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## The Promise and Perils of New Regionalist Approaches to Sustainable Communities

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# THE PROMISE AND PERILS OF “NEW REGIONALIST” APPROACHES TO SUSTAINABLE COMMUNITIES

*Lisa T. Alexander\**

“There is a critical difference between  
going through the empty ritual of  
participation and having the real power  
needed to affect the outcome of the  
process.”<sup>1</sup>

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1. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. INST. PLAN. 4, 216 (1969).

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### INTRODUCTION

On February 4, 2010, Shaun Donovan, the Secretary of the U.S. Department of Housing and Urban Development (HUD), announced HUD's creation of the Office of Sustainable Housing and Communities (the "Office").<sup>2</sup> Given the rather depressing state of the U.S. housing market, the announcement was one bright spot on an otherwise dim horizon for U.S. housing policy. The new Office is a program within HUD "designed to help build stronger, more sustainable communities by connecting housing to jobs, fostering local innovation and building a clean energy economy."<sup>3</sup> Through the Office, HUD seeks "to tie the quality and location of housing to broader opportunities such as access to good jobs, quality schools and safe streets."<sup>4</sup> Congress funded the Office in the FY 2010 Consolidated Appropriations Act,<sup>5</sup> and allocated \$150 million to the Office for a Sustainable Communities Initiative (the "Initiative").<sup>6</sup>

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2. Press Release, Andrea Mead, U.S. Dep't of Hous. & Urban Dev., HUD Secretary Donovan Announces New Office of Sustainable Housing and Communities (Feb. 4, 2010), available at [http://portal.hud.gov:80/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-028](http://portal.hud.gov:80/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-028).

3. *Id.*

4. *Id.*

5. FY 2010 Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat. 3034 (2009).

6. U.S. DEP'T OF HOUS. & URBAN DEV., FACT SHEET ON HUD'S SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM (2010) [hereinafter FACT SHEET], available at <http://portal.hud.gov/hudportal/documents/huddoc?id=regionalNOFA.pdf>.

Instead of a reactive attempt to correct U.S. housing policy's failures,<sup>7</sup> the Initiative is HUD's affirmative act "to stimulate more integrated and sophisticated regional planning to guide state, metropolitan, and local investments in land use, transportation and housing, as well as to challenge localities to undertake zoning and land use reforms."<sup>8</sup> The Initiative is one effort of the Obama Administration's broader Interagency Partnership for Sustainable Communities (the "Partnership"). The Partnership is a joint endeavor between HUD, the U.S. Department of Transportation, and the U.S. Environmental Protection Agency, to foster interagency coordination and cooperation around interdependent challenges.<sup>9</sup> The Partnership identified six livability principles that each agency member of the Partnership will incorporate into its programming. The principles are to: (1) provide more transportation choices; (2) promote equitable, affordable housing; (3) enhance economic competitiveness; (4) support existing communities; (5) coordinate policies and leverage investments; and (6) value communities and neighborhoods.<sup>10</sup> The Initiative is one HUD program designed to advance these livability principles.

One hundred million dollars of the Initiative's funding is for a competitive Sustainable Communities Regional Planning Grant Program (the "Grant Program").<sup>11</sup> Through the competitive Grant Program, HUD pro-

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7. Rightfully, most of the other articles from this Colloquium focus on legal solutions to the aftermath of the subprime mortgage crisis and the current foreclosure crisis. *See generally* Susan Block-Lieb & Edward J. Janger, *Reforming Regulation in the Markets for Home Loans*, 38 FORDHAM URB. L.J. 681 (2011); David A. Dana, *A Simple Approach to Preventing the Next Housing Crisis—Why We Need One, What One Would Look Like, and Why Dodd-Frank Isn't It*, 38 FORDHAM URB. L.J. 721 (2011); Anna Gelpern, *Financial Stability is a Volume Business: A Comment on the Legal Infrastructure of Ex Post Consumer Debtor Protections*, 38 FORDHAM URB. L.J. 767 (2011); Robin S. Golden, *Building Policy Through Collaborative Deliberation: A Reflection on Using Lessons From Practice to Inform Responses to the Mortgage Foreclosure Crisis*, 38 FORDHAM URB. L.J. 733 (2011); Melissa B. Jacoby, *The Legal Infrastructure of Ex Post Consumer Debtor Protections*, 38 FORDHAM URB. L.J. 751 (2011). Since legal scholars from this Colloquium and elsewhere are generating beneficial legal solutions to these problems, this Article instead analyzes the efficacy of affirmative attempts to devise long-range solutions to the problems of regionalism before those problems culminate in a crisis.

8. *Sustainable Housing and Communities*, U.S. DEP'T OF HOUS. & URBAN DEV., [http://portal.hud.gov/portal/page/portal/HUD/program\\_offices/sustainable\\_housing\\_communities](http://portal.hud.gov/portal/page/portal/HUD/program_offices/sustainable_housing_communities) (last visited Mar. 8, 2011).

9. *See* FACT SHEET, *supra* note 6.

10. U.S. DEP'T OF HOUS. & URBAN DEV., FR-5396-N-03, NOTICE OF FUNDING AVAILABILITY (NOFA) FOR HUD'S FISCAL YEAR 2010 SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM 3-4 (2010) [hereinafter NOTICE OF FUNDING AVAILABILITY], available at <http://www.hud.gov/offices/adm/grants/nofa10/scrpgsec.pdf>.

11. *See id.* at 5. Ninety-eight million dollars of the one hundred million dollar total is available for competitive grants. The remaining two million is reserved for capacity support grants.

vides financial incentives to metropolitan and rural grant applicants to create regional plans “that integrate housing, land use, economic and workforce development, transportation, and infrastructure investments.”<sup>12</sup> The Grant Program places a priority on funding projects that “translate the livability principles” into long-term strategies to address issues of regional significance.<sup>13</sup> The Grant Program’s unique targeting of regions as sites for regulatory reform, as well as its multijurisdictional and multisectoral emphasis, make it an example of what scholars and policymakers call “New Regionalism.”<sup>14</sup>

New regionalism has been defined as “any attempt to develop regional governance structures or interlocal cooperative agreements that better distribute regional benefits and burdens.”<sup>15</sup> New regionalist approaches recognize regions as key sites for the resolution of contemporary, interrelated problems that transcend local government and state boundaries. New regionalism includes collaborative efforts between cities and outlying suburbs to resolve metropolitan challenges such as affordable housing creation, transportation, sprawl, water access, infrastructure development, or environmental regulation.<sup>16</sup> The new regionalist agenda supports normative goals similar to the objectives that local government law seeks to advance, including: (1) equity and inclusion within, and amongst, self-defined territorial communities; (2) democratic participation; and (3) efficient and

12. *Id.* at 1.

13. *Id.* at 3.

14. See, e.g., Sheryll D. Cashin, *Localism, Self Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 885, 2028 (2000) (defining the term “new regionalism”); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity and the New Regionalism*, 78 WASH. L. REV. 93, 100-19 (2003); David D. Troutt, *Katrina’s Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109 (2008) (calling new regionalist attempts at metropolitan-wide governance and land use “equitable regionalism”); see also ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 170-82 (1994) (describing new approaches to resolving regional challenges); MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 12-13 (1997) (describing Minnesota’s experience with voluntary regional collaboration); NEAL R. PEIRCE ET AL., *CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD* 34 (1993) (describing the benefits of new attempts at regionalism); DAVID RUSK, *CITIES WITHOUT SUBURBS* 85-130 (1993) [hereinafter RUSK, *CITIES/SUBURBS*] (describing new strategies for addressing regional problems); DAVID RUSK, *INSIDE/OUTSIDE GAME: WINNING STRATEGIES FOR URBAN AMERICA* 153-335 (1999) [hereinafter RUSK, *INSIDE/OUTSIDE GAME*] (describing multiple examples of new regionalism).

15. Cashin, *supra* note 14 (using interlocal as a term of art to describe agreements between localities).

16. See Troutt, *supra* note 14.

accountable government.<sup>17</sup> Yet, new regionalists accept that new regulatory formulations and institutional collaborations are necessary to advance their objectives under contemporary conditions. New regionalism embraces a broad range of institutional arrangements and regulatory formations that privilege the well-being of the *region* as a whole, rather than the best interests of any one locality within a region.<sup>18</sup> New regionalism is a law reform strategy that responds to local government law's failure to: (1) resolve cross-border, multi-issue challenges; (2) promote regional equity amongst interdependent localities; and (3) foster participation and collaboration across local boundaries.

This Article examines the Obama Administration's Sustainable Communities Regional Planning Grant Program as an example of new regionalism. The Grant Program is not an example of formal regional governance or mandated regulation. It provides federal economic incentives to encourage multiple jurisdictions to collaborate and to devise solutions to long-standing regional problems. The Grant Program, thus, signals a new era of federal/regional governance relations that is reminiscent of the Great Society programs of the 1960s. Yet, the Grant Program differs from those prior efforts in that its institutional design reflects newer approaches to governance and regulatory reform. Specifically, the Grant Program's efforts to incentivize voluntary forms of participation and collaboration between multijurisdictional stakeholders, devolve planning functions to regional, public/private partnerships that include traditionally marginalized groups, and monitor outcomes to ascertain best practices, make it an example of what many scholars have called, "new governance" or "democratic experimentalism."<sup>19</sup>

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17. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1124 (1996) (discussing some of the normative goals of local government law).

18. See Cashin, *supra* note 14, at 2027-28 (describing various categories and types of new regionalist governance); see also Troutt, *supra* note 14 (referring to new regionalism as equitable regionalism and describing and explaining that equitable regionalism "recognizes that issues with distinct equity implications should be susceptible to regional cooperation because they are typically the subject of localist opposition").

19. See, e.g., Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in LAW AND NEW GOVERNANCE IN THE EU AND US 2 (Gráinne de Búrca & Joanne Scott eds., 2006) (describing new governance as "a range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command and control type regulation"); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing democratic experimentalism as decentralized governance which enables citizens and other groups to utilize their local knowledge to devise local solutions to their problems while regional or national coordinating bodies encourage such actors to share their knowledge with each other); Cristie Ford, *New Governance in the Teeth of Human Frailty*:

Though the term “new governance” defies precise definition, scholars generally agree that the emphasis on governance signals “a shift away from the monopoly of traditional politico-legal institutions, and implies either the involvement of actors other than classically governmental actors, or indeed the absence of any traditional framework of government.”<sup>20</sup> New governance also connotes a retreat from formal regulation; whereby bureaucratic elites impose rigid mandates in a top-down manner on the governed.<sup>21</sup> Instead, governmental entities merely identify broad goals and structure economic incentives to encourage collaborators to pursue those goals. New governance strategies also privilege the participation of non-traditional, or even marginalized, stakeholders in public problem-solving.<sup>22</sup>

Proponents of new governance assert that despite the absence of formal rules, mandates, and government control, all relevant public and private stakeholders in a given problem-solving network will often cooperate, irrespective of their power or status, to resolve public problems in a socially optimal and equitable manner.<sup>23</sup> They argue that informal public/private partnerships containing multiple stakeholders may be preferable to bureaucratic agencies when resolving complex public problems. Strict rules, regulations, and mandates are viewed as unnecessary to ensure regulatory accountability, if the gravity, enormity, urgency, and uncertainty of the public problem facing the stakeholder network make collaboration and coopera-

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*Lessons from Financial Regulation*, 2010 WIS. L. REV. 441; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 343 (2004); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001); Joanne Scott & Susan Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007); Louise Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 137, 145 (2006); Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673.

20. de Búrca & Scott, *supra* note 19 (a compilation of scholarly articles on new governance in the U.S. and the E.U.).

21. See Lobel, *supra* note 19.

22. See, e.g., Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago's Public Housing Reform Experiment*, 116 GEO. J. ON POVERTY L. & POL'Y 117 (2009).

23. See, e.g., Freeman, *supra* note 19, at 22 (describing collaborative governance as including the participation of parties who are interdependent and accountable to each other as well as involved at all stages of the deliberative process); Trubek, *supra* note 19, at 141 (describing collaborative health care collaborations including multiple types of stakeholders); Orly Lobel, *Rethinking Traditional Alignments: Privatization and Participatory Citizenship*, in PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY 1, 5 (Clare Dalton ed., 2007) (describing successful public/private collaborations in a variety of fields).

tion necessary for resolution of the challenge. Further, the informal nature of new governance's collaborative networks allows stakeholder collaborations to identify provisional goals, and then change those goals in response to new information.<sup>24</sup> New governance practice also places lawyers in less confrontational and more collaborative roles.<sup>25</sup>

New governance supporters assert that such approaches enhance the legitimacy, accountability, and transparency of regulatory reform as well as increase its experimental and democratic nature.<sup>26</sup> Most importantly, new governance scholars and advocates claim that such approaches to regulatory reform, if properly implemented, will often lead to more equitable distributive outcomes.<sup>27</sup> While many scholars maintain that new governance approaches provide many reasons for optimism, several others have shown that such approaches can present substantial pitfalls for traditionally marginalized stakeholders pursuing distributive justice through regulatory reform.<sup>28</sup> This Article examines both the promise and perils of the Sustainable Communities Regional Planning Grant Program as an example of new regionalism as new governance. Part I outlines new regionalism's response to the failures of local government law. Part II explains how new regionalism is in fact a form of new governance practice, and thus reflects the promise and perils of new governance approaches. Part III examines the regulatory architecture of the Sustainable Communities Regional Planning Grant Program and outlines the Grant Program's potential strengths. Part IV analyzes the Grant Program's potential weaknesses for advancing distributive justice in regional reform using the case of the Madison, Wiscon-

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24. See Kruse, *supra* note 19, at 677.

