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Stakeholder Participation In New Governance: Lessons From Chicago's Public Housing Reform Experiment

Lisa T. Alexander*

ABSTRACT

The efficacy of the public-private partnership as a tool for social reform is the subject of continued scholarly and public debate. New governance theory, an increasingly popular form of jurisprudence, constructs an optimistic vision of stakeholder collaboration in public-private partnerships that justifies the use of the public-private partnership in regulatory reform. New governance scholars contend that recent governance trends such as devolution, deregulation, decentralization, and privatization create opportunities for previously marginalized stakeholders to more fully participate in public problem-solving. New governance scholars expect that both public and private stakeholders, with differing interests, skills and objectives, will effectively collaborate to solve public problems in the absence of traditional formal legal protections. New governance's implicit promise is that traditionally marginalized stakeholders, such as poor public housing residents, will be empowered as a result of their participation in social reform. This Article examines stakeholder participation in Chicago's landmark ten-year HOPE VI public housing reform experiment as a test of these claims. Chicago's reform process is a national example as other cities replicate Chicago's model. Specifically, this Article examines the effect of

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social fissures along race, class and gender lines on the participation of public housing residents in Chicago's urban reform plan. This micro-study of Chicago's process reveals that empowered stakeholder participation is difficult to achieve under conditions of social conflict in the absence of traditional rights-based protections. This Article proposes a balance between "hard-law" and "soft-law" measures to provide a public law framework for future national HOPE VI reform. These recommendations may guide future new governance reform efforts that include traditionally marginalized stakeholders in public-private collaborations.

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“At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far, overhead, which they thought were lifelines meant for them.”

Patricia J. Williams¹

INTRODUCTION

On May 27, 1999, Chicago’s Mayor Richard M. Daley formally announced “the beginning of a new era in public housing in Chicago.”² His pronouncement introduced Chicago’s landmark public housing reform plan, known as the “Plan for Transformation” (the “Plan”).³ Chicago’s Plan is the nation’s largest recent urban public housing reform process given the number of units slated to be demolished and rebuilt.⁴ Chicago’s Plan is a national example as many other cities replicate Chicago’s innovations.⁵ Chicago’s Plan is financed, in part, by a 1.5 billion dollar public subsidy⁶ from the U.S. Department of Housing and Urban Development (“HUD”) to the Chicago Housing Authority (“CHA”) under the Housing Opportunities for People Everywhere Program (“HOPE VI”).⁷ HOPE VI is U.S. federal legislation, formally enacted in 1992, and revised in

1. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 1* (1991).

2. Janet L. Smith, *The Chicago Housing Authority’s Plan for Transformation*, in *WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES* 93, 101 (Larry Bennett et al. eds., 2006).

3. *Id.*; see also Chi. Hous. Auth., *The CHA’s Plan For Transformation—Plan Summary*, http://www.thecha.org/transformplan/plan_summary.html (last visited Apr. 27, 2009).

4. CHI. HOUS. AUTH., *PLAN FOR TRANSFORMATION BROCHURE 2* (2002) available at http://www.thecha.org/transformplan/files/plan_for_transformation_brochure.pdf (explaining that “[n]o other city in America has ever attempted public housing reform of this magnitude.”). Chicago demolished 38,000 severely distressed units of public housing and is slated to rebuild 25,000 units of public housing. Smith, *supra* note 2, at 93.

5. See Sudhir Alladi Venkatesh et al., *Chicago Public Housing Transformation: A Research Report*, at i (Columbia Univ. Ctr. for Urban Research & Policy, Working Paper, 2004), available at http://www.curp.columbia.edu/publications2/PH_Transformation_Report.pdf (explaining that “[t]he experiences of family relocation and resettlement in Chicago have informed other cities facing similar challenges”).

6. Smith, *supra* note 2, at 93.

7. See Venkatesh et al., *supra* note 5, at 2.

1998, with the broad goals (1) to redevelop severely distressed public housing developments; (2) to de-concentrate the poverty of public housing residents; and (3) to create viable, diverse, mixed-income communities.⁸

Chicago's Plan is also an example of new governance approaches to public reform. Scholars describe "new governance" as a variety of alternative approaches to regulation that eschew government mandated rules, norms and directives that are issued from the top down and are implemented primarily by governmental actors.⁹ New governance approaches encourage non-governmental stakeholders to formulate and to implement the non-binding norms, goals and directives that shape regulatory reform.¹⁰ Chicago's HOPE VI reform effort reflects new governance trends, such as deregulation, decentralization, and privatization, since some of the Plan's interim decision-making is delegated to local public-private collaborations guided by broad directives and motivated, in part, by profit-making goals.¹¹

New governance jurisprudence,¹² an increasingly popular form of legal

8. HOPE VI was enacted in 1992 under Section 24 of the United States Housing Act of 1937 as amended by Section 535 of the Quality Housing and Work Responsibility Act of 1998 (P.L. 105-276) (QHWRA). See Janet L. Smith, *Public Housing Transformation: Evolving National Policy*, in *WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES*, *supra* note 2, at 19, 31-37 (explaining the goals of HOPE VI legislation); see also U.S. Dep't of Hous. & Urban Dev., *About HOPE VI*, <http://www.hud.gov/offices/pih/programs/ph/hope6/about/> (last visited Apr. 27, 2009) (explaining the key goals of HOPE VI public housing transformation); NAT'L HOUS. LAW PROJECT, *FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM*, at i (2002), available at <http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf> (explaining that HOPE VI was created in 1992 in response to the Urban Revitalization Demonstration Program and that "[i]n the first nine years of the program, HUD awarded over 4.5 billion dollars in competitive grants to PHAs to redevelop 165 public housing sites in 98 cities").

9. See generally LAW AND NEW GOVERNANCE IN THE EU AND THE US 65 (Gráinne de Búrca & Joanne Scott eds., 2006) (compiled scholarly articles on new governance in the U.S. and in the EU).

10. See *id.* at 3.

11. See, e.g., Larry Bennett et al., *Introduction*, in *WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES*, *supra* note 2, at 3-4 (describing Chicago's public housing reform plan as privatizing property management); Note, *When Hope Falls Short: HOPE VI, Accountability and the Privatization of Public Housing*, 116 HARV. L. REV. 1477, 1477 (2003) (describing Chicago's transformation of its Cabrini-Green Development as an example of the privatization of public goods and services) [hereinafter Note, *When Hope Falls Short*].

12. U.S. legal scholars have analyzed new governance trends that emerged in the U.S. and the EU as early as the mid-1980s to the present. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) [hereinafter Freeman, *Collaborative Governance*]; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) [hereinafter Freeman, *The Private Role*]; Bradley C. Karkkainen, *Adaptive Management and Regulatory Penalty Defaults: Toward a Bound Pragmatism*, 87 MINN. L. REV. 943 (2003); James F. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 343 (2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L. J. 1611 (2001); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); David

scholarship, constructs an optimistic vision of stakeholder collaboration. New governance jurisprudence implies that positive long-term outcomes are possible for traditionally marginalized stakeholders who participate in substantially deregulated public-private collaborations.¹³ Similarly, a stated objective of Chicago's Plan is to include public housing residents in such public-private reform collaborations.¹⁴ The implicit promise of Chicago's Plan is that residents' participation in such decision-making networks will lead to an equitable distribution of the benefits of public housing reform.¹⁵

Yet, Chicago's ten-year HOPE VI public housing reform process is a cautionary tale. The Chicago example reveals that it is difficult for traditionally marginalized stakeholders to attain concrete benefits from public-private collaborations in the absence of traditional rules and rights-based legal protections. As the profit motive pervades urban reform, Chicago's Plan unfolds against the backdrop of mounting social tensions over access to, and control of, urban space.¹⁶ As this Article describes, increasingly complex social stratification along race, class and gender lines poses unique challenges for new governance's model of collaborative stakeholder participation.

While early new governance scholars discussed positive examples of stakeholder collaboration in deregulated public-private partnerships,¹⁷ they rarely analyzed the effect of social fissures on micro-level decision-making and

Trubek & Louise Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 EUR. L.J. 343 (2005); Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819 (2008) (reviewing LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 9).

13. In her early work, Professor Audrey McFarlane critiqued the "stakeholder" justification for community participation in urban reform, which is similar to the new governance conception of stakeholder collaboration. She argued that the stakeholder model failed to recognize that "the development process is weighted to protecting certain interests," and that "inconsistent goals will be discarded as irrational, impractical or simply undesirable." See Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 902 (2001). This Article expands upon those initial observations by outlining new governance theory's vision of stakeholder participation; analyzing Chicago's ten-year HOPE VI public housing reform plan as an example of the theory; analyzing the effect of race, class and gender on stakeholder collaboration; and proposing concrete reforms for future HOPE VI legislation.

14. See CHI. HOUS. AUTH., *supra* note 4, at 3 (describing mechanisms to include residents in the decision-making structures).

15. *Id.*

16. See Cheryl L. Reed, *Class Conflict Hits Home*, CHI. SUN-TIMES, Nov. 14, 2005, at 12 (explaining growing class conflicts between middle-class, working, and poor blacks on Chicago's South side).

17. See, e.g., Orly Lobel, *Rethinking Traditional Alignments: Privatization and Participatory Citizenship*, in PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS 1, 5 (Clare Dalton ed., 2005) (discussing examples of successful experimentation with public-private partnerships in a variety of legal domains); Salamon, *supra* note 12, at 1614-15 (noting the importance of third-sector non-profit and for-profit organizations in public-private partnerships); Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 139, 145 (2006) (describing the use of public-private collaborations in the Health Insurance Portability and Accountability Act of 1996 (HIPPA)).

collaboration.¹⁸ Many new governance scholars extolled the benefits of deregulated stakeholder collaborations for innovation in public reform.¹⁹ Yet, at the same time, such scholars underemphasized the harmful distributional consequences of such decision-making networks for marginalized groups. While some new governance scholars acknowledged that traditional regulation and litigation could at times “disentrench” established institutions,²⁰ many others advocated provisional and non-binding norms and standards as preferable to traditional public law regulation and litigation.²¹ Increasingly, many new governance scholars acknowledge that traditional rights-based regulation and litigation may need to operate in tandem with new governance processes.²² Yet, few scholars have analyzed how such processes should be structured at the micro-level.

This micro-study of the Chicago experience shows that under conditions of social conflict “hard law”²³ protections can enhance, rather than undermine the participation of marginalized stakeholders in such reform networks. While scholars continue to debate the social utility of resident participation in urban reform,²⁴ this Article asserts that participation has a normative dimension; it is not merely an end in itself, but a means through which traditionally marginalized

18. See Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 503 (2008) (reviewing THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR (Andrea K. Schneider & Christopher Honeyman eds., 2006) (describing new governance as “macro in its orientation”).

19. See William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 9, at 3-4 (“Important features of these regimes seem designed neither to resolve disputes or to vindicate accepted values, but to induce learning and innovation.”).

20. See Sabel & Simon, *supra* note 12, at 1062 (defining destabilization rights as formal legal rights enforced through traditional public law litigation that destabilize and “disentrench” change-resistant bureaucratic public institutions).

21. See, e.g., Lobel, *supra* note 12, at 344 (“The new governance model connotes a decentering of legal scholarship, challenging the traditional focus on formal regulation as the dominant locus of change.”); Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 9, at 3-4 (describing new governance as in favor of regulatory approaches that are “less rigid,” “less prescriptive” and “less committed to uniform outcomes”).

22. See discussion *infra* Part IV-B.

23. See David M. Trubek et al., ‘Soft Law,’ ‘Hard Law’ and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 9, at 65 (defining “hard law” as traditional regulation and “soft law” as non-binding directives).

24. See, e.g., Susan Bennett, “The Possibility of A Beloved Place”: Residents And Placemaking in Public Housing Communities, 19 ST. LOUIS U. PUB. L. REV. 259, 304 (2000) (describing levels of resident participation in HOPE VI public housing reform generally); Barbara L. Bezdek, *To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 41 (2006) (arguing that “public/private redevelopment of urban community space must be controlled by and directly benefit the affected city residents”); McFarlane, *supra* note 13, at 865 (arguing for an empowerment theory of community participation that explicitly connects participation to a redistribution of decision-making power); Georgette C. Poindexter, *Who Gets The Final No: Tenant Participation in Public Housing Redevelopment*, 9 CORNELL J.L. & PUB. POL’Y 659, 660 (2000) (providing guidelines to temper, but not eradicate the role of tenants in public housing redevelopment).

stakeholders²⁵ can secure positive long-term outcomes from urban redevelopment. Without sufficient public law protections, resident participation in urban reform may not result in positive long-term outcomes, but may only serve to legitimate reform plans that gentrify poor communities and privilege ruling-class interests. Residents may more “meaningfully participate” in such informal stakeholder collaborations if their participation is bolstered by a public law framework.²⁶ At the same time, new governance collaborations guided by non-binding directives, protocols, or standards may still be necessary to promote innovation in public housing reform.

Part I of this Article explains new governance scholars’ apt critique of traditional “command and control” regulation and rights-based public impact litigation. Part I also outlines new governance theory’s concept of “empowered participatory governance”. Part I further illustrates that the profit-motive, a growing form of power in urban reform, creates unique problems for new governance’s concept of collaborative stakeholder participation.

In Part II, this Article illustrates that HOPE VI reform, in general, and Chicago’s Plan in particular, reflect new governance trends. Specifically, Sections C1 and C2 of Part II examine two deregulated local decision-making processes in Chicago’s HOPE VI reform experiment; namely, (1) the birth of the mixed-income norm in Chicago; and (2) the creation of site-based resident screening criteria at each redevelopment. These processes reveal that social conflict along race, class and gender lines affects both individual and institutional stakeholder representation and collaboration in urban reform. Part III describes two contrary HOPE VI redevelopment processes governed by consent decrees that led to accountable development in Chicago. These examples show the benefits of hard law protections for traditionally marginalized stakeholders in regulatory reform collaborations.

Part IV summarizes the lessons learned from Chicago’s public housing reform experiment. Admittedly, a single-city case study has some limitations, since legal frameworks, political institutions and cultures differ in every city or locality. Yet, Chicago is a significant laboratory in which to examine the circumstances that can undermine stakeholder collaboration and to identify what conditions are necessary for meaningful community input in new governance processes under conditions of social conflict. Part IV also analyzes a recent federal bill which

25. Professor Boa Santos during a roundtable on new governance and new legal realism defined marginalized stakeholders as “the invisible, discardable, and excluded populations that, of course, are absent [and] silenced”. Joel Handler et al., Symposium, *A Roundtable on New Legal Realism, Microanalysis of Institutions, and New Governance: Exploring Convergences and Differences*, 2005 Wis. L. Rev. 479, 505 (2005).

26. See Poindexter, *supra* note 24, at 660 (explaining that current funding guidelines for HOPE VI require housing authorities to engage in “meaningful” community participation in the planning process without defining “meaningful”); see also Freeman, *Collaborative Governance*, *supra* note 12, at 28 (defining meaningful participation as “[t]hose solutions that foster continued engagement and require joint responsibility for implementation, monitoring, and revision”).

seeks to reauthorize national HOPE VI funding and to resolve the previous law's shortcomings. While this bill is promising, the mechanisms for resident participation in the bill resurrect traditional "top-down" participatory measures. Such measures may not enhance "meaningful resident participation."²⁷ Drawing upon the insights of the Chicago example and emerging new governance scholarship, Part IV proposes a balance between traditional hard-law and soft-law new governance measures to provide a public law framework for HOPE VI reform. Lastly, the conclusion explains the implications of these findings for future HOPE VI reform efforts and for other new governance experiments that include traditionally marginalized groups.

I. NEW GOVERNANCE AND COLLABORATIVE STAKEHOLDER PARTICIPATION

A. *The Critique of "Command and Control" Regulation and Public Impact Litigation*

New governance theory represents a paradigm shift in contemporary legal scholarship about the appropriate role of traditional administrative regulation, adjudication, and public impact-litigation in public problem-solving.²⁸ New governance theorists aptly critique the traditional "top-down" "command and control" model of regulation that originated in the New Deal era.²⁹ Under this model, regulatory goals and objectives were developed by federal agencies filled with bureaucratic experts.³⁰ Such agency experts advanced regulatory goals through detailed rule promulgation.³¹ Public interest advocacy groups, in turn, would comment on a proposed regulation through traditional notice and comment periods.³² Courts could then require agencies to respond to the factual, analytical, and policy submissions made by the various participating interests and to justify policy decisions with detailed reasons supported by the rulemaking record.³³

27. See *supra* note 26 and accompanying text.

28. See *supra* note 12 and accompanying text.

29. See Lobel, *supra* note 12, at 379 (critiquing the old "command and control" regulatory model's one-size-fits-all approach); see also Karkkainen, *supra* note 12, at 966 n. 74 (discussing the burdens placed on regulated entities by highly prescriptive "command and control" regulation).

30. See Lobel, *supra* note 12, at 371 (explaining that "[d]uring the New Deal Era, a key feature of the organization of law and order was the commitment to centralized, institutional decision-making authorities relying on professional, official expertise").

31. See *id.* at 373 (arguing that the regulatory powers of administrative agencies were predicated upon the belief that the technocrats who ran administrative agencies possessed "superior knowledge, information, and expertise").

32. See Freeman, *Collaborative Governance*, *supra* note 12, at 12 (explaining that "only after the Notice of Proposed Rulemaking do parties supply detailed arguments about the technical and practical difficulties of implementing a rule, instead of much earlier when the information might be more valuable to the agency in formulating the proposed rule").

33. Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 569 (2007) ("Experts and affected stakeholders do not participate

New governance theorists contend that this older model of regulation provided limited opportunities for marginalized groups to meaningfully participate in the formulation and implementation of regulatory goals.³⁴ To the extent that various public interest groups could participate in the goal-setting process, groups with more power and influence might easily dominate the process.³⁵ Powerful groups could “capture” a given agency by convincing the relevant bureaucrats to weaken regulatory standards or to accept certain rationales for a lack of industry compliance.³⁶ Proponents of new governance contend that this regulatory approach was ineffective and failed to promote broad public participation.

According to new governance scholars, the ineffectiveness of this “top-down” approach to regulation was caused in part by law.³⁷ Law operated as a rigid mandate, thereby creating distance between parties rather than facilitating collaboration and coordination.³⁸ Regulatory laws were inflexible in that they could not easily respond to uncertainty or adapt to change.³⁹ Regulatory solutions were also ineffective because they were devised with limited information and generated by distanced experts, rather than by individuals and institutions involved in implementation on the ground.⁴⁰

New governance scholars also critique the public interest impact-litigation model of public problem-solving, most prevalent during the 1960s and 1970s.⁴¹ Under this model, representative plaintiffs, led by public interest lawyers, sued public institutions using a class-action model of litigation, in the hopes of transforming such institutions. In many areas of public service provision, judges

in elaborating norms; their role is to supply facts, interpretations, and legal arguments, which are then processed by the judicial decision-maker . . .”).

34. See Lobel, *supra* note 12, at 373 (explaining that the new governance model “challenges [the new deal’s] conventional assumptions” and seeks “to [involve] more actors in various stages of the legal process”).

35. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 445 (2003) (describing the limitations of the interest representation model of administrative law such as the accountability of the interest representatives to their claimed constituencies and the development of regulatory solutions that fail to secure the broad public good).

36. See *id.*; see also Cass Sunstein, *Interest Groups in American Law*, 38 STAN. L. REV. 29, 74-75 (1985) (describing agency “capture” by well-organized groups).

37. See generally *Introduction*, in *LAW AND NEW GOVERNANCE IN THE EU AND US*, *supra* note 9, at 65 (explaining that “law either has not caught up with developments in governance, or it ignores developments which do not conform to its presuppositions, structures and requirements”).

38. See Trubek, *supra* note 17, at 149 (outlining the limitations and failures of traditional “hard law” measures).

39. See Lobel, *supra* note 12, at 364 (“Not only have the techniques of law become outmoded and the need to design second generation legal strategies become apparent, the aspirations of law and policy have themselves undergone transformation.”).

40. See Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 Wisc. L. Rev. 645, 677 (explaining the purposes of information in the new governance experimentalist paradigm).

41. William Simon describes the new governance movement’s, and the law-and-society movement’s, focus on two clusters of organizational forms, namely, the command and control bureaucracy of the new deal and the rights-recognizing judiciary associated with the Warren Court. See Handler et al., *supra* note 25, at 498.

supervised the reform of public institutions via judicial standard-setting enforced through consent decrees.⁴² During the remedial stage of public litigation reform, consent decrees operated as regulatory codes,⁴³ requiring judicial supervision and micromanagement of administrative processes.⁴⁴ New governance theorists contend that judges and public interest lawyers often lacked the technical expertise and information necessary to effectively reform public institutions.⁴⁵ Public law litigation also provided limited opportunities for class representatives to meaningfully participate in the goal-setting and the decision-making aspects of public reform.⁴⁶

Early federal government stewardship of public housing exemplified new governance scholars' criticisms of command and control regulation. Congress created public housing through the Wagner-Steagall Housing Act of 1937 (the "1937 Act").⁴⁷ The 1937 Act structured public housing as a federally regulated, but locally managed endeavor. The 1937 Act provided local government control of public housing by authorizing the creation of local public housing authorities (PHAs) to "build, own, and operate housing for low and moderate income households."⁴⁸ Yet, the federal government maintained control over the scope and direction of public housing provision through top-down mandates in federal statutes and regulations, and the Annual Contributions Contract ("ACC") executed by the federal government and local PHAs.⁴⁹

Special interest groups also substantially influenced Congress and federal agencies regarding the normative objectives of public housing provision. Initially, the powerful private real estate lobby resisted the creation of public housing, calling it "socialistic and wasteful."⁵⁰ The real estate lobby's true concern was competition from units created and maintained by the government.⁵¹ Congress was able to justify public housing as an effort to assist a temporarily "submerged middle class" coming out of the Depression.⁵² While the real estate lobby could not entirely thwart the creation of public housing, it encouraged Congress to mandate that PHAs maintain the lowest standards of housing construction and to require that PHAs reserve public housing units for the poorest

42. See Sabel & Simon, *supra* note 12, at 1044.

43. *Id.* at 1024.

