When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development

Audrey G. McFarlane

WHEN INCLUSION LEADS TO EXCLUSION: THE UNCHARTED TERRAIN OF COMMUNITY PARTICIPATION IN ECONOMIC DEVELOPMENT[*]

Audrey G. McFarlane[†]

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INTRODUCTION: THE DILEMMA OF PARTICIPATION IN
DEVELOPMENT

> The idea of citizen participation is a little like eating spinach: no one
> is against it in principle because it is good for you.[1]

Since the advent of federally-sponsored urban develop-
ment, the federal government has sought to facilitate decen-
tralized decision-making by local governments.[2] While the geo-
graphical proximity of local government makes it best suited to
determine the types of local development activities and the
manner of execution of such local projects, federal programs
have nevertheless strongly encouraged local governments to
include community participation in the development decision-
making process.[3] As a result, the federal push for decentraliza-
tion has involved both a release of power and a limited com-
mand: a devolution of development decision-making power to
local governments with a requirement to involve local .
citizens—residents and proponents of inner-city neighborhoods
that are typically poor and, more often than not, black.

Participation evokes notions of democracy, egalitarianism,
and inclusion and, as the introductory quotation illustrates, it
is easy to support in principle. Any citizen is theoretically
eligible to share his or her views about the shape, pace, and
location of a development project through a variety of partici-
patory methods, such as public meetings, focus groups, adviso-

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[1] Sherry Arnstein, *Eight Rungs on the Ladder of Citizen Participation*, in
CITIZEN PARTICIPATION: A CASEBOOK IN DEMOCRACY 335, 337 (Edgar S. Cahn &
Barry A. Passett eds., 1970).

[2] *See, e.g.*, Housing Act of 1949, Pub. L. No. 171, 63 Stat. 413, 417 (1949).

[3] The antecedents for federally encouraged citizen participation extend back to
when Congress chartered chambers of commerce in 1912 to learn about the views
of the business community. In the 1930s, the Department of Agriculture developed
locally elected county and community committees of farmers to create a more
direct relationship between the federal government and farmers and allow the De-
partment to adapt federal grants-in-aid to local needs. *See* United States Advisory
Commission on Intergovernmental Relations, *Citizen Participation in the American
Federal System* 110 (1979); *see also* Housing Act of 1949, Pub. L. No. 171, §
105(d), 63 Stat. 413, 417 (requiring citizen participation through public hearings);
Housing Act of 1954, Pub. L. No. 560, § 221(a)(1), 68 Stat. 590, 600 (1954) (mak-
ing citizen participation a mandated element of the "workable program for commu-
nity improvement" for those communities or localities that requested provision of
mortgage insurance).

ry committees, or community charrettes. But participation is often less easy to support in practice because of its structural disconnect with urban development. Participation relies on contrastingly radical precepts of direct democracy—the views of a collection of non-professional, non-expert, and potentially disruptive citizens are to be included in a legally technical and logistically complicated development process that usually depends heavily on training and expertise. Moreover, precepts of community participation dictate that people who are of different class, race, education, status, and socioeconomic backgrounds shall work together in an open decision-making process. People who are interested in a neighborhood for the profit to be made are supposed to work together with people who are only concerned about the quality of life in the neighborhood. At a minimum, a participatory development process envisioned as collaborative, synergistic, and inclusive can also potentially mean delay, disruption, and perceptions of wasted time.

This disconnect between principle and practice has been reflected over time and over the variety of federal urban development initiatives to revitalize inner cities that have mandated community participation.[4] The types of participatory mechanisms have varied, however, in an ebb and flow of contrastingly strong and weak mandates for participation. This ebb and flow of federally-mandated participation is particularly striking because neither strong nor weak provisions have resulted in participation that has been uniformly satisfactory to individual citizens, communities, or local governments. At least one, some, or all are dissatisfied. The failures are often attributed to problems with inadequate funding or implementation or an impolitic violation of political federalism by inappropriately attempting to closely manage local participatory processes at the federal level.[5] This Article argues that the problem is not implementational or lack of federal respect for local control. Rather, the problem is at once rhetorical, normative, and structural.

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[4] For instance, Urban Renewal, Community Action, Demonstration Cities, Community Development Block Grant, and Empowerment Zones. *See supra* Part I.

[5] *See, e.g.,* Barlow Burke, Jr., *The Threat to Citizen Participation in Model Cities,* 56 CORNELL L. REV. 751, 775 (1971) (attributing the failures of citizen participation in the Model Cities Program to lack of vision and direction of federal government's bureaucratically complex management of the program).

Part I of this Article describes the ebb and flow of federal participatory mandates between strong and weak mandates for participation, all of which have been dissatisfying or unproductive. Part II picks up where federal mandates have left off by examining the three dominant sets of justifications for participation in the context of the elite-dominated and privatized process of urban development. Part II then considers the extent to which each type of explanation convincingly justifies the often time-consuming processes and conflict inherent in community participation. The justifications, which I characterize as instrumental, democratic, and empowerment, make broad claims about the benefits and purposes of participation. This Article argues, however, that the familiar instrumental or efficiency-based justifications for participation, as well as democratic or process-based justifications, are inadequate, standing alone, to justify or explain the importance of community participation in development. Instead, empowerment theories that explicitly connect participation to a redistribution of decision-making power are an important yet overlooked aspect of the basis for community participation in development. These theories recognize that given the exclusive and privatized nature of the development decision-making process, including representatives of poor urban communities (communities that have been racialized black and classified poor) entails an act of resistance to the nature of economic development that is currently directed exclusively towards meeting the interests of the middle class and the wealthy. I then argue for a way to reconcile the three theories to provide the best justification for participation, as well as to discuss the substantive choices that must be made to make participatory mandates meaningful.

The road to economic opportunity and community development
starts with broad participation by all segments of the communi-
ty .... Communities that stand together are communities that can
rise together.[6]

I. THE EBB AND FLOW OF FEDERAL EFFORTS TO ENCOURAGE
LOCAL COMMUNITY PARTICIPATION

The above-quoted statement seems an inspiring indication
of the federal government's commitment to the right of par-
ticipation for poor community residents in urban economic
development. Or is it? On closer examination, what exactly
does the statement mean? Notions of decentralized decision-
making, local control, and community involvement come to
mind. In some ways the federal government is demonstrating
great deference and respect for local geographies while also
attempting to reconfigure the boundaries of inclusion and ex-
clusion in development at the local level. But crucial questions
remain unanswered: How broad should broad participation be?
To what end? On what decisions? Why should all segments of
the community be involved in a complicated, technical, largely
legal and financial process that is usually handled by business
and government elites?[7] How does collective community action
lead to improved economic opportunity? For whom? Where did
this idea come from?

Participation has to be understood within the context of
the history of urban development programs in the United
States. Urban development has been an ongoing local govern-
mental project of creating a functioning and productive city by
planning, financing, and developing a variety of commercial
and residential facilities, amenities, and uses of land. Begin-
ning in the late 1930s and 1940s, the emphasis was on the

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[6] U.S. DEP'T OF HOUS. AND URBAN DEV., BUILDING COMMUNITIES: TOGETHER.
APPLICATION FORMS FOR EMPOWERMENT ZONES AND ENTERPRISE COMMUNITIES 4
(1994).

[7] *See* Audrey G. McFarlane, *Race, Space and Place: The Geography of Eco-
nomic Development,* 36 SAN DIEGO L. REV. 295, 351 (1999) ("The current geogra-
phy of economic development is one in which economic development is designed
and intended to be carried out in particular ways in particular places: privately
and exclusively in central business districts on the other side of the line demarcat-
ing the difference between the inner city and the rest of the city.").

elimination of slums in cities to improve quality of life for those residents while also promoting the overall economic health of the city by making it an attractive place for middle-class residents.[8] Today, the articulated rationale for redevelopment is more directly and explicitly economic development.[9] That rationale is consistent, however, with what urban development always has been and meant in the United States. In either case, the goal is the same: to facilitate the social and economic well-being of urban citizens.

While the federal government has sought to encourage the private sector actors to take the lead in initiating and planning development,[10] federal legislation has also endeavored since at least the 1950s to get cities to include affected residents in the process of development decision-making.[11] In some ways this is a reflection of the impact of the Administrative Procedures Act,[12] through which the federal government attempted to make federal rule-making accessible to citizens who care to have a role in shaping the outcome of implementing regulations. Continuing in that tradition, programs as diverse as urban renewal, housing development, and transportation funding have included citizen or community participation requirements to ensure that the process of project identification, programmatic priorities, and implementation allows for some democratic participation by ordinary citizens.[13] Therefore, the

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[8] *See, e.g.*, Housing Act of 1949, Pub. L. No. 171, tit. I, 63 Stat. 413, 414-21.

[9] *See, e.g.*, Louise A. Howells, *Looking for the Butterfly Effect: An Analysis of Urban Economic Development under the Community Development Block Grant Program*, 16 ST. LOUIS U. PUB. L. REV. 383, 390 (1997) (critiquing CDBG's effectiveness as an economic development program).

[10] In comparison, European approaches have been more centralized and state directed. Increasingly, however, England has attempted more privatized approaches to what they term "urban regeneration." Susan Fainstein, *Urban Development*, in ENCYCLOPEDIA OF HOUSING 614, 615 (Willem van Vliet ed., 1998).

[11] *See* Burke, *supra* note 5, at 751-55 (discussing the history of citizen participation in federal programs since the 1930s).

[12] These administrative processes began with public hearing requirements and evolved into comment procedures. The rules governing these processes are detailed, numerous, and cumbersome. At the federal level, they have been criticized for mandating rule-making processes that are monopolized by professional interest groups (which are typically the only ones with the sustained interest and resources to keep track of detailed and often tedious rule making sessions) rather than involving ordinary citizens. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation*, 93 NW. U. L. REV. 173, 175 n.5 (1997).

[13] Citizen participation requirements are also contained in many other block

proliferation of participation as an accepted aspect of local planning and decision-making is due largely to the federal government. Today, the inclusion of participatory mechanisms in local decision-making is an accepted cornerstone practice in the field of land use planning and development and environmental management.[14] The potential benefit is the extent to which such participatory procedures encourage localities to take into account the interests of groups that are typically excluded from political or planning processes. While there are many success stories, the record of the grand federal initiatives for participation in development has been, at best, mixed.[15]

A. *Modern Participation and the Rubber Stamp*

The first experience with massive urban redevelopment in the United States arose out of the Housing Act of 1949's (the "1949 Act") Slum Clearance and Urban Renewal program.[16] This program provided funding for cities on a per project basis for locally generated plans for demolishing slums and renovat-

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grant programs. Participation requirements mandated in the Local Crime Prevention Block Grant Program passed as part of the Safe Streets Act of 1994, 42 U.S.C. § 13756 (2000). *See* RAYMOND SHAPEK, MANAGING FEDERALISM: THE EVOLUTION AND DEVELOPMENT OF THE GRANT-IN-AID SYSTEM 190-201 (1981). A number of other categorical programs require public participation in the policy formulation process. *See, e.g.*, The Federal Highway Act, 23 U.S.C. § 128 (2000); The Elementary and Secondary School Act, 20 U.S.C. § 6319 (a)(1) (2000). Both Acts require public participation in the state spending of federal grant monies. The goal is often to get local governments to plan regionally with other areas whose interests might be affected by the grants.

[14] 5 U.S.C. §§ 500 *et seq.* (2000). A few cities are even beginning to include community participation components in their zoning practices and even legislation. *See, e.g.*, City of Glendale, Arizona, Citizen Participation Ordinance (requiring persons requesting a zoning change that requires a public hearing to first prepare and implement a citizen participation plan that must involve informing and providing an opportunity to discuss the proposed changes in advance of the public hearing). *See generally* Margaret A. Moote et al., *Theory in Practice: Applying Participatory Democracy Theory to Public Land Planning*, 21 ENVTL. MGMT. 877 (presenting a case study of Bureau of Land Management utilization of a more participatory method of public land use management).

[15] In one sense, it might be accurate to use the word disappointing instead of mixed. But there have been indirect benefits from past participatory experiences apart from whether or not the participatory mechanism worked in a particular federal program. *See infra* note 39 (discussing the role that the Great Society programs played in providing employment as well as urban political power in Northern cities during the late 1960s and early 1970s).

[16] Housing Act of 1949, Pub. L. No. 171, 63 Stat. 413, 417 (1949).

ing blighted areas "to improve the urban environment, to keep middle class residents and reduce the flight of high income taxpayers to the suburbs."[17] The approach was to facilitate such redevelopment by removing certain market and property ownership obstacles to updated uses of urban land.[18] The typical urban renewal program involved designating an area as blighted, preparing a development plan, holding a public hearing, exercising the power of eminent domain (typically by a redevelopment authority) to assemble parcels of land for development, physically clearing and bulldozing the land, and marketing the cleared land to potential developers.[19] Urban renewal is less remembered for its claimed successes than for its conspicuous failures. The fundamental flaw of urban renewal was that it incorrectly assumed that private redevelopment would occur if land that had been declared blighted was cleared and made available for development.[20] This flawed assumption had a devastatingly and irreparable impact: the designation of blighted areas destroyed many stable neighborhoods and displaced the low-income residents who were, more often than not, black.[21] Relocation assistance was minimal for property owners and nonexistent for renters. Residents were displaced into other neighborhoods that then became over-

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[17] MANUEL CASTELLS, THE CITY AND THE GRASSROOTS 102 (1983). Herbert Gans, writing at the time, observed that urban renewal "cleared slums to make room for many luxury-housing and a few middle-income projects, and . . . also provided inexpensive land for the expansion of colleges, hospitals, libraries, [and] shopping areas." Herbert J. Gans, *The Failure of Urban Renewal, in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 539 (James Q. Wilson ed., 1966).

[18] C. Theodore Koebel, Center for Hous. Research, Va. Polytechnic Inst. and State Univ., *Urban Redevelopment, Displacement, and the Future of the American City* 7-8 (1996).

[19] *See* Martin A. Anderson, *The Federal Bulldozer, in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY, *supra* note 17, at 492-93. *See generally* MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949-1962 (1964).

[20] One problem, for example, was that the cleared land might be undesirable for development because it was still surrounded by slums. Gans, *supra* note 17, at 542.

[21] Gans, *supra* note 17, at 538-39. According to Anderson, two-thirds were Black or Puerto Rican. ANDERSON, *supra* note 19, at 65; *see also* Charles F. Casey-Leininger, *Making the Second Ghetto in Cincinnati: Avondale, 1925-70, in* RACE AND THE CITY: WORK, COMMUNITY, AND PROTEST IN CINCINNATI, 1820-1970, at 232, 242 (Henry Louis Taylor, Jr. ed., 1993) (describing how urban renewal was used in support of deliberate policies to racially segregate neighborhoods).

crowded and also deteriorated.[22] Declaring a neighborhood blighted was also a self-fulfilling prophecy—it hastened deterioration by removing any incentive that property owners, who knew their property was going to be acquired, had to maintain the property.[23]

The Housing Act of 1954[24] (the "1954 Act") amended the 1949 Act to add rehabilitation as a goal in addition to development. The 1954 Act contained a modest community participation requirement: each city was supposed to come up with a "workable program" for urban renewal.[25] Citizen boards were convened but were often hastily assembled advisory committees that had a token representative of the communities (mostly poor, mostly black) on the board.[26] This representative most often simply provided a "rubber stamp," legitimating urban redevelopment decisions that had already been made by the local government. Therefore, very little meaningful participation in important redevelopment decisions by either ordinary citizens or residents of the affected neighborhoods took place.[27] Participation with little meaning had an unintended consequence, however. While urban renewal is widely under-

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[22] Gans, *supra* note 17, at 539.

[23] Koebel, *supra* note 18, at 8-9.

[24] Housing Act of 1954, Rehabilitation & Neighborhood Conservation Housing Insurance provisions, Pub. L. No. 560, ch. 649, 68 Stat. 590, 596-603 (1954) (amending the 1949 Act to provide incentives for rehabilitation as well as demolition).

[25] The guidelines consisted of a pamphlet concerned that the form and extent of citizen participation would vary from locality to locality. The guidelines recommended, among other things, that cities use a citizen's advisory committee "consisting of prominent citizens appointed by the mayor." U.S. Housing and Home Finance Agency, *How Localities Can Develop a Workable Program for Urban Renewal* 10-11 (Mar. 1955). The guidelines further advised, "Opportunity to participate should be available to all neighborhood interests so that there is full understanding of the program by occupants of the affected city blocks. Those affected by the program should have an opportunity not only to be informed but to express their views, fears, or apprehensions." *Id.*; *see also* Charles F. Casey-Leininger, *Planning Community Control and the Persistent Ghetto in Cincinnati, 1956-1980* (1995) (unpublished), *at* http://comm-org.utoledo.edu/papers96/casey-leininger.htm (last visited Mar. 30, 2001) (discussing Cincinnati's "workable program" as a process of seeking meritorious suggestions).

[26] *See generally* Arthur R. Simon, *New Yorkers Without a Voice: A Tragedy of Urban Renewal*, ATLANTIC MONTHLY (Apr. 1966) (providing firsthand account of the ineffective attempts by poor residents to participate in and impact the outcome of a New York City urban renewal program).