25. See, e.g., Orly Lobel, *Lawyer Loyalties: Speech Rights and Duties Within Twenty-First Century New Governance*, 77 *FORDHAM L. REV.* 1245 (2009); Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 *WIS. L. REV.* 277; Louise G. Trubek, *Public Interest Lawyers and New Governance Advocating for Health Care*, 2002 *WIS. L. REV.* 573.

26. Some of the seminal works in new governance theory and practice which make this assertion include: de Búrca & Scott, *supra* note 19; Dorf & Sabel, *supra* note 19; Freeman, *supra* note 19; Lobel, *supra* note 19; William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW & SOC. INQUIRY* 503 (2008).

27. See Gráinne de Búrca, *New Governance and Experimentalism: An Introduction*, 2010 *WIS. L. REV.* 227, 238 (explaining that an "empirical overview of the scholarly field might well suggest that most new governance scholars themselves subscribe to a theory of distributive justice and conceive of experimentalist governance as one way of realizing this").

28. See, e.g., Alexander, *supra* note 22; Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 *WIS. L. REV.* 239; Douglas NeJaime, *When New Governance Fails*, 70 *OHIO ST. L.J.* 323, 348-49 (2009); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 *U. PA. L. REV.* 541 (2008).



sin/Dane County regional area. Finally, the Article concludes by outlining the implications of these observations for new regionalist and new governance practice.

## I. NEW REGIONALISM'S RESPONSE TO THE FAILURES OF LOCAL GOVERNMENT LAW

### A. Cross-Border, Multi-Issue Challenges

As local government law scholars have demonstrated, the contemporary reality of increasing metropolitanization creates problems for traditional local government law.<sup>29</sup> The term metropolitanization describes the interrelationship between “urban cores and suburban peripheries.”<sup>30</sup> Suburbanization—the migration of people from cities to suburbs—is the defining trend in the recent history of U.S. metropolitanization.<sup>31</sup> Increasing suburbanization from the 1960s to the present has led to the creation of multiple incorporated local jurisdictions.<sup>32</sup> Those multiple suburban municipalities were created because major metropolitan cities resisted annexing the growing suburbs, and because incorporation allowed localities to control their fiscal, taxing, and social powers to attract low cost, high-earning individuals and to exclude undesirables.<sup>33</sup> While small, suburban municipalities proliferate, the U.S. population increasingly lives in large, sprawling, economically interdependent, metropolitan areas—including cities and suburbs—rather than the geographically distinct and isolated areas that an incorporated municipality traditionally connotes.<sup>34</sup> Studies have shown that by the year 2000, “nearly one-third of Americans lived in the ten largest metropolitan areas.”<sup>35</sup>

As a result of increasing metropolitanization, residents of a particular locality may conduct their activities outside of the locality in which they re-

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29. See Briffault, *supra* note 17, at 1115-17 (“The governance of metropolitan areas is the central problem for local governance law today.”); see also Cashin, *supra* note 14, at 1991-92.

30. BERNADETTE HANLON, JOHN RENNIE SHORT & THOMAS J. VICINO, CITIES AND SUBURBS: NEW METROPOLITAN REALITIES IN THE US 6 (2010).

31. See *id.* at 37.

32. See Cashin, *supra* note 14, at 1992.

33. See, e.g., Briffault, *supra* note 17, at 1136; see also Cashin, *supra* note 14, at 1991-93.

34. See Briffault, *supra* note 17, at 1116.

35. HANLON, SHORT & VICINO, *supra* note 30, at 5. The 2010 Census may reveal even more significant metropolitanization, yet this data has not been fully analyzed at the printing of this Article.

side, but within the broader metropolitan region.<sup>36</sup> Cities and suburbs, within and across state lines, may be economically and socially interdependent.<sup>37</sup> Under these conditions, local municipal actions inevitably have cross-border effects.<sup>38</sup> The decisions of a particular locality to exclude or include certain land uses, or to provide public subsidies for housing construction or economic development, will inevitably generate externalities or have spillover effects on neighboring localities.<sup>39</sup> Additionally, the actions of one locality acting alone to resolve housing or economic development challenges may be inadequate to resolve the regional scope of the problem. Further, if most suburban localities within a metropolitan region exercise their own local zoning powers to exclude affordable housing, then the aggregate effects of several localities' actions may put severe burdens on the central city.<sup>40</sup> Thus, the interdependence of localities within a particular region and the cross-border effects of their decisions suggest that regional, rather than local or state, regulation and cooperation may be necessary to resolve problems the effects of which transcend traditional local boundaries.<sup>41</sup>

Many public policy challenges are also substantively integrated. For example, improving the quality of life for low-income public housing residents cannot be achieved by reforming housing structures alone.<sup>42</sup> If one locality seeks to reform public housing without examining the entire regional job market, that locality's action or inaction may affect neighboring localities within the region. Public housing residents in improved housing, but without any meaningful access to local employment, may have significant commutes to work or may need transportation to a neighboring locality within the region to find work. Reformers must acknowledge the inter-related, multi-issue character of metropolitan problems and devise

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36. See Briffault, *supra* note 17, at 1116-17.

37. See HANLON, SHORT & VICINO, *supra* note 30, at 3 (explaining that the northern counties of Virginia, a once "predominately rural . . . small town state," have become part of the "metropolitan orbit of Washington DC" as incomers to the region working in DC have moved out to the Virginia suburbs).

38. See Briffault, *supra* note 17, at 1133 (defining cross-border effects).

39. See *id.*; see also ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING 117 (2004) (defining externalities and spillover effects as costs imposed on others external to a transaction because all the costs of the exchange cannot be fully internalized by the primary parties to the action).

40. See Briffault, *supra* note 17, at 1134.

41. See Troutt, *supra* note 14, at 1172.

42. See Memorandum from Peter R. Orszag, White House Office of Mgmt. & Budget, et al., to the Heads of Exec. Dep'ts and Agencies, Developing Effective Place-Based Policies for the FY 2012 Budget 6 (June 21, 2010), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m10-21.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-21.pdf) (describing the federal government's efforts to coordinate public housing reform with educational and crime reforms).

coordinated solutions throughout a given region. Thus, local government law's tendency to encourage discrete, single-issue, regulatory responses prevents the regional resolution of substantively integrated problems.

### B. Equitable Regionalism

Local government law structures often preclude the *equitable* resolution of regional problems.<sup>43</sup> Equity, as used here, includes equal access to opportunity, the "fair and just inclusion"<sup>44</sup> of all relevant stakeholders in a given reform project, and "distributive justice," defined as an equitable distribution of the benefits and burdens of reform. Supporters of new regionalism assert that by normalizing the self-interested, local decisions of municipalities, particularly suburban municipalities with exclusionary tendencies, the traditional structure of local government law exacerbates interlocal fiscal disparities and undermines regional equity and collaboration.<sup>45</sup> The local autonomy over land use and fiscal decisions that local government law affords municipalities was justified when localities were separated by significant unincorporated land, and before transportation and job patterns connected formerly distinct geographic areas.<sup>46</sup> Yet, under contemporary conditions, restricting local autonomy to a broad range of small local governments with control over discrete, but economically and socially interdependent territories, leads to fragmented local land use decisions, systemic exclusion, and distributional inequities.<sup>47</sup>

Not surprisingly, these effects of local government law operate along racial as well as economic lines.<sup>48</sup> Race is often the preeminent determinant of locational choice.<sup>49</sup> Citizens may move to a particular suburban locality primarily because of the race of its residents, rather than its mere "mix of services and taxes."<sup>50</sup> Thus, municipalities acting in their economic self-

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43. See Briffault, *supra* note 17, at 1115, 1140.

44. Angela Glover Blackwell, *Equitable Development*, in BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS AND POLICYMAKERS 179 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

45. See Briffault, *supra* note 17; see also Cashin *supra* note 14, at 1988.

46. See Briffault, *supra* note 17, at 1133.

47. See, e.g., *id.* at 1135-37; Cashin, *supra* note 14, at 1993.

48. Cashin, *supra* note 14, at 1993-94.

49. See Lee Ann Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 163 (William Fischel ed. 2006) (explaining that Tiebout's hypothesis casts "citizens as consumers who vote with their feet for particular metropolitan areas"); see also Cashin, *supra* note 14, at 1994 ("[A]nd the recent empirical literature on locational choice suggests that race, as opposed to the mix of services and taxes a jurisdiction offers, is the strongest of the factors that influence locational decisions." (alteration to the original)).

50. See Cashin, *supra* note 14, at 1193-94.

interest have incentives to use their zoning, land use, taxing, and development powers to exclude undesirables, as determined primarily by an intersecting mix of racial and class factors. Local government law, therefore, normalizes and entrenches citizens' private, market-based, racial, and economic preferences, which exacerbates spatial and social inequity.<sup>51</sup>

As Professor Sheryll Cashin demonstrated, these dynamics often lead to a "tyranny of the favored quarter."<sup>52</sup> Since most metropolitan regions in the United States consist of central cities, inner-ring suburbs, and outlying exurbs,<sup>53</sup> localism has led to outer suburban rings that have rapid growth and obtain a disproportionate share of metropolitan public investments, such as new roads, highways, transportation systems, developmental infrastructure, and water sewer services.<sup>54</sup> The favored quarter reaps the benefits of development, but externalizes development's costs and burdens.<sup>55</sup> The phenomenon of the favored quarter also contributes to the continued racialization of space and allocation of benefits along racial lines. To the extent that the favored quarter is disproportionately white and a disproportionate allocation of subsidies to spur development are allocated to such quarters, the benefits and burdens of development are unevenly distributed throughout a region in a manner that maintains the existing order of white racial hierarchy.

Additionally, while outer-ring, affluent, and disproportionately white suburbs and exurbs tend to comprise "the favored quarter,"<sup>56</sup> the modern metropolis increasingly reflects other more complicated housing patterns and spatial relations that defy the traditional black/white divide between cities and suburbs.<sup>57</sup> As scholars have noted, the new metropolitan reality also reflects interrelated geographic territories with "heterogeneous and segregated communities, immigrant gateways, minority suburbs, middle-class America suburbs, Black-middle class suburbs," and great disparities be-

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51. *See id.*

52. *Id.* at 2003.

53. The term "exurbs" describes "a region or settlement that lies outside of a city and usually beyond its suburbs and that often is inhabited chiefly by well-to-do families." *Exurbs*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/exurb> (last visited Mar. 1, 2011).

54. *See* Cashin, *supra* note 14, at 2003 (citing MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 2-8 (1997)).

55. *See id.* at 2004.

56. SHERYLL D. CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 170 (2005) [hereinafter CASHIN, *FAILURES*].

57. *See* HANLON, SHORT & VICINO, *supra* note 30, at 106; *see also* John A. Powell, *Reflection on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 608-12 (2008).

tween rich and poor within each formation.<sup>58</sup> In these more complex metropolitan environments, localism may further exacerbate even more complicated racial and socioeconomic fissures and inequities.

### C. Political Participation and Collaboration Across Local Boundaries

Lastly, local government law's narrow focus on discrete geographic communities engenders a kind of nativism amongst residents of localities that precludes the pursuit of cross-border political alliances or multi-racial, multi-ethnic, or socio-economic diversity. As Professor Cashin also explains, localism tends to "institutionalize societal attitudes that, in turn, reinforce existing disparities of power, wealth and social access."<sup>59</sup> Thus, the existence of the favored quarter, and its racial and socioeconomic dynamics, appear to be the result of an otherwise race-neutral order. The role of government policy and subsidies in structuring and reinforcing private market forces is obscured, and the existing hierarchical racial and economic order is viewed by citizens as "natural." Therefore, residents of the favored quarter approve of zoning board denials, low-density development, referendums, and other actions that maintain the existence of the favored quarter, while remaining naïve about the structural racial character of their decisions. Residents may also fail to support local or state public policies or regulations that will more equitably redistribute resources throughout a region because of a failure to see how other more equitable possibilities are in the region's collective self-interest.