44. See *id.* at 1025.

45. See Scott & Sturm, *supra* note 33, at 569.

46. See generally William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 164 (2004) (explaining that the structure of rights-based impact litigation encourages "lawyers to limit client participation").

47. Pub. L. 75-412, 50 Stat. 888 (1937), codified as amended at 42 USC §§ 1437-1437z-7 (2000).

48. Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 499 (1993) (internal citations omitted).

49. *Id.* at 499-500.

50. Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV., 878, 896 (1990).

51. See Schill, *supra* note 48, at 502.

52. See Schill, *supra* note 50, at 896.

households.⁵³ From the enactment of the Housing Act of 1949 until the creation of HOPE VI in 1992, federal public housing policy primarily encouraged PHAs to target their housing towards the lowest income households.⁵⁴ As such, national public housing policy was captured by local and national groups, and public housing residents had few opportunities to substantially participate in the determination and direction of federal public housing policy.⁵⁵

Public impact-litigation to stem racial segregation in the siting of public housing developments in Chicago was also largely ineffective. Chicago's landmark *Gautreaux v. CHA* case, and its progeny, marked the beginning of substantial class-action public-impact litigation to curb intentional racial discrimination in the development of public housing.⁵⁶ Yet, even after federal court rulings held such practices to be unconstitutional, racial segregation in public housing continued unabated.⁵⁷ Many advocates also criticized the *Gautreaux* litigation for failing to include class representatives in critical decisions regarding the direction of the litigation and the remediation of past discrimination.⁵⁸

B. Stakeholder Participation in New Governance

New governance scholars contend that recent shifts in governance approaches—such as privatization, devolution, deregulation and decentralization—have created increased opportunities for non-bureaucratic stakeholder participation in public problem-solving.⁵⁹ While traditional liberals and rights advocates view such governance trends with trepidation and skepticism, new governance theorists see these trends as opportunities for democratic citizen participation.⁶⁰ In contrast to traditional “command and control” regulation, new governance approaches utilize local and informal networks of private and public stakeholders who are involved in complex, but collaborative, institutional relationships. These approaches draw on the pragmatism of American philosophers such as John Dewey.⁶¹ New governance scholars expect stakeholder networks to collaborate

53. See Schill, *supra* note 48, at 503-04.

54. See generally Schill, *supra* note 48, at 510-13 (describing federal legislation that contributed to the concentration of poverty in public housing).

55. See generally McFarlane, *supra* note 13, at 871-873 (discussion of resident participation in public housing redevelopment prior to HOPE VI); Poindexter, *supra* note 24, at 662-664 (same).

56. See *Gautreaux v. Chi. Hous. Auth.*, 265 F.Supp. 582, 583 (N.D. Ill. 1967) (summarizing the initial allegations in the *Gautreaux* complaint); see also Lisa T. Alexander, *A Sociolegal History of Public Housing Reform in Chicago*, 17-WTR J. AFFORDABLE HOUS. & COMM. DEV. L. 155, 156 (2008).

57. Schill, *supra* note 48 at 515.

58. See Alexander, *supra* note 56, at 169 n.93.

59. See Lobel, *supra* note 12, at 345; see also Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 195 (2000) (describing non-bureaucratic stakeholder participation in the Habitat Conservation Plan).

60. See Dorf & Sabel, *supra* note 12, at 317.

61. See Dorf & Sabel, *supra* note 12, at 284-85. See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 143-219 (1927) (arguing that a sense of the “public” can be regenerated through local citizen experimentation).

in the formulation of interim goals and to revise and reformulate those goals through continued experimentation and implementation.⁶² The various stakeholders are perceived to continually hold each other accountable to achieve those goals.⁶³ As Professor Orly Lobel explains:

Collaboration thus promotes mutual accountability, defined as “accountability among autonomous actors committed to shared values and visions and to relationships of mutual trust and influence that enable renegotiating expectations and capacities to respond to uncertainty and change.”⁶⁴

Each stakeholder brings a different type of local information and feedback to the process of creating interim regulatory goals and to the assessment of the feasibility of the goals. Armed with better information, the stakeholder network can more effectively reformulate the regulatory goals in response to feedback.⁶⁵ This approach is viewed as inherently more dynamic, flexible, and responsive than previous New Deal regulatory approaches.⁶⁶ It can more effectively respond and adapt to unintended consequences and to change.

Law also plays a “softer” role by guiding the collaboration of interested stakeholders and facilitating the creation of mutually beneficial solutions, rather than imposing rigid mandates.⁶⁷ The “relational” nature of the collaborative networks is assumed to result in a spirit of mutual trust and cooperation. Stakeholders are not viewed as self-interested; rather they are viewed as forced, by the inadequacy of past approaches and by the realities of a new complex information-based economy, to willingly collaborate towards the resolution of public problems and the achievement of shared goals.⁶⁸

C. Reflexive Organizational and Institutional Networks

Marginalized stakeholders participate in new governance’s regulatory reform networks primarily through institutions and organizations.⁶⁹ The institutional and organizational participation of traditionally marginalized constituents in new governance networks can be categorized into at least three prevailing forms: (1) local and periodic, but open, public meetings, (2) community-based elected representatives in public and private governing bodies or councils, and (3)

62. See William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 9, at 37, 56.

63. See Lobel, *supra* note 12, at 378.

64. See *id.*

65. See Freeman, *supra* note 12, at 27.

66. See Trubek, *supra* note 17, at 149.

67. See *id.*

68. See Freeman, *Collaborative Governance*, *supra* note 12, at 22-23.

69. See Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 250-251 (2006) (defining the role of “organizational catalysts” and “institutional intermediaries” in new governance reforms).

third-sector non-profit or privatized organizations with community- or constituency-based boards. New governance scholars often discuss examples of organizational and institutional participation that fit into one or more of the above-mentioned categories.⁷⁰

For example, Professors Michael Dorf and Charles Sabel in their article, “*A Constitution of Democratic Experimentalism*,” established the contours of the first two forms of institutional democratic participation through a construct known as the “governance council.”⁷¹ The authors analogize the “governance council” to the “design team” in an engineering project.⁷² The “governance council” includes public officials, other local administrative agents and officials, service providers, and citizen users.⁷³ The service providers are the key link between the users of the service and public officials.⁷⁴ Service providers use their expertise to communicate with and to obtain information from the “citizen users” regarding existing barriers to improving service quality.⁷⁵

In such networks, effective participation allegedly occurs through periodic public meetings or through institutional bodies such as “housing authority advisory councils” or “ad hoc municipal task forces.”⁷⁶ The representatives in these ad hoc groups or councils may vary over time, and individuals and organizations may participate, or be asked to participate, as the public officials’ and service providers’ challenges change. Through this mechanism, the average citizen is thought to participate effectively and to collaborate with other stakeholders in the institutional network “to address larger questions of institutional architecture.”⁷⁷

According to new governance proponents, accountability and collaboration

70. See, e.g., Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 45 (2001) (arguing that several police departments have already moved toward a model of interpreting data and problem-solving that stresses collaboration with experts, researchers, service-providers, and community groups); Liebman & Sabel, *supra* note 12, at 184 (explaining that two intermediary nonprofit organizations affiliated with the University of Texas at Austin aggregated data collected by all schools in Texas to hold lower-level authorities accountable); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 226 (1998) (arguing that illegal drugs and violence in inner-city communities cannot be remedied without social organization and networks between law enforcement and community members); Sturm, *supra* note 12, at 491-519 (arguing that private companies’ efforts to address workplace discrimination should include mediating institutions, composed of nongovernmental organizations, including insurance agencies, employee caucuses, unions, and consulting organizations); Louise G. Trubek, *Old Wine in New Bottles: Public Interest Lawyering in an Era of Privatization*, 28 FORDHAM URB. L.J. 1739, 1745-46 (2001) (explaining how her non-profit public interest law organization formed a coalition of consumer and health care professional groups to meet with managed care organizations, administrative agencies, and the state legislature, to identify problems in the quality and accessibility of health care).

71. Dorf & Sabel, *supra* note 12, at 316.

72. *Id.*

73. *Id.*

74. *Id.* at 317.

75. *Id.*

76. *Id.* at 318.

77. *Id.*

emerge from these institutional networks by necessity.⁷⁸ Each constituency needs the other in order to complete its task. Dorf and Sabel contend that in the area of public housing reform, for example, “the quality of service provided depends so directly on the contribution of the beneficiaries that their active participation manifestly makes them co-providers.”⁷⁹ Dorf and Sabel also assert that “. . . the way the occupants of public housing use their homes shapes the maintenance, public security, and other services they need from the housing authority, and the services provided by the housing authority plainly shape the conditions of occupancy.”⁸⁰ As such, collaboration and accountability are presumed necessary for each participant to further its own objectives in the network.

The third form of institutional and organizational democratic participation, formal board representation, is prevalent throughout many of the sectors studied by new governance scholars.⁸¹ In the affordable housing and community economic development (“CED”) sector, Professor William Simon describes how community-based board participation is incentivized in various CED statutes and regulations. He explains, “[m]ost programs supporting CED have a board that is ‘representative of,’ ‘responsible to,’ or ‘accountable to’ the community or its low-income members.”⁸² Many of the statutes and regulations that provide federal public subsidies to spur private investment in CED require that participating non-profit third-sector organizations have boards that reflect the demographics of the local community. As Simon explains, the federal HOME Program, for example, requires that only one-third of boards of directors of non-profit Community Housing Development Organizations (“CHDOs”) can be comprised of government or business sponsors.⁸³ The Community Development Financial Institutions Fund (CDFI) requires that prospective organizations applying for “Community Development Bank” status have at least 50% of their governing boards comprised of nominees submitted from a committee of community-based leaders.⁸⁴ Through such regulatory requirements, policymakers seek to provide incentives for local groups to structure organizations that are responsive to the needs of local citizens or constituents.

New governance theory is thus more than a mere descriptive account of the processes of privatization, deregulation, decentralization and devolution. New governance’s construct of collaborative and “empowered participatory gover-

78. *Id.* at 319; *see also* Lobel, *supra* note 12, at 376.

79. Dorf & Sabel, *supra* note 12, at 317.

80. *Id.* at 318.

81. *See supra* text accompanying note 70; *see also* Trubek, *supra* note 70, at 1744 (describing non-profit organizations as ideal service providers because they tend to have participatory internal structures).

82. WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW BUSINESS & THE NEW SOCIAL POLICY* 173 (2001).

83. *See id.* at 174.

84. *See id.*

nance”⁸⁵ thus provides a normative justification for new regulatory trends because it suggests that accountable reform is possible through public-private collaborations. The concept of “empowered participatory governance” implies that the benefits of new governance approaches will outweigh their costs, since at least two primary norms of the administrative state—transparency and accountability—can be achieved through collaborative democratic participation. Public decisions are made transparent through information sharing, peer review of local decisions, and agency evaluation of institutional and organizational performance.⁸⁶ Accountability flows from transparency, since participating individuals, organizations and institutions can allegedly hold each other accountable to achieve interim regulatory goals because they are armed with better information.⁸⁷

Consequently, one alleged benefit of collaborative stakeholder participation is that marginalized constituents will be empowered. Their needs and concerns will be articulated and considered in such networks through a continuous process of organizational feedback and collaboration. Furthermore, in a complex technical and global economy, new governance scholars expect that continued and sustained collaboration will produce key information, unique insights, and key innovations that will make regulatory reform more effective. This account of collaborative governance, however, underestimates the complex operation of power within institutions and organizations under circumstances of social conflict.

D. Informality and Soft Law

New governance theorists’ faith in the benefits of collaboration leads them to view informal mechanisms as preferable to rigid rules for ensuring accountability.⁸⁸ While traditional command and control regulation elevates formal law and government agencies as the protectors of marginalized constituents’ rights and needs, many new governance scholars posit that marginalized stakeholders’ rights and needs will be better recognized and respected as a result of informal standard setting and continued stakeholder collaboration.⁸⁹ Since empowered participatory governance is constructed as an inherently collaborative process, it

85. See Archon Fung & Eric Olin Wright, *Thinking About Empowered Participatory Governance*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 5 (Verso 2003) (explaining the phrase “empowered participatory governance”).

86. See Kruse, *supra* note 40, at 681 (explaining that transparency promotes accountability by making “the measured success or failure of particular institutions available to both institutional monitors and community stakeholders”).

87. See *id.*

88. See William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 210 (2004).

89. See Kruse, *supra* note 40, at 683 (“The experimentalist governance paradigm promises that by being more closely involved in a collaborative and ongoing process of creating and revising the rules that govern their behavior, local actors will be more invested in complying with them.”).

leads new governance theorists to resist formal and rule-based approaches to regulation, and to embrace informal “soft law” approaches which would promote accountability within regulatory networks. As Professor Louise Trubek explained in her discussion of new governance in the health care arena, “[g]uidelines, benchmarks and standards that have no formal sanctions are important elements in new governance.”⁹⁰ Thus, new governance in its purist form eschews formal rights and administrative mandates as effective tools to solve problems.⁹¹ Under this conception, formal rules that mandate the participation of marginalized groups are ultimately indeterminate.⁹² As circumstances change, the enforcement of rigid rules proves illusory. Cooperation is hindered, rather than facilitated, by court-imposed sanctions for failure to comply.

Instead, new governance relies primarily on information pooling between organizations and institutions involved in problem-solving. Through information pooling, organizations are encouraged, rather than forced to improve performance.⁹³ Agency benchmarking and evaluation of organizational performance, as well as cataloging of “best practices,” also create incentives for network participants to improve their performance and to innovate to resolve public problems. New governance’s account of the limits of rights and of judicial enforcement illustrates formal law’s indeterminacy, but it discounts the symbolic value of rights for marginalized groups.⁹⁴ Under circumstances of unequal bargaining power, information asymmetries, and distributional conflict, the possibility of rights based claims and the specter of court supervision can bolster the bargaining position of marginalized groups and force their needs to be respected.⁹⁵ This may be particularly true when the profit motive pervades the localized agenda of the on-the-ground networks in inner-city reform.⁹⁶ This Article questions whether the new governance account of organizational and institutional collaboration, guided primarily by soft-law mechanisms, is adequate to promote participation and accountability under circumstances of profound social conflict.

90. Trubek, *supra* note 17, at 149.

91. See Kruse, *supra* note 40, at 682 (“[D]emocratic experimentalism can be seen as an informal system of governance that trades rights-enforcement for more organic systems of accountability . . . and civic engagement that may never materialize.”).

92. See Simon, *supra* note 88, at 170.

93. See Kruse, *supra* note 40, at 681.

94. See Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 405 (1987) (discussing the symbolic importance of rights for blacks).

95. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 968-69 (1979) (explaining how the formal laws and rules used in divorce court provide the parties certain bargaining chips in negotiations outside of court).

96. See generally Patience A. Crowder, *Ain't No Sunshine: Examining Informality and State Open Meeting Acts As the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 639 (2007) (explaining that informality in inner-city deal making subordinates community interests and elevates the interests of business elites).

E. The Missing Analysis of Power

Much new governance scholarship tends to de-emphasize public problems that involve complex relations of power, where gains for the most marginalized stakeholders must be obtained at the expense of gains for more empowered stakeholders.⁹⁷ New governance proponents correctly identify the limits of prior governance approaches. However, in developing an alternative theory, many studies highlight examples of positive organizational and institutional collaboration, while underemphasizing examples of social reform characterized by conflict. Many new governance scholars identify macro-processes that contain participatory elements, but “bracket” critical questions of distribution and power at the micro-level.⁹⁸ One commentator described this optimistic view of organizational and institutional collaboration as a “jurisprudence of hope.”⁹⁹ Many examples of regulatory reform cited by new governance scholars are also in fields such as civic environmentalism, workplace regulation, and information technology—most of which consist predominately of technical professionals working through collaborative organizational networks.¹⁰⁰ Such professionals

97. Although not all public problems can be reduced to a zero-sum game, there are many public problems whose resolution has been consistently plagued by complex power dynamics and some social conflict. This is particularly true in the context of dwindling public resources to resolve problems. While inner-city urban reform is not always a zero-sum game, the revitalization of urban spaces often leads to gentrification and the attendant displacement of renters, public housing residents or other groups. See Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned from the D.C. Housing Authority's HOPE VI Projects*, 10-SUM J. AFF. HOUS. & COMM. DEV. L. 353 (2001).

98. Professor William Simon, for example, acknowledges potential threats to the legitimacy of new governance, such as distributive justice, but he asserts that such concerns must be “bracketed” in order to fully appreciate the innovative potential of new governance approaches. See Handler et al., *supra* note 25, at 506 (“It is a salient feature of these institutions that would trouble you, and I think should trouble anybody, that they tend to bracket distributive questions—that they tend to focus on the possibility of collective gains, mutual gains, and hope that those gains will be large enough so that it will be worth it to people not to focus on the distributive gains.”).

99. See Kruse, *supra* note 40, at 683 (explaining that the vision at the heart of democratic experimentalism is based largely in a jurisprudence of hope). At the writing of this Article, hope is increasingly becoming a motivating force in politics. President Barack Obama emerged victorious from the 2007-2008 democratic primaries and the 2008 election largely because of the contagion of hope. While the author concurs that hope is a necessary force in today's politics, new governance theory's jurisprudence of hope is misplaced in some circumstances. More than hope is needed to bolster the participation of public housing residents in HOPE VI reform. See generally Note, *When Hope Falls Short*, *supra* note 11.

100. See, e.g., Freeman, *Collaborative Governance*, *supra* note 12, at 1 (describing collaborative governance in the fields of health and safety and environmental regulation); Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121 (2001) (exploring different patterns of work and production, and the possibilities for worker organization and employee voice in various settings); Jody Freeman & Daniel Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005) (proposing a modular conception of environmental regulation characterized by flexible coordination between government agencies and public and private actors); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking Precursor to a New Paradigm*, 89 GEO. L.J. 257 (2001) (describing the use of performance monitoring and benchmarking in the area of environmental regulation); Sturm, *supra*

may be similarly situated in terms of educational and social capital, bargaining endowments and access to information with which to devise shared goals. Such equities can lead to the development of “win-win” solutions to technical problems.

Without an investigation of how power—particularly in the form of race, class or gender dynamics—may operate “on the ground” to thwart organizational collaboration, new governance theory may fall short in analyzing the most intractable public problems, such as those in which various stakeholders’ interests are juxtaposed against one another, rather than oriented towards cooperation. New governance studies have given little attention to how race, class, gender and other social fissures impact the effective representation of marginalized constituents’ interests in such reform collaborations.¹⁰¹ Additionally, virtually no scholars have analyzed how race, class and gender dynamics affect the actual realization of HOPE VI’s stated commitment to the robust participation of public housing residents in reform decision-making.¹⁰²

Emerging new governance legal scholarship increasingly acknowledges the serious challenges that informal collaboration poses to the robust participation of

note 69, at 252 (explaining the role of organizational catalysts in workplace equity); David Post & David R. Johnson, *Chaos Prevailing on Every Continent: Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055 (1998) (discussing new governance and decentralized decision-making in the field of complex systems). *But see* Liebman & Sabel, *supra* note 12 (describing new governance approaches in educational reform); Kathleen Noonan, Charles F. Sable & William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, *passim* (Columbia Pub. Law Research, Paper No. 08-162, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088020 (describing new governance approaches in social welfare policy).

101. While many new governance studies do not explicitly discuss race, class and gender, a few do. *See, e.g.*, Archon Fung, *Deliberative Democracy, Chicago Style: Grassroots Governance in Policing and Public Education*, in FUNG & WRIGHT, *supra* note 85, at 129; Garrett, *supra* note 70, at 43; Tracey Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1604 (2002); Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315, 1369 (2007); Julissa Reynoso, *The Impact of Identity Politics and Public Sector Reform on Organizing and the Practice of Democracy*, 37 COLUM. HUM. RTS. L. REV. 149, 158 (2005); Susan Sturm & Lani Guinier, *Learning From Conflict: Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515, 515 (2003); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 956 (1996). However, when these scholars analyze race, class and gender they rarely conclude that social conflicts along race, class or gender lines can threaten the viability of collaborative decision-making networks. An exception is Susan Sturm’s and Lani Guinier’s work on new governance approaches to workplace inclusion and equity in higher education.

102. One early commentator did analyze HOPE VI’s public-private collaborations as an example of some of the accountability measures proposed in the privatization literature generally. The commentator rightly observed that “privatization produces an alignment of public- and private-sector interests that renders ineffective the accountability mechanism proposed by the privatization literature.” This commentator, however, did not specifically analyze the affects of race, class or gender on collaboration. *See Note, When Hope Falls Short*, *supra* note 11, at 1479. This Article expands upon that early work, by focusing on the impact of race, class and gender dynamics on collaboration in Chicago’s ten-year experiment.

marginalized groups in social reform.¹⁰³ Recognizing this weakness in new governance scholarship, Professor William Simon concedes that new governance scholarship “calls out” for two additional types of socio-legal analysis: first, “implementation studies,” in which scholars study the efficacy of a regime’s current practices in vindicating its articulated goals;¹⁰⁴ and second, a “power-dynamics assessment,” in which scholars would study:

[t]he gap, not between rule and circumstances, but between the parties’ collective articulated goals and their differing ‘real interests’ (in the sense explicated by Steven Lukes in *Power*). *So this would include an analysis of the procedural structure of negotiation among the stakeholders, the bargaining endowments in terms of both legal rules and cultural or economic resources, and then the psychological process of interaction, etc.* Here, we are interested in the contrast between the collectively articulated goals of the system and what the researcher intuits as the real interests of the individual sub-constituencies of the system.¹⁰⁵

This Article provides a “power dynamics assessment” of the complex dynamics of race, class, and gender at play in Chicago’s HOPE VI reform process. Public housing reform and inner city urban redevelopment generally are examples of regulatory reform under conditions of social conflict. Public housing reform is plagued by more social conflict than an optimistic new governance account may concede. While it does not advocate a complete return to previous command and control approaches, this Article explores which new governance approaches may enhance marginalized constituent’s participation in HOPE VI reform, and also proposes where a more formal public law framework may be necessary.