[27] *Id.*

stood to be a program originally designed to help restore cities that contributed instead to their decline,[28] urban renewal is ironically noteworthy for another contribution. Urban renewal may have been partially responsible for galvanizing local communities and policymakers to understand the importance of including meaningful measures for citizen participation in future urban development programs.[29]

B. *Power to the People: Community Participation "Back in the Day"*

During the 1960s, the federal government declared a "War on Poverty" and adopted a number of social service and development programs containing relatively strong participatory requirements to address the problems of black poverty in northern city ghettos.[30] The inspiration for a strong participatory mandate in federal War on Poverty (also coined "the Great Society") programs stemmed from a privately funded, precursor program, the Gray Areas program. This program

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[28] Koebel, *supra* note 18, at 9. *See generally* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1974).

[29] *See* Susan S. Fainstein & Clifford Hirst, *Neighborhood Organizations and Community Planning: The Case and Context of the Minneapolis Experience, in* REVITALIZING URBAN NEIGHBORHOODS 96-111 (W. Dennis Keating et al. eds., 1996) ("Federal requirements for increased resident participation in redevelopment planning arose from the backlash from neighborhood destruction in early planning efforts."). At the time, James Q. Wilson observed:

> The growth of neighborhood resistance to urban renewal has been gradual and cumulative. Many of the earliest redevelopment projects were completed with little organized opposition. Somehow, however, people have learned from the experience of others and today, in cities which have been engaged in renewal for several years, the planners often find prospective renewal areas ready and waiting for them, organized to the teeth.

James Q. Wilson, *Planning and Politics: Citizen Participation in Urban Renewal, in* URBAN RENEWAL: THE RECORD AND THE CONTROVERSY, *supra* note 17, at 409. Arguably, the experience with the 1956 interstate highway program and its destruction of poor neighborhoods also played a role. *See generally* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

[30] The War on Poverty was originally described as an "anti-riot" bill by the *New York Times*. JAMES A. MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT 222-23 (1990). *See generally* Edgar S. & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

was one of the first to conceive of the problems of blacks in poor communities as being a problem of "place" rather than race—racial discrimination and segregation. Instead, the program sought to promote assimilation of poor black ghetto residents into the mainstream of society and the economy by, among other things, strengthening inner-city neighborhoods as communities.[31] The program mainly attempted to improve services in these neighborhoods by utilizing a strong notion of participation. Residents would be guided to help themselves by participating in community affairs. It was hoped that the process of participation would strengthen the local community and the participant as well as create pressure for improved services for ghetto residents.[32] While the origins of this approach were largely theoretical and untested, they made a significant contribution to the belief in community participation mandates. They failed, however, to provide much guidance on how to approach the endeavor.

One of the key programs of the War on Poverty was the Economic Opportunity Act's "Community Action Program" ("Community Action"). Community Action adopted the Gray Areas program's idea of participation by residents in the provision of services. Focused on improving social service delivery in the areas of nutrition, employment, and welfare,[33] the Community Action required "maximum feasible participation of the poor" in the program.[34] This provision was overlooked during congressional debates over the bill and thus there is little, if any, legislative history explaining its goal or purpose. It became an issue, however, when mayors attempted to organize community action boards that were packed with the usual array of public officials and civic leaders. In response, many black communities organized and demanded authority over the program's priorities and decision-making.[35] Citizens in many

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[31] ROBERT HALPERN, REBUILDING THE INNER CITY: A HISTORY OF NEIGHBOR-HOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES 91 (1995).

[32] *Id.*

[33] Nicholas LeMann, *The Unfinished War*, 262 ATLANTIC MONTHLY 37, 37, 49 (1988).

[34] Economic Opportunity Act of 1964, Pub. L. 88-452, § 2, 78 Stat. 508, (formerly 42 U.S.C. § 2701) (repealed Pub. L. 97-35, tit. VI, § 683(a), 95 Stat. 519 (1981)).

[35] *See* MORONE, *supra* note 30, at 230-31.

cities also took the opportunity to speak out on a broad range of issues, including unpopular urban renewal projects and poor city services.[36] In so doing, they forced a more direct response to poverty than originally contemplated by the Community Action program—new services.[37]

A good part of Community Action's focus became participation itself. Hundreds of independent local organizations (community action agencies) were created to coordinate a variety of service programs including "neighborhood services, education, health, manpower, housing, social services, and economic development."[38] There were protracted struggles over board composition and representation on the boards of community action agencies to establish the meaning of participation.[39] These conflicts exposed all of the underlying structural conflicts in the participatory mandate: What was the meaning of participation? Who should be represented on the boards? How should representatives be selected? How much decision-making authority and power should they have?[40] From the city government's point of view, the mayor should control the poverty programs and formulate policy with black representatives as advisers or in salaried sub-professional roles.[41] From the

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[36] MORONE, *supra* note 30, at 236.

[37] *See* MORONE, *supra* note 30, at 220-21 (describing the indirect approach to poverty contemplated by the Community Action program's precursor, the Gray Areas Program which sought to remedy municipal agency failure to coordinate).

[38] *See* HALPERN, *supra* note 31, at 108.

[39] The War on Poverty, arguably, channeled the political energy of the movement from struggle over relatively general concepts like "shared power," "freedom," or integration to seemingly more concrete battles over the terms of their participation in the War on Poverty boards. MORONE, *supra* note 30, at 226-27. Community Action Agencies are widely recognized, however, as the agents of integration of blacks into local politics and government. HALPERN, *supra* note 31, at 109-10; MORONE, *supra* note 30, at 248. *But see* Jacqueline Pope, *The Colonizing Impact of Public Service Bureaucracies in Black Communities*, *in* RACE, POLITICS AND ECONOMIC DEVELOPMENT: COMMUNITY PERSPECTIVES 141 (James Jennings ed., 1992).

[40] An early task force announced that maximum feasible participation meant at least one representative from each neighborhood served by the agency. MORONE, *supra* note 30, at 230. By the spring of 1965, the required number that was to be chosen by democratic techniques had expanded to "roughly one third" of the agency's governing board. MORONE, *supra* note 30, at 230. In some cities black leaders demanded control over the local CAAs, succeeding in about twenty cities. HALPERN, *supra* note 31, at 109. In 1966, Congress sought to clarify the definition of participation and amended the Economic Opportunity Act to require that one-third of each CAA board be made up of representatives of the poor. *Id.* at 109-10.

[41] MORONE, *supra* note 30, at 229.

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community perspective, they should have control of the expenditure of social service and development dollars in their communities. In the early days of the program, the federal government's Office of Economic Opportunity ("OEO") accepted the role of arbiter in the conflicts and often sided with local groups that sought more participation.[42]

This mobilization and organization backed by the federal government upset the political balance in cities around the country. In fact, the most significant aspect of the Community Action approach to social services and participation of poor residents was that it initially provided for direct funding of Community Action Agencies, thus bypassing state and local governments. This was "widely regarded by local politicians as funding black political opposition right on their turf" and was subsequently eliminated.[43]

The urban development component of the War on Poverty was the Model Cities program.[44] The purpose of the Model Cities program, as stated by Congress, was "to provide additional financial and technical assistance to enable cities of all sizes . . . to plan, develop and carry out locally prepared and scheduled comprehensive city demonstration programs . . . ."[45] The Model Cities program was intended to address the prob-

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[42] MORONE, *supra* note 30, at 230; *see also* Robert G. Dixon, Jr., *Rebuilding the Urban Political System: Some Heresies Concerning Citizen Participation, Community Action, Metros, and One Man-One Vote*, 58 GEO. L.J. 955, 958-62 (1970) (discussing OEO and HUD's role in experimenting with various techniques of citizen participation).

[43] *See* LeMann, *supra* note 33, at 54.

[44] *See* Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, 80 Stat. 1255, 1261-66 (referring to planned metropolitan development) (formerly 42 U.S.C. §§ 3301-3313 omitted pursuant to 42 U.S.C. § 5316 (2000) due to termination of authority to make grants and loans under this subchapter after Jan. 1, 1975); Economic Opportunity Act of 1964, Pub. L. No. 88-452, tit. II, 78 Stat. 508, 516-20 (codified as amended in scattered sections of 42 U.S.C.) (referring to "Urban and Rural Community Action Programs"). Many environmental statutes passed during the 1970s and 1980s also contained significant enhanced opportunities for participation in agency decision-making. *See, e.g.,* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994) (providing for public participation in preparation of Environmental Impact Statements); Occupational Safety and Health Act, 2 U.S.C. § 1341 (1994, Supp. IV 1998) (providing for oral legislative-like hearings).

[45] Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, tit. I, § 101, 80 Stat. 1255 (1966). This language is also found at 42 U.S.C. § 3301 (2000).

lems of the physical infrastructure within ghetto neighbor-
hoods and demonstrate that urban development could also be
inclusive of the poor.[46] It attempted to link social services and
job training to housing and physical community development
activity in target "model" inner-city neighborhoods in a limited
number of cities.[47]

> Cities interested in obtaining a Model Cities grant had to develop an
> elaborate plan for revitalizing the neighborhood . . . developed by a
> newly created body called a City Demonstration Agency composed of
> elected officials, representatives of major agencies (e.g., schools,
> housing authorities, health, welfare, employment), labor, and busi-
> ness leaders."[48]

The program instead provided for "widespread citizen partici-
pation."[49] Paradoxically, this provision was intended to mini-

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[46] The prologue declared:
[I]mproving the quality of urban life is the most critical domestic problem
facing the United States. The persistence of widespread urban slums and
blight, the concentration of persons of low income in older urban areas,
and the unmet needs for additional housing and community facilities and
services arising from rapid expansion of our urban population have re-
sulted in a marked deterioration in the quality of the environment and
the lives of large numbers of our people while the Nation as a whole
prospers.
Demonstration Cities and Metropolitan Development Act of 1966, "Comprehensive
City Demonstration Programs," Findings & Declaration of Purpose, Pub. L. No. 89-
754, tit. I, § 101, 80 Stat. 1255. The language can also be found at 42 U.S.C. §
3301 (2000).
[47] HALPERN, *supra* note 31, at 121. *See generally* Otto J. Hetzel & David E.
Pinsky, *Urban Development Symposium, The Model Cities Program*, 22 VAND. L.
REV. 727 (1969).
[48] HALPERN, *supra* note 31, at 121. *See generally* Robert A. Aleshire, *Power to
the People: An Assessment of the Community Action and Model Cities Experience*,
32 PUB. ADMIN. REV. 428 (1972); Katherine A. Hinckley, *The Bang and the Whim-
per: Model Cities and Ghetto Opinion*, 13 URB. AFF. Q. 131 (Dec. 1977); *Special
Project: Nashville Model Cities: A Case Study*, 25 VAND. L. REV. 727 (1972).
[49] Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No.
89-754, tit. I, § 101, 80 Stat. 1255. This language is also found at 42 U.S.C.
§ 3303(a)(2). The basic philosophy of the Act was stated by the then newly estab-
lished Department of Housing and Urban Development ("HUD"). HUD stated that
"improving the quality of life of the residents of a model neighborhood can be
accomplished only by the affirmative action of the people themselves. This requires
a means of building self-esteem, competence and a desire to participate effectively
in solving the social and physical problems of their community." North City Area-
Wide Council, Inc. v. Romney, 456 F.2d 811, 813 n.5 (3d Cir. 1972) [hereinafter
Romney II] (quoting Department of Housing and Urban Development, City Demon-
stration Agency Letter No. 3 (Oct. 30, 1967)).

mize the level of neighborhood participation in comparison to what had taken place under the Community Action program.

The Community Action program illustrated the difficulties of governmental coordination of the technical planning aspects of development, along with unanticipated or unstructured community involvement or control.[50] The Model Cities program was the first attempt to remedy the perceived excesses of Community Action's participatory mechanisms. The participatory mechanisms in the Model Cities program were structured in a way that attempted to minimize the level of participation. In contrast to Community Action's mandate of maximum feasible participation of the poor, Model Cities contained a general requirement of "widespread citizen participation"[51] but attempted to minimize participation by channeling funding of development through state and local governmental agencies instead of directly to community groups.[52] Therefore, development could take place with the appropriate level of participation—in consultation with neighborhood residents in program planning and governance. But, because black ghetto communities were relatively organized in a number of cities, the existing federal procedures, while minimal, and the relatively close oversight gave procedural entree to communities that wanted to protest or litigate. For example, in most cities, plans were prepared by City Hall before neighborhood residents could mobilize, indeed, before they were aware that a new program was being

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[50] According to Morone, the idea of community focused efforts of self-empowerment was "redolent with implicit threat to established power relations and full of promise to the black communities that were struggling for a way to break into them." MORONE, *supra* note 30, at 222.

[51] The Demonstration Cities Act directed the Secretary to "emphasize local initiative in the planning, development, and implementation" of local programs to insure "prompt response to local initiative" on the part of the federal government and to ensure that all Model City plans provide for "widespread citizen participation in the program." Demonstration Cities and Metropolitan Development Act of 1966, § 103(b)(1)-(2), 80 Stat. at 1257.

[52] *See* Thomas J. Oliver, Annotation, *Validity, Construction, Application of "Model Cites" Provisions of Demonstration Cities and Metropolitan Development Act of 1966, as Amended (42 U.S.C.A. §§ 3301-3313)*, 10 A.L.R. FED. 802, 808 (1967) ("The Model Cities Act requires participation by area residents both in the planning and in the implementation of a model cities program, although it has been recognized that such participation is required only in the sense of consultation with government officials, rather than in the sense of a citizen veto or approval power.").

planned.[53] Nonetheless, when residents did learn of program plans, many inner-city neighborhoods, educated by their experiences with Community Action, were already organized to react quickly to their exclusion from the planning process. "When they did react, they discovered that they were able to tie up planning or program monies from HUD to a particular city, in turn providing further impetus for them to demand a role in the program."[54] As a result of demands by community activists working for political empowerment through self-determination of local neighborhoods, later Model Cities programs provided a process to ensure a role for local communities in defining their problems and goals.[55] It also provided a blueprint for the consequences of excluding citizen participation. Citizens would resort to their remaining avenue of redress—obstruction, protest, and litigation.

1. Litigating to Enforce Participation: Too Little Too Late

While a few groups attempted to use litigation to vindicate unfulfilled participation goals, litigation often took too long and, even on the rare occasion of a judgment in favor of the plaintiffs, accomplished little. For example, one of the cases involving a successful challenge to a citizen participation scheme, *North City Area-Wide Council, Inc. v. Romney*,[56] illustrates that litigation often produces, at best, mixed results. *Romney* arose out of the City of Philadelphia's proposed Model Cities program. The city applied for a grant that proposed to use a coalition organization comprised of a combination of local organizations, the North City Area-Wide Council ("AWC"), as its citizen participation arm.[57] AWC's participatory activities would include conducting program planning, evaluation, and *operation*.[58] HUD subsequently informed all cities by letter

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[53] HALPERN, *supra* note 31, at 122; *see also* Arnstein, *supra* note 1, at 350.

[54] HALPERN, *supra* note 31, at 122. *See generally Romney II*, 456 F.2d 811 (3d Cir. 1972). Arnstein noted that citizens were "enraged by previous forms of alleged participation [and] refused to be 'conned' again. They threatened to oppose the awarding of a planning grant to the city. They sent delegations to HUD in Washington. They used abrasive language. Negotiations took place under an cloud of suspicion and anger." Arnstein, *supra* note 1, at 350.

[55] HALPERN, *supra* note 31, at 185.

[56] *Romney II*, 456 F.2d 811 (3rd Cir. 1972).

[57] *Id.* at 814.

[58] The City's application concluded that the two basic causes for the conditions

that citizen participation groups should only engage in program *planning and evaluation* but were prohibited from *"operating"* a Model Cities program.[59] HUD administrators then indicated to Philadelphia that its Model Cities plan would be rejected if the plan continued to utilize AWC's services as a program operator.[60] The concern was that a conflict of interest would result from one entity planning and evaluating a program that it also operated.[61] Representatives of the AWC objected strongly to their exclusion from program operation.[62] They requested extra time, however, to consult with their constituents about the exclusion of operations from participation[63] While AWC was seeking input from constituents, the city administrator for the program amended the citizen participation plan to exclude the AWC as the citizen participation arm of the Philadelphia program because time was of the essence to meet a HUD deadline.[64] AWC brought a class-action suit claiming the City's and HUD's actions were in violation of the Demonstration Cities Act's citizen participation requirements.[65] Initially dismissed on summary judgment, the litigation ensued over the next three years, terminating in a successful decision on the merits for AWC in 1972.[66] On the sec-

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in the target area are poverty and powerlessness and, therefore, a central aim of the Philadelphia Program was to provide Model Cities residents with an opportunity to participate fully in City decisions affecting the target area and to assume some control over their own economic resources. North City Area-Wide Council, Inc. v. Romney, 399 F. Supp. 1124, 1126 (E.D. Pa. 1971) [hereinafter *Romney I*].

The background to this application is interesting. One account reads as follows:

> Philadelphia wrote its . . . application and waved it at a hastily called meeting of community leaders. When those present were asked for an endorsement, they angrily protested the city's failure to consult them on preparation of the extensive application. . . . [Instead, at] their next meeting, citizens handed the city officials a substitute citizen participation section that changed the ground rules from a weak citizen's advisory role to a strong shared power agreement. Philadelphia's application to HUD included the citizens' substitution word for word.

Arnstein, *supra* note 1, at 350.

[59] *Romney II*, 456 F.2d at 815.

[60] *Id.* at 816.

[61] *Id.* at 815.

[62] *Id.* at 817.

[63] *Id.* at 816.

[64] *Romney II*, 456 F.2d at 816-17.

[65] *Id.* at 812.

[66] *Id.* at 818.

ond of two appeals, the Third Circuit held that the exclusion of AWC was in violation of the participatory provisions of the Model Cities Act and implementing regulations.[67] The court ordered the community group reinstated in the Model Cities process.[68] The legal victory failed, however, to garner much for the organization or the community it represented. While the litigation was pending, the planning and implementation of the program in Philadelphia had gone on without the required participatory group.[69] Although Philadelphia was ordered to and did replace the existing illegal board, there was probably little left to decide and less to implement.