As Professor Briffault argues, local residents tend to be oblivious to interlocal, economic interdependence.<sup>60</sup> Yet, localities within a large metropolitan area "tend to rise and fall together."<sup>61</sup> Studies have shown "a high correlation between city and suburban growth in employment, income, and population."<sup>62</sup> The health of central cities tends to influence citizens' perceptions of the region as a whole and somewhat determines the region's ability to attract jobs, tourists, and other drivers of economic growth.<sup>63</sup> The interdependence of localities throughout a region exists beyond the central city/suburb relationship. Compact suburban commercial sites, often known as "edge cities," also recruit workers from throughout the region.<sup>64</sup> To the

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58. HANLON, SHORT & VICINO, *supra* note 30, at 106.

59. Cashin, *supra* note 14, at 2026.

60. See Briffault, *supra* note 17, at 1149.

61. *Id.* at 1139.

62. *Id.* at 1138 (quoting Richard Voith, *City & Suburban Growth: Substitutes or Complements?*, FED. RES. BANK PHILA. BUS. REV., Sept.-Oct. 1992, at 21, 29).

63. *Id.* at 1139.

64. *Id.* at 1140.

extent that some localities within a region suffer from high crime, poor educational systems, and the like, those dynamics in such localities may also affect neighboring and affluent localities within the region.<sup>65</sup>

The existence of multiple local boundaries within a region can also undermine regional collective action and coalition-building amongst members of traditionally disadvantaged groups. Scholars in the field of housing and community development law note the "limitations of localism"<sup>66</sup> in creating multi-racial, multi-ethnic, socio-economically diverse coalitions with common interests.<sup>67</sup> They urge advocates and community members in search of distributive justice to "look beyond community boundaries to a more comprehensive antipoverty approach that acknowledges the significance of regional and transnational networks in the process of economic reform."<sup>68</sup>

The aforementioned shortcomings of local government law illustrate that, given the new metropolitan realities, traditional, local government law's unfettered local autonomy and focus on small geographic territories thwarts the actual realization of equity, community, participation, and collective action within the region. These are the normative values that local government law is designed to advance.<sup>69</sup> Yet, local government law, in practice, operates to undermine those values under contemporary conditions. New regionalism attempts to respond to such limitations of local government law by offering new territorial, regulatory, and political frameworks to resolve intractable public problems.

## II. "NEW REGIONALISM" AS "NEW GOVERNANCE"

### A. The Retreat From Regional Governments

Notably, most proponents of new regionalism do not call for the creation of formal, general purpose regional governments to resolve regional problems. Their resistance stems from the history of unsuccessful attempts to create general purpose regional governments.<sup>70</sup> While the concept of "regional governments" in the United States dates back to the nineteenth cen-

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65. *See id.*

66. Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 456 (2001).

67. *See id.* at 399.

68. *Id.* at 456.

69. *See* Cashin, *supra* note 14, at 1998.

70. *See id.* at 1989 n.11 (citing JOHN J. HARRIGAN, *POLITICAL CHANGE IN THE METROPOLIS* 342-65 (1993)).

ture,<sup>71</sup> the rise of regional regulatory formations in the modern era stems from U.S. federal grants programs in the areas of housing, transit, and urban development in the 1960s and 1970s.<sup>72</sup> The U.S. Federal-Aid Highway Act of 1962 required that urban areas form metropolitan bodies for transportation planning as a condition of receiving federal funding for interstate highway construction.<sup>73</sup> Specifically, the Housing and Urban Development Act of 1965 mandated the creation of organizations composed of public officials whom HUD found to be “representative of the various political jurisdictions within a metropolitan urban area.”<sup>74</sup> This provision encouraged the creation of elected regional councils of government (“COGs”) and metropolitan planning organizations (“MPOs”).<sup>75</sup> These regional bodies were originally composed of publicly elected officials.<sup>76</sup> Yet, in the 1980s, the Reagan Administration dismantled many of the federal programs that required metropolitan regional review and abandoned regional review requirements as a condition of federal funding.<sup>77</sup> Thus, the creation of formally elected regional councils dwindled and the new MPOs that were created consisted largely of appointed or voluntary members.<sup>78</sup> Such bodies also lost their central planning and formal governance function.<sup>79</sup> While metropolitan transportation planning still occurs, such planning bodies do not perform significant regional land use planning functions.<sup>80</sup>

Additionally, court ordered attempts to mandate regional cooperation have also been largely unsuccessful. In the 1970s, the U.S. Supreme Court began its retreat from the civil rights movement victories of the 1950s and 1960s, sanctioning localities’ exclusionary zoning powers even though such actions had deleterious effects on regional equity and integration.<sup>81</sup> Further, in the few cases that did mandate, through consent decrees, regional action as a remedy for past discrimination, local, predominately white residents staunchly resisted efforts to include formerly excluded pop-

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71. Briffault, *supra* note 17, at 1117.

72. *See id.* at 1148.

73. *See* Federal-Aid Highway Act of 1962, Pub. L. 87-866, 76 Stat. 1145; *see also About MPOs: A Brief History*, AMPO, <http://www.ampo.org/content/index.php?pid=15> [hereinafter *About MPOs*] (last visited Mar. 1, 2011).

74. *See About MPOs, supra* note 73.

75. *See id.*

76. *See id.*

77. *See* Briffault, *supra* note 17, at 1148.

78. *About MPOs, supra* note 73.

79. *See* Briffault, *supra* note 17, at 1148; *see also About MPOs, supra* note 73.

80. *See* Cashin, *supra* note 14, at 2029-30.

81. Troutt, *supra* note 14, at 1147-48.

ulations or redistribute resources throughout the region.<sup>82</sup> Consequently, while some supporters of new regionalism still advocate for "regionally bounded governments to address matters of regional significance,"<sup>83</sup> many new regionalists have reluctantly accepted "the political futility of seeking consolidated regional government."<sup>84</sup>

### B. Regional Governance and Stakeholder Collaboration Dilemmas

New regionalists support the creation of limited-purpose metropolitan governments, interlocal cooperative agreements, or other more informal and voluntary regional collaborations.<sup>85</sup> New regionalism is, thus, a reform movement that is distinct from older efforts to foster general purpose regional governments that supplant local authority.<sup>86</sup> Instead, new regionalist approaches emphasize *voluntary* interlocal collaboration to resolve fiscal disparities and distributional inequities.<sup>87</sup> New regionalism, then, is also a form of "new governance." Similar to new regionalism, the primary normative goals of new governance are to: (1) develop regulatory arrangements to facilitate democratic participation and experimentalism,<sup>88</sup> (2) promote efficiency,<sup>89</sup> problem-solving, and accountability<sup>90</sup> in regulatory reform; and (3) enhance distributive justice. Yet, a growing number of scholars express skepticism and concern about the ability of new governance methods to fulfill these goals, particularly when traditionally marginalized stakeholders are in collaboration with more economically and socially empowered groups.<sup>91</sup>

In my Article, *Stakeholder Participation in New Governance: Lessons From Chicago's Public Housing Reform Experiment*, I outline three common power dilemmas that often affect the participation of marginalized stakeholders in informal, public/private urban reform collaborations.<sup>92</sup>

82. *See id.*; *see also* ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX: A STORY OF SEGREGATION HOUSING AND THE BLACK GHETTO* 161-62 (2006).

83. Briffault, *supra* note 17, at 1115.

84. Cashin, *supra* note 14, at 2027.

85. *See, e.g.*, Cashin, *supra* note 14, at 2028; Troutt, *supra* note 14, at 1173.

86. *See* Cashin, *supra* note 14, at 2027 ("The New Regionalist agenda accepts the political futility of seeking consolidated regional government. Instead, it attempts to bridge metropolitan social and fiscal inequities with regional *governance* structures . . ."); *see also* Note, *Old Regionalism, New Regionalism, and Envision Utah: Making Regionalism Work*, 118 HARV. L. REV. 2291, 2292 (2005).

87. Cashin, *supra* note 14, at 2027; Note, *supra* note 86.

88. *See generally* Dorf & Sabel, *supra* note 19, at 267.

89. Lobel, *supra* note 19, at 344.

90. Freeman, *supra* note 19, at 22.

91. *See, e.g.*, Alexander, *supra* note 22; Bach, *supra* note 28; NeJaime, *supra* note 28.

92. *See* Alexander, *supra* note 22, at 135-42; *see also* NeJaime, *supra* note 28.



First is the problem of demographic representation.<sup>93</sup> This occurs when it appears that the right stakeholder representative—an organization or an individual who will advocate for, and advance, the interests of traditionally marginalized stakeholders—has been identified because the representative's racial, gender, or socio-economic characteristics are similar to those of the group that he, she, or it purports to represent.<sup>94</sup> Despite this seeming alignment of demographic characteristics, however, such representatives may have competing allegiances to other groups because of multiple and rival identity characteristics (i.e., class over race, gender over class, socio-economics over race, etc.).<sup>95</sup> Thus, demographic representation does not always result in meaningful representative governance. Rather, it can lead to false representation. In such instances, organizations or individuals that appear to be representative of traditionally marginalized or disempowered stakeholders' interests may be present in the collaborative network, but in practice they may actually intentionally further the interests of other, more empowered groups within the network because of competing allegiances.<sup>96</sup>

Second is the related problem of representative opportunism. Even when a well-meaning, demographically or ideologically aligned representative participates in new governance's informal, public/private partnerships, motivated by both social and profit making goals, the representative may act opportunistically to pursue his or her own selfish ends.<sup>97</sup> Both individual and organizational representatives can exhibit such opportunism. Like individuals, organizations depend on their environment for power and status as well as financial resources.<sup>98</sup> Both organizations and individuals can be easily seduced by individual or organizational network participants with more money, power, or status.<sup>99</sup> Such individuals and organizations may be dependent upon the private interests in a given network for financial support as well as positive social reputation or social capital.<sup>100</sup> These rep-

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93. See Alexander, *supra* note 22, at 137-39.

94. See *id.* at 138.

95. See *id.*

96. See *id.* at 157-58.

97. See *id.* at 139-41.

98. JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 20 (1996).

99. See *id.* at 20-21; see also Alexander, *supra* note 22, at 139-41.

100. Social Capital theorists assert that individuals' and organizations' "social networks have value." ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 7 (2000). Even non-profit or socially oriented organizations may depend upon the private interests in a given network for positive social capital that validates and legitimizes the organization to other network participants. This social validation can also lead to increased financial resources or social opportunities. See HANDLER, *supra* note 98, at 20-21.

representatives may receive promises or enticements from network participants with more status, such as collaboration on future development projects, choice units in newly designed housing, and financial inducements that lure the representatives to support positions that further the interests of more dominant stakeholders within the collaborative network.<sup>101</sup> Such representatives may do so to further their own individual or organizational interests, rather than the long-term interests of their constituents.<sup>102</sup> In this instance, it is opportunism, rather than competing identity characteristics, that can lead stakeholder representatives to betray the interests of the groups they purport to represent.<sup>103</sup>

The third dilemma, representative acquiescence, "occurs when stakeholder representatives unwittingly articulate their needs, and those of their constituents, in terms that reflect the dominant narratives of urban reform, rather than demand concessions that will lead to the long-term empowerment of their constituents."<sup>104</sup> When this dilemma occurs, the representative is not consciously acting opportunistically or in contravention of his or her constituent's interests; rather, the representative is unwittingly consenting to a framing of the problem that justifies outcomes contrary to the long-term interests of the marginalized stakeholders.<sup>105</sup> When this occurs there is no clear conflict between the marginalized stakeholder representatives and other more empowered stakeholders in the network. Nor are there issues important to traditionally marginalized stakeholders that are omitted or unexpressed.<sup>106</sup> Rather, the marginalized stakeholder representative is in positive collaboration with more wealthy or empowered members of the network, and ultimately agrees to plans or projects which disempower his or her constituents.<sup>107</sup>

Both organizational and individual representatives can acquiesce. Organizations, both for-profits and non-profits, also gain legitimacy, power, status, and resources by "conforming to the dominant cultural belief systems in [their] environment."<sup>108</sup> Thus, organizations, through their managers and leaders, may agree to conceptualize problems and solutions in terms that affirm the more dominant organizations or individuals in the collaborative network. Acquiescence can lead marginalized stakeholders and

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101. See Alexander, *supra* note 22, at 162-63.

102. See *id.* at 141.

103. See *id.* at 162.

104. See *id.* at 138.

105. See *id.* at 141-42.

106. See *id.* at 136.

107. See *id.* at 138.

108. See HANDLER, *supra* note 98.

their representatives who are participating in the decision-making forums of urban reform to agree to inequitable distributive outcomes. Acquiescence is a power dilemma because it precludes fair and reasoned deliberation between the marginalized stakeholder representatives and other participants in the deliberative network. Fair and reasoned deliberation suggests a dynamic in which each stakeholder representative expresses their constituents' needs, desires, goals, and solutions. The deliberative network, then, considers the stated positions of each representative. From the arguments proffered, the deliberative network then selects amongst the expressed options based upon the strength of each expressed argument and each solution's ability to resolve multiple and often competing objectives.