F. Power and the Profit Motive: Demographic Representation, Opportunism and Acquiescence

In his seminal work, “Power: A Radical View,” Professor Steven Lukes describes three important dimensions of the operation of power.¹⁰⁶ The one-dimensional view is predicated upon the easily observed exercise of power—where one person with more power over takes the will of another and forces the subordinated person to consciously do something he or she would not otherwise

103. See, e.g., Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J.L. & MED. 395 (2003) (acknowledging that healthcare is not immune to deeply rooted inequalities in American Society); see also discussion *infra* Part IV-B.

104. Handler et al., *supra* note 25, at 501.

105. *Id.* at 502 (emphasis added).

106. See STEVEN LUKES, *POWER: A RADICAL VIEW* 23 (2d ed. 2005); see also JOEL F. HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* 116-36 (1996) (describing Steven Lukes’ explanation of power and applying it to the operation of power in human service agencies).

do.¹⁰⁷ Studies of this view of power focus on explicit human behavior, observable conflicts and measurable policy preferences in decision-making.¹⁰⁸

The two-dimensional view of power is closely related to the first, but it focuses not only on easily identifiable power struggles, but also on how power may more subtly exclude and suppress key individuals, issues, and perspectives from the decision-making agenda.¹⁰⁹ To study power at this level, a researcher must make inferences about arguments, grievances, perspectives and individuals that are subordinated in various social processes, rather than focus only on what can be easily observed.¹¹⁰

The third-dimension, which is the most difficult to identify and measure, does not occur when there are clear formal conflicts or unexpressed grievances. Rather, it occurs when the dominant subject begins, through narratives, discourse, and other ideological and psychological processes, to determine the subordinated object's wants, needs and desires.¹¹¹ This final dimension of power is the most difficult to study because it requires studying the objective sociological effects of hegemonic ideologies and also internal subjective psychological processes.¹¹² Studying this third level of power is a methodological challenge, as the researcher must make inferences about the interests and values of subordinated people that may not be clearly articulated or easily measured.¹¹³ Yet, in modern poverty and urban reform efforts, power frequently operates at this more structural, institutional and ideological third level, which is the most difficult to measure empirically.

As the profit-motive and complex race, class and gender tensions increasingly pervade urban reform, various reform agendas and narratives that further ruling-class interests have emerged. Arguably, the mixed-income approach to housing is one such narrative, as well as other discourses of social uplift, personal responsibility, and self-sufficiency, amongst others. While these narratives can justify reforms that lead to positive long-term changes for low-income and traditionally marginalized constituents, they can also provide a normative justification for regulatory reform efforts that privilege ruling-class interests. Urban reform occurs against the backdrop of these multiple, shifting and sometimes unstated reform agendas. These reform agendas operate on the different levels of power described above.

This Article analyzes Chicago's public housing reform experiment along these three levels of power. A power analysis of Chicago's reform experiment reveals at least three limitations in new governance theory's account of stakeholder

107. See HANDLER, *supra* note 106, at 116.

108. See *id.* at 117.

109. See *id.* at 118.

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.* at 130.

collaboration in social reform. First, the new governance account of stakeholder collaboration assumes that the “right” stakeholder—the one who will effectively represent the long-term interests of marginalized stakeholders in such collaborations—can be easily identified. Second, even assuming that the right stakeholder can be identified, new governance theorists rarely discuss how the increasingly market-driven and public-private nature of such reform collaborations can create incentives for stakeholder representatives to act opportunistically in contravention of their constituents’ long-term interests. Finally, those same incentives can lead well-meaning stakeholder representatives to unwittingly acquiesce in the prevailing discourses that elevate ruling-class interests as the universal objectives of urban and social reform.

The first problem of identifying the right stakeholder—the one whose behavior and decision-making will advance the long-term interests of marginalized constituents—operates at the first level of power. At this level, the first challenge is for low-income minorities to identify the right person or institution whose behavior will support policies that are in the best interests of the totality or at least in their particular collective interest. Implicitly this stakeholder representative must be willing to hold fast in the face of overt power conflicts. Thus, the researcher who seeks to study power at this level must study the easily observed behavior of stakeholder representatives throughout a development process.

The second problem of representative opportunism operates at both the first and second levels of power. Here observers must simultaneously study both what the stakeholder representative does and fails to do. The focus of the study should be on the intentionally opportunistic behavior of the stakeholder representative as well as omitted options and perspectives. The nature of the problem that the stakeholder network must solve is defined, in part, by such omissions.¹¹⁴ The focus is on policy perspectives that might advance the interests of marginalized stakeholders that the stakeholder representative fails to raise or turns away from as the goal setting and decision-making process unfolds. The researcher’s focus here is on the “bottom up” perspectives that fail to appear on the problem-solving agenda. This level of analysis is important, since simplistic understandings of identity politics may give certain local decision-making processes the gloss of representativeness and accountability, when, in fact, such processes do not lead to outcomes that advance the long-term interests of marginalized constituents.

The problem of acquiescence operates at the third level of power and is, thus, the most difficult to identify. Here, the researcher focuses on the outcomes of the decision-making process as well as the observable behavior of the stakeholder representatives. If the outcomes do not further the long-term interests of the stakeholder representatives’ constituency, then the researcher must ask why. If

114. See generally WILLIAMS, *supra* note 1, at 121 (“Blacks and women are the objects of a constitutional omission that has been incorporated into a theory of neutrality. It is thus that omission becomes a form of expression . . .”).

domination or opportunism does not provide an easy answer, then acquiescence is a plausible alternative explanation. A researcher can identify acquiescence by observing how stakeholder representatives frame and articulate the problem to be solved. 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. New governance theory's construct of informal, but collaborative private-public stakeholder participation does not sufficiently account for such dynamics and therefore underestimates the need for formal public law approaches to guide and to hold such collaborations accountable to public law values.

1. Demographic Representation

Historically, scholars and practitioners in the field of urban revitalization have equated demographic representation with representative governance. As Professor Susan Bennett explains, lawyers working to empower traditionally marginalized communities often presume that they can gauge "representativeness" by examining "the fit between the composition of an organization's leadership and the demography of its neighborhood."¹¹⁵ If the racial, gender, or socio-economic characteristics of the elected or appointed tenant representatives are similar to the characteristics of those they purport to represent, then scholars and practitioners often presume that such representatives will sufficiently identify, and advocate for, their constituents' interests.

Similarly, many new governance scholars highlight examples of social reform in which organizations with low-income or minority representation participate.¹¹⁶ In such instances, scholars often presume that groups are "representative" because they have leaders of the same racial, ethnic or socio-economic background as the relevant community.¹¹⁷ While examples of adequate representation abound, there are also numerous contrary examples where such representatives do not advance long-term interests of their constituents. As class stratification and complex identity politics become an increasing part of social reform, it is equally probable that such representatives may feel allegiances to other constituencies based upon competing identity characteristics.

It is important when analyzing new governance's informal reform collaborations to acknowledge this social complexity throughout the reform process. A

115. Susan D. Bennett, *Little Engines That Could: Community Clients, Their Lawyers' and Training in the Arts of Democracy*, 2002 Wis. L. Rev. 469, 477 (2002) (noting that "researchers have taken great care to distinguish 'substantive representation'—a similarity between an organization's and its constituents' perception of the neighborhood's needs—from 'descriptive representation'—a similarity between an organization's and its constituents' demographic and socio-economic characteristics").

116. See *supra* text accompanying note 70.

117. See Bennett, *supra* note 115, at 477.

reform network may appear to be sufficiently representative at the outset because certain representatives reflect the demographics of their communities. Yet, such collaborations may need to be monitored to ascertain if the representative does in fact advance the long-term interests of his or her constituents and to assess if the network's decision-making leads to outcomes that reflect the long-term interests of its purported constituency. Consequently, a representative that is not demographically aligned could possibly be a better representative.

2. Representative Opportunism

Second, even if a duly elected representative, who is both demographically and ideologically representative of his or her constituent group, participates in new governance reform collaborations, he or she can be easily influenced in such informal public-private collaborations, motivated by both social and profit-making goals. This is also the case with organizational representatives. The likelihood that marginalized constituents' representatives will act opportunistically and pursue their own selfish ends increases as tenant representatives and non-profit organizations collaborate with for-profit entities motivated by financial returns. The incentives in such collaborations may encourage stakeholder representatives to either intentionally, or unwittingly, fail to adequately represent their constituents.

Corporate governance theory's concept of managerial opportunism is instructive. Managerial opportunism is the tendency of elected board representatives and managers to abdicate their obligations to their constituents to pursue self-interested profit-making ends.¹¹⁸ Shareholders are considered the "owners" of the firm since they have a residual interest in the profits of the firm. Yet, despite their ownership claim, shareholders are not the decision-makers who control the day-to-day operation of the firm.¹¹⁹ Instead, shareholders delegate this power to a board of directors which then monitors the behavior of corporate officers, who are responsible for the day to day decision-making of the firm.

This separation of ownership and control in the modern corporation creates a principal-agent problem.¹²⁰ The shareholders are principals who delegate power and authority to agents, the directors and managers. Within the scope of the agency relationship, the directors and managers, have duties to act only in the interests of their principals. Managerial opportunism occurs when the agent managers consciously take advantage of their insider status, position, and access

118. See Amir N. Licht, *Managerial Opportunism and Foreign Listing: Some Direct Evidence*, 22 U. PA. J. INT'L ECON. L. 325 (2001).

119. See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32-33, 122-26 (describing that shareholders are the owners of the modern corporation).

120. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 197-202 (rev. ed., 1967) (discussing a director's obligation to exercise "fidelity to the interests of the corporation").

to information to behave in ways that advance their own individual self-interests. Thus, managerial opportunism undermines the principal's realization of his or her goals and furthers only the agent's personal interests. Corporate governance theory seeks to minimize managerial opportunism through the establishment of fiduciary duties and other forms of contractual control.¹²¹

In the absence of formal legal or public law protections, there is an increased likelihood that tenant representatives or low-income board representatives will consciously act opportunistically. Well-meaning and demographically aligned representatives can be easily seduced by the enticements of those individual or organizational network participants with more money, power or status. Such stakeholders may receive informal enticements or incentives to pursue their own self-interested ends such as guaranteed choice units in the new housing, choice jobs, increased power and control within the housing complex, or increased respect and status by housing authority officials or private developers.

Further, organizations are also prone to opportunism.¹²² Non-profit organization leaders are perceived to be indifferent to the profit-motive, since such organizations are formed for broad public purposes and they cannot distribute profits to their members or constituents in the form of dividends or distributions.¹²³ Yet, non-profits operating in a capitalist economy must make profits to further their public ends. They are permitted to do so as long as those profits are made in a manner consistent with the non-profit's public purposes and are not distributed as dividends to the organizations' members, boards, or participants.¹²⁴

However, as non-profits increasingly engage in joint ventures with for-profit organizations and form for-profit subsidiaries to finance their public purposes, their representatives are increasingly exposed to the institutional rules, structures and incentives of for-profit organizations.¹²⁵ They are increasingly inducted into the professional norms and discourse of a for-profit culture. Under such circumstances, the risk of co-optation is heightened. In such networks, non-profit organizations or tenant representatives are often dependent upon the for-profit participants for financial support as well as social capital. If such networks are dominated by elite professionals, there are multiple incentives for lower income representatives to pursue decisions that will bolster their individual status within

121. See Frank B. Cross & Robert A. Prentice, *The Economic Value of Securities Regulation*, 28 CARDOZO L. REV. 333, 359-60 (2006) (explaining that state corporate law creates fiduciary duties and uniform codes of conduct to curb "managerial opportunism").

122. See HANDLER, *supra* note 106, at 20 ("As long as organizations have a choice (and most do), they will favor those clients that will enhance legitimacy and garner or preserve resources . . .").

123. See Evelyn Brody, *Agents Without Principals, The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 458-59 (explaining that the classic conception of the non-profit is based on the "non-distribution constraint" that forbids a non-profit from distributing resources to its owners).

124. See *id.* at 459 n.8.

125. See generally MICHAEL I. SANDERS, *JOINT-VENTURES INVOLVING TAX-EXEMPT ORGANIZATIONS 1* (2d ed. 2000) (describing the participation of tax-exempt organizations in joint ventures with for-profit entities).

the network. As such, organizational representatives also have incentives to protect their own interests, rather than those of their constituents. Without a public law framework, representative opportunism in each case may go unchecked.¹²⁶

3. Representative Acquiescence

Third, both individual and organizational stakeholder representatives may also unwittingly act opportunistically. Chicago's original public housing residents are overwhelmingly black, female and poor.¹²⁷ Historically, they have been vilified in public discourse—constructed as lazy, undeserving, and prone to manipulating public resources.¹²⁸ Such social constructions of public housing residents can justify punitive legal and regulatory initiatives or efforts to decrease such residents' presence in certain neighborhoods. In order to counteract such narratives and improve their social status in the network, public housing resident representatives may unintentionally acquiesce in decisions that further the interests of the wealthier or more empowered stakeholders in the reform collaborations. This risk is heightened if such resident representatives suffer from information asymmetries regarding the technical complexities of urban redevelopment and HOPE VI reform.

Similarly, organizational representatives are not neutral actors within the social world. As separate "persons" under the law, organizations obtain their power, authority, legitimacy and longevity from the social frameworks in which they are embedded.¹²⁹ Although run by natural persons, organizations and institutions also construct an identity of their own.¹³⁰ As Professor Joel Handler explains, organizations depend upon their environments to obtain legitimacy, resources

126. *But see* Susan Helper et al., *Pragmatic Collaborations: Advancing Knowledge While Controlling Opportunism*, 9 INDUS. & CORP. CHANGE 443, 471-75 (2000) (arguing that pragmatic collaborations based on "learning by monitoring" both advance knowledge and control opportunism and thus align interests between the collaborators).

127. *See* ROBERTA M. FELDMAN & SUSAN STALL, *THE DIGNITY OF RESISTANCE: WOMEN RESIDENTS' ACTIVISM IN CHICAGO PUBLIC HOUSING* 19 (2004) (describing the feminization of poverty in public housing by explaining that "[a]lthough the first public housing leaseholders were overwhelmingly male-headed families, in Chicago public housing, in 1991 85% of the families listed a woman as the primary leaseholder [and] by 1997, the percentage was up to 94%") (citations omitted). This trend is also true of HOPE VI reform, generally. *See generally* Danielle Pelfrey Duryea, Note and Comment, *Gendering the Gentrification of Public Housing: HOPE VI's Disparate Impact on Lowest-Income African American Women*, 13 GEO J. ON POVERTY L. & POL'Y 567, 582 (2006) (explaining that "the statistical predominance of African American woman-headed households in HOPE VI target sites strongly suggests that those who have suffered the brunt of the program's acknowledged shortcomings are extremely poor African American women").

128. *See* RHONDA Y. WILLIAMS, *THE POLITICS OF PUBLIC HOUSING: BLACK WOMEN'S STRUGGLES AGAINST URBAN INEQUALITY* 128 (2004) ("[B]lack women who sought low-income assistance became repositories of deviance.")

129. HANDLER, *supra* note 106, at 20.

130. *Id.*

and power.¹³¹ To the extent that other organizations within a problem-solving network are profit-motivated or elite-dominated institutions, organizations purported to represent the interests of marginalized constituents may also inadvertently acquiesce in discourses and decisions that favor the more empowered actors in the network.¹³²

As Part II reveals there is evidence that such power dynamics did occur in the local decision-making collaborations that implemented HOPE VI reform in Chicago. These dynamics illustrate a classic accountability problem for new governance's informal public-private collaborations. The Chicago example suggests that the participation of elected tenant representatives and non-profit organizations with community based boards in new governance collaborations must be evaluated throughout the redevelopment process. Additionally, it suggests that there must be adequate safeguards to protect organizational and individual network participants who represent the minority view. If organizational participants who strive to represent the minority viewpoint are consistently outvoted, or if their contributions are summarily dismissed, then new governance must provide some formalized protections for such participants.

II. HOPE VI AS NEW GOVERNANCE: EXPLORING STAKEHOLDER COLLABORATION AND POWER

A. *Hope VI as New Governance*

HOPE VI is now in its seventeenth year of implementation in cities across the country.¹³³ While the efficacy of HOPE VI as a strategy for public housing reform is the subject of continued scholarly debate,¹³⁴ HOPE VI reform in

131. *Id.*

132. *Id.* at 21.

133. In 1992, Congress first passed the Urban Revitalization Demonstration Program amendments to the U.S. Housing Act of 1937, known as the Housing Opportunities for People Everywhere Programs Act of October 6, 1992. Whereas most legislation is simultaneously authorized and appropriated by Congress, HOPE VI initially operated through appropriations only. In the 1992 amendments, Congress appropriated the first \$300 million dollars for the program through a FY1992 Notice of Funding Availability (NOFA), published in the Federal Register. As such, HUD administered grants under the program through each fiscal year's notices of funding availability (NOFA) and individual Grant Agreements rather than through formal regulation. Later, HOPE VI was authorized by Congress for the first time, when the Quality Housing and Work Responsibility Act of 1998 repealed the October 6, 1992 legislation and further amended Section 24 of the Housing Act of 1937. Most provisions of the Public Housing Reform Act were incorporated into the FY 1999 NOFA. The subsequent FY 2000 NOFA incorporated all provisions of the authorization. See U.S. DEP'T OF HOUS. & URBAN DEV., HOPE VI PROGRAM AUTHORITY AND FUNDING HISTORY (2007), available at <http://www.hud.gov/offices/pih/programs/ph/hope6/about/fundinghistory.pdf>.

134. See, e.g., Bennett, *supra* note 11; Patrick E. Clancy & Leo Quigley, *Response, HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL'Y 527 (2001); Lynn E. Cunningham, *supra* note 97, at 353; Megan Glasheen & Casius Pealer, *Continuing the Conversation with Policy Makers: A Review of the Brookings Institution Report on HOPE VI*, 15-FALL J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 104 (2005); Ngai Pindell, *Is There Hope for HOPE VI?*:

general, and Chicago's Plan in particular, reflects new governance trends. HOPE VI reform epitomizes devolution, decentralization, privatization, informality and stakeholder collaboration. First, initial federal HOPE VI grant authorizations embraced devolution and decentralization by removing rigid mandates that impeded local public housing authorities' ("PHAs") discretion in the development of revitalization goals. Under the Clinton Administration, HUD suspended the federal one-for-one replacement rule that previously guided all public housing redevelopment and modernization.¹³⁵ This former federal rule required public housing agencies to develop a replacement unit for each demolished public housing unit. Suspending this requirement enabled local PHAs to "tear down projects without having to replace demolished 'hard units' with an equivalent number of new public housing units."¹³⁶ Rather, displaced residents could be offered a voucher to use in the private housing market.¹³⁷ Thus, through federal deregulation, local PHAs gained more flexibility and discretion to determine the number of public housing units in each mixed-income public housing redevelopment.

Second, the Quality Housing and Work Responsibility Act of 1998 ("QHWRA"), formalized and further expanded HOPE VI's initial innovations. It eliminated admissions preferences for the lowest income families and expanded the ability of PHAs to evict tenants and to conduct criminal background checks on prospective tenants.¹³⁸ Through QHWRA, the federal government also formally changed its role in public housing provision. HUD transformed from public housing steward to incentive creator.¹³⁹ In this new model, federal agencies such as HUD and the IRS govern from a distance; at the most, they outline very broad goals and create incentives to bring together a network of local private and public stakeholders who will collaborate and experiment in an effort

Community Economic Development and Localism, 35 CONN. L. REV. 385 (2003); Harry J. Wexler, *HOPE VI: Market Means/Public Ends—The Goals, Strategies, and Midterm Lessons of HUD's Urban Revitalization Demonstration Program*, 10-SPG J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 195 (2001); Sean Zielenbach, *Catalyzing Community Development: HOPE VI and Neighborhood Revitalization*, 13-FALL J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 40 (2003); Sean Zielenbach, *The HOPE VI Elderly Demonstration Program after Five Years*, 13-FALL J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 81 (2003); Note, *When Hope Falls Short*, *supra* note 11; Duryea, *supra* note 127; Michael S. Fitzpatrick, Note, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421 (2000); Herbert R. Giorgio, Jr., Comment, *HUD's Obligation to "Affirmatively Further" Fair Housing: A Closer Look At HOPE VI*, 25 ST. LOUIS U. PUB. L. REV. 183 (2006); Dana L. Miller, Comment, *HOPE VI and Title VIII: How a Justifying Government Purpose can Overcome the Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277 (2003).

135. See Smith, *supra* note 8, at 35 (explaining the enactment of the 1995 Reversions Act, which suspended the one-for-one replacement rule).

136. See *id.*

137. See *id.*

138. See *id.* at 36.

139. See Yan Zhang & Gretchen Weismann, *Public Housing's Cinderella: Policy Dynamics of HOPE VI in the Mid-1990s*, in *WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES*, *supra* note 2, at 41, 59 (mentioning that HUD emphasized the devolution of control from the federal government to local PHAs).

to implement broad reforms.

The mixed-income approach to public housing reform exemplifies this trend as QHWRA identifies mixed-income as a goal, but gives local PHAs substantial latitude to implement mixed-income reforms.¹⁴⁰ The broad objective of mixed-income housing is to expose very-low and low-income residents to higher-income households in order to stem the social dysfunction that has historically plagued very low-income public housing.¹⁴¹ Advocates of the mixed-income approach seek to simultaneously de-concentrate the poverty of public housing residents as well as to mitigate the racial segregation and class isolation that many public housing residents experience.¹⁴²

Third, Congress embraced privatization approaches in QHWRA. The legislation authorizes the use of public housing development funds and operating subsidies for projects owned by private entities.¹⁴³ It also provides public subsidies to create incentives for private investors to invest in public housing reform.¹⁴⁴ Fourth, consistent with new governance theory's penchant for informality, flexibility and experimentation, HUD did not develop rigid regulatory standards to implement HOPE VI.¹⁴⁵ Rather, yearly notices of funding availability ("NOFAs"), individual grant agreements, and in a few cases legal opinions and consent decrees, formed the legal obligations and requirements of the program.¹⁴⁶ These slightly more flexible sources could be more easily revised and updated in response to future information and change.