The issues in *Romney* were at once factual and legal. The court's task was to determine if the legally required standard for citizen participation had been met: at a minimum, had the proper amount of participation taken place. This required the court to interpret HUD's vague statutory language and HUD's numerous contradictory attempts to clarify the policy. The standard of legally required participation the court seemed to arrive at was "consultation." Even though the program had subsequently proceeded with an independent citizen group in place, the issue was what weight the court should give to the failure to consult with the original participatory organization about the proposed elimination of "operations" from an approved participatory scheme. The court of appeals chose to enforce the participatory mandate in a manner intended to discourage cities from using similar maneuvers to exclude or bypass legitimate citizen representatives for potentially more pliable or less challenging substitutes. From both the community's and the city's standpoint, however, the court's decision probably represented an unwelcome or disruptive intrusion of the dictates of process in an already process-laden endeavor. Thus, the *Romney* case illustrates the problem of using litigation to vindicate unfulfilled participatory goals. More importantly, however, it also probably served as a cautionary tale for legislators on how *not* to structure a participatory process. Explicitly stated rights of appeal or enforcement mean delay. Since *Romney* and the Model Cities and Commu-

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[67] *Id.*
[68] *Id.*
[69] *Romney II*, 456 F.2d at 818.

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nity Action experiences, participatory provisions have been structured to eliminate any legally enforceable participatory mandates. Participatory provisions are usually drafted without any language that could be interpreted as guaranteeing an enforceable right to participation. As a result, later participatory provisions that have followed the Community Action and Model City era, such as those in the Community Development Block Grant and the Empowerment Zone programs,[70] have never included language that could ever serve as an enforceable mandate in court. While this has served as a pragmatic limit on frivolous litigation for leverage by disgruntled or dissatisfied community participation advocates, it has also meant that citizens have been relatively powerless to enforce participatory mandates that are ignored by local government or that fail to provide citizens with a meaningful voice for their needs, views, and desires.

C. *Public Hearings and One-Way Participation*

In 1974, the Community Development Block Grant program ("CDBG") replaced the Model Cities and other categorical grant programs.[71] Instead, CDBG provided block grant funding to all eligible cities to engage in an extensive list of general activities related to remedying urban decay.[72] This program also had the dubious distinction of replacing the strong participatory mandates of the Great Society era with minimal citizen participation mechanisms. On the other hand, CDBG's relatively weak mandate has nonetheless been particularly influential in making participation part of the local scene by providing a continuous source of funds for local community development activities for metropolitan cities and urban counties.[73]

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[70] *See infra* text accompanying notes 79-90; 92-119.

[71] *See generally* Catherine Lovell, *Community Development Block Grant: The Role of Federal Requirements*, PUBLIUS (Summer 1983).

[72] The Act lists twenty-five activities eligible for CDBG funds, a number of which are specifically geared toward economic development. 42 U.S.C. § 5305(a) (2000). For an in-depth discussion of the effectiveness of CDBG as an economic development program, see generally Howells, *supra* note 9.

[73] *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. I, § 101, 88 Stat. 633 (codified at 42 U.S.C. § 5301 (1974)); *see also* DENNIS R. JUDD & TODD SWANSTROM, CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY 227 (2d ed. 1998). CDBG is an entitlement program that awards funds to eligible

CDBG, at least on the face of the statute, states that community participation is an integral aspect of the program's vision and requirements for local planning and decision-making with respect to CDBG dollars. The statute program conditions the annual award and use of CDBG funds on city governments providing a detailed citizen participation plan.[74] The plan is required to encourage participation "by persons of low and moderate income who are residents of slum and blight areas."[75] As stated above, the federal government's participatory mandates have been instrumental in encouraging local governments to institutionalize practices geared towards soliciting citizen participation. The availability of CDBG funding for neighborhood development activities is credited with having led to a "concomitant growth in the number of [urban political] groups, and the gradual increase in sympathy for them on the part of municipal government."[76] Therefore, CDBG (as well as other federal development programs) has caused cities to become used to working with citizens and consulting with them for their views on public development decisions.[77]

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jurisdictions that apply. CDBG replaced eight categorical programs that required jurisdictions to compete for funding that could be used only for the explicit purposes outlined in the programs: Model Cities; Open Space, Urban Beautification and Historic Preservation Grants; Public Facility Loans, and Water and Sewer and Neighborhood Facilities Grants. Charles E. Connerly & Y. Thomas Liou, *Community Development Block Grant, in* THE ENCYCLOPEDIA OF HOUSING, *supra* note 10, at 64.

[74] 42 U.S.C. § 5304(a)(3); 24 C.F.R. § 570.303 (2000). *See* Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297, 306 (1996). Mashaw and Dylan argued that the block grant format generally arises during Republican administrations and only gives an illusion of local discretion. *Id.* at 318-24. They further argued that block grants come with a list of restrictions on the use of funds and that the citizen participation requirement is an example of one of those federal restrictions. *Id.* at 324. ("Thus, it is hardly accurate to think of the states (or localities) being completely 'free' within a particular policy area to spend in anyway they see fit.").

[75] 42 U.S.C. § 5304(a)(3)(A).

[76] Robert J. Chaskin & Ali Abunimah, *A View from the City: Local Government Perspectives on Neighborhood-Based Governance in Community-Building Initiatives*, 21 J. OF URB. AFF. 57, 68 (1999).

[77] *Id.* In 1995, as part of a consolidation of applications for a variety of block grant funds, HUD amended the administrative regulations governing community participation in CDBG. The citizen participation plan is now explicitly required to provide for and encourage citizen participation in specified stages of the planning process. 24 C.F.R. § 91.105(a)(2) (2000). Most significantly, the city must consider any comments of citizens received in writing, or orally at the public hearings, and

Notwithstanding the quietly influential role this program has played, the participatory mandate in the CDBG program provides for a very limited form of participation. Adopted in the wake of the Model Cities and Community Action era (during the Nixon era of the New Federalism), for nearly twenty years the CDBG statute merely required public hearings and notice. Cities have only to conduct public hearings to obtain citizen views to obtain CDBG funding.[78] The CDBG statute was vague about recommended procedures for these hearings, but it required that citizens be provided "with reasonable and timely access to local meetings, information, and records relating to the [city's] proposed use of funds."[79]

CDBG's limited community participation provisions led to relatively minimal forms of citizen participation. Numerous lawsuits claiming the inadequacy of community participation provisions have been brought but have been uniformly unsuccessful. Instead, courts typically have found that the statutory language provided near-absolute discretion to the cities in utilizing minimal citizen participation schemes that were subject to minimal, if any, oversight by HUD. For example, a participatory scheme providing merely an advisory role for citizens was consistent with the dictates of the statute. In *City of Miami v. Rodriguez-Quesada*,[80] former members of a citizen advisory board established by Miami to facilitate citizen participation sued after an elected board was dissolved and an appointive board was installed in its place.[81] The court held that nothing in CDBG nor its regulations restricts a city in any way from determining the manner and means of community in-

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attach a summary of these views, including those not accepted and the reasons therefore, to the final consolidated plan. *Id.* at § 91.105(b)(5). In some ways, these changes to the CDBG participatory regulations are a noteworthy improvement by requiring the cities to provide an explanation and justification for its funding decisions. Nevertheless, they still only allow one-way communication of information to the public; any response of approval or disapproval by the community need not impact the final outcome of the decision.

[78] 42 U.S.C. § 5304(a)(3)(D).
[79] 42 U.S.C. § 5304(a)(3)(B).
[80] 388 So. 2d 258 (Fla. Dist. Ct. App. 1980).
[81] This case also demonstrates that the motives may not always be pure in community participation. According to the record, the City took this action because the Board had not provided an opportunity for residents to voice their opinions and had alienated resident participation within the area. *Id.* at 259.

put.[82] According to the court, "the Act requires community input; however, this input is advisory in nature."[83]

Even where public hearings allowed only for minimal time to testify, and thus provided inadequate time to present different suggestions for budget allocation decisions, the participatory structure was upheld. In *Broaden v. Harris*,[84] community organizations representing low-income minority residents sought to enjoin the CDBG program in Pittsburgh, charging that the program allocations for public works and recreation failed to allocate sufficient resources to the needs of low income families and renters, and that citizens were only granted five minutes at the public hearings to give their views on fund allocations. The court held that the standard of what was adequate citizen participation was based on whether the city certifies it to be adequate.[85] Pittsburgh exceeded the minimum requirement of holding two hearings by also mailing letters to concerned individuals and groups and by holding public workshops to explain the scope of the Act prior to submitting each application.

Similarly, in *N.A.A.C.P. v. Hills*,[86] a Santa Rosa, California program was challenged because it failed to provide funds for low- and moderate-income housing and included inadequate opportunities for citizen participation in the development of Santa Rosa's plan. The court decided that the plan was adequate because the application had been considered by an advisory commission and because four public hearings (several of which were attended by only a few persons but one of which was attended by over 100 persons) provided citizens with sufficient opportunities to make their views known.[87]

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[82] *Id.*

[83] *Id.*

[84] 451 F. Supp. 1215 (W.D. Pa. 1978).

[85] *Id.* at 1225.

[86] 412 F. Supp. 102 (N.D. Cal. 1976).

[87] *Id.* at 111-12; *see also* Ulster County Cmty. Action Comm., Inc. v. Koenig, 402 F. Supp. 986 (S.D.N.Y. 1975). In *Koenig*, a community-based corporation sued to enjoin CDBG charging, *inter alia*, that the city had failed to comply with the citizen participation requirements. *Id.* at 990. The court held that the city had complied with the requirement by appointing members of a Community Development Advisory Council and by holding two public hearings attended by 150 persons that included distribution of HUD rules and regulations showing the range of eligible activities under HCDA. *Id.* at 989-90. Newspaper reports of each step of the application process and the city's proposals for use of the money ensured that

The preceding cases were decided correctly by the various courts. Although the legislative history is silent, it seems safe to assume that the legislation for CDBG following, as it did, on the heels of the Great Society program participation experience, was intentionally weakened to provide for minimal forms of citizen participation. It was drafted to fulfill the vision of planning as being a technical, expert-driven process that ultimately should be controlled by local government decision-makers. Citizens would have a say, but they would not have any ability to see that their voice actually had an impact on CDGB project priorities and spending decisions.

1. Political Federalism and Federal Deference

In addition to the minimal participation envisioned by the program, CDBG also excluded any federal agency, including HUD, from exercising substantive oversight over the nature and effectiveness of the citizen participation program. This in effect meant that citizens would not have the right to appeal to a higher authority if the city did not provide a meaningful participatory process or was unresponsive to citizen views aired at pubic meetings. In fact, a city is able to satisfy the CDBG participatory scheme requirement merely by its own certification that it had complied. In *Nickols v. Pierce*,[88] in response to a challenge to a community participation plan, the court found that HUD was not required to conduct an independent investigation to ascertain whether an applicant had actually complied with the citizen participation requirements for the preapplication or application.[89] Rather, HUD was permitted to rely upon the certification or assurance provided by the applicant.[90] Therefore, the view of participation during the CDBG era was that participation should largely be passively receptive of information with citizen opinions merely advisory.

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the public was adequately informed. *Id.* at 990.

[88] 556 F. Supp. 1280 (S.D. Ohio 1982).

[89] *Id.* at 1295.

[90] Other difficulties included standing. *See generally* George D. Brown, *Federal Funds and Federal Courts—Community Development Litigation as a Testing Ground for the New Law of Standing*, 21 B.C. L. REV. 525 (1980); Janet Varon, *Passing The Bucks: Procedural Protections Under Federal Block Grants*, 18 HARV. C.R.-C.L. L. REV. 231 (1983).

Accordingly, courts would not interfere to ensure that the feedback was either effective or taken into account in city decision-making about the distribution of CDBG funds. As a concession to political federalism or comity principles, HUD would not intervene in the substantive participatory decisions made at the local level. The Model Cities and Community Action experiences left a hard-forgotten lesson that disrupting or altering local political relationships was politically costly.

D. *Front-Loading Enforcement: Mandating Participation for Eligibility*

The discussion thus far has painted a picture of an ebb and flow of participatory structures in development. Weak participation structures in the urban renewal era were followed by strong participatory structures in the Great Society programs, which were then followed by the weak participation of the CDBG era. Accordingly, the more recent participatory structures mandated in federal development programs (e.g., the Empowerment Zone program) contain what appear to be textually strong participatory mechanisms reminiscent of the Community Action and Model Cities days.

The Empowerment Zone Program is an economic development program that provides tax incentives to encourage businesses to relocate to the inner city, as well as federal funding for complementary economic development activities. In contrast to the limited nature of CDBG participatory provisions, the Empowerment Zones community participation mandate was structured in a way that was more strongly supportive of active community participation—community participation was built in up front as a required element for qualifying for funds that were to be awarded to a limited number of cities. The Empowerment Zone legislation, contained in the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),[91] included a front-loaded enforcement mechanism for the participatory mandate. To be designated an Empowerment Zone, cities had

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[91] Omnibus Budget Reconciliation Act of 1993, 26 U.S.C. §§ 1391-1397D (1994) (amended by Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 951-952, 111 Stat. 788, 885, *reprinted in* 1997 U.S.C.C.A.N. 678 (codified as amended at 26 U.S.C. § 1391 (2000))).

to submit an application with a strategic plan for mobilizing and coordinating state, local, private, and community resources.[92] The strategic plan had to contain a "process by which the affected community is a full partner in the process of developing and implementing the plan and the extent to which local institutions and organizations have contributed to the planning process."[93] Therefore, Empowerment Zones ostensibly conceived of participation in a much more substantial way. Accordingly, as an initial matter, participation was a very important aspect of qualifying for the initial round (Round I) of zone designations.[94] As the following discussion will demonstrate, however, it has not always been clear what exactly it means to make an "affected community" a full partner. The exact meaning of the phrase was subject to interpretation, which cities were inclined to interpret narrowly or minimally. Moreover, once zone designation was made, the local political circumstances dictated the extent to which the participatory mandate was followed during the implementation process. The overall participatory experience in the Empowerment Zones program was less than positive, productive or meaningful.

1. Struggles to Define and Organize Participation

During competition for Round I of Empowerment Zone designations, each city struggled to come up with a process that met the ambitious, but nevertheless vague, statutory goals.[95] The principal goal seemed to be that a collection of heads is better than one. In particular, the goal seemed to be to allow all who had a stake in the process to benefit from the process. Under HUD regulations, "[t]he people involved in the

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[92] 26 U.S.C. § 1391(f)(A).

[93] 26 U.S.C. § 1391(f)(2)(B).

[94] In 1997, Congress authorized twenty additional Empowerment Zones (fifteen urban and five rural) eligible to receive federal tax incentives but not SSBG funds. *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788, *reprinted in* 1997 U.S.C.C.A.N. 678 (codified at 26 U.S.C. § 1391). While designations were made during 1998, they were not effective until January 1, 2000. *Id.*

[95] *See, e.g., Partnering for Empowerment (Zones)*, 2 EZ EXCHANGE: THE NATIONAL EMPOWERMENT ZONE QUARTERLY 1, 1-2 (Egan Urban Center, Summer/Fall 1997) (noting the perplexing vagueness of the participation mandate and conflicting signals from HUD about whether participation should come mainly from partnerships among organizations or resident participation).

development of the strategic plan and implementation of the components must represent all who have a stake in the future of each designated area's neighborhoods and the larger community."[96] The importance of this element was emphasized by a checklist of questions designed to ensure collaborative compliance with this element.[97]

The HUD explanatory literature also suggested goals of bottom up, popular control, reminiscent of the War on Poverty era: "Residents decide what happens in their neighborhoods, not federal officials in Washington."[98] The assumption appears to be that if federal officials are not involved in dictating the details of programmatic design and implementation at the

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[96] U.S. DEP'T OF HOUS. AND URBAN DEV., GUIDEBOOK FOR COMMUNITY-BASED STRATEGIC PLANNING FOR EMPOWERMENT ZONES AND ENTERPRISE COMMUNITIES, BUILDING COMMUNITIES TOGETHER, HUD-1443-CPD, at 6 (Jan. 1994). This participatory mandate evidenced three. dimensions: stakeholder theory, participatory theory, and planning theory.

[97] Applicant cities were required to: (1) describe the specific groups, organizations, and individuals participating in the production of the plan and describe the history of these groups in the community; (2) explain how participants were selected and provide evidence that the participants, taken as a whole, broadly represent the racial, cultural, and economic diversity of the community; (3) describe the role of the participants in the creation, development, and future implementation of the plan; (4) identify two or three topics addressed in the plan that caused the most serious disagreements among participants and describe how those disagreements were resolved; (5) explain how the community participated in choosing the area to be nominated and why the area was nominated; and (6) provide evidence that key participants have the capacity to implement the plan. 24 C.F.R. § 597.200(d) (1999).

The checklist provides a window into understanding the various intentions underlying the participation requirement: element two obliquely acknowledges that racial identity might be a factor but couches it in terms of diversity, assuming that diversity will ensure that a wide range of views are included in the collaborative planning process. Element four suggests a process-oriented goal—that the purpose of the collaboration is process and the lessons to be learned from the expected disagreements and agreements. The element six requirement of demonstrated capacity means that organizational expertise and ability to accomplish goals is an important part of the collaborative participation process. This element's goal orientation would militate against a citizen-oriented, grassroots process. The difference in emphasis between elements four and six reveal the difficulty in reconciling participatory processes that emphasize the benefits of an ostensibly inclusive planning process that is meant to be empowering with an economic development process that emphasizes particular economic goals.

