to politics for any immediate changeover to happen. Some might argue that a powerful transit leader, like Andy Byford, might be able to step in and steer the MTA in the right direction, but even that seems unrealistic given the vast number of problems Mr. Byford had to steer the MTA through during his limited tenure.<sup>415</sup> For better or worse, the only present options forward seem to involve a form of government control. Perhaps in the distant future, a new attempt might be made for an independent Board after a city- or state-run MTA has combated the problems that led to this public authority's failures in the first place. But until then, a truly independent authority seems unrealistic.

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<sup>412</sup> See Jake Blumgart, *Why Doesn't New York City Have Full Control of Its Subways?*, GOVERNING (June 18, 2021), <https://www.governing.com/now/why-doesnt-new-york-city-have-full-control-of-its-subways> [https://perma.cc/Y24R-WGT2].

<sup>413</sup> Ravitch, *supra* note 347.

<sup>414</sup> *Id.*

<sup>415</sup> Liebson, *supra* note 297.

Whether through public pressure, political maneuvering, or something else, the MTA must either transform into a version of the BAT or STA, or face its own impending mortality. The MTA's problems cannot be pushed off until tomorrow. The dysfunctional public transit system drastically and negatively impacts the lives of millions of working-class New Yorkers, and further serves to divide the city by race, wealth, and class.<sup>416</sup> A solution can no longer be delayed.

## VII. BEFORE IT'S TOO LATE

At the time this paper is being written, the world is enveloped in the COVID-19 crisis. Industries, both local and multinational, have collapsed under the weight of sputtering economies and consumers who cannot leave their homes.<sup>417</sup> The MTA has similarly been deeply harmed—in fact, the New York Times stated that the “subway faces its worst financial crisis yet—one that threatens to hobble the system and have a lasting impact on the city and region.”<sup>418</sup> The issues that the MTA faces are life-threatening, and conversion is necessary if there is any hope of saving the transit agency.

MTA ridership has dropped steeply over the pandemic.<sup>419</sup> The city lost over ninety percent of its subway ridership at the beginning of the crisis, and numbers have been slow to recover.<sup>420</sup> Each rider represents a not-insignificant portion of how the MTA covers its immense expenses.<sup>421</sup> The Times article imagines the fallout of the pandemic's impact on the MTA—“subway and bus lines eliminated, unpredictable wait times for trains as service is slashed, more breakdowns with less money spent on upkeep and steeper fare hikes.”<sup>422</sup> Even with a federal bailout and aid packages, the MTA was forced to reckon with the consequences of an entire year of running an operational subway system while

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<sup>416</sup> Gorton & Pinovskiy, *supra* note 72.

<sup>417</sup> See, e.g., Aaron Klein & Ember Smith, *Explaining the Economic Impact of COVID-19: Core Industries and the Hispanic Workforce*, BROOKINGS INST. (Feb. 5, 2021), <https://www.brookings.edu/research/explaining-the-economic-impact-of-covid-19-core-industries-and-the-hispanic-workforce/> [https://perma.cc/W3QY-JTE3].

<sup>418</sup> Hu & Goldbaum, *supra* note 57.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*



losing nearly all their riders and their creeping debt.<sup>423</sup>

Next, it is important to know that a drop in ridership does not mean the MTA's expenses have lessened. In fact, new challenges have raised expenses in several areas, like cleaning.<sup>424</sup> COVID-19 forced the MTA to undertake significant sanitary measures.<sup>425</sup> In 2020, reporters expected the cleaning costs in the subway would "hit half a billion dollars."<sup>426</sup> Consider additional costs that were not previously budgeted for—new advertisements calling riders to wear a mask and socially distance, for example.<sup>427</sup>

In tandem, these factors mean that the MTA's operating budget has collapsed, while its expenses have increased over the course of the pandemic.<sup>428</sup> In 2020, the MTA was forced to mostly fend for itself—former Treasury Secretary Steven Mnuchin recommended that the MTA simply borrow more money, noting that "[t]he markets are open for them").<sup>429</sup> At the same time, it has been expected to provide the same 24/7 service it has in the past to help essential workers commute to their jobs.<sup>430</sup> These problems build off one another. Once COVID-19 is eventually eradicated (or at least not an emergency), the MTA will not be able to return to business as usual. Instead, it will have to face not only the problems that have been mounting for the last several decades, but the long-term effects of COVID-19's vicious attack upon the public transit system.