Lastly, HOPE VI reforms provide opportunities for third-sector private or non-profit institutions and public housing residents to participate in reform. Public housing residents can form resident management corporations to bid and to assume certain management responsibilities from the CHA.¹⁴⁷ Ten percent of HOPE VI's grants are to be used for services to residents such as job training and placement, day care, and substance-abuse counseling.¹⁴⁸ These services are often performed by non-profit organizations that contain low-income and minority

140. See *infra* Part II Section C1.

141. See Janet L. Smith, *Mixed Income Communities: Designing Out Poverty or Pushing Out the Poor?*, in *WHERE ARE POOR PEOPLE TO LIVE? TRANSFORMING PUBLIC HOUSING COMMUNITIES*, *supra* note 2, at 259, 260; see also Michael Schill, *Chicago's New Mixed Income Communities Strategy: The Future of Public Housing*, in *AFFORDABLE HOUSING AND URBAN REDEVELOPMENT IN THE UNITED STATES* 151 (William Van Vilet ed., 1997).

142. See Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 *GEO. J. ON POVERTY L. & POL'Y* 35, 81 (2002) (explaining that HUD's income deconcentration rules attempt to address the problem of racial segregation by using income as a proxy for race).

143. See The Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 539, 112 Stat. 2594-95 (amending the United States Housing Act of 1937, 42 U.S.C. § 1437z-7 (2000)); see also Poindexter, *supra* note 24, at 660.

144. See *supra* text accompanying note 143.

145. See Zhang & Weismann, *supra* note 139, at 46; see also Note, *When Hope Falls Short*, *supra* note 11, at 1486.

146. See Zhang & Weismann, *supra* note 139, at 46.

147. See SIMON, *supra* note 82, at 23 (citing 24 C.F.R. § 964.120-50).

148. See SIMON, *supra* note 82, at 23.

board members. These regulatory reform initiatives reflect a federal policy to create partnerships between, residents, management, community organizations, or enterprises.¹⁴⁹ While public-private collaboration is a stated goal of HOPE VI, “meaningful resident participation” in local goal-setting and decision-making is difficult to enforce, in part because Department of Housing and Urban Development funding guidelines do not clearly define “meaningful”.¹⁵⁰ Furthermore, participation objectives are only reflected in grant agreements executed between a PHA and HUD, or in general notices of funding availability, not in formal legislation.¹⁵¹ Residents are only third-party beneficiaries of such agreements and therefore cannot easily sue to enforce such rights in court.¹⁵²

While Section 18 of the U.S. Housing Act of 1937 still requires that HUD disapprove any PHAs application for demolition or rehabilitation that is not developed in consultation with residents and resident advisory boards, this requirement can be easily met in form, but not in substance.¹⁵³ A PHA can easily comply by establishing resident advisory councils and presenting preformed plans to resident representatives. While such measures enable PHAs to comply, they do not ensure that residents meaningfully participate in revitalization decision-making.

Moreover, when residents attempt to enforce their “group right” to participation in federal courts, defendants routinely assert that residents cannot enforce such rights. While Section 18 of the U.S. Housing Act seemingly provides a clear private right of action to enforce residents’ rights to participation, defendants increasingly argue that such a mandate does not create a legally enforceable private right of action. Recent U.S. Supreme Court decisions have narrowed the circumstances under which a private right of action can be implied in Section 1983 to enforce federal statutes and regulations.¹⁵⁴ Residents have to expend increasing time and money to assert this right in light of new Supreme Court

149. *Id.* at 22.

150. See Poindexter, *supra* note 24, at 660.

151. See Note, *When Hope Falls Short*, *supra* note 11, at 1492.

152. See U.S. DEP’T OF HOUS. & URBAN DEV., FY 2000 HOPE VI REVITALIZATION GRANT AGREEMENT, Art. XIII (B)(1)&(2), available at http://www.hud.gov/utilities/intercept.cfm?offices/pih/programs/ph/hope6/grants/revitalization/00/fy00_rev_grantagreement.pdf (“(1) providing substantial opportunities for affected residents to provide input, advice, counsel, recommendations, and opinions as the Grantee plans and carries out its revitalization efforts; [and] (2) providing reasonable resources, as approved by HUD, for technical assistance, training, and capacity building to prepare affected residents to participate meaningfully in the planning and implementation of the Grantee’s revitalization efforts”); see also Note, *When Hope Falls Short*, *supra* note 11, at 1485.

153. See 42 U.S.C. § 1437p(b)(2) (1994).

154. The U.S. Supreme Court held that there is no private right of action for individuals to file a lawsuit for disparate impact discrimination pursuant to the implementing regulations of Title VI of the Civil Rights Act of 1964. See *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (“Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.”) (citations omitted); see also *Gonzaga v. Doe*, 536 U.S. 273, 283 (2002) (“We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”).

opinions.¹⁵⁵

New governance theory suggests that, despite such difficulties, the broad goal of resident participation can be effectively implemented through “empowered participatory governance”. Advocates of collaborative, but empowered participatory governance assume that public housing residents will be adequately represented through a representative governance structure. Empowered stakeholder collaboration, therefore, is the primary mechanism through which residents are to hold private interests and public agencies accountable in HOPE VI reform. A robust and collaborative conception of stakeholder participation in new governance reform networks thus justifies regulatory approaches such as devolution, decentralization, privatization and informality. However, an examination of Chicago’s implementation process reveals that the majority of residents did not “meaningfully participate” in the key decision-making processes of HOPE VI reform.

B. Chicago’s “Plan for Transformation”

Chicago’s Plan officially began in January of 2000 with an initial HOPE VI grant to the CHA in the amount of \$1.5 billion dollars over 10 years.¹⁵⁶ The massive scope of the Plan requires significant private sector investment and involvement. At its initial launch, the Plan required at least \$3 billion dollars of additional private sector investment.¹⁵⁷ Chicago’s initial HOPE VI grant also provided the impetus for a much larger effort to transform Chicago’s downtown and inner-city core to help reposition Chicago as a global metropolis.¹⁵⁸ In fact, promises of a revitalized downtown and South Side figured prominently in Chicago’s recent bid to host the 2016 Olympics.¹⁵⁹ The United States Olympic Committee selected Chicago as the American competitor to host the 2016

155. See *Wallace v. Chi. Hous. Auth.*, 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003) (holding that the Fair Housing Act (FHA) and applicable HUD regulations created duty for city housing authority to act affirmatively to further fair housing which was subject to private enforcement under § 1983).

156. The Plan was initially published in draft form for public comment on September 30, 1999. Yet, the final version of the Plan was released on January 6, 2000 and approved by HUD in February of 2000. See Smith, *supra* note 2, at 94. But see William Wilen & Rajesh D. Nayak, *Relocated Public Housing Residents Have Little Hope of Returning: Work Requirements for Mixed-Income Public Housing Developments*, in WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES, *supra* note 2, at 216, 217 (arguing that while the Plan was officially launched in 2000, it began as early as 1996, when HUD temporarily took control of the CHA).

157. See Smith, *supra* note 2, at 93.

158. See Larry Bennett, *Downtown Restructuring and Public Housing in Contemporary Chicago: Fashioning a Better World Class City*, in WHERE ARE POOR PEOPLE TO LIVE: TRANSFORMING PUBLIC HOUSING COMMUNITIES, *supra* note 2, at 282, 286; see also Ryan Chittum, *In Inner-City Chicago, ‘Metropolis’ Hopes to Rise*, WALL ST. J., Mar. 28, 2007, at B1 & B8 (exemplifying Chicago’s commercial redevelopment).

159. See Greg Hinz, *USOC Picks Chicago for 2016 Olympic Bid*, CHICAGOBUSINESS.COM, April 14, 2007, <http://www.chicagobusiness.com/cgi-bin/news.pl?id=24588&bt=Olympic+Bid&arc=n&searchType=all>.

Summer Olympics.¹⁶⁰ If ultimately selected, Chicago proposes to hold the opening ceremonies in a newly built temporary stadium in Washington Park, a South Side park near the site of the once infamous, and now redeveloped, Robert Taylor Homes public housing development.¹⁶¹

Like HUD, CHA also transformed its role in public housing provision from an owner to an incentive creator. As Professor Janet L. Smith explains, “[a]s laid out in the original ‘Plan for Transformation,’ the CHA no longer positions itself as a housing provider, but rather now is a ‘facilitator’ of housing.”¹⁶² Prior to creation of the Plan, CHA owned over 20 large multi-family public housing developments and an even larger number of senior properties in inner-city neighborhoods.¹⁶³ Now CHA only owns the land under the new mixed-income developments; it does not own the buildings or other improvements on the land. The new mixed-income developments are owned by private developers who lease the land under the developments from CHA under a 99-year ground lease for one dollar per year.¹⁶⁴

Chicago’s “Plan for Transformation” is designed to revitalize Chicago’s public housing stock through a combination of demolition, new construction, and existing public housing revitalization.¹⁶⁵ Yet, the Plan’s success hinges on the efficacy of the mixed-income approach to public housing reform. Under the Plan, CHA seeks to rebuild or refurbish 25,000 housing units. 31% of the 25,000 unit goal will consist of refurbished public housing units in new mixed-income developments.¹⁶⁶ “Each mixed-income development will consist of roughly equal numbers of public housing units, affordable units subsidized by the low-income housing tax credit program, and unsubsidized market-rate units, although the precise mix of units varies by development.”¹⁶⁷ Thus, the Plan encourages renters and owners of different socio-economic, racial and cultural backgrounds to live with and to collaborate with one another.

The mixed-income approach also requires considerable public-private stakeholder collaboration. There are numerous examples of stakeholder collaboration in Chicago’s Plan. Chicago’s participation in HUD’s Moving to Work Demonstra-

160. *Id.*

161. Brian Louis, *Chicago’s Olympic Dreams Rest on Rehab Over Truck Parking Lot*, BLOOMBERG.COM, June 12, 2007, <http://www.bloomberg.com/apps/news?pid=20601103&sid=ac1Xclf2QjEE&refer=us>.

162. Smith, *supra* note 2, at 119.

163. See CHI. HOUS. AUTH., *supra* note 4, at 2.

164. See Grotto et al., *Public Housing Limbo*, CHI. TRIB., July 6, 2008, at 2, available at <http://www.chicagotribune.com/news/nationworld/chi-cha-main-sunday-bd-06-jul06,0,2989588.story>.

165. RITA A. FRY, INDEPENDENT MONITOR’S REPORT TO THE CHI. HOUS. AUTH. AND THE CENTRAL ADVISORY COUNCIL REGARDING YEAR 8 OF THE CHA PLAN FOR TRANSFORMATION 4 (2007).

166. See *id.* at 4.

167. See Wilen & Nayak, *supra* note 156, at 230 n.5.

tion Project (“MTW”) is one example.¹⁶⁸ The MTW is another federal demonstration program authorized by the Omnibus Consolidated Rescissions Act of 1996.¹⁶⁹ The MTW’s creation overlapped with the federal enactment of HOPE VI reforms. The MTW is designed to “offer PHAs the opportunity to design and test innovative, locally-designed housing and self-sufficiency strategies for low-income families by allowing exemptions from existing public housing and tenant-based Housing Choice Voucher rules.”¹⁷⁰ MTW program encourages public housing residents to work and to develop other self-sufficiency skills. The CHA cites the MTW as its source for imposing work requirements on public housing residents.¹⁷¹ In 2000, CHA applied for an MTW grant so it could more flexibly implement the Plan for Transformation.¹⁷² HUD granted CHA participation in the MTW program. The MTW is the impetus for many of the public-private collaborations in Chicago’s Plan. The MTW also led CHA and private developers to collaborate with other non-profit organizations and workforce development experts to devise programs to help residents fulfill the work requirements of the MTW.

CHA’s Service Connector Program is further evidence of stakeholder collaboration. Established in 2001, the Service Connector program assists original public housing residents transitioning from public housing to temporary housing and back to the mixed-income communities upon completion.¹⁷³ It also helps former residents who choose to permanently relocate into the private housing market with a housing choice voucher.¹⁷⁴ In Chicago, several non-profit organizations with low-income membership or board representation often contract with private developers to provide services such as job training, substance abuse counseling or work readiness programs.¹⁷⁵

Despite Chicago’s efforts to facilitate collaboration in public housing reform, its Plan unfolds against the backdrop of mounting power conflicts. While proponents of the Plan maintain that the Plan has helped to improve neighborhoods and transform the lives of many of Chicago’s public housing residents,¹⁷⁶

168. CHI. HOUS. AUTH., FY 2006 MOVING TO WORK ANNUAL REPORT, at inside back cover, *available at* http://www.thecha.org/transformplan/files/fy2006_mtw_collaborations2.pdf (includes a list of public and private organizations with whom CHA collaborates).

169. *See* U.S. Dep’t of Hous. & Urban Dev., Moving to Work (MTW) Background and Purpose, <http://www.hud.gov/offices/pih/programs/ph/mtw/background.cfm> (last visited Apr. 27, 2009) (citing Pub. Law. 104-134, 110 Stat. 1321, dated Apr. 26, 1996).

170. *Id.*

171. *See* Wilen & Nayak, *supra* note 156, at 221.

172. *See id.* at 218.

173. *See* CHI. HOUS. AUTH., FY2008 MTW ANNUAL PLAN - PLAN FOR TRANSFORMATION YEAR 9, at 85, *available at* http://www.thecha.org/transformplan/files/6_MTW_030108.pdf.

174. *See id.* at 86 (“CHA announced that in FY 2008 the former the Service Connector Program will be replaced with a new program called family works that will focus primarily on housing choice and workforce development.”).

175. *Id.*

176. *See, e.g.,* Daniel Levin, Op-Ed., *Reversing Disinvestment in Vital Neighborhoods*, CHI. TRIB., Jul. 19, 2008, at 23 (Chairman of Habitat Co. arguing that Chicago’s Plan is successfully reversing 50 years of

some of the evidence to date does not fully support these claims. Many residents have been displaced from their original homes with no hope of returning to the new developments upon completion.¹⁷⁷ While some displacement of public housing residents was by design, at present, at least 56,000 remain on the waiting list to enter undeveloped public housing units.¹⁷⁸ At the same time, growing numbers of working, middle- and upper-middle class residents are moving into former public housing neighborhoods in mixed-income developments. Why didn't resident participation in Chicago's reform Plan not result in a more equitable distribution of the benefits of reform? As the following sections show, social fissures along, race, class and gender lines, insufficient funding, and inadequate public protections, all coalesced to subordinate residents' needs.

C. Identity Politics: What's Race, Class and Gender Got To Do With It?¹⁷⁹

Complex race, class and gender dynamics continue to be among the greatest obstacles to successful public housing reform in Chicago. Chicago's public housing population is overwhelmingly black, female and poor.¹⁸⁰ As such, public housing residents experience multiple and intersecting forms of structural and social oppression as well as intentional animus.¹⁸¹ This Section reviews the past and present of public housing reform in Chicago to illustrate how the intersecting oppressions of race, class and gender have shaped various ideologies and reform agendas in Chicago's public housing reform saga. It also describes public housing reformers' gradual move away from formal law toward informal

disinvestment in Chicago's vital neighborhoods); Toni Preckwinkle, Op-Ed., *Neighborhood Progress*, CHI. TRIB., Jul. 19, 2008, at 23 (Chicago alderman arguing that Chicago's Plan contributes to neighborhood progress in North-Kenwood-Oakland); Lewis A. Jordan, Op-Ed., *Meeting Challenges*, CHI. TRIB., July 19, 2008, at 23 (CEO of the CHA arguing that the Plan is successful meeting the myriad challenges of public housing reform). *But see* Grotto et al., *supra* note 164, at 4.

177. Sudhir Venkatesh, *Breaking Promises at the CHA; Many New CHA Units Not Going to Ex Residents*, CHI. TRIB., Jul. 3, 2007, at 15 (describing that two-thirds of CHA families on the waiting list are finding that their applications to live in the revitalized housing are being denied).

178. *See* Grotto et al., *supra* note 164, at 2.

179. This heading was inspired by Tina Turner's famous song and by David Wilkins' characterization of this question at Wisconsin Law School's New Legal Realism Symposium. *See* Howard Erlanger et al., *Forward: Is it Time for a New Legal Realism*, 2005 WIS. L. REV. 335, 351 (David Wilkins remarked, "[a]nd, then, the third question is what I like to call the Tina Turner question, which is: what's race got to do with it, got to do with it—or why is studying race in the legal profession an important lens?").

180. *See* Feldman & Stall, *supra* note 127, at 19 (noting that in 1991 85% of the families in Chicago's public housing stock listed a black woman as the primary leaseholder); *see also* W. David Koeninger, *A Room of One's Own and Five Hundred Pounds Becomes a Piece of Paper and Get A Job: Evaluating Changes in Public Housing Policy from a Feminist Perspective*, 16 ST. LOUIS U. PUB. L. REV. 445, 448 (1997) (citing *Complaint, Cabrini-Green Local Advisory Council v. Chi. Hous. Auth.*, No. 96 C 6949 (N.D. Ill. Oct. 25, 1996), at 14 [hereinafter *Complaint*] (alleging that at the time sixty-three percent of the residents of the Cabrini-Green housing development in Chicago were female)).

181. *See, e.g.*, Lorna Fox, *Re-Possessing Home: A Re-Analysis of Gender, Homeownership, and Debtor Default for Feminist Legal Theory*, 14 WM. & MARY J. WOMEN & L. 423, 491 n.476 (2008) (explaining the extensive literature on the "feminization of poverty").

public-private stakeholder collaborations to mitigate race, class and gender inequities in public housing administration.

Historically, class action public impact-litigation was the primary legal mechanism used by public housing reformers to achieve widespread public housing reforms.¹⁸² For example, litigation was used to combat the Chicago Housing Authority's history of building public housing units in racially segregated and impoverished areas. During the 1950s and 60s, "[o]f the 33 projects constructed only one was located in an area less than eighty-four percent black, and all but seven were located in a census tracts that were at least ninety-five percent black."¹⁸³ This situation prompted a class of African-American plaintiffs to sue CHA for its intentional segregation policies in a lawsuit, called *Gautreaux v. Chi. Hous. Auth.*¹⁸⁴ The Plaintiffs sued CHA under the Civil Rights Act of 1964, and then the Fair Housing Act, for intentional discrimination in public housing.¹⁸⁵ A federal district judge found CHA liable for intentional discrimination and issued a judgment order forbidding CHA from constructing any additional public housing in predominately black neighborhoods unless it also built public housing elsewhere.¹⁸⁶ In 1976, the U.S. Supreme Court found that HUD was also liable and that together HUD and CHA should work throughout the entire Chicago metropolitan area to remediate their past histories of racial discrimination.¹⁸⁷

That decision paved the way for a widespread program of race-based remediation in Chicago's public housing program. Black public housing residents were given Section 8 housing vouchers to move to suburban areas that were at least 70 percent white and had "low concentrations of minorities".¹⁸⁸ It also led to a scattered-site program to build additional public housing throughout Chicago.¹⁸⁹ However, the scattered-site program was thwarted by Chicago's complex racial and class politics. CHA was an arm of the first Mayor Richard J. Daley's administration and run by white administrators beholden to the Mayor and his predominately white constituency.¹⁹⁰ Those white constituents gave Not in My Backyard ("NIMBY-ism") responses to the prospect of a public housing

182. See Lisa T. Alexander, *supra* note 56, at 155, 156 (2008) (describing the history of class-action public housing litigation addressing racial discrimination in Chicago). Gender was also an intersecting form of oppression in these cases as the class members were overwhelmingly poor, black women. See Complaint, *supra* note 180, at 14.

183. See Hendrickson, *supra* note 142, at 45.

184. *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736 (N.D. Ill. 1969).

185. *Id.*

186. *Id.*

187. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

188. See Hendrickson, *supra* note 142, at 58.

189. *Id.*

190. See Feldman & Stall, *supra* note 127, at 51 ("From the early 1960's, CHAs executive director was a "crony" of the then mayor, Richard J. Daley.").

presence in their neighborhoods.¹⁹¹ Additionally, many black leaders argued that the *Gautreaux* Consent Decree led to a reduction in federal dollars for new housing in black communities.¹⁹² This resistance led CHA to produce little to no new public housing in Chicago from 1969 until 1981, when the *Gautreaux* Consent Decree was revised.¹⁹³

As with other instances of traditional public impact litigation and remediation, mounting frustration with the difficulties of implementing a widespread race-based remediation plan caused policymakers to turn towards more class-based solutions for urban reform. In 1981, for example, the *Gautreaux* Plaintiffs agreed and Judge Aspen ruled under the *Gautreaux* Consent Decree that new public housing could be built in what were considered “revitalizing areas.”¹⁹⁴ “Revitalizing areas” include areas that have: “a substantial minority population and are undergoing sufficient redevelopment to justify the assumption that these areas will be more integrated in a relatively short time.”¹⁹⁵ As such, instead of requiring CHA to build in predominately white areas to foster integration, the new ruling allowed scattered-site public housing units to be built in primarily Black and Latino areas with an increasing Black and Latino middle-class.

Some housing reformers, many of whom were black, viewed the de-centering of race-based approaches to ameliorate poverty as a potentially powerful viable alternative to the less successful integration-focused remedies that previously guided public housing reform. The switch from race-based to class-based remediation also coincided with emergence of the neoliberal approach to urban community development.¹⁹⁶ The neoliberal approach reduced federal government funding and stewardship of social programs, and replaced it with tax incentives and public-private partnerships as the primary mechanisms of social reform.¹⁹⁷ Neoliberals also moved away from litigation-based strategies for

191. See Alexander, *supra* note 56, at 157 (describing the NIMBY responses to CHA’s efforts to build scattered site units in predominately white neighborhoods).

192. See Polikoff *Combats ‘Residential Apartheid’ With Gautreaux, Sacrifices Inner-City Shelter Needs For Open Housing Goal*, CHI. REP., Mar. 1978, available at http://www.howardfairhousing.org/civil_rights_school/125/507/ (summarizing black leaders’ criticisms of the remedial stage of the *Gautreaux* case).

193. See William P. Wilen & Wendy L. Stasell, *Gautreaux and Chicago’s Public Housing Crisis: The Conflict Between Achieving Integration and Providing Decent Housing for Very Low-Income African-Americans*, in *WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES*, *supra* note 2, at 239, 245.