[98] U.S. Dep't of Hous. and Urban Dev., *Empowerment Zone/Enterprise Community Initiative, at* http://www.hud.gov/cpd/ezec/ezecinit.html (last visited Mar. 30, 2001); *see also* U.S. DEP'T OF HOUS. AND URBAN DEV., BUILDING COMMUNITIES TOGETHER: URBAN EMPOWERMENT ZONES & ENTERPRISE COMMUNITIES APPLICATION GUIDE, HUD-1552-CPD (July 1995).

local level, then the process would be an authentically commu-
nity-controlled process. Notwithstanding the suggestion that
popular political control was the goal, this view was not rein-
forced with any enforcement mechanisms in the Empowerment
Zone empowerment program. While HUD retains the ability to
decommission the entire Empowerment Zone for failure to
comply with any provision of the Empowerment Zone authoriz-
ing statute, such a sanction is unlikely and disproportionately
harsh.[99]

   2.   Money's Influence: United Application and Divided
        Participation

   In terms of fostering participation, the Round I Empower-
ment Zones participatory process' shining hour was the appli-
cation process. At that stage, the participation requirement
was an element of eligibility, and cities took these require-
ments relatively seriously and sponsored extensive
participatory activities. Communities held mass meetings and
formed smaller charrettes and discussion groups.[100] Conflicts
and disagreements arising from fundamental diverging points
of view were quickly suppressed and put aside in the excite-
ment of competing for designation. Thus, processes were open
for what were for sometimes collaborative, "visioning" planning
processes. Professional staff or consultants in New York and
Philadelphia, for example, solicited a wide range of public
input and participation to design local programs.[101] While
New York's program was ultimately the least inclusive of ordi-
nary community residents, other cities like Baltimore and
Philadelphia outdid themselves at the application stage of the
process by using a wide base of input to construct revitaliza-
tion plans.[102]

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   [99] *See* 26 U.S.C. § 1391(d) (2000).
   [100] *See* MARILYN GITTELL & KATHE NEWMAN, HOWARD SAMUELS STATE MANAGE-
MENT AND POLICY CENTER, EMPOWERMENT ZONE IMPLEMENTATION: COMMUNITY
PARTICIPATION AND COMMUNITY CAPACITY 7 (1998) (expanded case study of the
initial organizing phase of the Empowerment Zone participation process).
   [101] Marilyn Gittell & Kathe Newman, *Expanding Civic Opportunity: Urban Em-
powerment Zones*, 33 URB. AFF. REV. 530, 535 (1998).
   [102] *Id.* at 535-39.

3. Privatized Participation and Public Competition

Following designation of Employment Zone cities, the emphasis on community representation and participation in Empowerment Zone governance changed from community involvement to organizational inclusion. Following designation, most cities established relatively centralized governance structures, often placing a private, non-profit corporation in charge of Zone activities.[103] Ideally, these management corporations would act not only as providers of funding, but also as intervention agents who would "change the ways in which public agencies, private [business] firms, nonprofit organizations, and community groups interacted."[104] By facilitating relationships among the variety of local groups and organizations, "they could begin to think of themselves as a common domain, define common problems, and set common directions."[105]

It turned out, however, that federal participation and the funding eligibility requirement in Empowerment Zones was initially very disruptive. By creating "new catchment area boundaries and eligibility requirements[,] . . . [Empowerment Zones] disturbed existing relations."[106] Yet existing structures for development reasserted themselves relatively quickly. According to the Gittell and Newman study, "élite networks composed of mayors, foundation officers and development intermediaries were influential in promoting established community development corporations as the community participants in each city and in moving the designs for the Empowerment Zones toward traditional business development approaches."[107] Also, the goal of facilitating interaction among business, government, and community never happened. There was

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[103] *Id.* at 542. Some cities created an unincorporated operating board with Philadelphia and New York City, dividing the zone into smaller independently operating zones. Some cities (Baltimore, Chicago, and Detroit) added local community clusters along with their central boards. The local community cluster structures afforded more community and community-based organizational involvement. Atlanta and Baltimore created citizen advisory boards that review all EZ actions. *Id.* at 542-43.

[104] *Id.*

[105] Howell S. Baum, *Education and the Empowerment Zone: Ad Hoc Development of an Interorganizational Domain*, 21 J. URB. AFF. 289, 289 (June 22, 1999).

[106] *Id.*

[107] Gittell & Newman, *supra* note 101, at 554.

little contact between community organizations and businesses investing in the Zone. Notwithstanding the presence of business representatives on the governing boards, business representatives contended that governance processes take too long and that there is too much conflict among community representatives.[108] According to Gittell and Newman, "[n]ew businesses or businesses that expand within the Zone[] have little incentive . . . to work with Empowerment Zone governance boards or governance structures. Instead, they frequently bypass these organizations and go directly to the city economic development agency."[109] Gittell and Newman concluded, accurately, that businesses did not need to work with Empowerment Zone governance structures to hire zone residents or be eligible for the tax incentives.[110]

To the extent that community participation did exist, much of that participation centered initially around discordant and competitive struggles over representation on governance boards. The community participation process in each city was characterized by initial years of disorganization as a variety of people and institutions—with a variety of goals, desires, and motivations—struggled, argued, and fought over governance issues within each Empowerment Zone. Each city's conflict centered around three similar issues: (1) numeric community representation on central boards, (2) defining or identifying proper or authentic community representatives, and (3) fighting over whether economic development or social service programs would be the program's priority. Also, fights over decentralized or centralized control were common. The fights represented many things. To some, they reflected a necessary and healthy process of participation and negotiation.[111] To others both inside and outside of the process, the conflicts represented the futility of including disaffected people in a sophisticated process of problem solving.[112] Oddly, the conflict over repre-

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[108] GITTELL & NEWMAN, *supra* note 100, at 7.

[109] *Id.* at 7.

[110] *Id.*

[111] *See, e.g.,* 24 C.F.R. § 597.200(d) (1999) (identifying two or three topics addressed in the plan that caused the most serious disagreements among participants and describing how those disagreements were resolved).

[112] This argument can be discounted to the extent that participatory mechanisms usually involve the leaders of the beneficiary communities. This point also

sentation, to some extent, brought community organizations together in strategic alliances. According to Gittell and Newman, however, while "the struggle for representation on governance boards brought community organizations togeth-er[,] . . . the competition for money divided them."[113] The of-ten fierce competition over the allocation of resources was in part related to turf protection. For example, city council mem-bers in Detroit and Chicago competed with community organi-zations for funds—the council members argued that they should be involved in decisions affecting their districts.[114]

The competition over resources also reflected a disagree-ment over programmatic priorities. Project selection and focus were primarily determined by city officials or Empowerment Zone professional staff who took charge of writing benchmarks, thus giving themselves a decisive role in the process.[115] Gittell notes, however, that priorities between Empowerment Zone staff and community representatives differed. Indeed, community representatives had a different definition of eco-nomic development from professional staff. They wanted social services and programs that would develop "community assets such as micro-enterprises owned by residents."[116] The com-munity view often contrasted sharply with that of Empower-ment Zone professional staff members who tended to stress recruiting established businesses to the Zone.[117]

Over time, substantial compliance with the participatory mechanisms has decreased, become nominal, or ceased. This may be due in part to the fact that neither the statute nor the regulations provided any explicit enforcement mechanism other than revocation of designation.[118] Other than a general over-

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raises the question of whether widespread educational benefits accrue in fact to a significant number of poor residents. *See* Fainstein & Hirst, *supra* note 29, at 110-11 ("The poor, renters and minorities are insufficiently represented in neighbor-hood planning processes. Thus, even where neighborhood planning has been pro-moted as an agent of redistribution, such as the Community Action Program of the War on Poverty, it has not lived up to its potential to produce social equity.").

[113] GITTELL & NEWMAN, *supra* note 100, at 8.

[114] *Id.* at 7.

[115] *Id.* at 9.

[116] *Id.* at 9-10.

[117] *Id.*

[118] 26 U.S.C. § 1391(d) (2000) (authorizing HUD Secretary to revoke Empower-ment Zone designation for failure to make progress in meeting the benchmarks set forth in the strategic plan).

sight by HUD, no ongoing explicit standards or requirements applied other than the standards and benchmarks supplied by each city's strategic plan and adopted operating structure. The more significant reason, however, might be that the federal incentive to make an effort to seek that participation ended after the application process was completed. While the community was initially drawn in for purposes of being awarded designation as a zone, they were for the most part gradually pushed to the side of the economic development component of the program.[119] This does not mean that cities did not try to comply with the community participation mandate, but it is not clear that anyone ever really determined the actual goal of community participation. And, without an overarching goal other than community involvement, the situation became complicated and contentious. The tendency was to move the direct community participation to the side either by having them make no decisions or by having them make decisions on topics marginal to the entire process of economic development. Therefore, it is useful to consider what value or purpose participation is supposed to fulfill. Perhaps a considered examination of the possible justifications could help to make sense of why we go through the time and bother of direct community involvement in development.

II. THEORIES OF PARTICIPATION IN DEVELOPMENT IN THREE
     DIMENSIONS

    In light of the tendency for weak, as well as seemingly strong, community participatory mandates to lead to community marginalization or exclusion, why should direct community participation exist? This Part considers the underlying theoretical arguments and justifications for such participation. Each theory, while conceptually overlapping in its normative bases and claims, establishes relatively distinct goals for what local governments, individual citizens, and black communities are supposed to get out of participation. The types of justifications

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[119] *See generally* Renee Berger, *People, Power, Politics: An Assessment of Federal Empowerment Zones: Empowerment Zones/Enterprise Communities Program*, 63 PLANNING 4 (Feb. 1997); Mitchell L. Moss, *Where's the Power in Empowerment Zone?*, 5 CITY J. 76 (Spring 1995).

for participation fall into three general normative categories: (1) instrumental theories stemming from bureaucratic rationalism and pragmatism that answer the question of how local governments benefit from participation, (2) democratic theories promising self-development and transformation that answer the question of what an individual citizen obtains from participation, and (3) empowerment or political control theories on behalf of low-income black communities that answer the question of how a low-income black community can benefit as a whole.

A. *Local Governments and Extrinsic Theories of Participation*

The first category of justifications for participation is the most familiar and, at least on the surface, seems to make the most sense. These justifications are instrumental arguments that pragmatically consider participatory processes to be valuable for extrinsic reasons—for what they contribute to utilitarian goals of administrative, bureaucratic, and managerial efficiency. In other words, participation is merely a useful means to an efficient end. Local governments use citizen participation schemes not because of a commitment to any intrinsic values of participation for citizens, but for their extrinsic value to local government administration. The following discussion will first contextualize this theoretical position within the context of local urban development and then proceed to examine the instrumental justifications of participation.

1. The Backdrop to Instrumentalism: The Spatialized Imperative of Growth

The definition of urban development has narrowed in recent years to focus specifically on economic development. The emphasis is now on providing business incentives and tax abatements for business corporations to encourage them to relocate to or remain within a particular municipality or region. As the emphasis has narrowed, however, the elite-driven process of development has become even more attenuated.[120]

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[120] Two commentators have noted:
   The development and ownership of industrial properties have been trans-

Local economic development is now specifically structured to meet the high-end service, entertainment, and shopping needs of the "global elite"—and to promote tourism to attract suburban visitors.[121] Recent federal urban economic development programs have attempted to capitalize on these trends by providing for the creation of zones within cities where federal tax incentives and other federal funds are made available to encourage local economic development in impoverished areas. This approach is flawed, however, because it ignores racialized space in cities and attempts to direct development to the areas that exist on the "wrong side" of the inner-city boundary—the side that is racialized black and classified poor.[122] Economic development is not meant to take place on this side of the boundary because this is the site where "the Other," or undesirably different person, is located. Moreover, these places carry the burden of very loaded, negative images of poverty, crime, and danger. They and their inhabitants are places and people to be avoided. The question that remains is whether mandating community participation can counteract this "geography of economic development" and work to the benefit of impoverished communities.

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formed in the past few decades. Most industrial properties were once purpose-built by the owner and subsequent user. Today, industrial space is more likely to be built by developers acting speculatively, leasing to users, and managing the properties as part of their portfolios.
MICHAEL A. PAGANO & ANN O'M. BOWMAN, CITYSCAPES AND CAPITAL: THE POLITICS OF URBAN DEVELOPMENT 12 (1995).

[121] *See* Robert A. Beauregard & Anne Haila, *The Unavoidable Incompleteness of the City*, 1997 AM. BEHAVIORAL SCIENTIST 327, 328 (1997) (noting "the multiple business centers, transformed waterfronts, gentrified neighborhoods and hollowed-out zones of manufacturing of the late 20th century city and the influence of an increasingly delocalized ownership of property").

[122] *See* McFarlane, *supra* note 7, at 337-42; *see also* John O. Calmore, *Racialized Space and the Culture of Segregation: Hewing a Stone of Hope from a Mountain of Despair*, 143 U. PA. L. REV. 1233, 1236-38 (1995) (tracing the role of racialization and racialized space in configuring residential segregation); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1913 (1994) (demonstrating that law creates and perpetuates racially identified spaces); Alastair Bonnett, *Geography, 'Race' and Whiteness: Invisible Traditions and Current Challenges*, 29 AREA 193, 199 (1997) (pointing out that racialized space does not only refer to black space but also white space and that white space tends to be viewed as socially transparent, normative, neutral, banal, dull, noncontroversial, and normal).

Economic development is carried out through a set of privatized structures and processes designed primarily, if not exclusively, to meet the needs of business elites and to encourage capital investment in particular geographic areas to promote growth and increase land prices and rents.[123] That process is designed to be quickly responsive, private, and shielded from public scrutiny.[124] This is accomplished through elites wielding informal channels of power, as well as quasi-private government entities, such as public authorities, operating free from public scrutiny.[125]

Conventional wisdom is that a measure of good city management is the extent to which it provides a hospitable environment for business.[126] The actors in the economic develop-

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[123] *See* JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 62, 73 (1987).

[124] *See* MATTHIAS STIEFEL & MARSHALL WOLFE, A VOICE FOR THE EXCLUDED: POPULAR PARTICIPATION IN DEVELOPMENT: UTOPIA OR NECESSITY? 10 (1994) ("The characteristic contemporary patterns of economic growth, of modernization and of nation-building all have strongly anti-participatory traits. . . . Societies develop complex batteries of defenses against popular participation."); Robert A. Beauregard, *Constituting Economic Development: A Theoretical Perspective, in* THEORIES OF ECONOMIC DEVELOPMENT: PERSPECTIVES FROM ACROSS THE DISCIPLINES 267 (Richard D. Bingham & Robert Mier eds., 1993) (attributing the scant critical assessment of economic development to its "inherent sensibility, avowed pragmatism and unflinching optimism [that] overwhelm[s] intensive probing of its theoretical tendencies and ideological biases").

[125] *See generally* ROGER G. NOLL & ANDREW ZIMBALIST, SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS (1997) (discussing the use of publicly unaccountable stadium authorities to finance, construct, and operate the recently proliferating sports stadia); *see also* ALBERTA M. SBRAGIA., DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT 139 (1996) ("[A]uthorities are created for anti-democratic purposes—the evasion of rules that apply to government itself.").

[126] *See* LOGAN & MOLOTCH, *supra* note 122, at 59 (describing the official Fantus ranking of business climate based on taxation, labor, legislation, unemployment compensation, scale of government, and public indebtedness and noting that a 1975 survey by the Industrial Development Research Council of corporate executives responsible for site selection decisions ranked states simply as "cooperative," "indifferent," or "anti-growth"); *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 68 (1990). Young wrote:

Despite . . . rhetoric to the contrary, the primary beneficiary of big government . . . is private enterprise. . . . Government creates institutions and develops policies explicitly aimed at promoting the long-term interests of capital accumulation. To this end, federal and sometimes local government regulates the economic system through tax policy, monetary policy, tariffs and import-export trade policies, debt spending, farm and corporate subsidies, and regulation of its own spending levels.

Id. at 68-69.

ment process have been labeled a "growth coalition" that works in concert with government officials to turn each city into a "growth machine."[127] These descriptive labels arise because in many municipalities, economic development is a process controlled by a political alliance of public officials, businessmen (particularly those involved in property investment, development, and real estate financing), and bureaucrats.[128] Aided by a discourse or narrative of economic development that relies on terms like "business-friendly," "public-private partnership," and "empowerment,"[129] the growth coalition operates to channel expressed citizen interests into a system of land-use decisions oriented towards the imperative to promote growth.[130]

The dominance and hegemony of the economic development narrative and the irresistible nature of its privatized processes overshadows community perspectives about quality of life in neighborhoods and community voices clamoring for services. Instead, under the local economic development dis-

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[127] LOGAN & MOLOTCH, *supra* note 122, at 50.

[128] *Id.* at 62-85. Cities are the site where the growth coalition operates and is therefore referred to as "the growth machine." *Id.* at 32-37; *see also* Richard C. Feiock & James C. Clingermayer, *Development Policy Choice: Four Explanations for City Implementation of Economic Development Policies*, 22 AM. REV. OF PUB. ADMIN. 49, 60 (1992) (arguing that the building industry unions play a great role in directing municipal resources towards economic development to protect and provide jobs). *But see* Richard C. Box, *Critical Theory and the Paradox of Discourse*, 25 AM. REV. PUB. ADMIN. 1, 8 (1995) (arguing that the growth coalition theory fails to account for differences between communities).