Instead, acquiescence represents a form of power whereby the more influential and assertive members of the deliberative stakeholder network, through narratives, ideology, and other psycho-social processes, cause the stakeholder representatives to accept positions or solutions that maximize the economic and social interests of the dominant members of the network.<sup>109</sup> Alternatives or contrary positions or solutions are never expressed or even considered by the problem-solving network because the marginalized stakeholder representatives have accepted a framing of the problem and its possible solutions that favors the more affluent and empowered members of the network.<sup>110</sup> Thus, through acquiescence the dominant members of the network obtain the willing consent of the marginalized stakeholder representatives to plans and projects that may not be in their long-term interests. Such representatives acquiesce either because they are not knowledgeable about alternative outcomes or because they unwittingly ascribe to narratives, ideologies, and frames that actually further ruling class interests.

### C. Stakeholder Collaboration and Power

These common power dilemmas correspond to the three dimensions of power first explicated by Steven Lukes in his seminal work, *Power: A Radical View*.<sup>111</sup> The first dimension is the overt and easily observed exercise of power—where one person overtakes the will of another.<sup>112</sup> The second

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109. See Alexander, *supra* note 22, at 138.

110. See *id.*

111. See STEVEN LUKES, *POWER: A RADICAL VIEW* 23 (2d ed. 2005); see also Alexander, *supra* note 22, at 135 (this analysis is based upon Steven Lukes' analysis of the dimensions of power in his seminal work, *POWER: A RADICAL VIEW*, wherein Lukes argued that power has at least three dimensions and that understanding the most subtle and empirically difficult to prove dimension of power was necessary to understand how socially dominant groups can secure the willing participation of those they successfully dominate).

112. See LUKES, *supra* note 111.

is how power can operate to more subtly exclude and suppress certain individuals or reform goals from the decision-making agenda.<sup>113</sup> Third, acquiescence is the most pernicious and difficult to identify operation of power, when "the dominant subject begins through narratives, discourse and other ideological and psychological processes to determine the subordinated object's wants, needs and desires."<sup>114</sup>

Demographic representation operates at the first level of power. The challenge is for traditionally marginalized stakeholders, or policymakers seeking to ensure that the interests of traditionally marginalized groups are represented in a reform effort, to identify a representative whose primary allegiance is to the marginalized stakeholders' long-term interests. The ideal representative is one "who will hold fast in the face of overt power conflicts."<sup>115</sup> In some instances, this may mean that a non-demographically aligned individual or organization may be a better representative. "[T]he researcher who seeks to study power at this level must study the easily observed behavior of stakeholder representatives throughout a [reform process]."<sup>116</sup>

Representative opportunism operates at both the first and second levels of power. Scholars studying this problem must observe both the explicit behavior of the organizational or individual stakeholder representative, but also make inferences about arguments, grievances, perspectives, and individuals that "fail to appear on the problem-solving agenda."<sup>117</sup> Such perspectives may be omitted because the representatives pursuing their own selfish ends may seek to suppress such issues from the decision-making agenda in contravention of their constituents' long-term interests. A researcher seeking to understand this second dimension must make inferences about marginalized stakeholders and their representatives, rather than focus only on the easily observed behavior of the stakeholder representative.<sup>118</sup>

Finally, representative acquiesce operates at the third-dimension of power, which is also the dimension most difficult to measure empirically. At this level, the researcher must attempt to understand how hegemonic ideologies may operate to lead representatives to support outcomes that are not in their constituents' long-term interests. Such inquiries are difficult to measure, since it requires attempting to understand positions that are not

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113. *See id.*

114. Alexander, *supra* note 22, at 136.

115. *Id.* at 137.

116. *Id.*

117. *Id.*

118. *Id.* at 136.

expressed, as well as the relationship between internal subjective processes and public policy outcomes. A researcher studying power at this level, at a minimum, must observe the narratives that such stakeholder representatives use to frame the reform challenge and must make inferences about whether or not that framing leads to outcomes that are in the long-term interests of marginalized stakeholders.

The operation of the above-mentioned forms of power present challenges for the presumed collaborative nature of new governance's voluntary and informal public/private stakeholder reform networks. As the profit-motive increasingly dominates urban reform projects, and as complex metropolitan dynamics increase possible social fissures along race, class, and other lines, these levels of power may operate in any given reform project to undermine positive collaboration between differently situated groups.<sup>119</sup> These power dilemmas may obscure unique forms of regulatory capture that deviate from the standard instances—whereby a state agency charged with advancing the public interest instead furthers commercial or powerful special interests that dominate the regulated industry.<sup>120</sup> Instead, the interests of the dominant actors in the stakeholder network are furthered through the informal stakeholder representative's behavior in the deliberative process, rather than by a dominated bureaucratic agency.

New governance theory and practice's retreat from elected governments, formal law, substantive and participatory rights, and confrontational lawyering may leave traditionally marginalized stakeholders without adequate recourse to ensure that their needs and desires are heard, respected, and honored at the decision-making tables of urban reform.<sup>121</sup> Thus, without adequate accountability measures, new governance's informal collaborations may lend themselves to a kind of sham participation and collaboration which precludes the most equitable resolution of regional problems. New governance scholars increasingly recognize these potential pitfalls.<sup>122</sup> One scholar asserts that in order to ensure that new governance experiments achieve their stated goals of participation, collaboration, and distributive reform, at least two preconditions are necessary. There must be "[1] the broadest possible degree of stakeholder participation compatible with

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119. See *id.*; Patience Crowder, "Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making, 74 TENN. L. REV. 623, 639 (2007).

120. Michael E. Levine & Jennifer L. Florence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990) (defining regulatory capture).

121. See Alexander, *supra* note 22, at 165.

122. See generally de Búrca, *supra* note 27.

effective decision-making, and [2] effective and informed monitoring."<sup>123</sup> These preconditions are essential elements of the institutional design of any new governance reform project.

Yet, even if the institutional design of a new governance reform effort satisfies these preconditions, it is not clear that such elements are sufficient to ensure that power dilemmas do not operate to undermine distributional equity in regional reform. In the next section, this Article examines the promising aspects of the institutional design of the Sustainable Communities Regional Planning Grant Program that may mitigate the problematic operation of power in metropolitan reform collaborations. The Article also analyzes the potential weaknesses of the Grant Program's institutional design that may permit power dilemmas to undermine the collaborative promise of the Grant Programs' regional collaborations.

### III. THE SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM'S PROMISE

The Sustainable Communities Regional Planning Grant Program is an attempt by the Obama Administration to resurrect federal incentives to facilitate regional collaboration as a condition to receive federal funding.<sup>124</sup> Yet, other than the 1960's housing and transportation programs mentioned previously, there is little precedent in our federalist system for this type of federal/regional regulatory cooperation.<sup>125</sup> While the Grant Program is only one small federal government incentive program that devolves the resolution of regional problems to voluntary, public/private collaborations, it provides an example of the promise and perils of new regionalism as new governance. The Grant Program's institutional design reflects HUD's attempt to embrace new regionalism as new governance in that it imposes few mandates or requirements on localities or metropolitan planning bodies. HUD also attempts, through the institutional design of the Grant Program, to address some of the shortcomings of traditional local government law by facilitating regional cooperation and equity and resolving interrelated problems. The Grant Program's promising features, in this regard,

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123. *Id.* at 235.

124. The Grant Program's Advance Notice and Request for Comment acknowledges that "[w]hile the benefits of integrated regional planning are numerous, the incentives, institutions, and funding for such efforts are not widely available." See U.S. DEP'T OF HOUS. & URBAN DEV., FR-5396-N-01, SUSTAINABLE COMMUNITIES PLANNING GRANT PROGRAM ADVANCE NOTICE & REQUEST FOR COMMENT 7 (2010) [hereinafter ADVANCE NOTICE AND REQUEST FOR COMMENT], available at [http://portal.hud.gov/hudportal/documents/huddoc?id=SH\\_GRANT\\_PLAN.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=SH_GRANT_PLAN.pdf).

125. See Briffault, *supra* note 17, at 1154 (describing the decline of federal/regional collaboration during the 1960s and 1970s).

include: (1) a commitment to broad multijurisdictional stakeholder participation, including the participation of traditionally marginalized stakeholders, throughout the Grant Program process; (2) requirements for applicants to develop comprehensive solutions to interrelated problems; and (3) obligations for applicants to conduct effective and informed monitoring of their progress throughout the grant planning process.

#### A. Broad, Multijurisdictional, Stakeholder Participation

In structuring the Grant Program, HUD resisted a completely top-down approach to regulation by requiring a high degree of stakeholder participation in both the creation of the Grant Program and throughout the process. At the outset, HUD specifically tried to gain significant input from multiple stakeholders about the Grant Program's institutional design. An Advance Notice and Request for Comment (the "Advance Notice") was initiated shortly after the Grant Program was announced.<sup>126</sup> The Advance Notice requested feedback from "[s]tate and local governments, regional bodies, community development entities, and a broad range of other stakeholders on how the Program should be structured."<sup>127</sup> Specifically, HUD sought feedback about several things, including the categories of regions that should be included in the Grant Program, the types of activities that should be allowed in each category, and common performance metrics for each proposed funding category.<sup>128</sup> HUD created a "Wiki" to serve as a repository for comments on the Grant Program's design and make it easy for many different stakeholders to shape the goals of the Grant Program at its inception.<sup>129</sup> HUD also conducted a series of outreach and listening sessions, as well as webinars, to educate the broad public about the Grant Program opportunity.<sup>130</sup> These efforts were designed to increase the inclusiveness and transparency of the grant process.<sup>131</sup>

After the Notice of Funding Availability (NOFA) was devised, HUD retained its facilitative posture by imposing few requirements or mandates on applicants, and by allowing much of the planning and solutions to regional problems to come from the localities cooperating in a given region. While HUD gave applicants substantial discretion in how to shape plans that would advance long-term sustainability in their regions, it did provide minimum preconditions for what counts as a "region." Further, while the NO-

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126. See ADVANCE NOTICE AND REQUEST FOR COMMENT, *supra* note 124, at 1.

127. *Id.*

128. See *id.*

129. See *id.* at 2.

130. See *id.*

131. See *id.*

FA did not require applications solely from governmental entities or general purpose regional governments, it did closely define what multijurisdictional entities were eligible applicants for the Grant Program.<sup>132</sup>

An eligible applicant is a "multijurisdictional and multi-sector partnership consisting of a consortium of governmental entities and non-profit partners."<sup>133</sup> A consortium that represents a large metropolitan area with an existing MPO must include certain collaborators in the effort, such as: (1) the principal city or cities within the region; (2) any other general unit of government with the largest population in the region; (3) other localities or Tribes that ensure that the consortium represents no less than fifty percent of the population within the region; (4) the existing MPO or regional planning agency, if any; and (5) a non-profit organization, foundation, or educational institution within the region that can "engage a diverse representation of the general population" and has "the ability to work with the units of general local government."<sup>134</sup> The Grant Program also provides requirements for eligible applicants from "non-defined areas," which include any area outside the boundaries of an existing Metropolitan Statistical Area.<sup>135</sup> Thus, the Grant Program does mandate what essential entities must be part of a consortium. As such, a mandate for broad stakeholder participation is incorporated into the Grant Program's design. Beyond those minimum requirements, however, the Grant Program gives applicants substantial leeway in determining which entities should be part of the consortium.

A consortium will not be recognized unless it can produce a written Partnership Agreement or a Memorandum of Understanding that evidences a commitment between all the members of the consortium to work as a group.<sup>136</sup> The Partnership Agreement or Memorandum of Understanding must be executed within one hundred twenty days after the effective start date of the agreement and it must be signed by all relevant members of the consortium.<sup>137</sup> The consortium must identify a "lead applicant" to act in a representative capacity with HUD and to hold fiscal and administrative responsibility for the consortium.<sup>138</sup> Consortia that receive funding must also work in partnership with public housing authorities in the region, al-

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132. See NOTICE OF FUNDING AVAILABILITY, *supra* note 10, at 18-20.

133. *Id.* at 18.

134. *See id.*

135. *Id.* at 19.

136. *See id.* at 20.

137. *See id.*

138. *See id.* at 19.



though such entities need not be formal members of the consortium.<sup>139</sup> The requirement of submitting the Memoranda of Understanding demonstrates that the Grant Program seeks to encourage voluntary, interlocal cooperative agreements, whereby the obligations between parties are outlined via contract rather than via statutory regulation. It is also an element designed to hold applicants accountable to their stated claims of collaboration and broad stakeholder participation.