194. See MARY PATTILLO, *BLACK ON THE BLOCK: THE POLITICS OF RACE AND CLASS IN THE CITY* 184-185 (2007).

195. *Id.* at 185 (citing *Gautreaux v. Landrieu*, 523 F. Supp. 665, 669 (N.D. Ill. 1981)).

196. See Scott L. Cummings, *Community Economic Development As Progressive Politics: Towards A Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 421-422 (2001) (explaining that the Clintonian neoliberal policies of the late 1980s and early 1990s shifted anti-poverty programs towards market-based strategies).

197. See *id.*

social reform and towards more transaction-based legal strategies for reform.¹⁹⁸ These more contractual and deal-based approaches are reliant on public-private collaborations to balance private and public goals. While the neoliberal approach to community development signaled a policy shift towards privatization, devolution and decentralization, it also reflected the age-old norms of self-help and community self-determination that particularly resonated with the growing black middle-class.¹⁹⁹

At the same time, during the 1980s, both the color and nature of the City's political leadership began to change. After a brief respite from the first Daley administration, Harold Washington was elected as Chicago's first black mayor in 1983.²⁰⁰ In contrast to the approach of the former Daley administration, Washington embraced new strategies to include neighborhood groups, residents, and non-profit organizations in redevelopment processes.²⁰¹ In 1984, he issued his *Chicago Works Together: Chicago Development Plan 1984*, which embraced an equitable approach to redevelopment and explicitly promoted enhanced public-private collaboration and public participation in redevelopment decision-making.²⁰² As Washington endeavored to implement his plan, conflicts between various constituents in Chicago ensued and Washington's efforts at reform were ultimately cut short in 1987, when he died in office.²⁰³ He was replaced by acting mayor Eugene Sawyer (1987-1989), who then lost in the subsequent election to Richard M. Daley, the former Mayor Daley's son.²⁰⁴

Although whites reassumed power in the mayoral slot, Washington's administration paved the way for the growing black middle-class to secure several aldermanic and administrative positions in City government as well as leadership positions in institutions central to urban reform. Washington's administration also signified the beginning of the emergence of what sociologist Mary Pattillo has termed "black middlemen and black middlewomen."²⁰⁵ As Professor Pattillo explains, these actors are "brokers" within the public and private networks that now dominate urban reform.²⁰⁶ "They exist within a system of coalition politics

198. See Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 Nw. U. L. REV. 1251, 1285 (2006) (reviewing JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005)) (explaining that community economic development lawyering focuses on designing public-private partnerships to build affordable housing, create jobs, and increase services in low-income communities).

199. See Cummings, *supra* note 196, at 399 ("Premised on the idea that poor neighborhoods are underutilized markets in need of private sector investment, market-based CED gained a broad range of ideological adherents, resonating with proponents of black nationalism, neoliberal economics and postmodern micropolitics.").

200. See GREGORY D. SQUIRES, *CAPITAL AND COMMUNITIES IN BLACK AND WHITE: THE INTERSECTIONS OF RACE, CLASS AND UNEVEN DEVELOPMENT* 113 (1994).

201. *Id.*

202. *Id.*

203. *Id.*

204. See PATTILLO, *supra* note 194, at 235.

205. *Id.* at 3.

206. *Id.* at 18.

that fosters and requires both finesse and subterfuge in the back and forth translation of the demands of various interest groups.”²⁰⁷ The emergence of black middlemen and middlewomen also coincided with a growing skepticism of traditional impact litigation as the most useful mechanism to achieve racial and social justice.

The growing presence of black middlemen and middlewomen and the return of upper middle-class whites and blacks to the inner-city have substantially changed the power dynamics of inner-city revitalization.²⁰⁸ Many members of the black middle-class are now stewards of urban reform as leaders, managers, officers and employees of the various public and private institutions that now direct urban revitalization.²⁰⁹ Because of their race, such stewards may be perceived as representatives of black public housing residents’ interests. The presence of demographically similar managers and agents may legitimate the network’s regulatory decisions in the eyes of policymakers and scholars, even though the stewards are not elected and they may approve decisions that will not advance the long term interests of their constituents.

The private or profit-motivated participants in the network can also create formal and informal incentives, such as increased reputational, social, or financial capital, which encourage the representatives to act opportunistically. The question of whose interests these actors represent becomes quite complex, as class stratification amongst blacks becomes an increasing reality.²¹⁰ Chicago also seeks to entice upper-income residents back to the inner-city to ensure its transformation process.²¹¹ As such, social tensions around class, race, and ethnicity are heightened in Chicago’s inner-city.²¹² Since a majority of public housing households are headed by single black women, gender dynamics are also

207. *Id.*

208. *Id.* at 121.

209. Vincent Lane and Terry Peterson, both black males, were Chief Executive Officers (CEO) of the CHA. See Chi Hous, Auth., Officials of the Chicago Housing Authority: From the Time of its Inception in 1937 (March 26, 2008), http://www.thecha.org/aboutus/files/List_Commissioners_back_1937.pdf; see also ABT ASSOCIATES, INC., CHICAGO HOUSING AUTHORITY TIMELINE DEC. 1986 – AUG. 1998, at 2 (1998), available at <http://www.abtassociates.com/reports/D19980404.pdf>. On July 7, 1999, Sharon Gist Gilliam, a black female, was appointed by Mayor Richard M. Daley as the Commissioner of the CHA. See Chi Hous, Auth., About Us – Sharon Gist Gilliam, http://www.thecha.org/aboutus/sharon_gist_gilliam.html (last visited Apr. 27, 2009). Lewis A. Jordan, a black male, and a former Chicago public housing resident, is now CEO of the CHA. See Chi Hous, Auth., About Us—Executive Team, http://www.thecha.org/aboutus/executive_team.html (last visited Apr. 27, 2009). Since 1994, Renee Glover Lewis, another black woman, has served as the CEO of the Atlanta Housing Authority. See Atl. Hous. Auth., About Us—Our President and CEO, <http://www.atlantahousing.org/profile/index.cfm?fuseaction=ceo> (last visited Apr. 27, 2009).

210. See PATTILLO, *supra* note 194, at 118.

211. Antonio Olivo, *Downtown Chicago Tops Urban Living*, CHI. TRIB., Nov. 15, 2005, at 7 (explaining that Chicago’s downtown market leads the country in a widespread revival of residential urban centers); see also Audrey McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence, and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 8 (2006) (describing municipalities’ “quest for the upper-middle class resident”).

212. See Reed, *supra* note 16, at 12.

an undeniable part of the transformation of public housing communities.²¹³ Thus, it is more unclear than ever that there is a unified black presence in the inner-city.

This increasingly complex social stratification presents significant challenges for new governance theory's optimistic vision of collaborative stakeholder participation in social reform. New governance theory and praxis must sufficiently engage this social complexity in order to determine how best to balance traditional "hard law" and "soft law" approaches to produce beneficial outcomes for traditionally marginalized stakeholders. Sections C1 and C2 of this Part, examine two local goal-setting and decision-making processes in Chicago's HOPE VI reform experiment; namely, (1) the birth of the mixed-income norm in Chicago; and (2) the creation of site-based resident screening criteria at each redevelopment. Both processes reveal how race, class, and gender dynamics operated "on the ground" to obscure conflicting interests, to conceal distributive inequities and to undermine effective participation and collaboration. These examples show that empowered stakeholder collaboration can be easily undermined in increasingly informal, privatized and decentralized decision-making networks. These dynamics force new governance scholars to reconsider the role of "hard law" in local public-private stakeholder collaborations.

1. The Birth of the Mixed-Income Norm: Demographic Representation

The birth of the mixed-income norm illustrates these social tensions. The mixed-income approach to public housing reform coincided with the emergence of the black middlemen and middlewomen and the ascent of the public-private partnership. The mixed-income norm emerged from informal public-private stakeholder collaborations. It is, thus, an example of norm-generation in such collaborations. The emergence of the mixed-income norm reveals the limits of demographic representation and the problems of representative opportunism and acquiescence in stakeholder collaborations motivated by profit-making goals.

In 1988, Mayor Eugene Sawyer appointed Vincent Lane, a prominent member of the black middle-class as Executive Director of the CHA.²¹⁴ Lane continued as Executive Director under Mayor Richard M. Daley's administration, the son of former Mayor Richard J. Daley. Lane grew up in public housing, but he rose to prominence as a private real estate developer with experience in developing subsidized housing projects.²¹⁵ He was also a former member of one of Chicago's influential policy and planning non-profits, the Metropolitan Planning Council ("MPC"). Lane had an earnest commitment to public housing reform and he sought to improve CHA's tarnished reputation through programs that would improve the quality of life of public housing residents in Chicago.

Between 1988 and 1991, Lane lobbied HUD to provide financing for his

213. See *supra* text accompanying note 180.

214. See Smith, *supra* note 8, at 7.

215. See PATTILLO, *supra* note 194, at 230.

Mixed-Income New Communities Strategy (“MINCS”).²¹⁶ MINCS was a demonstration program with the goal to rehabilitate existing public housing units in two high rises into mixed-income communities and to acquire new units in low-density mixed-income areas.²¹⁷ These objectives reflected Lane’s belief, and a philosophy that was gaining currency amongst the black middle-class and other policymakers, that one of the major flaws in public housing was the intense concentration of poor residents in the developments.²¹⁸

This shift towards income de-concentration as the solution to public housing’s problems reflected black Professor William Julius Wilson’s sociological theories about the cultural and behavioral causes of urban poverty and social dysfunction.²¹⁹ Wilson is also a prominent member of the black middle class. In *The Truly Disadvantaged*, Wilson argued that one of the primary causes of poverty and social dysfunction in Chicago’s inner city was the exodus of the black middle- and working-class from the inner-city.²²⁰ This group’s departure allegedly increased the “social pathologies” of the urban underclass, due to a lack of alternative positive role-models.²²¹ The premise of the mixed-income objective is that poor people are more likely to improve their social condition and their behavior through exposure to higher income households. While this argument may have some validity, it is predicated on primarily cultural and behavioral explanations for social problems that are also partly structural and institutional. The mixed-income narrative privileges discourses of social dysfunction as the root cause of continued poverty.

This theory gained significant currency amongst housing and community development reformers and the growing black middle class, as it seemed to explain the notoriously problematic social dynamics in Chicago’s public housing developments. As such, Lane lobbied to include funding for the demonstration project in the National Affordable Housing Act of 1990.²²² Lane ultimately received funding from HUD for his demonstration project. Lake Parc Place (“Lake Parc”) was the pilot project for the program and it proved to be a success when completed in 1991.²²³ Higher income families were living next to public housing residents. “A survey of residents found that nearly 80 percent of all families were satisfied or very satisfied with the development.”²²⁴ Public housing

216. *See id.* at 239.

217. *See Smith, supra* note 2, at 99.

218. PATILLO, *supra* note 194, at 239.

219. *See Zhang & Weismann, supra* note 139, at 46.

220. *See PATILLO, supra* note 194, at 106.

221. *See id.* at 107.

222. *See Smith, supra* note 2, at 99.

223. *See id.*

224. *Id.* at 100.

residents appreciated the reductions in crime, amongst other benefits.²²⁵ Fewer public housing residents were displaced by the redevelopment at Lake Parc Place than in the ensuing “Plan for Transformation.” Half of the units at Lake Parc were reserved for low-income families and the other half were for moderate-income families.²²⁶ However, the income mix and unit configuration used in Lake Parc Place differed substantially from that used in Chicago’s Plan for Transformation. All residents in Lake Parc Place were renters and there were no market rate tenants.²²⁷

On the local level, however, the success of Lake Parc Place prompted a shift in approach to public housing reform in Chicago. Between 1991 and 1994, an informal but diverse network of prominent stakeholders convened to formulate a new city-wide strategy.²²⁸ The network consisted of “Alexander Polikoff, lead counsel for the *Gautreaux* plaintiffs; George Ranney, board member of the University of Chicago, the MacArthur Foundation, and the Metropolitan Planning Council; University of Chicago Vice President, Jonathan Kleinbard; and CHA executive director, Vincent Lane.”²²⁹ The group also included other prominent black policy reformers and developers such as Allison Davis, a well-known black developer,²³⁰ and Valerie Jarrett, an appointed commissioner of the City Department of Planning and Development and a member of a prominent black family in Chicago.²³¹

225. *Id.* But see Hendrickson, *supra* note 142, at 76 (explaining that moderate-income tenants at Lake Parc Place had a higher turnover rate than low-income tenants and that no study confirmed interaction between residents of different income classes).

226. “Half of the 282 apartments [at Lake Parc Place] [were] designated for, and . . . marketed to, families with one employed adult and earning between 50 and 80 percent of median income (between \$21,700 and \$34,700 for a family of four in 1992) The other 141 apartments were set aside for very low income tenants . . . earning less than 50 percent of the median income. Former residents [of public housing] had first call on these units.” James E Rosenbaum et al., *Lake Parc Place: A Study of Low Income Housing*, 9 HOUS. POL’Y DEBATE 703, 705-706 (1998).

227. *Id.*

228. See PATILLO, *supra* note 194, at 239-40.

229. *Id.*

230. Allison Davis is a powerful black real estate developer with close ties to City Hall. See Grotto et al., *supra* note 164, at 2. Davis grew up in Hyde Park and was educated at some of Chicago’s finest schools, including the Chicago Lab School, the Hyde Park High School and Northwestern Law School. See Tim Novack, *How City Hall Critic Became a Cozy Insider*, CHI. SUN. TIMES, Nov. 11, 2001, at A14, available at <http://www.suntimes.com/news/politics/644511,CST-NWS-davis11.article#>. He returned to Chicago in 1967 and began working at the Metropolitan Housing and Planning Council, a progressive planning agency. *Id.* He was also a member of the progressive Chicago Council of Lawyers and became a partner at a small, but powerful firm, Davis, Miner, Barnhill & Galland. *Id.* Davis switched from primarily litigation work to transactional work as a lawyer on community development projects in Chicago. Subsequently, he began to receive various local political appointments, first from Mayor Harold Washington, and then from Mayor Richard M. Daley, who appointed Davis to the Chicago Plan Commission. Allison Davis is now a major developer and property manager in Chicago’s Plan. Most recently, he has been criticized for his involvement in Chicago’s Plan for Transformation. *Id.*

231. See Jody Kantor, *The New Team: Valerie Jarrett*, N.Y. TIMES, Nov. 5, 2008, <http://www.nytimes.com/2008/11/06/us/politics/06jarrett.html>. Valerie Jarrett was Co-Chair of the Obama Transition Team. *Id.* She was also chosen by President Obama as a White House Senior Advisor and

Notably, this informal network included few, if any, tenant representatives and their meetings were not open to public review.²³² Yet, they did consist of some black middle- or upper-middle class professionals with social clout and technical knowledge about subsidized housing development. Such representatives were likely understood to be “working in the interests of the residents.”²³³ While many of these reformers might have had “the best interests of public housing residents in mind,” many may have also had conflicting interests and affiliations. The group devised extensive development plans for the area which focused on demolishing existing public housing to make way for new mixed-income communities.²³⁴ Lane did not serve long enough to spearhead his dream of local and national mixed-income reform. In May 1995, he was found guilty of mismanagement and the control of CHA was returned to HUD from 1995 to 1999.²³⁵

This saga reveals the shifting interplay of race and class in Chicago during this time. It also shows the retreat from formal law to achieve public housing reforms. It shows how class-stratification in the black community complicates the utility of demographic representation. Further, it demonstrates that some black middlemen and middlewomen do engage in representative opportunism in informal public-private stakeholder collaborations. Lane’s eventual ouster as Executive Director of the CHA for financial improprieties suggests that he was guilty of opportunism.²³⁶ Initially, when Lane was appointed Executive director of CHA, Lane was in favor of rehabilitating existing public housing units to expand, rather than to diminish housing opportunities for public housing residents.²³⁷ Yet, as time progressed, Lane became a staunch advocate for the mixed-income

Assistant to the President for Intergovernmental Relations and Public Liaison. *Id.* Ms. Jarrett has been a stalwart supporter and confidant of President Obama. *Id.* She is also an African-American of high social pedigree who has been well respected in local Chicago politics for decades. *Id.* Her great-grandfather was the first black person to graduate from M.I.T. *Id.* Her grandfather was the first black man to head the Chicago Housing Authority and her father was the first black resident at St. Lukes Hospital. *Id.* Prior to her involvement with the Obama Campaign, Ms. Jarrett served as Chief Executive of Chicago’s famous Habitat Company, a private real estate development company headquartered in Chicago that was the court appointed receiver for the CHAs scattered-site remedial program ordered under the *Gautreaux* consent decree. *See id.*; *see also* PATTILLO, *supra* note 194, at 240. While the Habitat Company has been criticized by some advocates for its management of some CHA projects, Valerie Jarrett has not been accused of any mismanagement or self-dealing. *See Kantor, supra.* She is also a well-intentioned advocate of beneficial public housing reform. *See id.*

232. *See* PATTILLO, *supra* note 194, at 239.

233. *See id.* at 240 (noting that Jarrett explained that these working group members “came without portfolio, but wanted to be helpful”).

234. *See id.* at 241. Predominately white public housing reformers outside of Chicago also expressed enthusiasm and optimism regarding the mixed-income approach to public housing reform that was later enshrined in HOPE VI legislation.

235. *See* Bennett, *supra* note 11, at 7.

236. Vincent Lane’s resignation came after CHA personnel misappropriated \$15.3 million dollars of CHA Pension assets and \$4.3 million in health insurance payments. Millions of dollars were also mismanaged through fraudulent actions by outside vendors. *See* Smith, *supra* note 2, at 97 n.23.

237. *See* PATTILLO, *supra* note 194, at 236.

approach, even if it led to a significant reduction in the supply of housing for public housing residents.²³⁸ Lane's shift in position—favoring the demolition of public housing units versus rehabilitation—also shows the negative effects of profit-oriented public-private collaborations on even well-meaning, demographically aligned, representatives.

Lane's shift also evidences the power of narratives which justify reforms that privilege ruling-class interests. The mixed-income narrative framed reform through public-private partnerships as necessary for resident empowerment. Yet, Lane's vision for public housing reform also reflected the narratives of *social uplift*, *personal responsibility*, and *income de-concentration*, often invoked by the black middlemen and black middlewomen, as well as neoliberals and conservatives. Yet, these "middlemen" are not necessarily disinterested or unbiased actors in urban reform.²³⁹ As Pattillo explains, their fate is both distinct from, but linked to, that of poorer black public housing residents.²⁴⁰ The black middlemen and middlewomen benefited from urban revitalization programs in monetary and non-monetary ways.²⁴¹ This reality increases the possibility of such actors exercising representative or managerial opportunism, as agents of public housing residents' interests.

The story of the birth of the mixed-income approach also shows institutional and organizational acquiescence. While the "concentration effect" premise of mixed-income reform has some validity as a sociological theory, the mixed-income mantra became a hegemonic narrative in urban reform that shielded Chicago's Plan from otherwise rational critiques.²⁴² The pursuit of the mixed-income objective in Chicago shifted the focus of implementation strategies away from the needs and desires articulated by public housing residents towards what was considered necessary to appease private investors and to attract working and upper-middle class buyers. Institutional actors participating in the Plan for Transformation, such as the CHA itself, local policy and planning non-profits such as the Metropolitan Planning Council ("MPC"), non-profit legal institutions such as Business and Professional People for the Public Interest (BPI), and private developers such as the Habitat Company, all began to construct a

238. *Id.*

239. *See id.* at 122.

240. *See id.* (describing "linked fate").

241. Given his experience as a developer, Allison Davis plays a significant role in Chicago's Plan. Davis is the primary developer for Stateway Gardens, a once infamous Chicago public housing development that is being redeveloped as a mixed-income community called Park Boulevard. *See Grotto et al., supra* note 164, at 2.

242. I remember my own experiences as a black middlewoman in Chicago litigating a case against CHA regarding aspects of Chicago's Plan. It became difficult to even articulate in public discourse, particularly in black middle class circles, a rational critique of the Plan's implementation. Most contrary arguments and evidence were constructed as an effort to derail progress for public housing residents themselves. Notably, the only arguments that resonated with the black middle class stewards were arguments that CHA's failed relocation plan directed displaced residents to predominately black working and middle-class neighborhoods, thereby destabilizing such neighborhoods.

narrative about mixed income reform that shielded the approach from significant critiques.²⁴³

One example the privileging of private interests is the reduction of public housing units proposed under Chicago's Plan. From its inception Chicago's Plan was designed to reduce the total number of public housing units in the City of Chicago from about 38,000 to 25,000.²⁴⁴ Arguably, the mixed-income objective could have been achieved even if 38,000 public housing units were dispersed throughout all the new mixed-income developments. But both insufficient HOPE VI funding and a desire to reduce the total public housing stock in the city were factors that likely led CHA to reduce the total number of units rebuilt under the Plan.

Further, demolition outpaced redevelopment and the Plan is significantly behind schedule. Initially, CHA predicted that 25,000 new or rehabilitated public housing units would be completed by fiscal year ("FY") 2009.²⁴⁵ In FY 2007, the CHA completed approximately 64.8% (16,202 units) of its 25,000 unit goal.²⁴⁶ CHA projected that it would complete another 1,008 units by the end of FY2008 representing approximately 68.8% of the total goal.²⁴⁷ A recent Chicago Tribune investigation found that almost nine years into the projected 10 year program only 30 percent of the mixed-income redevelopments have been rebuilt.²⁴⁸ While CHA predicted that the Plan would be completed by 2015, some insiders now project that the Plan may not be completed until 2025, due in large measure to the recent downturn in the housing market.²⁴⁹ The disconnect between the pace of demolition and the pace of rebuilding suggests that it was more important to clear the inner-city landscape of the notorious and formerly blighted high-rises, and pave the way for a re-definition of the inner-city, than to assure that former residents could return to the new developments.