[129] *See* Rob Atkinson, *Discourses of Partnership and Empowerment in Contemporary British Urban Regeneration*, 36 URBAN STUDIES 59, 60 (1999) ("The mere existence of an official discourse advocating empowerment and partnership is no guarantee that it will actually [take place because] the organizational contexts in which discursive practices operate are also sites of power relationships and contestation.").

[130] *See* David Wilson, *Metaphors, Growth Coalition Discourses and Black Poverty Neighborhoods in a U.S. City*, 28 ANTIPODE 72, 73 (1996) (analyzing the metaphors used in "growth" discourse in urban development). As two commentators observed:

> City development responses are path dependent: they lock in the protected interests of certain sectors of the business community as well as solution sets linked to factor costs. This limits the city's ability over time to adjust to changing constituencies and to address emergent problems unrelated to factor-cost issues. Local institutions continue to reflect this legacy of interests and economic growth models, *particularly those articulated by past federal programs*.

Susan E. Clarke & Gary L. Gaile, *Local Politics in a Global Era: Thinking Locally, Acting Globally*, 551 THE ANNALS: GLOBALIZATION AND THE CHANGING U.S. CITY 28, 37 (David Wilson ed., May 1997) (emphasis added).

course, a more beneficial long-term approach to providing jobs and job training supposedly will eliminate, once and for all, the need for social services.[131] Local government law supports economic development as a private endeavor, immune from public control or accountability, through the use of autonomous public authorities that routinely handle economic development without citizen input or influence.[132] Therefore, participation has a heavy burden of countering marginalization of poor black communities and residents by adequately taking into account the intensely political and spatialized nature of the economic development process.[133] Many believe that community input is inconsistent and unnecessary for economic development.[134]

2.   The Instrumental Value of Participation to Local Government

Somewhat ironically, despite the intensely political, spatialized, and privatized nature of economic development, participation has turned out to be a useful tool for local governments. As commentators have observed, in many if not

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[131] For example, at a community organizing meeting held at an elementary school in 1996 in Baltimore in connection with the Empowerment Zone, I recall an elderly woman speaking up to request help to fix her home that was in disrepair. She was dismissively informed that this process was about jobs.

[132] Public authorities and special districts have been held immune from the constitutional guarantees of one-person, one-vote, in part because they embody an expectation of private decision-making immune from public input because they are primarily conceived of as business enterprises. *See* Ball v. James, 451 U.S. 355, 368-71 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 734 (1973); Kessler v. Grand Cent. Dist. Mgmt. Ass'n, 158 F.3d 92, 100-03 (2d Cir. 1998). In the context of the Empowerment Zone, a number of early news accounts reflected the privatized nature of local structures of economic development. *See Board Officials Clash*, HOUSTON CHRON., July 11, 1995, at 11 (reporting that a rural Empowerment Zone Board President (Rio Grande) correctly pointed out that Rio Grande EZ is a private corporation and thus was not required to comply with Texas open meetings laws); Joseph Gerth, *Chicken-Plant Opponents Frustrated by Hearing*, THE COURIER-JOURNAL, July 5, 1999, at A1 (reporting that to comply with participation requirement, rural EZ Board merely held a public hearing in order to be eligible to use $1 million to purchase land for a chicken processing plant).

[133] *See* Beauregard, *supra* note 123, at 270 (describing economic development as an intensely political process).

[134] *See* Box, *supra* note 127, at 8 (noting that to the extent the growth coalition controls a city, the less possible it will be for city administrators to represent the interests of citizens who do not share the growth machine's goals).

most cases, "cities may work with organizations for purely instrumental purposes, as mechanisms through which to support particular kinds of activities."[135] Municipalities often call on neighborhood groups to review plans or budgets, develop neighborhood plans, or assist in the provision of services.[136] One benefit of community input has been that it allows cities to take into account unique needs and sensibilities of various sub-areas.[137] Also, participation can serve as an important vehicle for introducing a project to a proposed community, gauging its support or opposition, and providing a forum for civic activity on matters of immediate interest to city residents.[138] "Public officials see a benefit in working through identifiable community leaders who can broker relationships between them and the network of local actors unknown to them and who can provide apparent legitimacy to government activities in the neighborhood."[139] Therefore, community participation is primarily sought for its instrumental value in facilitating information gathering and as a political feed-back mechanism. In other words, community participation can, to a certain extent, promote administrative efficiency.

But local governments operate under dual pressures. With the advent of CDBG and its participatory norm (however minimal), local governments have either felt pressured or become accustomed to including citizen groups in public decision-making.[140] On the other hand, local governments have an ongoing

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[135] Chaskin & Abunimah, *supra* note 76, at 67.

[136] Fainstein & Hirst, *supra* note 29, at 100.

[137] Fainstein & Hirst, *supra* note 29, at 100.

[138] *See, e.g.*, Frank Benest, *Engaging Citizens in the Bottom Line*, AM. CITY & COUNTY (Dec. 1997) (recommending participatory annual budget process to create public support for difficult decisions); Michele Frisby & Monica Bowman, *The Future of Local Government: Involving Citizens in Community Decision-Making*, 78 PUB. MGMT. at A1 (Feb. 1996) (surveying proactive varieties of participatory schemes); Rob Gurwitt, *A Government That Runs on Citizen Power*, GOVERNING MAG. 48, 48-50 (Dec. 1992) (profiling local governments that use citizen participation as a way to engage and retain residents).

[139] Chaskin & Abunimah, *supra* note 76, at 75.

[140] Considerations of efficiency and effectiveness do not provide easy answers to difficult questions of how to select appropriate community representatives. "In most cases, the relationship with a neighborhood organization may be used as a proxy for neighborhood participation, out of a belief that the organization is well-enough grounded in the neighborhood to carry sufficient local influence." *Id.* at 69. The other question is decision-making authority. Should community groups have actual decision-making power? Most often, local government officials "considered the

obligation to try to provide efficient and effective services and administrative processes.[141] The goal of administrative efficiency is certainly laudable, but it means that participation that is often laborious, time-consuming, or potentially disruptive can quickly lose its appearance of efficiency.[142] Is participation still justified when it involves delay or disruption? This is an important question because it requires us to look beyond instrumental justifications that are otherwise so appealing.[143]

In particular, two problems result from a purely instrumental justification for, and view of, participation. Because economic development is privatized and elite-driven, instrumental justifications by definition mean that community members should not be included in decisions regarding economic development because they have nothing valuable to contribute to the decision.[144] The governmental decision-making agenda towards economic development is predetermined, and thus, community views or input will rarely, if ever, be useful. Therefore, instrumental justifications succeed in making community exclusion from agenda-setting seem rational and inevitable.[145] Instrumental theories thus would apparently dictate

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neighborhood's role in principally advisory terms, making clear their concerns and priorities in ways that both inform and respond to city plans." *Id.* Chaskin and Abunimah note that a few local government officials think, in contrast, "that neighborhoods should play a more driving role and take on more direct responsibility for development planning and activity." *Id.*

[141] *See generally* Gary Woller, *Toward a Reconciliation of The Bureaucratic and Democratic Ethos,* 30 ADMIN. & SOC'Y 85 (1998).

[142] Richard D. Margerum, *Getting Past Yes: From Capital Creation to Action,* 65 J. AM. PLANNING ASS'N 181, 190 (1999) ("[O]rganizations must be willing to withstand higher transaction costs. Decisions involving more consultation will require more time, and may require more personnel and resources.").

[143] *See* Brent Wall, *Assessing Ethics Theories from a Democratic Viewpoint, in* ETHICAL FRONTIERS IN PUBLIC MANAGEMENT: SEEKING NEW STRATEGIES FOR RESOLVING ETHICAL DILEMMAS 135 (James S. Bowman ed., 1991) (noting public administration's lack of a "legitimate normative frame of reference for administrative action").

[144] Studies have shown that participatory structures in New York City, for example, have had a net negative effect on the redistribution of wealth and power to poor areas because the poor, renters, and people of color are insufficiently represented in participatory processes. Fainstein & Hirst, *supra* note 29, at 109; *see also* Peter Marcuse, *New York City's Community Boards: Neighborhood Policy and its Results, in* NEIGHBORHOOD POLICY AND PROGRAMMES: PAST AND PRESENT 145 (Naomi Carmon ed., 1990). *See generally* JEFFREY M. BERRY ET AL., THE REBIRTH OF URBAN DEMOCRACY (1993).

[145] Participatory mechanisms have been acknowledged to be more effective at

that community not be included in economic development deci-
sion-making.

When programs like the Empowerment Zones program
force cities, at least on the surface, to seek citizen participation
in economic development decision-making, the resulting partic-
ipation may still be exclusionary and not meaningful. The
harmful aspects of purely instrumental motives are obscured
by the use of seemingly methodical and objective participatory
schemes informed by stakeholder theory. Stakeholder theory is
often the implicit basis for conceiving and implementing citizen
participation schemes.[146] Stakeholder theory originates from
corporate managerial decision-making models that seek to
accurately describe the groups of people both inside and out-
side of a corporation who have a "stake" in the operations and
decisions that a corporation makes. It considers "whether cor-
porations owe a duty of 'trusteeship' or 'responsibility' to other
social interests besides those of the shareholders."[147] Stake-
holder theory posits that corporate managers and shareholders
are not the only group of people whose interests a corporation's
performance can impact; instead, workers, consumers, suppli-
ers, creditors, and local communities have a stake in corporate
decision-making.[148] The idea is that everyone who has a
stake should be brought to the corporate decision-making table
or, at the very least, their interests should be taken into con-
sideration. Therefore, stakeholder theory is a very useful con-
struct for deciding the question of who should participate in a
decision-making process.[149] Within the context of an urban

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retaining middle-class residents within the city than they are at promoting the
interests of those at the bottom of the social hierarchy. Carmine Scavo, *The Use of
Participative Mechanisms in Large U.S. Cities*, 15 J. URB. AFFAIRS 93, 93-109
(1993).

[146] *See* Severyn T. Bruyn, *The Moral Economy*, 57 REV. OF SOC. ECON. 25, 27
(1999) (noting that stakeholder's theory offers a way to determine the common
good that is otherwise continuously evolving).

[147] Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Stat-
utes*, 61 GEO. WASH. L. REV. 14, 21-22 (1992) ("The corporation should be man-
aged for the benefit of its stakeholders: its customers, suppliers, owners, employ-
ees, and local communities."); William M. Evan & R. Edward Freeman, *A Stake-
holder Theory of the Modern Corporation*, in ETHICAL THEORY AND BUSINESS 66,
69-71 (Tom L. Beauchamp & Norman E. Bowie eds., 5th ed. 1997).

[148] Nell Minow, *Shareholders, Stakeholders, and Boards of Directors*, 21 STETSON
L. REV. 197, 218 (1991).

[149] *See* William Beaver, *Is the Stakeholder Model Dead? It Looks Like the People*

development planning process, the relevant stakeholders would be local government, community-based non-profit organizations, community businesses, individual community residents, developers, financial intermediaries, and foundation representatives.[150]

Stakeholder theory's premise of neutrality ultimately does not necessarily lead to meaningful community participation. Under stakeholder theory, "the decision-maker considers the views of all constituents with a stake in the process, without giving priority to the interests and benefits of any particular constituency."[151] Stakeholder theory is based on the view that "ultimate values or ends are arbitrary and political and cannot be determined by rational analysis and thus they must be accepted as arbitrarily given through the political process."[152] Communities are often considered one of many stakeholders in the issues and decisions facing cities. Therefore, in the context of development, when there are competing goals of profit, equity, economic empowerment, quality of life, or possibly other goals, the stakeholder technique seemingly provides a rational means of synthesizing and prioritizing goals. To that end, stakeholder theory presumes that through discourse, a rational outcome beneficial to the participants and the public good will

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Who Hold the Shares are Still Number One in the Mind of Corporate America, 42 BUS. HORIZONS 8, 12 (1999) (arguing that the hostile takeovers, downsizing, mergers, rise in executive compensation through stock options, and the rise in institutional investors have strengthened the primacy of the shareholder and largely rendered the stakeholder model meaningless in corporate America).

[150] *See* Ortwin Renn et al., *Public Participation in Decision-Making: A Three-Step Procedure,* 26 POL'Y SCIS. 189, 190-91 (1993) (proposing a participatory decision-making process utilizing three forms of knowledge: (1) knowledge based on common sense and personal experience, (2) knowledge based on technical expertise, and (3) knowledge derived from social interests and advocacy).

[151] *See* Georgette C. Poindexter, *Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process,* 15 VA. ENVTL. L.J. 37, 38 (1995). Compare this theory to the approach of equity planners, who believe the planners' role extends "beyond that of advocacy in making sure underrepresented voices are heard to that of giving planners the specific social responsibility of promoting redistribution where there is an imbalance of power and resources." Catherine Ross & Nancy Green Leigh, *Planning, Urban Revitalization, and the Inner City: An Exploration of Structural Racism,* 14 J. OF PLANNING LITERATURE 367, 369 (Feb. 2000). They further believe that "having a voice is not enough. Instead specific efforts must be made to redress the imbalances of resources, opportunities, and power that contribute to the material and social inequities experienced by racial minorities." *Id.* at 369-70.

[152] Woller, *supra* note 140, at 88.

ensue. Fundamentally, this argument is based on an assumption that all interests, when brought to the table, will be considered equally. Stakeholder theory does not adequately consider, however, that the development process is weighted towards protecting certain interests. To the extent that participants bring goals to the table that are inconsistent with the predefined and privatized goals of development, the process will either stop or the inconsistent goals will be discarded as irrational, impractical, or simply undesirable.[153] Therefore, instrumental justifications are inadequate for justifying community participation in economic development decision-making. Perhaps, however, the greatest problem for instrumental theories in justifying participation as a goal is their over-reliance on extrinsic justifications of bureaucratic rationality that fail to acknowledge the intrinsic value of community participation for the participants, regardless of efficient or rational outcomes. In addition, they fail to provide any reason at all to tolerate the messy elements of direct democracy that are implicit in any participatory mandate.

B. *Democratic Political Theory and the Intrinsic Value of Participation*

The law and policy of community participation, while rhetorically ubiquitous, are largely undeveloped and inadequate. One of the most important aspects of community participation is that it typically involves some level of direct participation by community members in a decision-making process. While participation of all residents of a particular community is physically impossible, and some form of representative scheme is re-

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[153] *See* Frank Fischer, *Citizen Participation and the Democratization of Policy Expertise: From Theoretical Inquiry to Practical Cases*, 26 POL'Y SCIS. 165, 169-70 (noting the mediating role that public administrators play between elites and the mass citizenry: regardless of the personal or moral intentions, public administrators tend to buy into a system of explanations designed to accommodate the needs of community to the structures of a larger system of domination and control). Also, consider the case of the relationship of community groups with the Mayor of New York City. Very real constraints have been demonstrated to operate in that arena where participants are constrained from disagreeing or expressing an unpopular view for fear of defunding or other punitive actions in unrelated matters. Therefore, local government retains significant power and discretion to shape the outcome of participatory processes.

quired, all of the methods of participation utilized are based on a very decentralized form of decision-making predicated on garnering widespread input on decisions related to agenda-setting and implementation. The direct democracy involved in a community participation scheme is of a different qualitative nature than the more familiar methods of direct democracy at the national and state level (such as the initiative and referendum). Instead of an up or down vote of "yes" or "no," the nature of direct democracy in community participation is based on the personal face-to-face form of discourse and negotiation. In many ways, this is the most direct analogue to the New England town meeting that often serves as the rhetorical justification for direct democracy and our normative vision of government.[154]

The rhetoric of direct democracy abounds in the justifications for both constitutional and political federalism. Power should devolve to state and local governments to provide as much local decision-making as possible, to let states serve as laboratories for innovation and experimentation, and to allow local control over decisions that are perceived to be primarily of local concern. As Gerald Frug has argued, one of the underlying influences on judicial decision-making with respect to issues of local government has to do with whether the court believes that decision-making is more appropriately centralized rather than decentralized.[155] Although Frug has identified a tendency for courts to decide in favor of centralized decision-making, he probably would not argue with the assertion that the rhetoric of local control and a defense of its benefits of flexibility and innovation forms a strong current in Supreme Court and other courts' jurisprudence in the recognition of a

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[154] For example, the New England Town Meeting is often offered as the example of direct democracy in action in North America. It meant that decisions were made collaboratively and directly involving face-to-face discussion, negotiation and compromise. Today's version of direct democracy, the up-or-down, yes-or-no vote at the ballot box, is a related but quite distinct form of direct democracy. *See* Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLIAMETTE L. REV. 421, 429 (1998) (noting that the consensus-based decision-making process of the New England Town Meeting has little in common with the direct democracy of statewide ballot initiatives and referenda).

[155] *See generally* Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

right to local control over criminal matters, zoning, and school finance.[156] Americans fundamentally believe, at least in the abstract, that local government is the level of government closest to the people and, wherever possible, that the people should have the ability to make decisions for themselves, or at least have their representatives, to whom they, in theory, have the most access, make the decisions for them.

In spite of our belief in local input and control, Hannah Arendt made the important observation that Thomas Jefferson was concerned that the Constitution had been justified under the rhetoric of democracy but had left little actual space for the practice of democracy.[157] According to Arendt, without the practice of democracy, Jefferson believed that the greater democracy itself was threatened because citizens would be ill-trained for public decision-making.[158] In keeping with Jefferson's concern about the rhetorical reverence for democratic principles in the abstract, the legal jurisprudence of direct democracy is otherwise sparse and under-developed because democracy is nevertheless envisioned as representative democracy and participation is envisioned as voting on election day.[159] In some ways, this puts direct democracy at odds with our predominant representative notions of democracy. As a result, no legally recognized or protected space exists for this form of decision-making because direct participation does not involve a formal system of elections of representative decision-makers.