Finally, since the Grant Program is a competitive program, applicants are selected on the basis of the number of points in each rating factor that they receive. "Only those applicants that meet the threshold review requirements will be rated and ranked."<sup>140</sup> HUD ranks all eligible applicants that meet the threshold requirements.<sup>141</sup> A total of 102 points can be awarded to an application.<sup>142</sup> Award sizes are ultimately based on regional population size and geographic boundaries.<sup>143</sup> Applicants are categorized as either "Large Metropolitan Regions; Medium Sized Regions; or Small-Sized Regions, Rural Communities or Small Town Areas."<sup>144</sup> Within each geographic formulation, HUD determines a minimum and maximum grant amount.<sup>145</sup> The points system helps HUD to determine the most eligible applicants within each category. "The scoring criteria used to award the maximum eligible points [in each rating factor of the] NOFA are how fully and thoroughly the applicant answers each item listed in each rating factor."<sup>146</sup> All applicants who receive a certain threshold score in their 2010 submission will qualify for preferred sustainability status, which also qualifies the applicant for "a broad spectrum of benefits" including capacity building resources and points in other funding competitions run by other agencies.<sup>147</sup>

Much like the Low Income Housing Tax Credit (LIHTC), the New Markets Tax Credit (NMTC), and other federal tax credit or grant programs for housing and community development, HUD reveals its normative priorities and objectives for the Grant Program through the number of points it allo-

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139. *See id.* at 21.

140. *Id.* at 60.

141. *See id.*

142. U.S. DEP'T OF HOUS. & URBAN DEV., FR-5415-N-01, POLICY REQUIREMENTS & GENERAL SECTION TO HUD'S FY 2010 NOFAS FOR DISCRETIONARY PROGRAMS 61 [hereinafter POLICY REQUIREMENTS & GENERAL SECTION], available at <http://www.hud.gov/offices/adm/grants/nofa10/gensec.pdf>.

143. NOTICE OF FUNDING AVAILABILITY, *supra* note 10, at 15-18.

144. *Id.* at 15.

145. *See id.* at 16-17.

146. *Id.* at 60.

147. *Id.* at 9.

cates to each rating factor. Rating factors with a higher maximum number of points indicate that the regulatory goal at issue is a high priority for HUD. In its Rating Factors, HUD demonstrates its commitment to the inclusion of marginalized stakeholders in both the planning and implementation of the regional plan, and as beneficiaries of the plan.<sup>148</sup> HUD gives fifty-five points to the "soundness of the approach" outlined in the plan.<sup>149</sup> Of those fifty-five points, seventeen points are awarded to how the consortium structures the planning process to advance equity, inclusion, and sustainability.<sup>150</sup> Those are the most points awarded to a subcategory within the "soundness of the approach" rating factor.<sup>151</sup> Thus, the Grant Program's institutional design demonstrates a commitment to incentivize and to maximize the participation of multiple stakeholders in the grant planning process, including traditionally marginalized or underserved stakeholders.

### **B. Equitable and Comprehensive Solutions to Interrelated Problems**

While the NOFA includes very few threshold requirements or substantive mandates,<sup>152</sup> it does encourage applicants to develop a planning process, and a long-range plan that responds to some of local government law's failures to facilitate comprehensive solutions to interrelated problems. The NOFA encourages this in its definition of eligible activities. Eligible activities are defined as "tasks necessary to develop a comprehensive Regional Plan for Sustainable Development (RPSD), to align investments with this plan, to improve the management capability to implement the plan, and to develop relevant policy, planning and evaluation capacity."<sup>153</sup> The NOFA lists, as an eligible activity, the development of a comprehensive regional plan that integrates existing land use plans in a number of areas.<sup>154</sup> The NOFA also encourages applicants to explain how they will adopt a housing plan that meets the need for affordable housing throughout the region,<sup>155</sup> and "incorporate[s] equity and fair housing analysis into regional planning."<sup>156</sup> Applicants are also encouraged to undertake regional transportation planning,<sup>157</sup> water infrastructure planning,<sup>158</sup> environmental

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148. *See id.* at 38-59.

149. *See id.* at 44, 61.

150. *See id.* at 45-46.

151. *See id.* at 61.

152. *See id.* at 28-30.

153. *See id.* at 22.

154. *See id.*

155. *Id.*

156. *Id.*

157. *See id.*

158. *See id.*

planning,<sup>159</sup> economic development planning,<sup>160</sup> and climate change impact assessments,<sup>161</sup> among other activities. This guidance for what constitutes an eligible activity directs applicants to consider the interrelated nature of regional problems when developing their applications.

The definition of eligible activities in the NOFA, however, does not require applicants to undertake such activities; it simply encourages such activities by providing examples in the definition. The NOFA clarifies that “[a]pplicants are not limited to the activities described below and are not required to address all of the activities but shall address those necessary to develop a comprehensive RPSD as is appropriate to their local context.”<sup>162</sup> Thus, while the NOFA encourages applicants to develop plans to address multi-issue regional problems, it does not mandate certain activities or include them as threshold requirements to receive funding. Lastly, the NOFA also incentivizes applicants to develop plans that address the interrelated nature of regional problems in their description of the needs that the regional plan will address.<sup>163</sup> It awards more points to plans that recognize the interrelated nature of regional problems, such as housing, transportation, water management, environmental sustainability, economic development, climate change, and plans that take affirmative steps to resolve such problems in a comprehensive way.<sup>164</sup>

### C. Effective and Informed Monitoring

The institutional design of the Grant Program also includes mechanisms to ensure that applicants achieve their stated results. HUD evaluates applicants’ progress toward their stated goals throughout the process.<sup>165</sup> The applicant is required to clearly identify its plan’s outcomes and benefits.<sup>166</sup> HUD identified eight outcomes that it requires all regions to incorporate into their plans as key to “achieving sustainability.”<sup>167</sup> These outcomes reflect HUD’s efforts to design the Grant Program to respond to the limitations of local government law in resolving region-wide problems. For example, two required outcomes include: (1) “the creation of regional transportation, housing, water, and air quality plans that are deeply aligned

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159. *See id.* at 25.

160. *See id.*

161. *See id.* at 26.

162. *Id.* at 22.

163. *See id.* at 39-42.

164. *Id.* at 3.

165. *Id.* at 57.

166. *See id.*

167. *Id.* at 57-58.

and tied to local comprehensive land use and capital investment plans"; and (2) "[r]educed social and economic disparities for the low-income, minority communities, and other disadvantaged populations within the target region."<sup>168</sup> Beyond the eight required outcomes, the Grant Program gives applicants substantial latitude to develop other outcomes and goals.<sup>169</sup> The Grant Program also requires applicants to develop benchmarks that are measures of progress toward achieving the stated goals at six-month, twelve-month, and twenty-four-month intervals.<sup>170</sup>

The Rating Factor Form that applicants must complete asks applicants to identify very specific goals as they relate to Rating Factor 5—Achieving Results and Program Evaluation. On the form, the applicants must: (1) list a regional planning issue to be addressed; (2) identify a long-term outcome that will demonstrate progress toward addressing the planning issue to be resolved; (3) demonstrate the livability principle that the outcome will further; (4) outline the particular stated HUD goal that the outcome addresses; (5) identify an applicable activity to advance the outcome, and state what progress they expect to make towards pursuing that activity at six, twelve, and twenty-four months; and finally, (6) identify a measure of progress that relates to the anticipated outcomes at each stage. HUD also encourages all applicants who receive awards to utilize the HUD e-Logic Model to manage the data necessary to demonstrate progress in achieving the stated outcomes.<sup>171</sup> The logic model is a tool that allows HUD and the applicants to reconcile the stated goals of the plan with empirical data.<sup>172</sup> A final workplan and the e-logic models are due sixty days after the effective date of the agreement.<sup>173</sup> The short intervals in which applicants are required to report progress towards stated outcomes suggest that participation, equity, and accountability will be monitored frequently, helping to increase the potential effectiveness of the Grant Program.

The Sustainable Communities Regional Planning Grant Program is, therefore, a promising federal initiative designed to address some of the most complex challenges that preclude significant progress on sustainable housing reforms in the modern urban metropolis. In order to advance regional sustainability, HUD designed the Grant Program to help localities overcome deficiencies in local government laws. The Grant Program attempts to resolve the challenges of localism by allocating money to region-

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168. *Id.* at 58.

169. *See id.* at 57.

170. *See id.*

171. POLICY REQUIREMENTS & GENERAL SECTION, *supra* note 142, at 61-63.

172. *Id.*

173. NOTICE OF FUNDING AVAILABILITY, *supra* note 10, at 64.

al collaborations and requiring that multiple organizations and governmental bodies within a region devise a written collaboration agreement detailing how collaboration will be facilitated. This element of the Grant Program is designed to facilitate planning, cooperation, and coordination between multijurisdictional governmental bodies and non-governmental groups.

Housing reformers' failure to see how housing law and policy is inexorably tied to other important substantive questions such as job creation, education, economic empowerment, environmental stewardship, and broader land use patterns has also been an Achilles heel. The Grant Program responds to local government law's failure to facilitate cooperation around interdependent challenges by awarding more points to plans that propose comprehensive solutions to substantively integrated problems.<sup>174</sup> The exclusion of low-income, traditionally marginalized, stakeholders in the planning and implementation of reform has also been a consistent critique of federal housing programs. The Grant Program addresses this by encouraging localities to include traditionally marginalized groups in the planning process.<sup>175</sup> HUD's commitment to make the resolution of such long-standing problems a central aspect of the Grant Program's institutional design is also a promising aspect of the program. It is not clear, however, that the broad stakeholder participation, comprehensive solutions to interrelated problems, and monitoring that the Grant Program requires is sufficient to mitigate the complex operation of power in informal, regional, public/private stakeholder collaborations. Next, Part IV explores the possible perils that the Grant Program's design may fail to address.

#### IV. THE SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM'S PERILS

Despite the positive aspects of the Grant Program, some possible perils still exist. This section outlines possible threats to marginalized stakeholders' meaningful participation in regional reform. Some aspects of the Grant Program's institutional design may leave the Grant Program's consortium collaborations susceptible to the various power dilemmas mentioned above. Demographic representation, representative opportunism, and representative acquiescence can result from: (1) the Grant Program's failure to mandate the participation of certain constituents in the consortium; (2) its encouragement of public/private partnerships and the leveraging of funds; and (3) its requirement that consortium participants have ex-

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174. *See id.* at 46.

175. *See id.* at 27, 45.

tensive experience and capacity. Lastly, this Part illustrates how the process of consortium development in Madison, Wisconsin, while generally positive, may indicate that certain power dilemmas are at work that the Grant Program is not designed to address.

Specifically, HUD encourages consortiums that include governmental agencies at different levels, non-profits, and other more informal public/private collaborations. Traditionally marginalized stakeholders and their representatives may find these collaborations to be politically and socially treacherous terrain. This Article does not intend to construe traditionally marginalized stakeholders or their representatives as incapable of self-advocacy, articulating or fighting for their interests, or collaborating with others in sophisticated urban reform efforts. To the contrary, throughout the history of housing and community development advocacy, several groups have been very effective in this regard.<sup>176</sup> This Article, however, does contend that urban centers are increasingly areas of intense social contestation. As globalization and metropolitanization increase the number of constituents who have a claim to, and a stake in, urban territory, low-income people of color and other traditionally underserved groups have to assert their needs against the backdrop of increasingly complex social fissures. When decision-making and planning about the futures of regions is devolved to regional, intergovernmental, and public/private collaborations, the design of such collaborative networks is essential to ensuring that distributive equity is realized. While the regional collaborations that the Grant Program encourages may provide important local context and experience, and help localities to understand their interdependence, there is also a risk that, absent sufficient mandates or public law protections, such voluntary and informal networks will operate to undermine important public and distributive values.

### A. Demographic Representation

The Grant Program allocates points to applicants if they can demonstrate their consortium's organizational capacity to fulfill the plan.<sup>177</sup> This requirement may incentivize the lead applicant to choose as partners individual or organizational representatives who are more professionalized, rather

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176. See generally *URBAN PROBLEMS AND COMMUNITY DEVELOPMENT* (Ronald F. Ferguson & William T. Dickens eds., 1999) (outlining the history of past urban development programs and the successes of community development groups and informal social organizations).

177. See NOTICE OF FUNDING AVAILABILITY, *supra* note 10, at 61-62.

than grassroots-oriented.<sup>178</sup> These professionalized individuals or organizations may appear or purport to represent marginalized stakeholders' interests because the representative organization or individual is from the same demographic background as the marginalized stakeholder group. The stakeholder representatives, however, may not be as attentive to the concerns of grassroots or politically-activist stakeholders, who may have legitimate ideas about how to advance equity within the region. Thus, grassroots groups, who may confront and challenge the more established stake-stakeholders in the consortium, may be excluded from the consortium. The Grant Program does not appear to provide recourse for stakeholders who attempted to join, but who were not selected as a part of the consortium.<sup>179</sup> Thus, HUD might consider allowing stakeholders who are not ultimately part of the consortium to file a social impact statement in which they can articulate why they were denied participation in the proposed plan, what their alternative visions are, or how they will be impacted by a plan proposed by a consortium in their region.<sup>180</sup>

Additionally, the localities that truly exacerbate inequity within a region may elect not to participate. The Grant Program's institutional design attempts to combat this problem by incentivizing the regional consortium to get the participation and buy in of key localities and cities in the region.<sup>181</sup> Yet, to the extent that the favored quarters do not elect to participate, those localities whose local land use decisions most frequently undermine regional equity may continue their practices, thereby impeding the progress of sustainable solutions. While the deliberative process of collaborative

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178. See Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2017 n.59 (2007) (citing Randy Stoecker, *The CDC Model of Urban Redevelopment: A Political Critique and an Alternative*, 19 J. URB. AFF. 1 (1997)) (explaining that as community groups assume the role of developers and hire increasingly professional and technical staff they become alienated from the interests of local community groups).