The evolution and implementation of the mixed-income policy reveals that it did not emerge from the "bottom up". Mixed-income was not necessarily a solution to public housing woes articulated by public housing residents. In fact,

243. See, e.g., Kim Grimshaw Bolton, Response to Public Housing Limbo 7/6/2008 (July 17, 2008), <http://www.metroplanning.org/articleDetail.asp?objectID=4456> (Metropolitan Planning Council responding to the Chicago Tribune's recent criticism of the Plan and arguing that at the outset of the Plan a group of civic organizations pledged to promote the Plan's success); Levin, *supra* note 176 (arguing that a recent spate of Chicago Tribune articles inaccurately describes the progress of Chicago's Plan and its scattered site housing program); Business and Professional People for the Public Interest, BPI Public Housing, <http://www.bpichicago.org/ph.php> (last visited Apr. 27, 2009) (describing its support and stewardship of the Plan).

244. See Smith, *supra* note 8, at 93.

245. See CHI. HOUS. AUTH., *supra* note 4, at 2.

246. Sharon Gist Gilliam, *Message From the Former CEO, in FY 2008 MOVING TO WORK ANNUAL PLAN, PLAN TRANSFORMATION YEAR 9*, at 1, 1 (CHI. HOUS. AUTH. ed., 2007), available at http://www.thecha.org/transformplan/files/1_Cover_030108.pdf.

247. *Id.*

248. See Grotto et al., *supra* note 164, at 1.

249. See *id.*

the Central Advisory Council (“CAC”), a representative body composed of elected tenant representatives from each Chicago public housing development, alleged that it was not included in the initial goal-setting and development of the Plan. Rather, the CAC was only asked to vote to approve the Plan after it was fully developed by CHA.²⁵⁰ Mixed-income, as the normative goal of HOPE VI reform, was a concept initially brokered and implemented by “black middlemen” representatives. It later came to be a central objective of national public housing reform. Mixed-income was lauded by both black and white local and national low-income housing reformers, as a solution to many of the long-standing problems of public housing reform that seemed incapable of resolution. Yet, the normative objective did not emerge from public housing residents themselves as a solution to their woes. Rather, it was a “top down” formulation, with the cloak of legitimacy, in part, because of the “black middlemen” and “black middlewomen” institutional representatives who were thought to represent the interests of the overwhelmingly low-income black female population of public housing residents.

While some residents have clearly benefited from mixed income reforms, the mixed-income norm operates to reduce the available housing stock for former public housing residents.²⁵¹ The increasing presence of upper-middle class whites and blacks in former public housing neighborhoods near Chicago’s downtown core is also changing the racial, ethnic, and socio-economic character of those places.²⁵² Mixed-income in Chicago, thus, contributes to the gentrification of former public housing neighborhoods and to the displacement of, rather than the empowerment of many former residents.²⁵³ As such, informal local public-private decision-making collaborations can subordinate residents’ voices and needs.

2. Site-Based Resident Screening Criteria: Representative Opportunism and Acquiescence

In contrast to the birth of the mixed-income norm, public housing residents and

250. See Smith, *supra* note 2, at 116 (“As one CAC member said, from the beginning we should have been there at the table.”) (citations omitted).

251. “In the first three quarters of FY2007, there was a 12.86% decrease in the total number of units available for occupancy in the CHA’s housing stock, given that units were taken offline for revitalization or demolition activity. This decrease resulted in a fewer number of occupied units, as well as a fewer number of residents.” See CHI. HOUS. AUTH., MOVING TO WORK FY2007 ANNUAL REPORT, app. at 144 (2008), available at <http://www.thecha.org/transformplan/reports.html>; see also NAT’L HOUS. LAW PROJECT, FALSE HOPE, *supra* note 8, at 7 (noting that through HOPE VI and related redevelopment activities “the country is facing a net loss of 107,000 public housing units through demolition”).

252. “The changes in the racial and ethnic make up of residents in family housing consisted primarily of an increase in the number of White, Native/Alaskan, Asian/Pacific Islander, and Hispanic residents. There was a 7.49% decrease in the number of Black residents.” See CHI. HOUS. AUTH., *supra* note 251, at 144.

253. See Glasheen & Pealer, *supra* note 134, at 106 (finding that Chicago’s Plan sparked most of the nearly \$1.6 billion in real estate transactions in the surrounding area since the plan began in 2000).

their elected representatives were undeniably involved in the public-private networks that developed site-based resident selection criteria. As previously explained, Chicago's redevelopments are mixed-income, containing units reserved for very low-income, low to moderate-income residents, and market-rate residents. Prospective *homeowners* in the new mixed-income developments are subject to virtually no rules or regulations, largely to entice market-rate homeowners to buy into Chicago's mixed-income redevelopments. However, all prospective and returning *renters* in Chicago's new mixed-income redevelopments must meet certain tenant screening and eligibility criteria.²⁵⁴ Public housing residents are primarily returning renters at each mixed-income redevelopment.

In order to qualify for occupancy in the new mixed-income redevelopments, all prospective and returning renters must meet two separate sets of criteria: the requirements of the Minimum Tenant Selection Plan (MTSP) devised by CHA, as well as the local and site-based resident screening criteria are established by private developers at each redevelopment site.²⁵⁵ In general, site-based criteria are "simply standards, rules or tests that property managers use to assess any resident (public housing, affordable or market rate) interested in moving into the new development".²⁵⁶ As CHA further explains, "[t]hese criteria often include credit history, criminal background checks, drug testing, housekeeping or home visits, and an evaluation of a resident's employment or self-sufficiency record."²⁵⁷

The CHA devises the MTSP and its criteria apply to all of the redevelopments in the Plan for Transformation.²⁵⁸ MTSP includes minimum hours of employment, credit history and financial standing requirements, residential history, criminal background checks, and mandatory school attendance for all young children in the household.²⁵⁹ CHA cited the MTW program and the associated Relocation Rights Contract (RRC) as sources of authority for the development of a work requirement as part of the MTSP.²⁶⁰ Each private developer of a

254. See Wilen & Nayak, *Work Requirements*, *supra* note 156, at 232 n.29 (explaining that CHA's Minimum Tenant Selection Plan (MTSP) issued on September 21, 2004 specified that all renters whether market rate, low-income or very low-income had to meet the MTSP, but homeowners who tend to be market rate are not subject to such criteria).

255. *Id.*

256. See Chi. Hous. Auth., Understanding Residency Requirements, http://www.thecha.org/relocation/residency_requirements.html (last visited Apr. 27, 2009).

257. *Id.*

258. See Chi. Hous. Auth., Minimum Tenant Selection Plan For Mixed-Income/Mixed Finance Communities, http://www.thecha.org/transformplan/files/Document_E_010208.pdf (last visited Apr. 27, 2009).

259. *Id.*

260. See Wilen & Nayak, *Work Requirements*, *supra* note 156, at 220-221. As a condition of its MTW grant, however, CHA had to execute a legally enforceable Relocation Rights Contract with all families residing in CHA housing as of October 1, 1999. *Id.* at 218. This contract provides all residents in public housing on or after October 1, 1999 a legally enforceable right to return to the redevelopments upon completion; yet residents must also meet the MTSP and site-based criteria. *Id.* at 220.

mixed-income public housing redevelopment must adopt the MTSP prior to closing on the financing for the new developments.²⁶¹ CHA mandates that the MTSP should be equally applied to all applicants and that the developer must comply with all federal, state and local civil rights laws when applying the criteria.²⁶² Although CHA has always had admission and occupancy requirements for public housing residents, the site-based Tenant Selection Plans (“TSP”) contain standards developed by private owners and developers at each site. Thus, the site-based TSPs are different at each of Chicago’s multiple mixed-income redevelopments.

CHA residents generally participate in the determination of the TSP through their Local Advisory Council (“LAC”) representatives.²⁶³ LAC members are public housing resident representatives elected by residents at each development every three years. Each LAC president is then given a seat on CHA’s Central Advisory Council (CAC), which makes implementation recommendations to CHA.²⁶⁴ The LAC representatives participate in the local public-private decision-making networks that devise the TSPs at each mixed-income development. Once the draft version of the site-based TSP is developed, the CHA hosts a public comment hearing and conducts a 30 day public comment period. Subsequently, the policies and the comments are submitted to the CHA Board for approval. Thus, the TSPs are a form of self-regulation generated through public-private collaborations. While there is some public oversight of the process of generating site-based criteria,²⁶⁵ the criteria are not published and best practices that empower residents are rarely identified.

Initial studies of site-based criteria at various Chicago redevelopments reveal that some TSPs are draconian or at least may include criteria that will be very difficult for public housing residents to meet.²⁶⁶ Some TSPs give property managers the ability to reject families that have declared bankruptcies more than two years prior to applying.²⁶⁷ Other sites preclude a resident from returning if they have any debt delinquency greater than \$1,000 dollars.²⁶⁸ At some sites, any

261. See Chi. Hous. Auth., *supra* note 258, at 1.

262. See *id.*

263. See Chi. Hous. Auth., *supra* note 251, at 10-11.

264. See Patricia A. Wright, *Community Resistance to the Plan For Transformation: The History, Evolution, Struggles and Accomplishments of the Coalition to Protect Public Housing*, in *WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES*, *supra* note 2, at 125, 131.

265. According to CHA a *working group* is established that consists of public housing resident leaders, the developer, CHA staff, community partners, the Habitat Company, the City of Chicago and *Gautreaux* Plaintiff’s Counsel. The working group consults with the developer to select a master developer. A Master Development Agreement is created that must be approved by HUD and other officials. The master developer is supposed to work in consultation with the working group to develop a site-based Tenant Selection Plan (TSP). See Chi. Hous. Auth., *supra* note 251, at 10-11.

266. See Raj Nayak & William Wilen, *Relocated Public Housing Residents Face Little Hope of Return: Work Requirements for Mixed-Income Public Housing Developments*, 38 CLEARINGHOUSE REV. 515, 521 (2004).

267. See *id.* at 520-22.

268. See *id.*

debt over 90 days past due could prevent an applicant from meeting the screening requirements.²⁶⁹ Some tenant plans look at criminal history indefinitely with regards to certain crimes.²⁷⁰ Some tenant plans are silent as to whether a conviction or merely an arrest is required to reject applicants.²⁷¹

If returning residents cannot meet the site-based criteria, then they are precluded from actually returning to the new developments, despite their formal right to return under the RRC.²⁷² Families covered by the RRC are given one year within which they can “work to meet” the criteria.²⁷³ They must receive social services or engage in activities that will help them meet the criteria within one year, but if they fail to successfully meet the criteria within one year they cannot return to the redevelopments. While some residents themselves may want strict tenant selection requirements,²⁷⁴ many of the tenant selection criteria such as credit histories, work records, and resident self-sufficiency records are likely required to appease low-income housing tax credit investors and prospective market rate home owners.

As discussed *infra* in Part III, the redevelopment processes at a few mixed-income developments were judicially supervised via consent decrees. Residents at those sites developed less stringent criteria. Representative opportunism and acquiescence may explain, in part, why stakeholder collaborations free of judicial supervision developed TSPs that may prevent former public housing residents from returning to the redevelopments. Chicago’s long history of patronage politics can affect representation.²⁷⁵ Some residents argue that LAC representatives are often closely aligned with CHA.²⁷⁶ For example, since LACs were created in 1966 only one LAC has ever sued CHA and that was the LAC at

269. *See id.*

270. *See id.*

271. *See id.*

272. *See id.*

273. *See* Chi. Hous. Auth., *supra* note 258, at 1.

274. Residents, rightfully so, may favor strict criminal background checks given the history of crime in public housing. *See* Kimberly E. O’Leary, *Dialogue, Perspective and Point of View As Lawyering Method, A New Approach to Evaluating Anti-Crime Measures in Subsidized Housing*, 49 WASH. U. J. URB. & CONTEMP. L. 133, 142 (1996) (explaining that in Chicago “5,000 public housing residents signed a statement in favor of warrantless searches of their apartments for weapons”). Yet, some argue that even public housing residents seek tempered crime control measures that “will not hurt their children and their communities.” *See* Tracey L. Meares & Dan Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. L. FORUM. 197, 213 (describing the responses of African-American residents living in Chicago’s high crime neighborhoods to Chicago’s gang loitering ordinance). However, residents may be less concerned about past due debts and other financial related criteria.

275. *See generally* Maureen A. Flanagan, *Politics*, in ELECTRONIC ENCYCLOPEDIA OF CHICAGO, <http://www.encyclopedia.chicagohistory.org/pages/989.html> (last visited Apr. 27, 2009) (describing Chicago’s long and notorious history of patronage politics).

276. Feldman & Stall, *supra* note 127, at 119; *see also*, William P. Wilen, *The Horner Model: Successfully Redeveloping Public Housing*, 1 NW J. L. & SOC. POL’Y 62, 84, available at <http://www.law.northwestern.edu/journals/njls/v1/n1/3/> (2006) (noting that many public advocates over the years have noticed how the LAC leadership is closely aligned with the CHA).

Cabrini-Green.²⁷⁷ Some residents complain that LACs lack real authority and are rubber stamping machines.²⁷⁸ City jobs for CHA residents are often filtered through the LAC.²⁷⁹ The LAC can help to get needed repairs in units among other benefits.²⁸⁰ Since LACs administer the resources given to them by the CHA, LAC representatives have distinct incentives to align their interests with CHA, the black middlemen and middlewomen, and other members of the public housing reform network. The lack of public oversight or judicial enforcement creates significant opportunities for resident representatives to act opportunistically.

Further, acquiescence is a greater danger. Black women public housing residents have long struggled against negative stereotypes that construct them as undeserving of the public subsidies designed to support them. As Roberta M. Feldman and Susan Stall illustrated in the book, *The Dignity of Resistance: Women Residents' Activism in Chicago Public Housing*, black women public housing residents in Chicago have long resisted such constructions through activism and participation in public housing struggles.²⁸¹ Yet, even as black women resist such narratives, public housing reform as new governance presents new challenges for such women.

The shift from 1960s and 1970s style protest reform towards collaborative stakeholder governance in urban revitalization has forced many working-class and poor blacks to increasingly articulate their needs in the discourse of "social uplift" and economic empowerment, frequently invoked by reformers and the black middle class.²⁸² As sociologists explain, these dynamics cause ambivalence amongst public housing residents regarding the new revitalization initiatives that are purported to be for their benefit.²⁸³ In order to gain personal legitimacy, poor people's representatives may be reluctant to suggest or to support criteria that other private actors in the network view with hostility. Such dynamics create incentives for public housing residents to articulate their needs in terms that resonate with those of other institutional actors in the network in order to receive funding, support, jobs, and attention to the problems of their neighborhoods. Thus, poor tenant or non-profit board representatives may unwittingly acquiesce in decisions designed to ultimately benefit elites. These power dynamics of race, class and gender pose a challenge for public housing reform predicated on

277. See *Cabrini Green Local Advisory Council v. Chi. Hous. Auth.*, No. 96 C 6949, 1997 U.S. Dist. LEXIS 625 (N.D. Ill. Jan. 21, 1997).

278. Wright, *supra* note 264, at 131.

279. See Larry Bennett et. al., *A Critical Analysis of the ABLA Redevelopment Plan*, in *WHERE ARE THE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES*, *supra* note 2, at 185, 201 (explaining that many residents at one development feel personally obligated to their LAC representative for apartments and jobs).

280. *See id.*

281. See Feldman & Stall, *supra* note 127, at 6.

282. See PATTILLO, *supra* note 194, at 109.

283. *Id.*

informal representative networks.

Second, as public housing reform becomes increasingly professionalized, black female tenant representatives must increasingly evaluate proposals from for-profit and non-profit affordable housing developers, and meet with public housing authority officers, non-profit and for-profit executives, and other service providers. While many tenant activists are quite savvy, many need technical assistance to increase their capacity to understand the myriad legal, accounting, and business issues that public housing reform now entails.²⁸⁴ In the absence of funding for technical assistance, residents may concede to the will of the majority, due to information asymmetries and other barriers to informed decision making. Even savvy tenant representatives may be unable to present alternative accountable development solutions in the absence of technical assistance.

Without proper assistance and public law supports, it may be difficult for residents to participate as co-equals with other stakeholders in public-private collaborations. Thus, public housing residents may not, in fact, “meaningfully participate” in the local decision-making networks that implement HOPE VI, in the absence of a public law consent decree or rights based-framework. These realities may belie new governance scholars’ assertions that participation is best facilitated by primarily informal collaborative networks.

III. ACCOUNTABLE DEVELOPMENT IN CHICAGO’S PUBLIC HOUSING REFORM PLAN

Two of Chicago’s HOPE VI redevelopments, Henry Horner Homes (“Horner”) and Cabrini-Green (“Cabrini”), were governed by different redevelopment processes. The struggles to reform Horner and Cabrini began before extensive deregulation of public housing redevelopment and before the nadir of the mixed-income norm and the public-private partnership. Consent decrees obtained to resolve litigation brought before Chicago’s Plan was enacted required that the public-private decision-making collaborations at Horner and Cabrini follow more formal rules, specifically designed to protect the residents’ interests. A broader coalition of residents also participated in the development of the Horner and Cabrini redevelopment Plans. While the LAC representatives were part of the process, a broader working group, including other residents, Plaintiffs’ counsel, CHA administrators, city officials, amongst others, participated in the

284. For example, many of Chicago’s mixed-income developments are financed with equity capital obtained through the Low Income Housing Tax Credit (“LIHTC”). Understanding the complex regulatory structure of the LIHTC and the complex syndication process it entails is complicated for even the average lawyer or law student. To competently participate in decision-making, residents must navigate this complex system of rules. This shifts their focus from alternative accountable development solutions toward understanding the technical complexities of the redevelopment process. *See generally* Randy Stoecker, *The CDC Model of Urban Redevelopment: A Critique and an Alternative*, 19 J. OF URB. AFF. 1, 9 (1997) (explaining that “[w]hen organizations led by the lower classes shift from advocacy to service, they move from internal to external dependency which includes dependency on staff and imposed leadership”) (citation omitted).

decision-making surrounding the redevelopment of Horner and Cabrini. Thus, the local decision-making was not solely in the hands of LAC representatives, black middlemen and middlewomen representatives, or CHA administrators.²⁸⁵

The stories that follow reveal that the Horner and Cabrini redevelopment processes are examples of accountable development. Accountable development is defined as a movement that seeks “to change city redevelopment practices through more confrontational grassroots campaigns aimed at increasing community participation in the planning process and forcing local developers and governmental officials to commit to redevelopment projects that are responsive to the needs of low-income residents.”²⁸⁶ The Horner and Cabrini redevelopment processes, respectively, are both examples of grassroots organizing that led to class action litigation to assert public housing residents’ rights to participate in redevelopment. While the lawsuits are examples of the traditional public-impact litigation criticized by new governance scholars, the remedial process contained both traditional “hard law” and “soft law” new governance elements. In fact, each story demonstrates that residents were able to more effectively and meaningfully participate in the public-private decision-making collaborations because of the existence of more traditional public law protections. These examples suggest that public law elements may be necessary for marginalized stakeholders to effectively participate in new governance’s public-private stakeholder collaborations.

A. Henry Horner Homes

Power struggles over the redevelopment of Henry Horner Homes began as early as 1988, when Vincent Lane was appointed head of the CHA, and long before CHA unveiled its Plan for Transformation.²⁸⁷ Horner was one of CHA’s

285. CHA now lists “working groups” as one of the key elements to enhance resident participation in the rehabilitation process. See CHI. HOUS. AUTH., *supra* note 251, at 10. However, some advocates and residents allege that the working groups at other redevelopments only consist of one or two resident representatives. Apparently, no lawyers are involved. Advocates assert that CHA or other public officials are usually the ultimate decision-makers in such groups. See Wilen, *supra* note 276, at 92.

286. Scott Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, 17 J. AFF. HOUS. & COMM. DEV. L. 59, 59 (2007) (defining the term “accountable development”); see also Shelia Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2003 (2007) (discussing “the emergence of an ‘accountable development’ strand of activism within the CED movement.”); Nona Liegeois & Malcolm Carson, *Accountable Development: Maximizing Community Benefits from Publicly Supported Development*, 37 CLEARINGHOUSE REV. 174, 176 (2003), available at <http://www.lafla.org/pdf/accountDevel.pdf>. Advocates have also coined a related concept called “equitable development.” See Angela Glover Blackwell, *It Takes a Region*, 31 FORDHAM URB. L. J. 1303, 1316 (2004) (defining “equitable development” as an approach to development that is “grounded in community building and participation; it embraces complexity and comprehensiveness and promotes inclusion through new strategies and policies”).

287. Bennett et al., *Introduction*, *supra* note 11, at 7-8.

most notorious public housing developments.²⁸⁸ In 1991, CHA claimed that Horner was CHA's "most troubled development" and "one of the most distressed public housing properties in the nation."²⁸⁹ The substantially deteriorated conditions at Horner led public housing residents to file suit. In 1991, a class of plaintiffs consisting of a non-profit organization at Horner called Henry Horner Mothers Guild, current tenants at the Horner development, and prospective applicants for the Horner developments, filed a lawsuit entitled *Henry Horner Mothers Guild v. Chicago Housing Authority*.²⁹⁰ The suit alleged that, due to the deteriorating conditions at Horner, CHA and HUD had effectively demolished the Horner developments in violation of Section 1437 of the United States Housing Act of 1937, 42 U.S.C. § 1437 (2000), by failing to maintain the buildings.²⁹¹ In 1995, the Plaintiffs reached agreement on the terms of a consent decree (the "Horner Decree").²⁹² Thus, the HOPE VI redevelopment process at Horner, now called West Haven Park, was governed by a consent decree which required greater participation of residents in interim decision-making than other sites in Chicago's Plan.²⁹³

Specifically, the Horner Decree mandated the creation of a working group called the Horner Residents' Committee (HRC). The HRC consisted of seven elected building, block or area representatives as well as class counsel for the *Horner* plaintiffs.²⁹⁴ The Horner Decree required CHA, the private developer for the Horner redevelopment, as well as the Horner Managing agent to reach agreement with the HRC on all matters pertaining to the Horner redevelopment.²⁹⁵ If agreement could not be reached, then the court or a court appointed mediator could work to resolve the dispute.²⁹⁶

With respect to the site-based resident screening criteria, the HRC and other residents were a critical part of developing the Horner criteria. The criteria were listed in the Horner Decree. Initially, residents at Horner only had to meet five criteria: (1) the family must not voluntarily vacate their unit; (2) the family must not be evicted pursuant to a court order; (3) the leaseholder must not be convicted of any felony involving physical violence or crimes against property that adversely affect the health, safety, or welfare of other persons, or the misdemeanors of aggravated assault, unlawful use of a weapon, battery or criminal damage

288. Alex Kotlowitz's famous book, "There Are No Children Here," followed the lives of two young boys living in Henry Horner. Henry Horner homes figured in the book as a dilapidated development at the center of crime, drugs, violence and despair. See Alex Kotlowitz, *THERE ARE NO CHILDREN HERE* (1991).