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[156] *See, e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29-31 (1973) (reasoning that funding disparities in Texas' school system were not constitutionally infirm especially in light of the Supreme Court tradition of deferring to local control of education); *see also* Joan Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law,* 1986 WIS. L. REV. 83, 104-113, 118-119.

[157] HANNA ARENDT, ON REVOLUTION 234-59 (1965).

[158] *Id.* at 258-59.

[159] *See generally* Christopher J. Peters, *Adjudication as Representation,* 97 COLUM. L. REV. 312 (1997) (arguing that systems of lawmaking in representative government provide constructive participatory government through electoral coercion and interest representation).

C. *The Lack of Legally-Protected Space for Direct Democracy*

The system of government set forth in the United States Constitution is described as government for and by the people. The "people" form the touchstone for a government that is republican or representative—a small group of citizens are chosen by election to make public decisions, while the people are carefully relegated to a secondary or indirect form of decision-making.[160] Democratic participation is provided for in the right to participate in the choice of decision-makers. These decision-makers are typically elite leaders who compete for the votes of the non-elite.[161] Their responsiveness to the concerns of ordinary people is ensured through the risk of loss of reelection and pressure by active interest groups in between elections.[162] Accordingly, constitutional law has focused heavily on ensuring the fairness of representative processes to protect political equality. Universal suffrage, freedom of expression, and the principle of "one person one vote" are the hallmark of the protection of the right to democratic participation.

Direct participation has been primarily described and understood in its negative sense, however, through the well-known warnings of James Madison. He urged ratification of the then-proposed U.S. Constitution based on the protection that its representative structure and system of checks and balances would provide against the dangers and evils of direct democracy. He wrote:

> From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. . . . Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.[163]

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[160] Carol Pateman argues that representative theories of democracy establish a democratic ideal that is anti-democratic or anti-participation because such theories seek systemic stability by relying on the active participation of the minority elite and the non-participation of the apathetic, ordinary person. CAROL PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 42, 104 (1970).

[161] *Id.* at 14.

[162] *Id.*

[163] THE FEDERALIST NO. 10, at 133 (James Madison) (B.F. Wright ed., 1961).

From Madison's point of view, the chaos and dissension associated with direct participation were to be avoided at any cost. The threat they posed to private property, and thus to liberty, were intolerable, and meant that democratic participation should be structured into a remote system of represented government and a federal system premised upon checks and balances. Madison's views prevailed in the structuring of the U.S. system of government and thus were directly responsible for the contemporary understanding that participation be mainly representative and chiefly protective—to protect the individual's private interests and to provide protection against overreaching by elected leaders.[164] Most importantly, Madison's beliefs about human nature and the perils of unchecked freedom and power were incorporated into our system of government and into our beliefs about the potential of democracy. It is important to note that Madison's republican notions of democracy sought to weight the democratic balance in favor of the liberty interests of property owners. Thus, his cautionary admonitions about the perils of direct democracy never really addressed the impact on the liberty of those at the bottom of the socio-economic scale. Nonetheless, because democracy is premised on equality and because guarantees of equality are designed to guarantee human flourishing and self-actualization for all, the dangers of direct democracy do not justify its dismissal.

The biggest push for direct democracy came from the Progressives, who at the turn of the century sought to shift *political* decision-making on legislation to ordinary voters. Techniques included several electoral devices such as direct primaries, proportional representation, non-partisan elections, and the initiative, referendum, and recall.[165] The initiative, referendum, and recall embody a very limited, if not crude, form of direct democracy because they involve "yes" or "no," one-shot decision-making. While this is probably the most suitable form of direct decision-making for mass participation, it has been strongly criticized and questioned for its failure to

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[164] *See* PATEMAN, *supra* note 159, at 14.

[165] *See* Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 13 (1997).

educate voters adequately about the issues, its lack of protection for minority interests against majority interests, and its inability to correctly weigh the strength of voter concern or relative-disinterest in a particular issue.[166]

The common law jurisprudence of direct democracy, to the extent that it exists, is primarily contained in dicta in the areas of civil and criminal trial juries. Juries are generally regarded as a key democratic institution of the trial system and are considered to enhance participatory or direct democracy.[167] Courts often supportively preface a discussion of a jury trial by describing it as the one area of direct democracy in the judicial system.[168] The jury is regarded, therefore, not as a judicial institution but rather as a political institution.[169] The jury is viewed as a representative of the community that legitimizes the justice system by including a representative cross-section of all members of the community in the decision-making process. As one judge has observed, "There can be no universal respect for law unless all Americans feel that it is their law—that they have a stake in making it work."[170] Use of the jury has been under attack as judges and lawyers struggle over just how active or inactive a jury should be and just how in-

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[166] *See generally* Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434 (1998).

[167] *See* Article, *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1421, 1423 (May 1997) (examining the jury as a "dispute resolution mechanism, an equitable weapon against tyranny, a legitimator of legal decisions, and an instantiation of democracy"); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 204-06, 218-21 (1995) (analogizing jury participation rights with voting rights). *See generally* Herbert J. Storing, *What the Anti-Federalists Were For*, *in* 1 THE COMPLETE ANTI-FEDERALIST 19 (Herbert J. Storing ed., 1981).

[168] *See, e.g.*, Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271 (D. Mass. 1998) ("Our willingness as a society to drift away from the use of civil juries reflects a failure in understanding of the jury's essential function in our American democracy. The jury system is direct democracy at work. It is, in fact, the most vital expression of direct democracy in America. Today, it is the New England town meeting writ large, the people themselves governing.").

[169] Alexis de Tocqueville observed, "It would be a very narrow view to look upon a jury as a mere judicial institution. . . . The jury is, above all a political institution, and it must be regarded in this light in order to be duly appreciated." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282 (Henry Reeve trans., Francis Bowen & Phillips Bradley eds., 1993).

[170] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 27-28 (1977).

volved it should be in a trial. This struggle is reflected in the increasingly common contractual waivers of right to a jury trial in agreements with business enterprises.[171]

Notwithstanding the direct democratic threads identified above, our legal cognizance and understanding of democratic participation is primarily found in the right to vote.[172] Contemporary understandings of democratic participation, however, extend beyond the right to vote and recognize that decision-making takes place in contexts other than elections for officials, one-shot referenda, or trials. Decisions about structuring and implementing urban development projects require more than a one-shot vote of "yes" or "no," and instead require discourse, collaboration, conflict resolution, implementation, and evaluation. The federal government has attempted to create a space for this kind of decision-making for ordinary citizens that has the potential to become a means of engaging in actual public policy decision-making at the local or neighborhood level. The jurisprudence of democracy, however, provides very little, if any, guidance about how to handle legal questions arising from the stepsister of representative democracy: Direct democracy. Direct democracy embodied in community participation mandates presents challenges to democratic jurisprudence because it moves beyond an individual right of one person, one vote, to a collectively held, perceptible (yet precisely undefinable) community right of participation. To tolerate direct participation's slower and messier form of decision-making, compelling explanations of participation's intrinsic value are required. Democratic political theory allows us to consider the benefits to community residents of community participation, and the benefits to the cities that must sponsor it, or at

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[171] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34-35 (1991) (upholding use of arbitration agreements enforceable in employment agreements); Randolph v. Green Tree Fin. Corp., 178 F.3d 1149, 1157-59 (11th Cir. 1999) (invalidating arbitration clause in consumer financing agreement), *rev'd*, 121 S. Ct. 513, 522-23 (2000) (reversing based on Randolph's failure to make any showing of prohibitive costs in proceeding to arbitration).

[172] *See* Reynolds v. Sims, 377 U.S. 533, 561-87 (1964) (recognizing the constitutional guarantee of one person, one vote principle under Equal Protection Clause). *But see* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-20 (1993) (arguing that the right to vote involves not only the substantive function of participation but also aggregation of individual preferences and governance).

least allow it to take place. Thus, we may consider whether these intrinsic benefits are worth the inevitable tradeoffs in smoothness or efficiency.

D. *Direct Democratic Political Theory and the Intrinsic Value of Participation*

Democratic political theory views direct participation as being important for three related but distinct reasons: participation is thought to promote egalitarianism, education, and self-transformation. First, direct citizen participation is important for its intrinsic value of promoting egalitarian principles and human flourishing. It recognizes that human beings value those activities and processes that allow them to grow and develop.[173] Therefore, participation is valuable for fulfilling innate and basic human developmental needs for agency and for living up to one's own potential. The notion of citizen participation in its most general sense derives from a democratic concept that all people are equal in their decision-making ability and should have the right to participate in decision-making on matters or issues that directly or indirectly concern them or have an effect on their lives.[174] Accordingly, based on his well-known observations of equal decision-making and self-help practices employed by free, white male citizens in pre-industrial, 1830s America, Alexis de Tocqueville regarded de-centralized government, and its attendant freedom to directly participate in public decision-making, as an incredible producer of energy and activity in the United States.[175] In his view, the political advantages of direct participation outweigh the administrative advantages of more centralized government decision-making:

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[173] Mark Warren, *Democratic Theory and Self-Transformation*, 86 AM. POL. SCI. REV. 8, 9 (Mar. 1992).

[174] Gerald Frug, *Empowering Cities in a Federal System*, 19 THE URBAN LAW. 553, 560 (1987).

[175] DE TOCQUEVILLE, *supra* note 168, at 261. The United States, as it then existed, was, in de Tocqueville's view, a democratic society. He made what is now clearly a contradictory observation: "In the United States, except for slaves, servants, and paupers supported by the towns, there is no class of persons who do not exercise the elective franchise, and who do not indirectly contribute to make the laws. *Id.* at 257.

> Democracy does not give the people the most skillful government,
> but it produces what the ablest governments are frequently unable
> to create; namely an all-pervading and restless activity, a super-
> abundant force, and an energy which is inseparable from it, and
> which may, however unfavorable circumstances may be, produce
> wonders.[176]

Central to de Tocqueville's celebration of participation was the
notion that public decision-making should incorporate plural-
ism and thus should be directed by multiple viewpoints, rather
than a centralized governmental entity.[177]

Of course, not all democratic political theories advocate
direct participation. Most democratic political theory presumes
that participation should take place at the ballot box in a re-
publican form of government.[178] By contrast, a smaller collec-
tion of democratic theories posit that the basic, yet crucial,
process of participation is citizens themselves being involved in
priority-setting, as well as decision-making, dialogue and delib-
eration.[179] "Participatory politics deals with public disputes
and conflicts of interest by subjecting them to a never-ending
process of deliberation, decision, and action."[180] At the heart
of this strong democratic theory is "democratic talk," which is
more than mere speech: "It refers both to human discourse and
interaction using both language and linguistic symbols."[181]
According to Benjamin Barber, strong democratic talk serves
nine functions: it allows "the articulation of interests; bargain-
ing and exchange; persuasion; agenda-setting; exploring mutu-
ality; affiliation and affection; maintaining autonomy; witness
and self-expression; reformulation and re-conceptualization;

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[176] *Id.* at 261-62.

[177] de Tocqueville wrote, "It is not always feasible to consult the whole people,
either directly or indirectly, in the formation of the law; but it cannot be denied
that, when this is possible, the authority of the law is greatly increased." *Id.* at
256; *see also* Ross & Leigh, *supra* note 150, at 368 ("Implicit in the theory of
advocacy planning is the idea of pluralism: that the planning process should be
guided by multiple viewpoints and entities, rather than by the technical staff of a
central planning agency.").

[178] *See generally* SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA:
POLITICAL DEMOCRACY AND SOCIAL EQUALITY (1972).

[179] One of the most prominent of such direct democratic theories is Barber's
theory of strong democracy. BENJAMIN BARBER, STRONG DEMOCRACY: PARTICIPATO-
RY POLITICS FOR A NEW AGE 132 (1984).

[180] *Id.* at 151.

[181] *See id.* at 173.

community-building as the creation of public interests, common goods, and active citizens."[182]

1.   The Power of Discourse: Self-Development, Self-Transformation, and Interdependence

The major function and effect of participation for proponents of democratic theory is an educative one.[183] Direct participation provides certain educational benefits and fosters certain psychological attitudes that are valuable to the person and to the society. Participation therefore serves as a learning process that educates citizens with the skills needed to sustain democracy.[184] This can be an education in how to negotiate a political process and create a sense of political effectiveness.[185] Under this approach, national or statewide representative institutions are an insufficient form of democracy. Such national or statewide institutions involve "electoral competition between elites [that] deprives non-elites of access to conditions of their own development."[186]

The educational effects of direct participation and strong democratic talk extend beyond political effectiveness. Democratic participatory theory is premised on profound arguments of self-development, indeed, self-transformation. Participation is thought to foster important individual attitudes and psychological qualities that develop in spheres small enough to allow direct participation, such as the workplace, the neighborhood, the school board, and local government.[187] It promises to pro-

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[182] *Id.* at 173. *See generally* JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980).

[183] PATEMAN, *supra* note 159, at 31-33.

[184] *See* Jane Mansbridge, *Does Participation Make Better Citizens?*, 5 THE GOOD SOC'Y 3, 3-4 (Spring 1995) ("Participation does make better citizens. I believe it, but I can't prove it. And neither can anyone else."); *see also* Karen Stenner-Day & Mark Fischle, *The Effects of Political Participation on Political Efficacy: A Simultaneous Equations Model*, 27 AUSTRALIAN J. OF POL. SCI. 282, 302-03 (1992) (noting the absence of studies investigating the perceptions of political participation on individuals' perceptions of political efficacy and arguing that conventional forms of participation, such as partisan and community activism, do serve an educative and developmental function which mitigates against resort to extreme political behavior, but lessens confidence in the responsiveness of the political regime).

[185] *See* PATEMAN, *supra* note 159, at 32.

[186] Warren, *supra* note 172, at 9.

[187] *See* PATEMAN, *supra* note 159, at 42-43; Warren, *supra* note 172, at 8.

vide experiences that make people "more public-spirited, more tolerant, more knowledgeable, more attentive to the interests of others, and more probing of their own interests."[188] During a participatory process, the individual is thought to learn that one "has to take into account wider matters than [one's] own immediate private interests . . . to gain cooperation from others, and . . . learn[] that the public and private interest are linked.[189] Participationists conceive of people at their best and then seek a politically institutionalized form of direct democracy "to help them become better than they are."[190]

The transformational benefits of participation extend beyond the individual to the greater community and are quite profound. Participation brings about an awareness of interdependence.[191] Moreover, participatory deliberation and action educates people to see their common interests, and therefore, community grows out of participation.[192] Accordingly, democratic political theory promises to further individual autonomy through the process of dialogue, bargaining, challenge, compromise, and consensus building.[193] Autonomy develops through interactions with other people and through learning about their unique capacities, problems, and interests, which allows people to "distinguish the wants, desires, and commitments that lend coherence to their identity from the wants, desires, and commitments that they have, perhaps uncritically, accepted from their culture and may experience as a source of unhappiness."[194]

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[188] Warren, *supra* note 172, at 8.

[189] PATEMAN, *supra* note 159, at 25.

[190] BARBER, *supra* note 178, at 25.

[191] "[T]he participatory process ensures that although no man, or group, is master of another, all are equally dependent on each other and equally subject to the law." PATEMAN, *supra* note 159, at 27.

[192] BARBER, *supra* note 178, at 152. According to Carol Pateman, these community building effects are premised on a basic economic equality because "there is no disruptive division between rich and poor" as well as "the experience of participation in decision-making itself [that] attaches the individual to his society and is instrumental in developing it into a true community." PATEMAN, *supra* note 159, at 27.

[193] PATEMAN, *supra* note 159, at 12.

[194] *Id.*

2.   Critiquing the Self-Transformation Basis for Participation

There are a number of problems, however, with the participation theory's promise of self-transformation. The first is what types, if any, of conflicting interests are transformable into common interests?[195] While the promised benefits of participation are logically premised on social interdependency, such interdependencies may not always be sufficient to transform conflicting interests into common or mutual interests.[196] For example, during the organizing or participatory phase of the Empowerment Zone program, the process illustrated that battles of governance and priorities were, in fact, battles over scarce goods. Only a certain number of people could participate in the decision-making, and even with mediation of some sort, these conflicting interests could not be transformed into common interests.[197] Therefore, participation's self-transformation thesis must more clearly delineate the different types of interests and their differing potential for commonality, conflict, and transformation.[198]

Another shortcoming of participation theory is its advocacy of talk and process for community building or as being universally beneficial.[199] This is problematic because process de-

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[195] *Id.* at 14; *see also* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (unpublished manuscript on file with author) (examining the norms and conditions for inclusive democratic communication under circumstances of structural inequality and cultural difference).

[196] PATEMAN, *supra* note 159, at 14. Clearly, social interdependencies do not necessarily reflect mutual interests. *See* THE FEDERALIST NO. 10, *supra* note 162, at 77; JOHN STUART MILL, ON LIBERTY xiv (John Gray ed., 1991) (noting that democratic society does not always protect individual and minority liberty and that the people have many conflicting interests, faiths, and beliefs).

[197] Warren, *supra* note 172, at 14 (arguing that impersonal mechanisms like mediation rather than transformation are called for).