179. In Madison, Wisconsin, representatives of the Southdale Neighborhood Association explained that despite their efforts to develop an ambitious plan to advance equity in a low-income minority and white working class neighborhood, the lead applicant did not select them as a member of the consortium. See Telephone Interview with Paul Finch, Legal Consultant to Michael Goldsby (Aug. 23, 2010).

180. This Article derives the concept of social impact statements from the definition of environmental impact statements under the National Environmental Policy Act. Environmental impact statements require proposed projects to disclose their environmental impacts, including "adverse effects" of the project. Scholars have suggested that a social capital impact statement might help identify the pro-social capital and negative social capital effects of a particular project. See THOMAS SANDER, ENVIRONMENTAL IMPACT STATEMENTS AND THEIR LESSONS FOR SOCIAL CAPITAL ANALYSIS 4 (1999), available at <http://www.hks.harvard.edu/saguaro/pdfs/sandereisandsklessons.pdf>.

181. See NOTICE OF FUNDING AVAILABILITY, *supra* note 10, at 1-2, 45.

long-range regional planning may help localities and other stakeholders in the region to identify their collective regional interests, without strong state-level mandates that require localities to engage in regional land use reform, many of the most important localities may decline to participate. The favored quarter may resist participating or it may participate in a manner that precludes the most equitable solutions over the long-term.

### B. Representative Opportunism

The Grant Program also encourages applicants to substantially engage the private sector and business interests in the consortium.<sup>182</sup> Economic competitiveness and distributive equity are both key stated goals of the Grant Program. However, these goals are often in tension in any urban reform planning effort. Involving private sector or business interests in the consortium does risk that the private for-profit business entities may come to dominate the reform agenda in a manner that does not benefit traditionally marginalized groups. While the rating factors criteria attempt to mitigate this problem, it is unclear how a marginalized group can articulate its concerns with the consortium during the process. This is particularly true if the lead agency is the group that does the reporting to HUD. How can the consortium hold the lead agency accountable during the planning process? What if the lead agency provides data about the number of disadvantaged stakeholders who are participating in the planning process, but fails to articulate the strategic battles at the micro decision-making level that such parties lost? Should a private right of action to halt the planning process exist, if tensions arise within a consortium? Is the price of this constraint on the planning process too high? Would it allow disgruntled groups to hijack an important plan, falsely, in the name of equity or inclusion? Or would such a constraint further ensure that consortium participants are responding to traditionally marginalized constituents' concerns throughout the bargaining process because it acts as a regulatory penalty default rule?<sup>183</sup>

HUD also understandably places a high priority on how the consortium leverages HUD funds with other sources.<sup>184</sup> While this requirement will produce cost savings and help to enhance the efficiency of the Grant Program, it may be in tension with the requirement to include marginalized constituents and devise solutions which benefit such populations over the long-term. An increase in a plan's private financial resources may also in-

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182. See *id.* at 24-25.

183. See Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 967 (2003) (defining "regulatory penalty default" rules).

184. See NOTICE OF FUNDING AVAILABILITY, *supra* note 10, at 18.



crease the influence that private interests have over the design of the regional plan. Certain fundamental equity principles, resident ownership structures, or other considerations that should operate as constraints or factors in the planning process may be excluded as more private money is provided to finance the plan. Consortium members may attempt to demonstrate a commitment to helping marginalized constituents by stating the number of units of affordable housing proposed in the vicinity of transit hubs, for example. They may, however, fail to consider co-housing or community land trust ownership structures which facilitate long-term community stewardship of resources, but sacrifice profitability and wealth building. Thus, development structures which enhance gentrification may be privileged over development forms that actually promote long-term equity.

### **C. Representative Acquiescence**

If the localities whose local land use decisions most undermine regional equity do elect to participate in the consortium, their participation may cause the consortium to reject those planning possibilities that really enhance the benefits of reform for the most marginalized stakeholders. Marginalized stakeholder representatives may be present in the network or organizations that serve such constituencies may participate, but they may acquiesce in decisions that advance the interests of the more empowered localities in the region because of a failure to recognize alternative possibilities. To the extent that most participant organizations in the regional network have similar professional goals and objectives, the organizations that represent traditionally marginalized stakeholders may assent to solutions which re-distribute resources, but do so in a less aggressive way because they accept the dominant stakeholders' framing of regional challenges. As such, the most aggressively equitable solutions may not be included in many reform plans. If collectively, several regional applicants fail to submit plans to HUD that aggressively pursue distributive equity, HUD will likely still provide the money to whatever level of collaboration and cooperation is submitted.

### **D. The Case of Madison, Wisconsin and Dane County**

The sections above analyze only the potential promise and perils of the Grant Program. The Grant Program is too new for a significant empirical study of outcomes. HUD only recently released the names of the Grant

Program's Finalist Grantees.<sup>185</sup> HUD awarded \$98 million of federal funding to forty-five regional areas, reserving \$2 million for capacity grants for selected grantees.<sup>186</sup> The grantees will be engaged in their planning processes over the next three years. The list of grantees and projects is impressive and suggests that the Grant Program spurred and supported important collaborations to resolve regional challenges.<sup>187</sup> While the local contexts of these various regional collaborations differ significantly, an analysis of the formulation of one consortium in the Madison, Wisconsin and Dane County regional area suggests that the process of consortium creation itself may reveal certain power dynamics that the Grant Program's institutional design will not uncover or address. An analysis of the federal Grant Program's success depends not only on analyzing quantitative outcomes, but also on studying the micro-level decision-making of public/private collaborations and the process by which problems are resolved. This Article proceeds to provide that type of micro-level analysis of the process of consortium creation in the Madison, Wisconsin and Dane County area.

Recently, three regional collaborations in Wisconsin were awarded funds by the Grant Program.<sup>188</sup> In the Madison, Wisconsin and Dane County regional area, the Capital Area Regional Planning Commission (CARPC) was awarded \$1,997,500 to further develop a regional master plan titled, "Vision 2020 the Dane County Land Use and Transportation Plan" (the "Plan").<sup>189</sup> CARPC is the designated regional planning agency in the area under Wisconsin Statutes § 66.0309.<sup>190</sup> The Plan was prepared

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185. See Press Release, Brian Sullivan, U.S. Dep't of Hous. & Urban Dev., HUD Awards Nearly \$100 Million in New Grants to Promote Smarter and Sustainable Planning for Jobs and Economic Growth (Oct. 14, 2010), *available at* [http://portal.hud.gov:80/hudportal/HUD?src=/press/press\\_releases\\_media\\_advisories/2010/HUDNo.10-233](http://portal.hud.gov:80/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-233) (last visited Jan. 6, 2011).

186. *Id.*

187. See U.S. DEP'T OF HOUS. & URBAN DEV., FY2010 SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT SUMMARIES, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=OSHCFY10RegAppList.pdf>.

188. See U.S. DEP'T OF HOUS. & URBAN DEV., SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT FINALISTS, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=SustainableFinalists.pdf>.

189. Press Release, Laura J. Feldman, U.S. Dep't of Hous. & Urban Dev., HUD Awards Nearly \$3 Million to Promote Smarter and Sustainable Planning for Jobs and Economic Growth in Wisconsin (Oct. 14, 2010), *available at* [http://danedocs.countyofdane.com/webdocs/PDF/capd/2010\\_postings/Regional\\_Planning\\_GrantWisconsin\\_Release14Oct.pdf](http://danedocs.countyofdane.com/webdocs/PDF/capd/2010_postings/Regional_Planning_GrantWisconsin_Release14Oct.pdf) (last visited Feb. 16, 2011).

190. See CAPITAL AREA REG'L PLANNING COMM'N, CARPC REGIONAL PROFILE 1 (2010) [hereinafter CAPITAL AREA REG'L PLANNING COMM'N, PROFILE], *available at* [http://dane docs.countyofdane.com/webdocs/PDF/capd/2010\\_postings/CARPC\\_Regional\\_Profile.pdf](http://dane docs.countyofdane.com/webdocs/PDF/capd/2010_postings/CARPC_Regional_Profile.pdf).

and adopted in 1997 by the predecessor agency to CARPC.<sup>191</sup> Other regional plans for the area were also adopted that address “specific functional areas and systems.”<sup>192</sup> Together these plans constitute the Regional Master Plan and meet Wisconsin’s Comprehensive Planning Law Requirements.<sup>193</sup> CARPC, however, applied for funds because these “regional plans are advisory and lack clear enforcement authority.”<sup>194</sup> CARPC asserted that “the main avenue for ensuring local implementation is through building a collaborative alliance with local units of government, an approach that requires resources which are in generally short supply.”<sup>195</sup> Thus, CARPC applied for funds to develop a collaborative local network of regional planning agencies and localities to coordinate long-range regional plans.<sup>196</sup>

CARPC is the lead applicant for the consortium. CARPC has thirty-seven years of extensive experience in regional planning and community development. Consequently, in keeping with the Grant Program’s requirement, CARPC devised a consortium consisting of experienced key partner organizations, including the Madison Area Transportation Planning Board, the City of Madison, Dane County, and the City of Fitchburg, among other participants.<sup>197</sup> CARPC’s consortium has outlined a positive, ambitious, and promising plan to enhance sustainability. Notably, seven municipalities in the region chose not to participate in the regional planning consortium.<sup>198</sup> CARPC intends to keep an “open invitation” to those localities and will devise a marketing plan to inform the municipalities of the positive outcomes of the plan.<sup>199</sup>

The consortium demonstrated its commitment “to ensure that the perspectives of diverse and traditionally underrepresented populations directly influence the development and implementation of the Regional Plan for Sustainable Development,”<sup>200</sup> by including consortium partners that

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191. See CAPITAL AREA REG’L PLANNING COMM’N, RATING FACTOR NARRATIVE: CAPITAL REGION SUSTAINABLE COMMUNITIES INITIATIVE 1 (2010) [hereinafter CAPITAL AREA REG’L PLANNING COMM’N, NARRATIVE], available at [http://danedocs.countyofdane.com/webdocs/PDF/capd/2010\\_postings/SCI\\_Grant/Capital%20Region%20WI%20Narrative.pdf](http://danedocs.countyofdane.com/webdocs/PDF/capd/2010_postings/SCI_Grant/Capital%20Region%20WI%20Narrative.pdf).

192. See CAPITAL AREA REG’L PLANNING COMM’N, APPENDIX: CAPITAL REGION WISCONSIN SUSTAINABLE COMMUNITIES GRANT APPLICATION 1 (2010), available at [http://dane.docs.countyofdane.com/webdocs/PDF/capd/2010\\_postings/SCI\\_Grant/APPENDIX%20Capital%20Region%20WI.pdf](http://dane.docs.countyofdane.com/webdocs/PDF/capd/2010_postings/SCI_Grant/APPENDIX%20Capital%20Region%20WI.pdf).

193. See *id.*

194. See *id.*

195. See *id.*

196. See *id.* at 1-2.

197. See CAPITAL AREA REG’L PLANNING COMM’N, NARRATIVE, *supra* note 191, at 1-3.

198. See *id.* at 18.

199. See *id.*

200. See *id.* at 19.

represent such populations. CARPC has invited the Urban League of Greater Madison, the Latino Support Network, and United Way of Dane County to participate in the consortium as organizations that represent the perspectives of traditionally underserved groups.<sup>201</sup> Additionally, CARPC intends to form a social equity committee within the consortium that will meet to strategize about how to advance regional equity in the plan. Undoubtedly, the above mentioned groups have a strong and important track record in the Madison, WI/Dane County area for advancing the interests of traditionally marginalized groups. The consortium's effort to include them in the planning process suggests its sincere desire to include marginalized constituents and their representatives in the process.

### 1. *The Local Fresh Food Market*

The consortium also intends to demonstrate its commitment to sustainability through the creation of four "catalytic projects."<sup>202</sup> The catalytic projects include: (1) a Sustainability Commerce Center in the City of Madison; (2) a Fresh Market Vegetable Packing House Feasibility Study, led by Dane County; (3) a Local Fresh Food Market in a Low-Income Food Desert,<sup>203</sup> (Feasibility Study and Business Plan) led by Dane County; and (4) a 100% Stormwater Infiltration System for a High-Density Transit Oriented Development.<sup>204</sup> The catalytic project of a Local Fresh Food Market in a Low-Income Food Desert is one of the plan elements designed to advance social equity and address the needs of low-income, traditionally underserved groups.<sup>205</sup>

The food market catalytic project will be located near the Southdale Neighborhood. CARPC describes the Southdale Neighborhood as consisting of "underserved communities with low-incomes, high unemployment and a general lack of access to goods and services." The Southdale Neighborhood is located in the Town of Madison, which is a small, local municipality situated between the larger Cities of Madison and Fitchburg, both in the Dane County regional area. Over time, the Town's territory was gradually incorporated into the Cities of Madison and Fitchburg, and the remain-

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201. *See id.* at 18.