289. See Wilen, *supra* note 276, at 68.

290. Complaint, *Henry Horner Mothers Guild v. Chi. Hous. Auth.*, No. 91 C 3116 (N.D. Ill. May 30, 1991); see also Wilen, *supra* note 276, at 68 n.24.

291. See Wilen, *supra* note 276, at 68 n 23.

292. Consent Decree, *Henry Horner Mothers Guild v. Chi. Hous. Auth.*, No. 91 C 3116, 5 (N.D. Ill. March 10, 1995).

293. See Wilen, *supra* note 276, at 69.

294. Wilen & Nayak, *supra* note 156, at 225.

295. Wilen, *supra* note 276, at 85.

296. *Id.*

to property; (4) any household member must not be convicted of the above felonies or misdemeanors unless the leaseholder agrees to exclude the convicted household member from the household; and (5) the family must not refuse to participate “in a family needs assessment” to determine the family’s needs.²⁹⁷ Under the decree, CHA also agreed not to implement a “work requirement” to screen out potential residents.²⁹⁸ Unsuccessful families were also allowed to appeal their rejections to a unique grievance panel.²⁹⁹

In 1997, Horner Residents agreed to additional resident screening criteria such as poor housekeeping and failure to attend a replacement housing orientation.³⁰⁰ Then in 2002, since the mixed-income developments receive equity capital through Low Income Housing Tax Credit (LIHTC), additional criteria were added such as: grounds to seek a deferral if household income exceeded applicable tax credit limits; or if admission would violate otherwise applicable restrictions under the various funding mechanisms used to finance Phase II of the redevelopment.³⁰¹

Although the *Horner* plaintiffs did have to amend their criteria to respond to private interests, the redevelopment process at Horner allowed more public housing residents to participate in the goal-setting and decision-making aspects of redevelopment, than at other sites.³⁰² “The residents were intimately involved in the design process, by reviewing and approving the designs of the buildings.”³⁰³ As William Wilen explains, “[a]t the Horner Annex, the architects met every week with the residents during the rehabilitation process, and adopted many resident suggestions concerning the design of the units, the size of the rooms, the configuration of the apartment, and the location of laundry room hook-ups.”

For over ten years, the seven members of the Horner Residents Committee (HRC) met on a monthly basis and at “special call” meetings as necessary, and monthly, with other Horner tenant leaders, to determine the position of the HRC on the various redevelopment matters. The positions taken by the HRC were determined based on the observations and experiences of the HRC members themselves, by input they received from Horner residents, and by information provided to them from their counsel and the HRC’s consultants, a city planner and a structural engineer.

As Wilen further elaborates,

297. *Id.* at 83 n.68.

298. *Id.*

299. *Id.*

300. *Id.* at 84.

301. *Id.*

302. *Id.* at 77 (explaining that in November 2003 the U.S. Government Accountability Office studied resident issues in 20 public housing redevelopments under HOPE VI and found that Horner Phase I had the “highest level of resident participation in the redevelopment process”).

303. *Id.* at 76.

... [o]ccasionally the *Horner* court, or, under the Phase II order, the Horner Mediator, John Schmidt, would ultimately have to resolve the issue when the HRC and defendants could not reach agreement. But for the most part, the redevelopment proceeded under the watchful eye of the HRC and through the process of the HRC reaching agreement with CHA, the developer and Horner management.³⁰⁴

Thus, the threat of judicial intervention forced the developers and other stakeholders to acknowledge and to incorporate the views of the residents. A broader group of residents than merely the LAC representatives were also included in the periodic decision-making regarding the redevelopment.

Individual families were also given legal redress. Families who applied to the Horner rental units and received a rejection could appeal their rejections to a unique grievance panel that consisted of representatives selected by both the HRC and management.³⁰⁵ Other redevelopments in Chicago's Plan did not have such redress. Under the general MTSP grievance policy which applied to all Chicago redevelopments under the Plan, only Chicago's administrative hearing officers reviewed such decisions.³⁰⁶

While the Horner redevelopment process emerged out of explicit conflict and litigation, both real estate professionals and poverty law advocates have identified the West Haven Park redevelopment as a model for public-private collaboration.³⁰⁷ Additionally, because over half of the residents at West Haven Park are former Horner residents, the private developers work with non-profit and private case managers, job training centers, and housing placement counselors to provide needed services to the residents.³⁰⁸ Lastly, fewer residents were displaced as a result of the redevelopment because the federal one for one replacement rule was still in place when the Horner Decree was negotiated, and the Horner Decree contained measures to better align the demolition of old units with the construction of new units. The Horner example demonstrates that some traditional public law elements enabled residents to participate in a manner that better distributed the benefits of redevelopment amongst all parties than the

304. *Id.* at 77.

305. Wilen & Nayak, *supra* note 156, at 227.

306. *Id.*

307. The Chicago regional office of the Local Initiatives Support Corporation identified the West Haven Park Redevelopment as the Outstanding For-Profit Neighborhood Real Estate Project of 2005. See Jeanette Almada, *Westhaven Park Developer Honored for Rental Project*, CHI. TRIB., Mar. 13, 2005, §16A, at 2. The award description notes that the for-profit developer "worked endlessly with all stakeholders—resident groups, the CHA, two aldermen, the plaintiff's counsel and neighborhood leaders—to shepherd this phase of development to completion. The results are superior." Chicago Neighborhood Development Awards, 2005 Outstanding For-Profit Neighborhood Real Estate Project, <http://www.lisc-cnda.org/display.aspx?pointer=3660> (last visited Apr. 27, 2009). In August 2005, *Multifamily Executive* magazine also awarded West Haven Park the "Grand" Project of the Year in the Mixed Income Category. See Wilen, *supra* note 276, at 76 (citing Rachel Z. Azoff, 2005 *Multifamily Executive Award Winners*, MULTIFAMILY EXECUTIVE, Nov. 15, 2005, at 50).

308. See Wilen, *supra* note 276, at 75-76.

participation of residents at other sites.

B. Cabrini-Green

The Cabrini redevelopment process also demonstrates the benefits of public law elements in stakeholder collaborations. Cabrini-Green was also known as one of Chicago's worst public housing developments.³⁰⁹ Unlike many of CHA's other public housing developments, Cabrini-Green is located at the intersection of two of Chicago's most affluent neighborhoods, the Gold Coast and Lincoln Park.³¹⁰ Thus, as early as the 1970s, City planners identified Cabrini-Green as a candidate for redevelopment.³¹¹ Yet, Cabrini-Green's revitalization was not a reality until 1993, when Vincent Lane, then head of CHA, worked with the Cabrini-Green LAC to develop a revitalization plan for Cabrini-Green that would empower residents.³¹²

As a result of its activism, the Cabrini-Green LAC did participate in the goal-setting aspects of the original plan. The revitalization plan became part of Lane's application to HUD for an initial HOPE VI grant to revitalize a few of Chicago's most distressed public housing residences. HUD granted CHA \$50 million dollars for the revitalization effort.³¹³ CHA was also required to sign a Memorandum of Agreement ("MOA") with the Cabrini-Green LAC, which gave the Cabrini-Green LAC an explicit right to participate in the redevelopment process.³¹⁴ Yet, Lane was ousted in 1995 before the original plan could be implemented.

Later in 1995, when HUD temporarily took control of the CHA, HUD, the City, CHA and other reformers met to develop the Near North Revitalization Plan which included plans for the redevelopment of Cabrini-Green.³¹⁵ Yet, the CHA, under the control of HUD, prevented members of the Cabrini-Green LAC from attending the private planning meetings for the new Near North Redevelopment Plan, despite the LAC's repeated requests.³¹⁶ In response, on October 24, 1996, the Cabrini-Green LAC sued CHA under the Fair Housing Act, Title VI, and the participation provisions of the U.S. Housing Act of 1937, among other state

309. In 1992, a young 7 year old boy was shot down by gang fire while walking with his mother from the development to the Jenner Elementary School across the street. See Don Terry, *Even a Grade School is No Refuge from Gun Fire*, N.Y. TIMES, Oct. 17, 1992, at 16.

310. Many of Chicago's other public housing developments were extremely isolated from other viable housing in the city. The Cabrini-Green site has always been close to Chicago's downtown core and its most affluent neighborhoods. See Patricia A. Wright et al., *The Case of Cabrini-Green, in WHERE ARE POOR PEOPLE TO LIVE?: TRANSFORMING PUBLIC HOUSING COMMUNITIES*, supra note 2, at 168.

311. In 1973, Cabrini-Green was targeted for redevelopment in the "Chicago 21 Plan". The city and a group of downtown developers sought to revitalize Chicago's downtown area. See *id.*

312. See *id.* at 170.

313. See *id.* at 171.

314. See *id.*

315. See *id.*

316. See *id.*

claims.³¹⁷ Specifically, the suit alleged that the redevelopment plans would adversely affect African-American women because they are disproportionately eligible for public housing, and it asserted that the Cabrini-Green LAC was injured because it was denied participation in the planning process, as required by the U.S. Housing Act, initial HOPE VI legislation and the MOA signed with the Cabrini-LAC.³¹⁸

After two years of negotiation, the parties settled and put in place a consent decree (the “Cabrini Decree”).³¹⁹ The decree provided for the Cabrini-Green LAC to be a partner in the development and gave the Cabrini-Green LAC a 51% ownership stake in the general partnership that would own part of Cabrini’s redevelopment.³²⁰ The requests for proposal (“RFP”) for redevelopment gave extra points to developers who maximized the Cabrini-Green LAC’s participation.³²¹ CHA was also required to form a “working group” consisting of the Cabrini-Green LAC, a community representative, CHA, the City, *Gautreaux* counsel, and the receiver, the Habitat Company.³²²

During 2001, the Cabrini LAC worked with CHA to create a lottery that would give first preference to original families displaced from Cabrini. The CHA signed an additional MOA with the Cabrini LAC.³²³ The additional MOA enabled the residents to issue their own RFPs with the \$400,000 dollars they received under the Cabrini Decree in order to hire technical assistance consultants to guide the Cabrini-LAC through the redevelopment process.³²⁴ In 2004, the Cabrini-Green tenants formed their own real estate development entity called “Cabrini-Green New Beginnings.”³²⁵ The resident owned entity hired real-estate development consultants from the Nathalie P. Voorhees Center for Neighborhood and Community Improvement at the University of Illinois Chicago.³²⁶ It also engaged the Edwin F. Mandel Legal Transactional Legal Clinic at the University of Chicago Law School to assist it in developing the legal capacity to create the development entity and engage in development work.³²⁷

In 2006, the Cabrini-Green public-private collaboration closed on the financing to construct, Parkside of Old Town (“Parkside”), a mixed-income community on the former Cabrini-Green North Extension site.³²⁸ Parkside is the only mixed-income Cabrini-Green development in which former Cabrini-Green residents are equity partners. Upon completion, Parkside of Old Town will

317. *See id.* at 172-73.

318. *See id.* at 173.

319. *See id.* at 174.

320. *See id.*

321. *See id.*

322. *See id.* at 176-77.

323. *See id.*

324. *See id.*

325. *Id.* at 179.

326. *Id.*

327. *Id.*

328. *See Fry, supra* note 165, at 26.

contain a total of 226 public housing units, 146 affordable housing units, and 404 market rate units.³²⁹

The Cabrini-Green LAC played a critical role throughout the development process. It helped generate more equitable site-based resident screening criteria. Several times, through the Cabrini Decree, the Cabrini-Green LAC sought court intervention to prevent the creation of site-based criteria that would be disadvantageous to a majority of former Cabrini-Green residents. For example, the Cabrini-LAC sought to compel CHA to “ earmark funds for replacement housing before the demolition of certain public housing buildings commenced and [to] amend certain provisions of the privately developed Parkside Tenant Selection Plan (“TSP”) . . .”³³⁰ The original TSP devised by the private developers required that families who have at least one adult who works at least 30 hours per week should occupy at least half of the public housing units in the new development.³³¹ That TSP included an exemption for a household member who elects to stay home to care for preschool children as long as one adult in the house is working.³³²

The Cabrini-Green LAC members, with the assistance of counsel, asserted that the TSP did not account for single heads of household.³³³ Former Cabrini-Green residents are overwhelmingly black female single heads of household.³³⁴ The Cabrini-Green LAC asserted that this provision of the original TSP violated the Fair Housing Act and the terms of the Cabrini Decree.³³⁵ Bargaining in the shadow of the law, the Cabrini-LAC was able to push its private development partners to exempt single heads of household from the 30 hour work requirement in the TSP.³³⁶

The Cabrini-LAC also sued to contest a provision in the Parkside lease stating that a lease may be terminated if “[t]he resident or any authorized family member is convicted of a felony.”³³⁷ The LAC argued that this provision violated federal law governing public housing leases as well as the terms of the Cabrini Decree.³³⁸ The court ruled that the provision should be redrafted to comply with federal law and to only allow felony convictions related to “the safe and healthy environment” of public housing.³³⁹ While critics of the Cabrini process contend

329. *See id.*

330. *Id.* at 27-28.

331. *Id.* at 28.

332. *Id.*

333. *Id.*

334. *See supra* text accompanying note 180.

335. *See Fry, supra* note 165, at 28.

336. *Id.*

337. *Id.* at 28-29.

338. *Id.*

339. *Id.*

that frequent litigation substantially delayed the development process,³⁴⁰ an Independent Monitor reporting to the CHA and the Central Advisory Council identified the process at Cabrini-Green as “an example of how cooperation can lead to improvements in the quality of public housing units and residents’ lives.”³⁴¹

The redevelopment processes at Horner and Cabrini demonstrate that the threat of judicial intervention to enforce their “group right” to participate in development decision-making enabled the residents to develop criteria that made it possible for a greater number of public housing residents to return to the new mixed-income developments and to extract other long-term benefits. Thus, traditional public law measures bolstered the negotiating position of the resident representatives such that they could demand more accountable reforms.³⁴²

Yet, power rarely concedes without a fight. Recently, CHA moved to diminish public housing residents’ participation in mixed-income communities by dismantling LACs. “On February 28, 2008, CHA published for public comment a draft of its Amended and Restated Moving to Work Agreement (“Proposed MTW”).”³⁴³ CHA’s Proposed MTW requests further waivers from federal and state law, including a waiver from the federal requirement that public housing authorities recognize public housing residents’ councils.³⁴⁴ HUD’s regulations require that public housing authorities recognize and financially support public housing resident councils.³⁴⁵ Yet, CHA requests that HUD waive this federal requirement with respect to all of CHA’s mixed-finance communities.³⁴⁶

CHA argues that resident councils will further stigmatize public housing residents in mixed-income communities by giving them a separate governing body.³⁴⁷ CHA contends that public housing residents living in mixed-income communities can effectively “participate in the broader community-based

340. See Cory Oldweiler, *Cabrini Changes Come All Too Slowly*, CHI. REP., Aug. 27, 2007, at 3, available at http://www.chicagoreporter.com/index.php/c/Cover_Stories/d/Cabrini_Changes_Come_All_Too_Slowly.

341. See Fry, *supra* note 165, at 27.

342. Currently, it would be difficult for residents to obtain such consent decrees in court. Many of the formal or implied rights asserted by public housing residents in the *Horner* and *Cabrini Green* lawsuits no longer exist. For example, at the time that the *Horner* and *Cabrini-Green* cases were filed, the *one for one* replacement rule was still in place. That rule required that for every unit of public housing that was demolished a new unit should be rebuilt. See discussion *supra* Part II.A. As a result of the existence of the one for one replacement rule, residents in the *Horner* and *Cabrini-Green* negotiations were able to insist that more than one-third of the units in the redevelopments should be reserved for public housing residents.

343. Letter from Richard M. Wheelock & Stephanie Villinski, Attorneys At Law, Legal Assistance Found. of Metro. Chi., to Chi. Hous. Auth. (Apr. 15, 2008), at 1 (on file with author) [hereinafter Letter from Wheelock & Villinski] (providing comments on CHA’s Proposed Amended and Restated Moving to Work Agreement as counsel to the Central Advisory Council (CAC)).

344. *Id.*

345. See 24 C.F.R. § 964.18 (2008). See generally 24 C.F.R. §§ 964.100-.150 (2008).

346. See Letter from Wheelock & Villinski, *supra* note 343, at 1.

347. See *id.* at 3.

neighborhood organizations that serve the entire development”.³⁴⁸ CHA’s request, if granted, will likely prevent former public housing residents from participating in the governance structures at each mixed-income development. By definition, most public housing residents are *renters* not owners in CHA’s mixed-income communities. Public housing residents, therefore, cannot vote to elect representatives to participate in such associations. As an alternative, CHA proposes to appoint a Mixed Finance Resident Ombudsman to solicit the concerns of public housing families residing in CHAs mixed finance communities.³⁴⁹ While CHA’s stated motivation is to protect public housing residents, their request can also be viewed as an effort to disempower residents in light of the Horner and Cabrini experiences.

C. *Lessons From Chicago’s Public Housing Reform Experiment*

Chicago’s HOPE VI public housing reform experiment illustrates the operation of power in urban reform. It provides many lessons about the limits of stakeholder collaboration in a pure new governance regime. First, it demonstrates that identifying the right stakeholder is a more difficult task than many staunch new governance advocates may be willing to admit. The birth of the mixed-income norm shows that some black middle-class representatives were prone to opportunism as they negotiated their various intersecting identities and affiliations with conflicting constituencies.³⁵⁰ While Lane initially advocated for public housing residents’ long-term interests, over time he changed. He was seduced by the mixed-income narrative and the enticements of profit-making entities. He was ultimately susceptible to opportunism. Organizations and institutions that long-fought for equity and racial justice also began to tout the mixed-income mantra, even if it resulted in implementation decisions that did not advance the long-term interests of public housing residents.

Second, the Chicago example also teaches that it was difficult for public housing residents to “meaningfully participate” in Chicago’s reform process in the absence of rights-bearing rules, formal rights to participation, judicial supervision or administrative recourse. The Horner and Cabrini examples show that private actors in such networks did not generate responsive solutions to

348. *See id.* at 2-3.

349. *See id.* at 1.

350. Allison Davis, Chicago’s famous black upper-middle class developer, was recently criticized for his stewardship of the redevelopment of Stateway Gardens into the new mixed-income development, Park Boulevard. *See* Grotto et al., *supra* note 164, at 4. Allison Davis’s son, Cullen Davis, is also extensively involved in property management for many of Chicago’s new mixed income developments. *Id.* His firm Urban Property Advisors (UPA) is the official property manager for Stateway Gardens and Park Boulevard, as well as the Cabrini-Green Rowhouses. *Id.* Cullen Davis also recently came under fire for imposing “heavy-handed rules” that apply only to public housing residents at Park Boulevard and for mismanagement at the Cabrini-Green Rowhouses, where a three-year-old boy was crushed to death by a heavy iron gate that fell on him. *Id.*

public housing residents' concerns, even though they were presented with information about residents' needs. Residents were rarely respected until they threatened litigation or court intervention. Third, residents who asserted formal rights and obtained consent decrees were more able to participate in key decisions throughout the development process. Assisted by lawyers and other technical assistance providers, the public housing residents were able to press their more profit-oriented collaborators to recognize and respect their needs. In fact, residents and their representatives were empowered, rather than hampered by the specter of judicial supervision.

Lastly, the Chicago experiment illustrates that a healthy balance between traditional public law and new governance approaches may be necessary to achieve innovation in social reform under circumstances of conflict. In the absence of such protections, the increased participation of organizations and institutions that purport to represent marginalized constituents will only legitimate regulatory strategies that further the interests of more empowered stakeholders, rather than provide outcomes beneficial to the marginalized stakeholders.³⁵¹ Without a public law framework, HOPE VI as new governance will promote gentrification and displacement, rather than resident empowerment.

This final lesson may be the most important. In her early work, Professor Audrey McFarlane charted the history of efforts to include residents and community members in urban revitalization decision-making from the New Deal era to the present.³⁵² She observed that over time various community development laws vacillated between rigid mandates for community participation and unenforceable aspirations to include community members in decision-making.³⁵³ As the next Section shows, urban revitalization law and policy has not moved much beyond the ossification of these two approaches. In recent bills to reauthorize HOPE VI funding, federal legislators return to a command and control approach to resident participation. In response, this Article attempts to move beyond these two polar extremes, to propose a combination of measures to

351. My search for a public law framework to bolster the most marginalized stakeholders' participation in new governance reforms resurrects a long-standing debate between advocates of Critical Legal Studies ("CLS") and Critical Race Theory ("CRT"). This debate centered on the appropriate role of rights in the amelioration of poverty and the promotion of racial and social justice. See, e.g., Kimberle Crenshaw, *Race Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356 (1988); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 304, 307 (1987); Williams, *supra* note 94, at 405. See generally Williams, *supra* note 1, *passim*. While not all CLS scholars are proponents of new governance, or vice-versa, new governance theory's penchant for informal processes over rigid mandates fits squarely within a CLS tradition. HOPE VI, as new governance, is informality, soft law, and extra-legal forms in action. There is merit in CLS's deconstruction of the limits of a formal rights-based regime. However, an analysis of HOPE VI, in the context of complex and conflicting power relations, challenges us to reconsider the role of rights, formal mandates, and judicial supervision in new governance reforms.

352. See McFarlane, *supra* note 13, at 865.

353. *Id.*

provide a more robust public law framework for resident participation in HOPE VI reform without stifling innovation.