[198] *Id.*

[199] *See, e.g.,* THE FEDERALIST NO. 10, *supra* note 162, at 133. Madison wrote:
   Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions. A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.
Id.

pends on context. Participation theory could be enhanced if it could account for the different types of settings in which successful consensus building and decision-making take place.[200] Consider: Can the mass participation community meeting, where everyone is welcome to participate, be equated with the types of places where participatory decision-making successfully takes place? For example, in settings such as voluntary organizations, school, the workplace, friendship, child rearing, and other consensual settings, conflict may be the exception rather than the rule, and when conflict does arise, it may be resolved simply by reaffirming common interests.[201] Participatory theory resonates with us because we know these transformations can and do happen, at least on an individual level. The types of settings are usually ones where trust has formed, and a desire to preserve relationships exists, and therefore, the setting makes agreement on a common goal or purpose possible. No one has quite figured out, however, how to mandate creation of these institutions of trust that will allow such transformations to take place. Therefore, where these and other commonalities have not been established, and where the setting is other than the ones described above, social relations are still inherently political with little possibility of remedy.

3. Participation Theory's Marginalization of Subordinated Identities and Difference

Differences in race and class also lessen strong democracy's self-transformation promise. Resulting differences in positional and status goods such as access to jobs, housing, and education, also affect participation's ability to meet its self-transformation promise.[202] Dialogue under these circumstances may heighten conflict by highlighting injustices and differences in class, culture, and identity.[203] For example,

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[200] Jane Mansbridge, *Unitary & Adversary: The Two Forms of Democracy*, 7 IN CONTEXT 10 1984, *available at* Context Institute, http://www.context.org/ICLIB/IC-07/Mansbridg.htm (last visited Mar. 30, 2001) (arguing that it is important to distinguish between the democracy of friends based on equal respect and the democracy of citizens based on equal rights).

[201] Warren, *supra* note 172, at 14.

[202] *Id.*

[203] *See generally* Howell S. Baum, *Ethical Behavior is Extraordinary Behavior;*

case studies illustrate the tension between race and class in planning.[204] Direct democratic participation may also fail in traversing these differences and in building community in a smaller context. Jane Mansbridge, in particular, has critiqued the community building rationale as a justification for participation, arguing that her research showed that small communities tend to operate by norms that silence those who disagree and encourage agreement to preserve social ties, even where there is legitimate reason for disagreement.[205]

4. The Limits of Discourse and Participation

Participation's reliance on argument or discourse is also problematic. Providing a mechanism for presenting a variety of viewpoints through the medium of argument assumes that the best viewpoint will be adopted once the viewpoints are offered for consideration.[206] But discourse usually marginalizes those who do not talk or those who talk in marginalized ways. For example, an ethnographic study of a rural planning process found that farmers trying to oppose development were marginalized in the process because of their discursive styles.[207] In particular, dominant organizational, ideological, and discursive forms predominated and disempowered ordinary citizens in public meetings. For instance, local conventions for decision-making on land uses were personal, ad hoc, individualistic, and moralistic, and advocated granting special consider-

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It's the Same as All Other Behavior, 64 J. AM. PLAN. ASS'N 411 (Sept. 1998).

[204] Ross & Leigh, *supra* note 150, at 372-77 (discussing role of race and class in zoning, brownfield redevelopment, and thwarted mass transportation systems).

[205] Mansbridge, *supra* note 181, at 166-71.

[206] Two commentators note, however, that there is a difference between supporters and opponents of a particular decision. *See* Lee Clarke & William R. Freudenburg, *Rhetoric, Reform, and Risk: Public Participation in Policy Decisions,* 30 SOC'Y 78, 79 (1993). Supporters make up their minds early in the process and are uninterested in new information. Opponents actively search for new information because they are interested only in supporting their position. *Id.* at 79-80. Therefore, the best viewpoint is not necessarily adopted. Instead opponents are likely to have the upper hand because argument becomes the medium through which they advance their interests. *Id.* at 81. This notion of supporters and opponents reveals another grave shortcoming of direct democracy in the context of today's society. *Id.* at 82.

[207] Warren, *supra* note 172, at 15. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1979).

ations to individuals for personal reasons.[208] This contrasted sharply with the bureaucratic rationality of public officials, developers, and attorneys, which emphasized consistent enforcement of a comprehensive plan—bureaucratic treatment of all persons according to the same rules.[209] Local residents whose interests development threatened most—local farmers and ranchers whose lands would be strip-mined—tended to use the local style so that their voices systematically carried less weight in the formal planning process.[210] This happens because the views of the marginalized threaten to transform the entire discourse from its pre-determined ends—i.e., if one actually allowed them to participate, they might transform the whole agenda. So, if participation theory really could come up with a model that could take into account the views of the people who were marginalized, the promised transformation would indeed be authentic and profound, but the transformation would not be self-transformation but rather outer transformation of the processes and circumstances that affect their lives.

E. *Are We Ready to Embrace Conflict?*

The self-transformation promise of democratic participatory theory is based on human nature at its best and embraces conflict without acknowledging our extreme discomfort with conflict. As a result, the promise of self-transformation fails to provide a sustainable justification for inclusion of poor black community residents in an expert-driven process like development, particularly when it slows down the process and injects dissension, uncertainty, or views and ideas that are otherwise considered marginal. Participation is ill-equipped to cope with the real or perceived differences between people. People's inter-

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[208] Caroline S. Tauxe, *Marginalizing Public Participation in Local Planning: An Ethnographic Account*, 61 J. AM. PLAN. ASS'N 471, 473-74 (Sept. 1995).

[209] *See id.* at 477.

[210] Tauxe notes that "throughout this planning process, both developers and government agents publicly hailed the ideal of citizen and community participation in impact mitigation and development planning, while the legal and procedural apparatus . . . and the cultural predisposition of local elites to support changes they associated with 'progress,' in combination, prevented such participation from posing any serious threat to the developers' plans." *Id.* at 475.

ests may not always make talk satisfying, useful, or meaningful as a justification for direct participation. In many senses, participation is based to a certain extent on an embrace of conflict because it believes that conflict can be resolved through dialogue and negotiation.

On the other hand, direct participation reveals conflict that leads to a profound sense of social disruption that people try to avoid. As the Model Cities and Empowerment Zones participatory experience demonstrated, the specter of delay, dissension, and chaos is appropriately associated with participation. It is important to consider that "people care deeply about social disruption." As one commentator has observed, "Social disruptions concerning community structure and ethos, hopes and expectations for family futures, institutional legitimacy, and collective responsibility are hard to measure for two reasons. First, they yield no body counts and, second, however valuable, markets have trouble pricing them." Participation theory provides no guidance to government or policymakers on how to appropriately gauge or balance the need for conflict and the concerns of those who dislike it. The tendency, perhaps understandable, is usually to avoid it.

Adding to the cautionary impact of Madison's perspective, our privatized notions of economic matters, our private lives, and our distrust of non-expert decision-making are also so ingrained and so rooted in fear of "the Other" that we are unable to acknowledge it aloud, let alone to ourselves. Therefore, we are left with near-universal generalized support for participation but little stomach for what it takes to follow through on that support. As a result, many participatory schemes are either too broad or too narrow, implemented too late, or required to take place so rapidly that they are doomed to be ineffective, alienating, and counter-productive. Instrumental theories are similarly, if not more so, unsatisfying. Not only does participation as a means to an end use people as tools in a misleading way, it assumes that government can employ neutral tactics and obtain a fair result even in the face of significant hierarchies of power. These power arrangements promise to always resolve conflicts of interests against the interests and desires of poor community residents. Therefore, a theoretical justification for participation seems like it should have a way to account for conflicts of interest in a way that those who

are marginalized, those whose discourse may not always equip
them to participate to their own benefit in a participatory
process, are able to get something for their time and effort.[211]
In other words, participation needs a substantive justification
other than efficiency or process. It needs a basis that sets an
explicit and unapologetic goal.

F. *Participation for Empowerment and Community Control*

Another set of arguments in favor of participation justify
citizen or community involvement as a means to political and
economic empowerment. These arguments believe that without
power to make decisions, participation is a meaningless exer-
cise that does not result in any tangible benefits to the commu-
nity. Here, the argument for participation is explicitly connect-
ed to a concept of justice and political efficacy that, taken to its
natural ends, explicitly seeks decision-making power for a
particular community.

This argument was most strongly advocated during the
1960s and 1970s, following the gains of the Civil Rights Move-
ment in the South and the frustration in Northern city ghettos
that civil rights had left no impact on the conditions of discrim-
ination, segregation, and poverty.[212] Under this view, par-
ticipation is a group right carried out by individuals on behalf
of the group.[213] Political control under the era's rubric of
Black Power for black ghetto communities was an overt goal of

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[211] Box, *supra* note 127, at 15.
[212] *See* CASTELLS, *supra* note 17, at 65-66. *See generally* LAWRENCE J. HANKS,
THE STRUGGLE FOR BLACK POLITICAL EMPOWERMENT IN THREE GEORGIA COUNTIES
(1987); *see also* RICHARD A. KEISER, SUBORDINATION OR EMPOWERMENT? AFRICAN-
AMERICAN LEADERSHIP AND THE STRUGGLE FOR URBAN POLITICAL POWER 5-7
(1993). Keiser wrote:

> Empowerment is a process by which a minority group or representatives
> of that minority group gain a greater ability to influence political out-
> comes in favor of the minority group. . . . [This] can be measured by
> analyzing the minority group's success in capturing important offices,
> instituting policies that are high on the group's agenda and meeting
> resistance from established groups, [while] securing miscellaneous benefits
> that other groups also desire.

Id. at 6-7.
[213] *See generally* Roberta Romano, *Metapolitics and Corporate Law Reform*, 36
STAN. L. REV. 923 (1984) (describing a typology of individualist versus organicist
theories).

black communities, activists, and public intellectuals.[214] Black Power as a theme for the black movement departed from the integrationist ideal of the Civil Rights Movement and emphasized instead "the autonomy of the black ghetto as a basis of cultural identity, social and political organization, and power for blacks."[215] While the Black Power movement theoretically sought a fundamental reordering or redefinition of social and economic structures to end racial and economic subordination, the dominant energy of the movement was directed towards attempting to "maximize the political clout of blacks within the existing structures [rather than] redefining and recreating those structures themselves."[216] Empowerment was conceived of in a way that extended beyond mere inclusion of the poor: instead, empowerment ideally meant that a community would have control of all governmental dollars spent on behalf of the community. This position was influenced in part by the existence of the Community Action, and later by the Model Cities programs that channeled some of the political struggles into struggles for control and composition of managing boards. This claim was also shaped, in part, by the unresponsiveness of municipal bureaucracies to the interests, concerns, and needs of inner-city black communities. Therefore, the black power theme was a call for municipal reform through devolution of power to neighborhoods to make decisions on its own behalf.

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[214] Arnstein, *supra* note 1, at 335, 336; *see also* JOHN T. MCCARTNEY, BLACK POWER IDEOLOGIES: AN ESSAY IN AFRICAN-AMERICAN POLITICAL THOUGHT. ch. 7 (1992) (discussing belief that black progress depends upon blacks controlling their own destiny). It continues to have resonance for some critical race theorists as well. *See, e.g.*, CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 22-23, 101-02 (1997) (arguing that the original concept of affirmative action was community control over governmental and economic resources spent for or within black communities); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 792-93 (illustrating the Black Power claim by favorably distinguishing a formal demand for racial and geographic separatism from the call to nationalism) Peller argues that the exclusion of a nationalist approach to racial justice from mainstream discourse has been a cultural and political mistake that has constrained the boundaries of racial politics. Peller, *supra*, at 793.

[215] CASTELLS, *supra* note 17, at 66-67.

[216] JAMES JENNINGS, THE POLITICS OF BLACK EMPOWERMENT 38, 102 (1992).

1. Ranking Participatory Methods: The "Ladder of
    Participation"

In the late 1960s, Sherry Arnstein[217] devised an influen-
tial model of participation that appeared to echo the claims for
black power. Writing on behalf of "have-not blacks, Mexican-
Americans, Puerto Ricans, Indians, Eskimos and whites," her
model divided the different forms that participation most often
used in federal social programs at the time according to a con-
tinuum of involvement she termed a "ladder of participa-
tion."[218] The "ladder" evaluated and ranked participatory
mechanisms based on the type and degree of participation as
"non-participation," "token participation," and "citizen power."
In the model, the lowest rungs of the ladder of participation
were assigned to forms of non-participation described as
manipulation,[219] therapy,[220] and informing.[221] These all in-

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[217] Arnstein had been a consultant to federal agencies wrestling with new strat-
egies for citizen participation and, at the time of publication of her article, was
chief citizen participation advisor to the Model Cities Administration. Arnstein,
supra note 1, at 335.

[218] Arnstein acknowledged that there could have been 150 rungs to properly
account for the actual variety of participation. *Id.* at 340.

[219] Arnstein's example of manipulation is organizing a rubber-stamp advisory
committee when a few representatives of the poor are placed on public boards;
this is token or meaningless participation. *Id.* Arnstein was probably referring to
urban renewal.

[220] During the 1960s and early 1970s, a popular social work approach to partici-
pation was to offer therapy to poor black residents to cure them of pathologies
that prevented them from adapting to their environment and perpetuated their
social and material degradation. *See, e.g.,* Shanti K. Khinduka, *Community Devel-
opment: Potentials and Limitations, in* NEW PERSPECTIVES ON THE AMERICAN COM-
MUNITY 396 (Roland L. Warren & Larry Lyon eds., 5th ed. 1988) (defining commu-
nity development as, among other things, a process of attempting to "educate and
motivate people for self-help" as well as "enable people to establish and maintain
cooperative and harmonious relationships").

This now discredited approach sounds similar to contemporary justifications of
community development that view therapeutic approaches as a predicate for col-
lective action to improve communities. *See* Patricia A. Wilson, *Empowerment: Com-
munity Economic Development from the Inside Out,* 33 URBAN STUD. 617, 622
(1996). Such approaches may be theoretically right, but, in application, the pater-
nalistic emphases are apparent. Conditions of poverty are merely seen as individu-
al limitations and failure and not as a rational reaction to the deprivations and
conditions under which some people are forced to live.

This self-help approach becomes even more problematic when it becomes part
of a government program. For example, Paolo Friere is credited with the concept
of liberatory education and conscientization for Latin American peasants. *See gen-
erally* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 137-38 (Myra Bergman Ramos

volved forms of one-way or instrumental communication in which government sought participants' views or attempted to act upon citizens without giving them a real voice. She assigned "token" forms of participation—consultation[222] or what Arnstein termed as placation—to the middle tier of the ladder.[223] Arnstein placed the most desirable forms of participation—those that involved exercises of "citizen power"—at the top of the ladder. Within this preferred tier, participatory activities were ranked in order of least preference: partnership,[224] delegated power,[225] and citizen control. According to

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trans., 1970). As a radical pedagogical tool, Friere's contributions have been invaluable. But for some reason, Friere's work has been very attractive to official governmental agencies. In the hands of these bureaucratic agencies, the liberatory and oppositional elements of the pedagogical project have been lost in a routinization and watering down of the pedagogy until it looks curiously like therapy. *See* Thomas Heaney, *Freirean Literacy in North America: The Community-Based Education Movement* (June 20, 1995), *available at* National-Louis University, Thresholds in Education, http://nlu.nl.edu/ace/Resources/Documents/FreireIssues.html (last visited Mar. 30, 2001) (arguing same).

[221] Informing as participation is self-explanatory—citizens are told of their rights and options. Obviously, information can be an important first step in participation, but if nothing else follows, such participation is of limited value. Arnstein, *supra* note 1, at 343.

[222] Consultation—citizen ideas are solicited through surveys, neighborhood meetings, and public hearings. Arnstein, *supra* note 1, at 344. For example, community members in a Baltimore neighborhood complained to the author of being asked regularly for letters of support for projects in their neighborhood even though they had no input in the planning or design. Obtaining residents' signatures on letters of support allowed developers to say the community played a role.

Yet, Arnstein's dismissal of consultation is a bit overstated to the extent she ignores the fact that this form of participation can serve as an initial leverage point in some circumstances. It is important, however, that she spoke so strongly on this point because her description illustrates strongly that consultation should never be mistaken as a preferred means of participation.

[223] Arnstein's use of the term "placation" essentially explains what she means by token participation: participation is merely for purposes of releasing a potential pressure valve of political opposition by providing a limited and truncated role for poor black citizens. *Id.* at 345-46.

[224] Partnership exists when citizens share planning and decision-making responsibilities through joint policy boards with mechanisms for resolving impasse. At this level, power can be redistributed through negotiation between community and decision-makers. According to Arnstein, the community often holds sufficient cards or influence and thus is sought out by the decision-makers for negotiation. *Id.* at 349. Although she did not specify what influence this was, one can imagine that ability to delay a time-sensitive project is the most likely form of influence because in land development, the old adage "time is money" is very strong.

[225] "Delegated power" exists where the community has dominant decision-making authority over a particular plan or program, and "citizen control" exists where

Arnstein, participation was only meaningful to the extent that it involved the following:

> [T]he redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future. It is the strategy by which the have-nots join in determining how information is shared, goals and policies are set, tax resources are allocated, programs are operated and benefits like contracts and patronage are parceled out. In short, it is the means by which they can induce significant social reform which enables them to share in the benefits of the affluent soci-ety.[226]

In short, participation is meaningful only to the extent that one has the power to affect the outcome of the development process.

2. The Limits of the Community Empowerment Claim

In some ways, Arnstein's insight and the quest for Black Power must be viewed within the context out of which they arose. The late 1960s were a period of social unrest and high hopes for new social possibilities. An explicit claim of a need for power made sense in many regards. Blacks had been politically disenfranchised in the cities.[227] The white exodus in the suburbs was underway but was only beginning to alter the balance of power in terms of voting strength.[228] The impact of local electoral districting practices on diluting minority voting strength were beginning to be addressed.[229] Municipal gov-

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participants or residents govern a program or institution, are in charge of policy and management, and can negotiate any attempts at change by outsiders. *Id.* at 351.