202. *See id.* at 14.

203. *See* MARI GALLAGHER, EXAMINING THE IMPACT OF FOOD DESERTS ON PUBLIC HEALTH IN CHICAGO 5 (2006), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/policy/ChicagoFoodDesertReport.pdf> (defining a food desert as a large geographic area with distant or no grocery stores).

204. *See* CAPITAL AREA REG'L PLANNING COMM'N, NARRATIVE, *supra* note 191, at 14.

205. *See id.* at 20.

ing territory is slated to be annexed into Fitchburg and Madison in 2022, rendering the Town of Madison extinct.<sup>206</sup>

Redevelopment of the Southdale Neighborhood was a key objective of the Town of Madison's 2001 Neighborhood Revitalization Plan, adopted by Dane County and approved by HUD.<sup>207</sup> One key objective of the Town of Madison's plan was the creation of a small grocery store within the neighborhood.<sup>208</sup> CARPC describes the location of the proposed fresh food market as a "food desert," in which residents lack access to fresh food, don't have access to cars, and must rely on local convenience stores with expensive and unhealthy products.<sup>209</sup> Through the Local Fresh Food Market Project, CARPC will seek to "create partnerships that will form direct links between the region's vital agricultural producers," and low-income minority end users in need of better nutrition.<sup>210</sup> The Grant Program's resources will be used to develop a business plan for the Local Fresh Food Market. The business plan will include projections of operating revenues and expenses, pricing and sourcing opportunities for locally grown food, surveys of neighborhood residents, and focus groups to ascertain capacity and demand as part of financial due diligence.<sup>211</sup> The total projected cost of these planning efforts is \$75,000; the planning is estimated to take six to seven months.<sup>212</sup>

The Local Fresh Food Market will be located in a site on the Novation Campus, adjacent to the Southdale Neighborhood.<sup>213</sup> The Novation Campus is a Brownfield redevelopment project<sup>214</sup> led by an experienced and established area private developer, the Alexander Company.<sup>215</sup> The private company is nationally renowned and has extensive experience in Brown-

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206. *Madison (Town), Wisconsin*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Madison\\_\(town\),\\_Wisconsin](http://en.wikipedia.org/wiki/Madison_(town),_Wisconsin) (last visited Mar. 1, 2011).

207. See CAPITAL AREA REG'L PLANNING COMM'N, NARRATIVE, *supra* note 191, at 17.

208. See *id.*

209. See *id.*

210. *Id.*

211. See *id.*

212. *Id.*

213. See *id.*

214. Brownfields are "abandoned, idled, or underused industrial and commercial sites where expansion or redevelopment is complicated by real or perceived environmental contamination." Amy L. Edwards, *When Brown Meets Green: Integrating Sustainable Development Principles Into Brownfield Redevelopment Projects*, 18 WIDENER L.J. 859 n.1 (2009).

215. See *The Alexander Company*, ALEXANDER CO., <http://alexandercompany.com/> (follow "Company" hyperlink) (last visited Mar. 1, 2011) ("Specializing in urban infill, new construction, [B]rownfield revitalization, and historic preservation, our developments give new life to historically significant buildings and urban neighborhoods.").

field redevelopment, sustainable urban-infill projects, and historic preservation.<sup>216</sup> The Novation Campus is Madison, Wisconsin's largest commercial, sustainable, urban-infill project, and is projected to provide over one million square feet of sustainable, commercial office space.<sup>217</sup> It is located on a former industrial site.<sup>218</sup> In addition to being a Brownfield site, the Novation Campus is located in a Tax Increment Financing District (TIF).<sup>219</sup> The TIF was specifically created to support the Novation Campus redevelopment. Previously, Wisconsin TIF law prohibited towns from creating TIF districts, but the Alexander Company lobbied the state to change the law to allow towns with border agreements to create TIFs.<sup>220</sup> The law was changed and the Novation Campus received approximately three million dollars in projected tax increment financing for Brownfields remediation. It is also expected to apply for and receive an additional twelve million dollars for the Novation Campus.<sup>221</sup> Many argue that the Brownfields remediation needed to revitalize the site could not have occurred without the TIF financing.<sup>222</sup>

Growing Power, Inc. is also a partner in the Local Fresh Food Market project. Growing Power, Inc. is a nationally recognized non-profit organization and land trust, which seeks to advance equal access to healthy food for all communities through the creation of sustainable, community-based agricultural food systems.<sup>223</sup> The organization is the brainchild of, and is run by, Will Allen, a MacArthur Genius grant recipient and nationally renowned innovator, who works on urban agriculture and sustainable food systems in Milwaukee, Madison, Chicago, and other urban centers.<sup>224</sup> Allen is an African-American resident of Milwaukee who has an unquestioned record of success and accountability to low-income minority com-

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216. *See id.*

217. *See id.*

218. *See id.*

219. A TIF is a debt structure authorized by state enabling legislation that takes the estimated future increase in property taxes generated by proposed redevelopment activities and captures that future tax increment to finance the redevelopment activities. *See* Dina Schlossberg, *Tax Increment Financing*, in *BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY DEVELOPMENT FOR ADVOCATES, LAWYERS AND POLICYMAKERS* 129-30 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

220. Vikki Kratz, *Losing the Farm*, *ISTHMUS* (Jan. 23, 2009), <http://www.thedailypage.com/isthmus/article.php?article=24901>.

221. *Id.*

222. *See id.*

223. *See* GROWING POWER, INC., <http://growingpower.org/index.htm> (last visited Jan. 7, 2011).

224. *See* CAPITAL AREA REG'L PLANNING COMM'N, PROFILE, *supra* note 190, at 18.

munities.<sup>225</sup> He has been selected by first lady Michelle Obama as a partner in her efforts to combat childhood obesity.<sup>226</sup>

In Madison, Will Allen is also involved in a grassroots effort with other progressive organizations, such as the Center for Resilient Cities, and businesses, such as Madison Gas and Electric, to create “a community center, a project-based middle school, a five-thousand-square-foot mixed-use development with neighborhood-focused businesses such as a restaurant and coffee shop, an MG&E Energy Services Center and several acres of intensive, year-round urban agriculture.”<sup>227</sup> This school, and the other efforts, all center on job training for, and the creation of, high-road, green-collar jobs.<sup>228</sup>

The final main partner in the Local Fresh Food Market project is Robert Pierce, a long-time African-American farmer and founder of the South Madison Farmer’s Market, who currently operates “a weekly farmers market within the Novation Campus and is interested in establishing a year-round market.”<sup>229</sup> These project partners are undeniably qualified. Will Allen and Robert Pierce, in particular, seem to be demographically and ideologically aligned with the interests of low-income, underserved populations in the Dane County area, and they have a good track record of outcomes and accountability to low-income minority communities.<sup>230</sup> Thus, it is logical that CARPC would select these partners for a project to further social equity goals.

## 2. *Struggle for the Soul of Southdale and Drumlin Farms*

Yet, despite this seeming alignment of interests, there have been a number of power struggles over the future of the Southdale Neighborhood. Although the Southdale Neighborhood has been described as having a “dismal reputation” with low rates of homeownership and high crime, there are some positive aspects of the community, such as the Drumlin Farms area, “a rural five-acre farm that operated as a site for Community Supported

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225. See Maggie Ginsberg-Schutz, *Pay Dirt*, MADISON MAG., Aug. 2010, at 1, available at <http://www.madisonmagazine.com/Madison-Magazine/August-2010/Pay-Dirt/> (explaining that Will Allen has been selected as one of Time Magazine’s Top 100 Most Influential People for his work on sustainable urban agriculture in low-income minority communities).

226. See Allen, Will, *C-SPAN Biographical History*, C-SPAN VIDEO LIBRARY, <http://www.c-spanarchives.org/willallen> (last visited Mar. 1, 2011).

227. Ginsberg-Schutz, *supra* note 225.

228. *Id.*

229. CAPITAL AREA REG’L PLANNING COMM’N, PROFILE, *supra* note 190, at 18.

230. See SOUTH MADISON FARMER’S MARKET, <http://southmadisonfarmersmarket.com/> (last visited Jan. 7, 2011).

Agriculture (CSA)."<sup>231</sup> CSAs are a way for local farmers to market their produce to local consumers who buy shares of the farmers' crops.<sup>232</sup> The Drumlin Farms area also contained farmhouses and community gardens in which, at one time, more than thirty families rented plots.<sup>233</sup> The Drumlin Farms territory will be annexed into the City of Fitchburg by 2022.<sup>234</sup> Yet, the Drumlin Farms were conducted on rented, not owned land.<sup>235</sup> In the late 1990s, some Drumlin supporters unsuccessfully tried to raise enough funds to purchase the property.<sup>236</sup> In 2007, the Alexander Company purchased Drumlin Farms as territory for the proposed Novation Campus.<sup>237</sup> As of 2009, the Alexander Company was "clearing the site" of existing housing and other structures because the Company deemed the existing structures to be in "very rough shape" and "cost-prohibitive" to refurbish or retain.<sup>238</sup> One Southdale resident argued that "the people who have been advocating are being evicted from the farm."<sup>239</sup>

Some local residents assert that, thus far, the Alexander Company has bought extensive land in the Southdale Neighborhood, including the Drumlin Farms area, for its commercial Novation Campus. Yet, there are few proposed community benefits for current local residents from the new development.<sup>240</sup> Original plans for the Novation Campus showed a parking lot and multistory building in the location of the community gardens of Drumlin Farms.<sup>241</sup> Further, some residents argue that despite formal public meetings, they feel that "Alexander's plans don't include them" and that the Novation Campus project has moved forward with "little public input."<sup>242</sup> Some residents contend that the Alexander Company has only given "lip service to inclusion."<sup>243</sup> Former Drumlin Farms and current Southdale residents are also concerned that they will ultimately be victims, rather

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231. *Id.*

232. *See, e.g., Community Supported Agriculture*, LOCAL HARVEST, <http://www.localharvest.org/csa/> (last visited Jan. 7, 2011) (describing CSAs as popular way for consumers to buy shares of local seasonal food directly from a farmer).

233. *See* Kratz, *supra* note 220.

234. *See id.*

235. *See id.*

236. *See id.*

237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.*; *see also* Interview with Michael Goldsby, Consultant for Southdale Neighborhood Ass'n, Madison, WI. (2010) [hereinafter Goldsby Interview].

241. *See* Kratz, *supra* note 220.

242. *See id.*

243. *See id.*



than beneficiaries, of the new project.<sup>244</sup> Some residents also remain skeptical of the Alexander Company's promises that the Novation Campus will bring them new jobs and tax revenues.<sup>245</sup>

In light of these concerns, residents of Drumlin Farms and the Southdale Neighborhood attempted to negotiate a community benefits agreement<sup>246</sup> with the Alexander Company to ensure that existing residents receive actual benefits from the redevelopment, such as affordable housing, job creation, and preserved community gardens, rather than promised, but not realized, benefits.<sup>247</sup> Residents told the Dane County Zoning Commission ("Zoning Commission") that they would provide support for the project if an agreement on community benefits could be reached.<sup>248</sup> The Zoning Commission did not facilitate the creation of a community benefits agreement, but in response to the residents' request, the Zoning Commission added an "amendment to the zoning petition" that required the Alexander Company to take "a more active role in meeting with the neighborhood."<sup>249</sup> However, the residents and developer did not create a formal contract promising community benefits.<sup>250</sup> The Alexander Company maintains that the Novation Campus will create significant jobs for area residents,<sup>251</sup> but the lack of a contract or formal agreement to enforce such promises may mean that such benefits do not actually accrue to existing residents.

The Alexander Company did, however, respond to community concerns by sending representatives door-to-door to inform "residents about [the] upcoming construction."<sup>252</sup> Forced in part by the City of Fitchburg's requirement that development projects cannot commence without a neighborhood plan, the Alexander Company did, in conjunction with the Town of Madison, help to create a neighborhood plan.<sup>253</sup> Some argue that Southdale and Drumlin Farms residents were not an integral part of the develop-

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244. *See id.* (explaining that low-income residents are being pushed out).

245. *See id.*; Goldsby Interview, *supra* note 240.

246. *See* Julian Gross, *Community Benefits Agreements*, in BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY DEVELOPMENT FOR ADVOCATES, LAWYERS AND POLICYMAKERS 189-204 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009) (defining "community benefits agreements" as a "legally binding, private contract between a developer and community-based organizations, under which the developer commits to providing specified community benefits through a proposed development project, and participating community groups agree to support the project in the governmental approval process").