IV. A PUBLIC LAW FRAMEWORK FOR HOPE VI AS NEW GOVERNANCE

A. *Hope VI Improvement and Reauthorization Act of 2007*

The future of HOPE VI is in jeopardy. The previous Bush Administration sought to defund the program, arguing that HOPE VI had already “accomplished its goal of addressing the needs of the nation’s 100,000 most distressed public housing units.”³⁵⁴ In response, federal legislators developed bills to reauthorize HOPE VI funding and to fix the program’s flaws.³⁵⁵ The U.S. House of Representatives formulated the HOPE VI Improvement and Reauthorization Act of 2007 (HR 3524).³⁵⁶ The bill extends HOPE VI funding for eight more years and authorizes \$800 million in funds each fiscal year from 2008 through 2015.³⁵⁷ The bill provides several solutions to improve the human results of HOPE VI reform and to return the benefits of HOPE VI reform to the original residents of public housing. The House Financial Services Committee approved the bill on September 26, 2007.³⁵⁸ The House finally approved the bill on January 17, 2008.³⁵⁹

On March 8, 2007, Senator Barbara Mikulski also introduced the Hope VI Improvement and Reauthorization Act of 2007.³⁶⁰ This Senate bill extends HOPE VI to 2013 and authorizes appropriations of \$600 million dollars per year from 2008-2013.³⁶¹ The Senate bill reflects substantially different policy choices. It does not include elaborate provisions to enhance the participation of residents in decision-making. The Senate bill does not provide for one for one replacement of public housing units nor does it include requirements for green development. The Senate bill emphasizes self-sufficiency through education and relocation services.³⁶² The Senate bill requires future HOPE VI grant recipients to include improvements to surrounding educational facilities in their revitalization plans.³⁶³

354. Libby George, *Lawmakers Resist White House Effort to End HOPE VI Housing Program*, CONG. Q. WKLY., Sept. 28, 2007, at 1; see also BARBARA SARD & LEAH STAUB, CTR. ON BUDGET AND POLICY PRIORITIES, HOUSE BILL MAKES SIGNIFICANT IMPROVEMENTS IN “HOPE VI” PUBLIC HOUSING REVITALIZATION PROGRAM 1 (2008), available at <http://www.cbpp.org/files/1-16-08hou.pdf> (explaining that in response to the previous Bush Administration’s efforts to eliminate HOPE VI Congress reduced annual funding for HOPE VI by 80% to \$100 million dollars in 2008).

355. While HOPE VI allocations have been reduced in 2008 there is still some bipartisan commitment to re-funding a reformed HOPE VI program in the future. See Sard & Staub, *supra* note 354, at 1.

356. H.R. 3524, 110th Cong. (2007).

357. See *id.* §§ 13, 14; see also George, *supra* note 354, at 1.

358. See H.R. REP. NO. 110-507, at 15 (2008).

359. H.R. 3524.

360. S. 829, 110th Cong. (2007).

361. See *id.* § 2(i)-(j).

362. See *id.* § 2(c)(6).

363. See *id.* § 2(d).

This bill has not yet been approved by the Senate.

While the House bill addresses the major shortcomings of prior HOPE VI legislation,³⁶⁴ such as restoring the one for one replacement rule,³⁶⁵ it also returns to a “command and control” approach to public housing reform. For example, the House bill prohibits PHAs from creating strict resident selection criteria that could not be grounds for evicting a family from a typical public housing unit.³⁶⁶ Through this initiative, HUD resumes control over the development of resident screening criteria. The objective of this provision is to stem the displacement effects of criteria devised by private developers. Yet, this measure warrants further analysis. Does the bill merely reinstate the old practices of HUD or each housing authority developing set criteria to apply to each redevelopment site? If the mixed-income approach prevails, and the new developments are still owned by private developers, will this requirement deter tax-credit investors, private developers and market-rate condominium purchasers from participating in the program? Will this command and control approach stifle innovation in the development of resident screening criteria?

The House bill also adopts a command and control approach to resident participation, providing participation through formal public hearings and notice and comment periods. For example, the House bill requires PHAs to provide notices to all residents in four circumstances. First, the PHA must provide residents with a notice of the PHAs intent to apply for an initial grant.³⁶⁷ Second, it must provide notice of receipt of a grant award and it must present tenants with various relocation options.³⁶⁸ Third, the PHA must provide a notice of adoption

364. House Bill 3524 requires PHAs to track all households temporarily or permanently relocated from public housing and to develop a relocation plan that results in comparable housing for displaced former residents. Press Release, H. Comm. on Fin. Serv., House Approves HOPE VI Improvement and Reauthorization Act (Jan. 17, 2008), http://www.house.gov/apps/list/press/financialsvcs_dem/press011707.shtml. PHAs must also make efforts to assist residents using Housing Choice Vouchers (HCVs) in the private rental market and to give residents extensions if they are unable to find replacement housing within 150 days. *Id.* The bill also includes an administrative enforcement mechanism for adversely affected residents. *Id.* It also allows up to 25 % of grant funds to be used for supportive services for hard to house residents or for residents who need services to comply with the required resident screening criteria at their redevelopments. *Id.*

365. The bill restores the “one for one replacement” rule removed by HOPE VI legislation. All public housing units in existence as of January of 2005 and subsequently scheduled to be demolished must be replaced on a one for one basis. *See id.* HUD can, however, reduce the required number of replacement units by 10 percent under a narrow set of circumstances such as a “compelling need” or “extenuating circumstances”. A court order or a land shortage is an example of an extenuating circumstance. While these provisions may create loopholes, the general consensus is that this measure will prevent significant reductions in the available housing stock for public housing residents. A study from the Center on Budget Priorities notes that “100,000 of the public housing units slated to be demolished under the first 15 years of HOPE VI awards will not be replaced by other units affordable to poor families. The House bill would stem this loss of affordable housing . . .” *See SARD & STAUB, supra* note 354, at 1.

366. *See* H.R. 3524 § 8 (amending Section 24 of the U.S. Housing Act of 1937 with subsec. (m)(2)).

367. *See* H.R. 3524 § 8 (amending Section 24 of the U.S. Housing Act of 1937 with subsec. (g)(2)).

368. H.R. 3524 § 8.

of a grant agreement and relocation options.³⁶⁹ Fourth, and finally, it must provide residents with a notice regarding the availability of replacement housing at the redevelopment.³⁷⁰ The House bill still encourages resident participation in the application process and throughout all phases of the planning and implementation of the HOPE VI redevelopment plan.³⁷¹ However, the bill does not provide best practices or other examples of effective measures to stimulate resident involvement. Nor does the bill require the Secretary of HUD to establish specific benchmarks or a ratings system to evaluate effective, rather than ineffective participation. Lastly, the House bill requires green development as part of a mixed-income public housing revitalization initiative.³⁷² In this Section of the bill, best practices and rating criteria are required.

The House bill addresses some of the critical problems with the original implementation of HOPE VI as new governance. As such, it is preferable to ending the HOPE VI program. The House bill adopts measures to empower residents and to mitigate the displacement effects of HOPE VI. The House bill restores the one-for-one replacement requirement and incentivizes PHAs/PHA's to develop plans that assist hard to house families.³⁷³ This will help ensure that fewer original public housing residents are displaced. However, the proposed legislation does not resolve the historic tension between rigid mandates for participation and broad privatized networks in which the meaningful participation of marginalized stakeholders can be easily undermined. The House bill's mandatory and consistent eligibility standards may stem displacement, but they may also undermine the participation of residents in development decision-making.

The Horner and Cabrini examples show that with proper legal and financial support residents were able to meaningfully participate in the on-the-ground public-private decision-making networks in HOPE VI reform. Horner and Cabrini residents were able to help the local decision-making networks innovate to respond to residents' needs. New governance's insight that traditional notice and comment procedures standing alone may not adequately ensure the participation of marginalized stakeholders has merit. At present, the participation structures in these bills do not adequately balance the need for increased formalization with the innovation that new governance approaches encourage.

B. Rivalry, Complementarity & Hybridity in New Governance

While this Article criticizes early new governance scholars' optimistic vision

369. *Id.*

370. *Id.*

371. *See id.*

372. *See id.* (amending Section 24 of the U.S. Housing Act of 1937 with subsec. (l)(1)).

373. *See* H.R. 3524 § 7(a) (amending Section 24 of the U.S. Housing Act of 1937 with subsec. (e)(2)(C)(xiii)).

of stakeholder collaboration, increasingly, new governance scholars acknowledge the need for formal law approaches in a new governance regime. Professors Joanne Scott and Susan Sturm recently re-envisioned a role for courts in new governance.³⁷⁴ They propose that courts can prompt new governance institutions to provide for the full and fair participation of affected stakeholders in new governance collaborations. They describe the EU courts' evaluation of standing in lawsuits as an example. They also argue that courts can "monitor the adequacy of the epistemic or information base for decision-making within new governance."³⁷⁵ Lastly, they contend that courts can promote principled decision-making in new governance by evaluating the "adequacy of deliberative processes by whether they have identified, justified, and applied the criteria guiding their decisions."³⁷⁶

Further, Professors David Trubek and Louise Trubek in their article, *New Governance and Legal Regulation: Complementarity, Rivalry and Transformation*, explained that new governance forms and traditional regulation can co-exist and operate in interesting and unique arrangements.³⁷⁷ Rivalry is defined as a situation in which new governance approaches and traditional regulation co-exist in a legal regime, but compete for dominance.³⁷⁸ Complementarity occurs when both systems operate side by side in search of common goals and resolution of problems that require multiple solutions.³⁷⁹ Lastly, hybridity occurs when the two approaches are merged into one integrated system, "in which the functioning of each element is necessary for the successful operation of the other," and the operation of law is transformed by the process of hybridity.³⁸⁰

Hybridity is a concept with many dimensions. As Professors Gráinne de Búrca and Joanne Scott explain, hybridity has at least three variants: fundamental/baseline hybridity, instrumental/developmental hybridity, and default hybridity.³⁸¹ Baseline hybridity eschews unrestrained new governance.³⁸² Rights and formal law still compliment new governance approaches by creating a legal bottom floor below which new governance practices cannot travel.³⁸³ Developmental hybridity promotes interaction between traditional formal law and new

374. Scott & Sturm, *supra* note 33, at 567.

375. *Id.*

376. *Id.*

377. See David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry and Transformation*, 13 COLUM. J. EUR. L. 539, 543 (2007) ("There are now many instances in which we can see new governance and law operating in the same policy domain.").

378. See *id.* at 544.

379. See *id.*

380. See *id.* at 543.

381. See Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, *supra* note 9, at 1, 7-9 (defining "fundamental/baseline hybridity", "instrumental/developmental hybridity" and "default hybridity").

382. See *id.* at 7.

383. See *id.* at 8.

governance approaches.³⁸⁴ The goal is for new governance practices to give content and meaning to formal law standards and public law norms.³⁸⁵ Default hybridity relegates formal law to a default status to be complied with only if new governance forms are unsuccessful.³⁸⁶ Similarly to default rules in contracting theory,³⁸⁷ default hybridity uses law to establish a harsh position to encourage stakeholders to collaborate and to produce alternative more desirable positions.

While recent new governance scholarship increasingly acknowledges that formal law may be necessary to the success of new governance forms, few U.S. scholars have proposed how such structures should operate to facilitate micro-level decision-making. This Article draws upon all three dimensions of hybridity to construct a public law framework for HOPE VI as new governance. HOPE VI regulation may more effectively advance the long-term interests of public housing residents if a hybrid approach is employed that incorporates both public law and new governance techniques. Some new governance approaches are retained and refined to help local public-private networks innovate, identify best practices, respond to change, and include residents in key decision-making networks. However, more traditional public law mechanisms such as lawyer involvement, judicial intervention, administrative appeals, and mandates for participation are also integrated to bolster the participation of public housing residents and their representatives in such reform networks.³⁸⁸ The following measures should be added to the HOPE VI Improvement and Reauthorization Act of 2007, if enacted in future years.

1. Hybridity: A Public Law Framework for HOPE VI as New Governance

a. Best Practices

HUD should generate minimum baseline tenant screening criteria that local PHAs and public-private collaborations cannot violate. Yet, consistent with a new governance approach, local PHAs and public-private collaborations can still devise resident screening criteria that are consistent with, but better than, the minimum baseline criteria devised by HUD. Each redevelopment, in each municipality receiving a HOPE VI grant, should be required by H.R. 3524 to report their site-based resident screening criteria to the local PHA. Additionally, each redevelopment should maintain a public database that tracks annually how

384. *See id.*

385. *See id.*

386. *See id.* at 9.

387. *See, e.g.,* Ian Ayers & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 91 (1989) (defining penalty default rules as “designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer”).

388. *See generally* David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 *CAL. L. REV.* 1051, 1060 (2005) (arguing that a rights-based regime represents a form of privatized performance evaluation for government programs).

many original residents are denied admission based upon such criteria. This report of the impact of such site-based criteria should be provided to the local PHA every 6 months. The local PHA can then determine which criteria enabled the greatest number of residents to return to the redevelopments. The PHA should also be required to report such data to HUD every 6 months. With this information, HUD can identify best practices in each jurisdiction with respect to site-based criteria. This recommendation reflects a belief that some new governance practices can lead to critical innovations. Thus, it may be beneficial to HOPE VI reform to allow each redevelopment to devise some criteria suited to its local conditions. HUD may also learn from the information collected in each jurisdiction to update its minimum criteria.

b. Independent Resident/Developer Screening Committees

If this recommendation is adopted, an independent Resident/Developer Screening Committee ("RSC") should be established at each redevelopment to mitigate the potentially problematic effects of race, class and gender dynamics on the meaningful participation of residents. The RSC must be an independent body that may contain LAC members, but that will also include other representatives elected by the residents. Thus, the RSC must have more residents involved than one LAC representative. Such representatives should serve on the RSC in staggered terms of different lengths (i.e. 6 mos, 1 year, 2 years). Although this is a form of representative governance, the size of such a committee and the rotating terms of resident members may provide a constant supply of affected residents and therefore mitigate the risk of co-optation. These committees can operate similarly to the working groups in the Horner and Cabrini examples. Residents could lead the process of identifying representatives to the Committee. The internet could be utilized to facilitate voting for Committee representatives. Residents can use their own computers or publicly available computers to vote anonymously, without having to attend a meeting. CHA could facilitate the voting by setting up a website that enables residents to participate via the internet. Those residents who do not have computers could vote in the usual manner. If there are concerns about the voting process, residents could challenge the process as a violation of their formal legal right to participate in redevelopment decision-making. These solutions are in addition to, not in lieu of, the participation mechanisms mentioned in the current bill.

c. Independent Grievance Committee and Judicial Intervention

As in the Horner litigation, an independent grievance committee should be created at each redevelopment site to hear grievances from residents regarding the quality of their participation in such networks. The grievance committee can also review the complaints of residents denied admission to each mixed-income development. The grievance committee should consist of one-third CHA

administrators, one-third representatives of the private developers, and one-third representatives of public housing residents. While residents should be required to exhaust their administrative remedies at the independent grievance committee first, H.R. 3524 should also create a private right of action to enable residents and their representatives on the RSC to enforce their group right to “maximum feasible participation” in state or federal court. These rights will enable residents to “bargain in the shadow” of the law in their localized-decision-making networks. As in the Horner and Cabrini litigation, the threat of judicial intervention may bolster the social and bargaining position of the residents’ representatives in such networks.

The private right of action to enforce the group right to participate will operate as a regulatory penalty default rule. As Professor Bradley Karkkainen defines it, “[a] ‘regulatory penalty default’ is a regulatory default rule that imposes harsh consequences on regulated entities, and thereby heightens incentives to ‘bargain around’ the default rule.”³⁸⁹ The regulatory penalty default rule stems from the penalty default notion in contract law, whereby “a penalty default is a gap-filling interpretive rule that intentionally imposes a harsh outcome on one or more parties in order to create an incentive for the parties to contract around the default rule in favor of an explicit alternative arrangement better tailored to their particular circumstances.”³⁹⁰

The threat of judicial intervention, as embodied in a mandated grievance commission and a private right of action to enforce the group right of participation, can itself act as a penalty default rule, thereby strengthening the resident representatives’ bargaining positions. As such, public housing resident representatives may not feel as much pressure to acquiesce in the decisions of the private actors in the network if the decision-making process itself is subject to judicial review and public scrutiny by other residents. Additionally, resident representatives may be empowered by such a rule because they know that a court can review the reasons why their position in a particular decision-making process represented the minority view.

Lastly, because judicial intervention can cause detrimental delays to urban redevelopment it should be an option of last resort. The private developers will have sufficient incentives to maintain appropriate relations with residents and their representatives throughout the development process because of the delays that such intervention can cause. Residents will also have incentives to cooperate as they can not access or benefit from replacement housing until the regulatory negotiation processes are concluded.

d. Technical Assistance Funding

A large majority of the support funding available under H.R. 3524 is dedicated

389. Karkkainen, *supra* note 12, at 967.

390. *Id.*

to providing original public housing residents with relocation assistance and supportive services to find new comparable housing or to return to the redevelopments.³⁹¹ This is a good allocation of funds, since studies show that prior HOPE VI grantees failed to provide adequate relocation assistance.³⁹² The bill should also authorize additional technical assistance funding to RSCs or public housing tenant association-owned development entities. The Cabrini redevelopment process revealed that money for technical assistance providers empowers residents in such networks. Those independent technical assistance providers enabled residents to analyze and to compare development plans, as well as to operate as informed equity partners in urban redevelopment. The resident entities retained lawyers, accountants and planners. A substantial commitment of HOPE VI funding should be allocated to allow resident groups and entities to hire technical assistance providers that will help residents to participate as equals in the complex redevelopment process.

e. The Role of Lawyers

The Horner and Cabrini processes reveal that lawyers have to have a broad range of skills to effectively represent and to empower residents in urban redevelopment. The lawyers in the Horner and Cabrini litigation were primarily skilled in impact litigation and direct services advocacy. Scholars in the field of affordable housing and community development have long argued that poverty lawyers must develop new transactional lawyering skills that mirror the deal-making services that transactional lawyers provide for their for-profit clients.³⁹³ Yet, the lawyers in both instances recognized the limits of their knowledge base and collaborated with other lawyers skilled in other areas. For example, in the Cabrini litigation the Cabrini-LAC worked with lawyers trained in litigation at the Legal Assistance Foundation of Chicago, as well as transactional lawyers and law students at the University of Chicago Law School's Mandel Legal Aid's Housing Initiative. Lawyers and students in the clinic were trained in transactional techniques. Yet, those lawyers were not simply "dealmakers" committed solely to a profit oriented bottom-line. Rather, the lawyers helped their low-income clients navigate the challenges that private sector involvement in social reform can bring.³⁹⁴

The Horner and Cabrini examples also illustrate that lawyers assisting clients

391. See H.R. 3524 § 8 (amending Section 24 of the U.S. Housing Act of 1937 with subsec. (g)(4)).

392. See NAT'L HOUS. LAW PROJECT, *supra* note 8, at 25-29.

393. See generally Ann Southworth, *Business Planning for the Destitute?: Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1126 (1996) (arguing that planning, more than litigation, may lend itself to collaboration with clients).

394. Nestor Davidson, *Values and Value Creation in Public-Private Transactions*, 94 IOWA L. REV. (forthcoming 2009) (manuscript at 2-3, on file with the author) (explaining that deal lawyers in public private partnerships must also anticipate the challenges of engaging the private sector in the resolution of public problems).

in urban redevelopment need a variety of legal skills—transactional, litigation and facilitative—to assist poor clients in urban redevelopment. Professors Sheila Foster and Brian Glick describe this type of lawyering as “integrative lawyering.” The integrative lawyer “now intervenes in negotiations from which the organization or community has been excluded.”³⁹⁵ As they explain, [t]his new role requires a shifting, flexible mix of skills and a more dynamic interaction with the organization and its varied functions—policy, community education, lobbying and organizing.”³⁹⁶ As such, to facilitate HOPE VI as new governance, the technical assistance funding should be sufficient to allow resident groups to hire integrative lawyers who have a variety of legal skills. This insight also has implications for the training of future community development lawyers and practitioners.

f. Participation Ratings and Benchmarking

Finally, H.R. 3524 also requires each agency to engage in benchmark reporting. This feature reflects a new governance approach. However, the quality of participation should be reported by each redevelopment group to the PHA and then the PHA should provide reports about the quality of participation throughout the project to HUD. HUD can utilize this information to develop participation protocols, which encourage each stakeholder network to utilize best practices and successful protocols.

CONCLUSION

Chicago’s public housing reform experiment is instructive for future HOPE VI reform. Legal advocates, public housing reformers, and public housing residents also struggle over the future of public housing in New Orleans after Hurricane Katrina.³⁹⁷ Some New Orleans reformers view Hurricane Katrina’s destruction as an opportunity to rebuild and to revitalize the City through new mixed-income communities. Other public housing residents and their advocates would like the existing public housing to be revitalized for existing residents. Resident participation in public-private reform collaborations will likely legitimate either course. However, like Chicago’s, New Orleans’ urban redevelopment occurs against the backdrop of social stratification along race, class, and gender lines. The recommendations in this Article will hopefully guide future HOPE VI reform efforts in New Orleans and beyond. Without such measures, residents may not meaningfully participate in HOPE VI reform, and will continue to be displaced,

395. Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2004 (2007).

396. *Id.* at 2005.

397. Julia Cass & Peter Whoriskey, *New Orleans to Raze Public Housing*, WASH. POST., Dec. 8, 2006, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/07/AR2006120701482.html>.

rather than empowered.

Lastly, the lessons learned from this case study also suggest that a typology of new governance approaches is needed. Perhaps in certain areas of reform, in which the participants are similarly situated in terms of bargaining endowments and social capital, new governance approaches can proceed unrestrained by traditional formal legal measures. Yet, the Chicago example suggests that legal scholars and practitioners may need to reconsider the role of formal legal protections for marginalized constituencies in public-private reform collaborations. Future regional development efforts, and other reform experiments that seek the participation of traditionally marginalized constituents, will need to balance hard and soft law protections. This balancing act requires human, social and financial resources. The present global financial crisis makes such approaches particularly challenging in the face of dwindling resources. Yet, perhaps the impending crisis also presents an opportunity to re-evaluate the role of law in facilitating the participation of traditionally marginalized groups in social reform. The Chicago example suggests that future reform efforts must incorporate traditional legal approaches to promote accountability, while using new governance approaches to stimulate innovation and collaboration.