[226] *Id.* at 337-38. Arnstein acknowledged the overly simplified duality of dividing the world into the haves and have-nots, but asserted that "the have-nots really do perceive the powerful as a monolithic 'system,' and power holders actually do view the have-nots as a sea of 'those people.' " Arnstein, *supra* note 1, at 339-40.

[227] *See* MORONE, *supra* note 30, at 191.

[228] *See, e.g.,* Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act,* 102 YALE L.J. 105, 134 (1992) (discussing shifts in the balance of power in southern cities when blacks began to outnumber whites).

[229] *See, e.g.,* City of Richmond v. United States, 422 U.S. 358, 371-72 (1975) (holding that annexation of majority white suburbs by a racially mixed city satisfies the Voting Rights Act of 1965 where the city maintains a "ward" method voting system); Perkins v. Mathews, 400 U.S. 379, 388-89 (1971) (holding that municipal annexations that have the capacity to dilute black voting strength within

ernment was notoriously unresponsive to black communities.[230] Racial discrimination in housing and employment was, for all intents and purposes, unchecked.[231] Urban renewal had destroyed black neighborhoods to such an extent that it was nicknamed "Negro Removal." Blacks were at the mercy of those with disproportionate power. It was clear that without power, they would continue to be.

Outside of this context, it is easy to argue that Arnstein's emphasis on power and control claims too much. Her notion of empowerment seems to be premised on the notion that empowerment of one group takes place at the expense of another. Today, it seems unrealistic to demand that government hand over power to communities to plan and operate government services.[232] The extent to which such a claim was made within the context of the civil and social unrest during the 1960s further limits the current viability of calling for citizen power and control. The Civil Rights Movement, along with urban riots/rebellions, welfare rights movements, and other such movements, provided an urban social movement behind the claim for citizen power. Today, that claim does not have the reinforcing social organization behind it. Of course, much urban activity has been channeled into neighborhood-specific, community development corporations that have taken on a major role as the actors at the local level that seek to fill the gaps in affordable housing and retail services. Studies have shown that while these self-help organizations are radical in one sense (because they are willing to take on problems in neighborhoods that are understood in the popular urban imagination to be beyond hope and barren of resources), they are mainly conservative in that they channel their activity into existing federal and foundation programs.[233] This fact supports Manuel

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the city constitutes changes in voting practices within the scope of the Act).

[230] *See* MORONE, *supra* note 30, at 191.

[231] As discussed earlier, one of the impetuses for the Gray Areas program and the Community Action program was the unresponsiveness of municipal bureaucracies to the needs of poor black communities and their residents. *See supra* text accompanying note 192.

[232] *But see* Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 77, 90-94, 96 (1998) (proposing a "block improvement district" governed by property owners to supplement city services).

[233] *See* Randy Stoecker, *The CDC Model of Urban Redevelopment: A Critique and an Alternative*, 19 J. URB. AFF. 1, 7-8 (1997) (critiquing CDCs for ceasing to

Castells' observation that urban social movements fail over the long term because once the fight is over, their energies are turned to administrative and managerial struggles of trying to balance the books and deliver services efficiently.[234]

The other limitation of the citizen power claim is its "geographical situatedness"—it locates the source of a citizen's interest and power within the confines of his or her community. In fact, the poor black neighborhood is viewed as an autonomous, self-sustaining unit capable of articulating and protecting the interests of its residents. It equates community control of decisions with community control of conditions within neighborhoods.[235] Therefore it treats the problems as internally, rather than externally, driven and ignores what has happened to these neighborhoods in the ensuing thirty-odd years. Indeed, continued globalization has relocated manufacturing to the southern United States and the Third World; decentralization of the metropolitan area has taken jobs and retail services from central cities, and last but not least, middle class and affluent people have moved the peripheries of the metropolitan area such that there are now new urban areas called exurbs and other urban areas called edge cities.[236] This approach might have had a glimmer of hope when segregation locked all

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be authentically community based as they have become corporatized and staffed by professionals from outside the community and their work is mostly technical and administrative delivery of housing services); *see also* Ram A. Cnaan, *Neighborhood-Representing Organizations: How Democratic Are They?*, 1991 SOC. SERV. REV. 614, 616 (Dec. 1991) (noting the influence of the iron law of oligarchy in NROs that leads to a discrepancy between the potential and actual level of democracy in those organizations).

[234] CASTELLS, *supra* note 17, at 103. On a macro level, Castells also opines that urban social movements are doomed in their quest to fight to define the meaning of the city because they are unable to offer an alternative system of production to capitalism. CASTELLS, *supra* note 17, at 103.

[235] *See generally*, NORMAN FAINSTEIN & SUSAN FAINSTEIN, URBAN POLITICAL MOVEMENTS: THE SEARCH FOR POWER BY MINORITY GROUPS IN AMERICAN CITIES (1974); JOHN HALL FISH, BLACK POWER, WHITE CONTROL: THE STRUGGLE OF THE WOODLAWN ORGANIZATION IN CHICAGO (1973); JOHN REX & ROBERT MOORE, RACE, COMMUNITY AND CONFLICT: A STUDY OF SPARKBROOK (1967). When one talks about a community that will be affected by a particular development project, one has hard, perhaps indeterminable, questions to answer about which is the relevant community. For instance, who are the proper representatives of the community? What if the representatives are often self-appointed and self-selected? These are the exceedingly difficult questions that must be faced in designing a participatory scheme and that are unanswered by political control theories.

[236] *See generally* JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER (1991).

classes together, but not today.

The idea of the inner-city neighborhood as a politically autonomous entity also has implications for the rest of the city. For instance, should all neighborhoods have political control of development and other financial decisions with respect to their neighborhoods? Will not the more affluent neighborhoods do better under these schemes if they are able to retain their resources for their own needs? This has already started to take place, to a certain extent, with the rise of home ownership associations as a form of neighborhood organization and the proliferation of special benefits districts that provide enhanced services to city neighborhoods.[237] The neighborhoods that are being left behind in these new subunits of local government are, more often than not, the poor black neighborhoods. Therefore, empowerment of these communities as economically flourishing or politically powerful units does not seem to be a viable endeavor.

3. The Subtle Logic of Empowerment Through Resistance

Arnstein's argument was more limited, however. She sought only to move past the rhetoric supporting participation and demonstrate that there were different levels of desirable participation.[238] She also acknowledged that the typology overly simplified the matter and did not address the most significant obstacles to achieving genuine levels of participation. Arnstein wrote:

> On the power holders' side, they include racism, paternalism, and resistance to power redistribution. On the have-nots' side, they include inadequacies of the poor community's political and socioeconomic infrastructure and knowledge-base, plus difficulties of organizing a representative and accountable citizens' group in the face of futility, alienation and distrust.[239]

In other words, Arnstein's typology sets a normative goal for participation—citizen-power—but does not take on the task of prescribing how to get there, particularly in the face of seemingly insurmountable obstacles. Therefore, Arnstein's typology

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[237] *See* Ellickson, *supra* note 231, at 96-98.

[238] Arnstein, *supra* note 1, at 339.

[239] *Id.* at 340.

has a more subtle logic that can be lost in its otherwise strong claim that meaningful participation involves a redistribution of power. Arnstein's typology is based on an innate understanding that participation inevitably leads to a power shift. If you include non-elites, the non-powerful, and the non-educated in an elite and expert-driven process like development, and structure the decision-making such that their views are taken into account, you are in effect giving them significant power. In fact, you threaten to disrupt the process because it is possible that the new participants will claim that the agenda should be changed in ways that it otherwise would not be. This is a significant shift in, and exercise of, power. Therefore, if we apply Arnstein's logic today, what she seems to be saying is that participation inevitably leads to either a shift in power or to exclusion. And exclusion is more likely a natural or inevitable result because a shift in power so clearly threatens to disrupt an otherwise settled, and often privatized, process.

To better understand this argument, reconsider the case of the AWC in Philadelphia's Model Cities Program discussed in *Romney*. *Romney* was discussed earlier as an example of the limits of litigation as an enforcement mechanism.[240] But if we look further into the case, it illustrates another compelling point. As discussed above, the dispute in the court of appeals was whether AWC had been improperly excluded from being consulted on a decision on which it had a right, as the citizen participation arm of the program, to be consulted. The court of appeals concluded that both the City's and HUD's familiarity with AWC's views did not excuse them from consulting with AWC about specific major changes. The court further observed that "the issue is not citizen veto or even approval, but citizen participation, negotiation, and consultation in the major decisions which are made for a particular Model Cities Program."[241] Local citizens were required to be consulted with respect to changes in the city's proposed program.

One has to wonder what kind of meaningful consultation could have taken place at that late date when AWC was finally reinstated. But the power of consultation in the context of the Model Cities program, with a legal guarantee and the ability to

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[240] *See supra* Part I.B.1.
[241] *Romney II*, 456 F.2d at 818.

enforce it in court, was greater than even Arnstein acknowledged. The potential power of enforced consultation is that it implicitly necessitates a form of disclosure by the government entity administering the program. By virtue of this disclosure, if citizen groups are organized, they can respond and challenge decisions with which they do not agree or that appear disadvantageous. Therefore, the court of appeals' decision in *Romney* accorded a potentially significant power to AWC when it provided legal recourse for the city's failure to comply with the Model Cities participatory mandate. But, by focusing only on the issue of AWC's exclusion, the court missed the essence of the underlying dispute. The real dispute was about the *nature* of AWC's participation: what constituted meaningful participation in the context of the Model Cities program. The OEO and HUD, in effect, interpreted meaningful participation to include planning and consulting. One can infer that this meant that citizens should have a role in setting the agenda, and perhaps being consulted on the fine tuning of the agenda. By contrast, AWC viewed participation as absolutely and necessarily involving the management of program operations. Why? Probably for the very practical reason that AWC wanted to bring to fruition what it had worked to conceive. Control of the operations meant true self-reliance and empowerment—employment in a project ostensibly designed to improve conditions in the neighborhood. This was a profitable enterprise and AWC disagreed that they should be excluded from the benefits of supervision and control of the operations. This underlying dimension of the participatory dispute in *Romney* supports Arnstein's argument that participation necessarily entails a redistribution of power. While HUD's categorical exclusion of citizen participatory units from program operations was based on fears of corruption or self-dealing, the manner in which it chose to handle this common corporate conflict-of-interest problem[242] suggests that an implicit goal of the directive was also to limit political disruptions at the local level by having citizen participation lead to redistribution of power to AWC.

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[242] The need to plan for conflicts of interests is an acknowledged issue in the organization and operation of closely held corporations. *See, e.g.,* Harry J. Haynsworth, *What Every Lawyer Needs to Know About Drafting Documents for Closely-Held Corporations: Special Problems of Closely-Held Corporations,* Q171 ALI-ABA 5, 8 (1988).

4. The Intractability of Conflicting Interests

In some ways, empowerment or political control theory is the most promising and satisfying theory because it is based on specific social groups and pragmatically takes into account the obstacles ordinary black people and communities face. It is liberatory in its aspirations, as well as unabashed in its embrace of political competition. Admittedly, it suffers from some of the same difficulties as the other justifications. In particular, it fails to provide a way to deal with conflicting interests within communities. For example, the participants in a community participation process are usually the elites of the community. Questions remain about whether their interests are always consistent with the very poor, who are either alienated or busy trying to survive and thus rarely participate in community decision-making.[243]

Yet political control and citizen power, while not literally practicable or desirable, are still conceptually important for the explicit recognition they give to the conflict of interests in the city in general and the development process in particular. As Castells has argued, "Cities contain two kinds of relationships that are ultimately antagonistically interdependent: those of production and economic accumulation and those of social interaction and community formation. The tension between them deeply permeates urban institutions, urban form and urban life."[244] Therefore, participation in a development process can never be seen as merely discourse for discourse's sake. Nor can we assume that bargaining and exchange will protect all interests. Instead, meaningful participation (i.e., having a decisive voice in favor of issues that may go against the prevailing value placed on economic development) is ultimately participation that is really an act of resistance. It seeks to bring a voice not to tinker with the process, but to redirect its emphasis away from uses and developments that gentrify centrally located neighborhoods, displacing poorer residents or channeling the resources of the city exclusively to the down-

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[243] *But see* Eleanor M. Novek, *Communication and Community Empowerment*, 11 PEACE REV. 61, 67 (1999) (discussing communication strategies used by a grassroots leadership group in building community).

[244] Janice K. Tulloss, *Citizen Participation in Boston's Development Policy: The Political Economy of Participation*, 30 URB. AFF. REV. 514, 514-37 (Mar. 1995).

town business district to the detriment of neighborhoods that could also benefit from the infusion of their fair share of resources.

CONCLUSION

Experiences with community participation have been dissatisfying for three broad reasons. First, the mandate is largely undefined, drawing upon vaguely defined and often conflicting rhetoric based on notions of pragmatic utilitarianism, individual self-transformation, or political control of development in poor, often black, neighborhoods. As a result, communities are given no real power to affect the outcome of development processes. Second, no real consensus on the purposes of development exists. Because community participation involves direct democratic decision-making, we, as a society, are at best ambivalent about such participation—torn between our desire for customer service and efficiency on the one hand, and vaguely but strongly held egalitarian notions of the right to express one's opinion on the other hand. Lastly, the mandates usually fail to contain any mechanism for enforcement of participatory requirements. Because participation is designed to include ordinary people in an area of public decision-making—urban economic development—that is privatized, expert-driven, and elite-dominated, failure to provide a means of enforcement for ordinary citizens means a community participation requirement can be rendered meaningless. As the foregoing discussion has shown, however, meaningful or effective participation of poor inner-city residents in the development process can only take place when participation is properly understood not only as a form of participatory inclusion, but also as a struggle for redistribution of power.[245]

At the beginning of this Article, I noted community participation's radical underlying premise that ordinary people are to be included in a legally technical and logistically complicated process, even if they are uneducated, untrained, and poor. People who are of different classes, races, education levels, professional status, and socioeconomic backgrounds are

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[245] *See generally* JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE (1987).

supposed to work together in an open decision-making process. People who are interested in a neighborhood for the profit to be made are supposed to work together with people who are only concerned about the quality of life in the neighborhood. Because there are competing interests that are often irreconcilable,[246] a participation scheme requires justifications that extend beyond mere instrumental justifications of efficiency or democratic justifications of the possible self-development benefits of process. The benefits to self, the understanding of others, and the benefit to local government administration come not from the process of negotiation, but from allowing for a real opportunity to affect the outcome of that negotiation. Adding democratic decision-making principles to the otherwise privatized and elite-driven sphere of economic development requires a fundamental commitment to the idea that inclusion of the community could reorder or change the development agenda. Therefore, a meaningful scheme of participation will necessarily be based on a commitment to some amount of redistribution of decision-making power.

Accordingly, a meaningful participatory scheme or plan requires three basic things. First, the community must be included early within a decision-making process, in fact at the agenda-setting stage of the process. This necessarily raises the question of whether the goals of economic development are up for discussion. We must be willing to allow community participants to broaden the definition of economic development beyond business incentives and job training to include other human needs and services as defined by the community. Second, any meaningful community participation scheme should include an enforcement mechanism, either in a set of sanctions for failure to provide for meaningful citizen participation or, at the very least, a guarantee that some level of an ability to affect the outcome of a decision-making process is provided.

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[246] *See* HALPERN, *supra* note 31, at 90 (describing the leading proponents of the Ford Foundation's Gray Areas Program's tendency to "believe[] that different groups in society ultimately had the same interests but were frustrated by not knowing how to combine their energies in a constructive process"); *see also* MONA HARRINGTON, THE DREAM OF DELIVERANCE IN AMERICAN POLITICS 3 (1986) (exploring in depth "the tendency to deny the reality of fundamental differences in interests among social classes, economic, and related groups, and the ways in which that tendency constrains problem solving.").

Third, a meaningful citizen participation scheme should allow citizens sufficient time to get used to all of the competing interests at stake in a city, which in the economic development context, with its sense of inevitability and constant promise of jobs, may not always be readily apparent. One approach probably should be to institutionalize citizen participation mechanisms permanently in the form of sub-local or community-based decision-making bodies. Local governments should not wait for a development project to attempt to belatedly throw together participatory institutions. The exclusionary forces and power of dominant interests in the "growth coalition" are too forceful to wait to attempt to redistribute decision-making power away from these actors. This may require, however, that local governments begin to contemplate delegating decision-making power on real and substantive decisions to allow community participation and education in the business of community decision-making on real decisions regularly.[247]

Of course, these recommendations in some ways are directed at the easy question: Why is participation important? The harder question of how to implement participatory schemes remains unanswered. But at the very least, we cannot answer the harder questions without at least addressing the relatively easy ones that this Article has focused on. The answer to the hard questions will necessarily be determined by the circumstances and context of particular places.[248]

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[247] Box, *supra* note 127, at 16 (advocating that public administrators have an obligation to give away knowledge and decision-making power for policy choices to better reflect citizen desires).

[248] *See generally* Robert Chaskin & Sunil Garg, *The Issue of Governance in Neighborhood-Based Initiatives*, 32 URB. AFF. REV. 631 (1997) (discussing the difficulties and unanswered questions of how to structure community-based participatory initiatives); Joel D. Wolfe, *A Defense of Participatory Democracy*, 47 REV. OF POLITICS 370 (July 1985) (discussing the problems of participation and popular control in large-member voluntary organizations).