247. *See* Kratz, *supra* note 220.

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *Id.*

253. *See id.*

ment of the Southdale Neighborhood Plan (the “Southdale Plan”), and that the Town of Madison allowed the Alexander Company undue influence by permitting the Company to hire its own consultant to produce the Neighborhood Plan.<sup>254</sup> Some residents stated, “Alexander was really in charge of the planning process,” and noted that “the original version of the plan left out affordable housing and transit.”<sup>255</sup> While the Alexander Company did hold several public meetings with neighborhood residents in 2007 and 2008, when the Fitchburg Plan Commission held a meeting to approve the Southdale Plan on December 2, 2008, eighty residents showed up mostly in support of retaining Drumlin as a farm.<sup>256</sup> The Southdale Neighborhood Plan was ultimately approved by the Zoning Commission “with language urging that a community garden remain in Southdale” and recognizing that the Drumlin Farms was part of neighborhood resources.<sup>257</sup> However, the Plan did not provide that the community gardens would remain at the Drumlin site, nor did it suggest a new location for the gardens.<sup>258</sup>

### 3. *The Southdale Springs Cooperative Housing Conceptual Plan*

Many residents argue, however, that given the significant investment of public dollars through TIF financing in the Novation Campus, the Novation Campus should contain more public benefits for existing residents.<sup>259</sup> Given their concerns about the Novation Campus’s lack of community benefits for existing residents, some residents of the Drumlin Farms and Southdale Neighborhoods sought to develop an alternative plan for the Drumlin Farms site.<sup>260</sup> The Southdale Neighborhood Association enlisted Constructive Change Consulting LLC, a company owned by Michael Goldsby. Goldsby is a local African-American consultant and a member of the Drumlin Farm Cooperative, who provides consulting on TID and TIF structures as well as sustainable development.<sup>261</sup> The Southdale Springs Cooperative Housing Conceptual Plan (the “Southdale Springs Plan”) is envisioned on an 8.05 acre parcel located on the site of the former Drumlin Farms, which is now owned by the Alexander Company and is slated for redevelopment on the Novation Campus. However, the Southdale Springs

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254. *See id.*

255. *Id.*

256. *See id.*

257. *Id.*

258. *See id.*

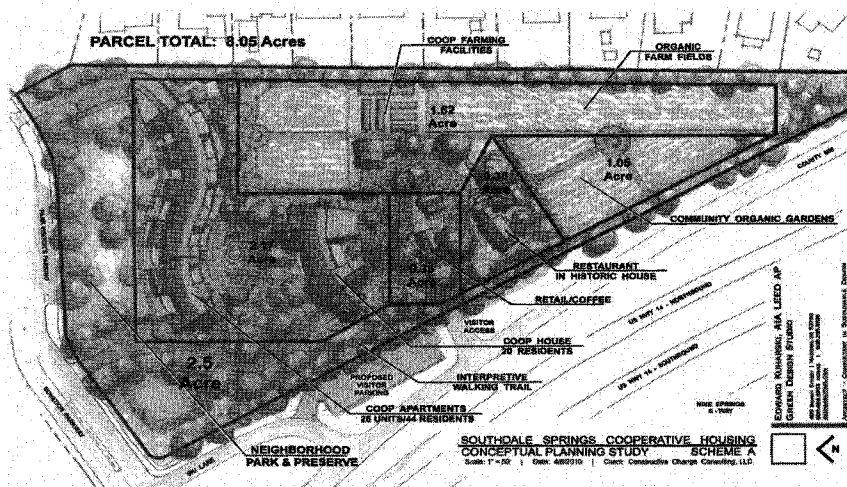
259. *See id.*; Goldsby Interview, *supra* note 240.

260. *See* Kratz, *supra* note 220.

261. *See* Michael Goldsby, *President at Constructive Change Consulting LLC*, LINKEDIN, <http://www.linkedin.com/pub/michael-goldsby/15/562/54> (last visited Mar. 1, 2011).

Cooperative Housing Plan is an alternative plan for the site, which attempts to retain some of the positive sustainable and communal features of the original Drumlin Farms site and gives existing Southdale residents more control over the scope of the redevelopment.

**Figure 1.** The Southdale Springs Plan.<sup>262</sup>



The Southdale Springs Plan would retain 1.05 acres of community organic gardens on the former Drumlin Farms site.<sup>263</sup> It would also reserve 1.62 acres of land on the site for cooperative farming facilities that would produce organic produce.<sup>264</sup> On the same site, within walking distance of the cooperative farms and community gardens, the plan would include a restaurant that utilizes the organic produce from the farm.<sup>265</sup> The restaurant would be located in a historic house on the site.<sup>266</sup> The site would also contain space for small businesses such as coffee houses and other retail.<sup>267</sup> The idea is that local residents who receive job-training in sustainable urban agriculture and entrepreneurship could staff the small businesses on the site.<sup>268</sup> Most importantly, 2.7 acres of the Southdale Springs Plan would be

262. EDWARD KUHARSKI, SOUTHDALE SPRINGS COOPERATIVE HOUSING CONCEPTUAL PLANNING STUDY SCHEME A (2010) (on file with author).

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.*

267. *See id.*

268. *See* Goldsby Interview, *supra* note 240.

reserved for affordable housing that retains the affordability of the housing over the long-term.<sup>269</sup> The housing structures include twenty-six units of affordable cooperative housing that would serve approximately forty-four residents, as well as some homeownership opportunities that would use a co-housing model, or some other form of long-term, affordable, community-based housing, such as single family housing on a community land trust structure.<sup>270</sup> The site would also reserve 2.5 acres for a neighborhood park and preserve as well as walking trails.<sup>271</sup>

Michael Goldsby, as a consultant to the Southdale Neighborhood Association, attempted to have the Southdale Springs Plan incorporated into CARPC's application to HUD for the Sustainable Communities Planning Grant Program. Goldsby contends that the Southdale Springs Plan's attempt to integrate resident-owned and controlled, long-term, affordable housing with preservation of green space, cooperatively owned organic farming, community gardens, and sustainable small businesses makes the Southdale Springs Plan consistent with the social equity and sustainability goals of the Grant Program.<sup>272</sup> Goldsby is also hopeful that the Southdale Springs Plan could dovetail with the efforts of Growing Power, Inc. and Will Allen to create a sustainable school and urban agricultural site.<sup>273</sup> The Southdale Springs Plan site is also located near major highways and is near a possible site for the proposed high-speed rail system between Madison and Milwaukee, Wisconsin.<sup>274</sup>

However, despite Goldsby's efforts, CARPC and those developing the Madison, Wisconsin/Dane County application to HUD's Grant Program elected not to work with Goldsby to implement the Southdale Springs Plan. Admittedly, there are several legitimate reasons that CARPC could have elected not to work with Goldsby and the architects of the Southdale Springs Plan. CARPC may have felt the Local Food Market Business Plan was easier to administer or more apt for the scope of the Grant Program, which is a three year planning grant.<sup>275</sup> CARPC may have also had more

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269. See KUHARSKI, *supra* note 263.

270. See *id.*; see also Goldsby Interview, *supra* note 240.

271. See KUHARSKI, *supra* note 263.

272. See Goldsby Interview, *supra* note 240.

273. See *id.*

274. As of the writing of this Article, Wisconsin Governor Scott Walker has rejected the federal money granted to be used for the high-speed rail project linking Milwaukee, Wisconsin to Madison, Wisconsin. See Jason Plautz, *Obama Admin Threatens to Take Back Wis. Rail Money*, N.Y. TIMES, Nov 9, 2010, <http://www.nytimes.com/gwire/2010/11/09/09greenwire-obama-admin-threatens-to-take-back-wis-rail-mo-87303.html>.

275. See Telephone Interview with Paul Finch, Legal Consultant to Michael Goldsby (Aug. 23, 2010).

confidence in the collaboration that would implement and administer the Local Fresh Food Market idea because of their track record of experience and success. CARPC may have also rendered the Southdale Springs Plan unrealistic because its organizers did not have site control and were in conflict with the Alexander Company which did have site control and paid large sums for the site.<sup>276</sup> CARPC may also have had less confidence in the grassroots community group's ability to effectuate their stated plans and steward the plan over the long-term. Lastly, personality conflicts may have been one of the reasons that CARPC elected not to work with Goldsby to implement the Southdale Springs Plan.

Yet, it is significant that an idea that is completely consistent with the long-term social equity goals of the Grant Program did not receive funding and was excluded from the process of consortium creation in this case. While the Local Fresh Food Market will undeniably reap multiple benefits for the neighborhood, and perhaps even serve a broader group than the Southdale Springs Plan, the Local Fresh Food Market does not guarantee that the residents of Drumlin Farms or the Southdale neighborhood will receive affordable housing, jobs, or control over the long-term scope of development in the area. CARPC does have other aspects of its plan that are designed to advance these goals, but it is not clear that those benefits will accrue to the existing residents of Southdale as many residents of Southdale apparently hoped. Further, many residents of Southdale claim that their elected representatives failed to adequately express their long-term needs in the process of neighborhood planning, or in their struggles to have greater, enforceable community benefits result from the Novation Campus redevelopment project.<sup>277</sup>

While it appears that CARPC has selected social equity partners that are demographically and ideologically aligned with low-income minority and underserved groups, it is not clear that those representatives will assert the distributive outcomes in the planning process that some Southdale residents hoped for. This is not to suggest that the selected social equity or catalytic project partners will intentionally or even opportunistically undermine the interests of traditionally marginalized groups. However, it seems likely that, in the instance of the struggle for the soul of Southdale, the representatives of marginalized stakeholders' interests selected by CARPC may accept a framing of the Novation Campus project as "in the long-term interests of Southdale residents," even if the campus creation sets in motion

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276. See Kratz, *supra* note 220.

277. See *id.*

processes of gentrification that ultimately displace, rather than empower, existing Southdale residents.

### CONCLUSION

The Sustainable Communities Regional Planning Grant Program's embrace of voluntary, regional public/private collaborations to advance regional equity has potential promise and perils. The present staff at HUD seems quite committed to working with regional collaborators to advance regional equity and mitigate possible risks. As such, the Grant Program is very promising. The case of Madison, Wisconsin can be characterized as one anecdote that may not be representative of the dynamics occurring across the country. It could also be dismissed as "much ado about nothing,"<sup>278</sup> since the selected representatives of marginalized groups in CARPC's plan seem well-qualified to advance equity for traditionally underrepresented groups. Yet, the narrative does reveal possible limitations in the Grant Program's institutional design. The most aggressive solutions to promote regional equity, or advance the interests of traditionally marginalized groups, may be excluded, sublimated, or omitted in the process of consortium creation. The most marginalized or grassroots groups may not have the capacity to be selected as consortium participants, yet they may have important perspectives on how to advance equity within the region.

Further, the Grant Program does not contain mechanisms to gather the kind of qualitative data or information that HUD would need to understand whether or not power is operating to undermine regional equity or disempower marginalized constituents in the process of consortium creation. It also remains unclear how marginalized groups who are selected to be part of the consortium effort might communicate their concerns about the planning process to HUD, since the lead applicant is the main point of contact for the Grant Program. The Grant Program also does not contain an administrative process through which other consortium members can hold the lead applicant accountable, if they feel that their interests are not adequately respected in the regional planning process. Thus, similar stories or power struggles could be occurring in the process of consortium development in other regions, but the Grant Program is not designed to capture those occurrences.

Additionally, the Grant Program does not mandate the participation of certain traditionally underserved or marginalized groups, or their represent-

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278. See generally WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* (Sheldon P. Zitner ed., Oxford Univ. Press, 1993) (infamous comedic play describing a situation in which a great fuss was made about matters that were in fact insignificant).

atives, in its threshold requirements for the Grant Program. It incentivizes applicants to include such groups, but it does not require them to do so. Consequently, a program may contain equitable elements on paper, but fail to retain those elements over the long-haul implementation stage. This is more likely if private interests are a substantial part of the plan. The Grant Program's focus on groups that have technical capacity and experience, and who can leverage funds, may mean that the most grassroots or politically active groups that represent traditionally underserved constituents may not be selected. While the Grant Program provides technical assistance funding to its grantees, little financial technical assistance was provided to help more inexperienced groups prepare for the application process.

These concerns outline only a few of the possible pitfalls for the Grant Program. While the Grant Program is promising, its penchant for voluntary and contractual regional collaboration may cause it to suffer from the long-standing criticisms of new governance in practice. Perhaps more participatory and outcome requirements; more mechanisms through which marginalized groups can express their concerns with the process of consortium formation or deliberation; more money for technical assistance, among other protections; can be incorporated into future voluntary, regional, problem-solving programs. Including protections of this kind may help the regional problem solving networks remain accountable to the public law values of equity and inclusion that continue to elude traditional local government law structures.