These issues will not impact everyone uniformly. As mentioned earlier, wealthier New Yorkers can avoid many of the worst effects of the pandemic on the transit system by driving or taking cabs/rideshares.<sup>431</sup> Poorer New Yorkers, who make up the vast

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<sup>423</sup> *Id.*

<sup>424</sup> Hu & Goldbaum, *supra* note 57.

<sup>425</sup> *Id.*

<sup>426</sup> Jose Martinez, *NYC Subway Pandemic Cleaning Costs Could Soak MTA*, THE CITY (Apr. 21, 2020, 6:41 PM), <https://www.thecity.nyc/2020/4/21/21247066/nyc-subway-pandemic-cleaning-costs-could-soak-mta> [<https://perma.cc/74M8-ECZU>].

<sup>427</sup> *Coronavirus News: MTA Launches Campaign Urging Riders to Wear Masks*, ABC NEWS (Jul. 20, 2020), <https://abc7ny.com/mta-subway-riders-wear-masks-operation-respect/6326383/> [<https://perma.cc/8AGH-8EYC>].

<sup>428</sup> Hu & Goldbaum, *supra* note 57.

<sup>429</sup> Hallum, *supra* note 374.

<sup>430</sup> See Jeff Andrews, *The MTA's Finances Work Only When the Subway is Full. Social Distancing Puts it in Crisis*, CURBED (Nov. 18, 2020), <https://www.curbed.com/2020/11/mta-covid-budget-crisis-subway-cuts.html> [<https://perma.cc/976V-MGZE>].

<sup>431</sup> Gorton & Pinovskiy, *supra* note 72.

majority of the city, have taken the subway throughout the pandemic and will continue to do so long afterward.<sup>432</sup> Every subway delay is someone's missed interview, someone's last warning before being fired, someone who is missing out on time with their children and family. This is a race issue, a class issue, a sex issue, and without drastic reform, will soon become an unsolvable issue.<sup>433</sup>

### CONCLUSION

Public authorities have their uses. By circumventing red tape and debt caps and fostering a culture of innovation and efficiency, public authorities can often succeed and manage a utility better than a government agency could under the same circumstances.<sup>434</sup> But the same qualities that make public authorities so successful—their quickness, for example, helped along by not needing to explain decisions to voters—make them dangerous when the public authority is “fake.”

When a public authority is too important to default on their debt and has a significant amount of non-revenue funds dedicated to its operations, or is financially insolvent in other ways, the authority can be “fake” and essentially operate as a state agency because of the pressure government can exert over the agency's decision-making. When these “fake authorities” rest in especially political environments, where government officials have greater incentives to make grand decisions impacting the authority, the situation can grow dangerous. Officials will not be held responsible for the authority's decisions and can use the authority's debt powers to develop their political careers or fund their pet projects. Combined with the authority's natural limited transparency and accountability, this perfect storm threatens the collapse of important infrastructure like the MTA.

This paper used the MTA as a case-study for this argument for many reasons, but especially because of the scale and speed of the MTA's failures. COVID-19 has sped up the inevitable, and the

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<sup>432</sup> *See id.*

<sup>433</sup> Sarah Goodyear, *More Women Ride Mass Transit Than Men. Shouldn't Transit Agencies Be Catering to Them?*, CITYLAB (Jan. 30, 2015), <https://www.bloomberg.com/news/articles/2015-01-30/more-women-ride-mass-transit-than-men-shouldn-t-transit-agencies-be-catering-to-them> [https://perma.cc/2T5B-X7EN].

<sup>434</sup> Nehemkis, *supra* note 1, at 30.

MTA's fracturing is now visible to the entire world. But the MTA's abject corruption and disruptions are not theoretical disasters—they are city-shaking and world-changing. What does New York City look like without a reliable subway or transit system? Can the transit system recover from the pandemic? Whether or not it can, the MTA's failures should serve as a warning for those who blindly advocate for public authorities or undemocratic structures without considering the weaknesses inherent in an "apolitical" system. Recall that the public authority's lack of accountability and transparency is not a bug, but a feature.