

2011

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Nestor M. Davidson

Fordham University School of Law, ndavidson@law.fordham.edu

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Recommended Citation

Nestor M. Davidson, *Fostering Regionalism: Comment on "The Promise and Perils of 'New Regionalist' Approaches to Sustainable Communities"*, 38 *Fordham Urb. L.J.* 675 (2011).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol38/iss3/2>

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Cover Page Footnote

Associate Professor, University of Colorado Law School. The author worked at the U.S. Department of Housing and Urban Development (HUD) during the period in which HUD developed the Sustainable Communities Regional Planning Grant Program. This Comment represents the views of the author solely and not of HUD.

FOSTERING REGIONALISM: COMMENT ON *THE PROMISE AND PERILS OF “NEW REGIONALIST” APPROACHES TO SUSTAINABLE COMMUNITIES*

Nestor M. Davidson*

INTRODUCTION

In *The Promise and Perils of “New Regionalist” Approaches to Sustainable Communities*, Professor Lisa Alexander provides a timely assessment of the U.S. Department of Housing and Urban Development’s new Sustainable Communities Regional Planning Grant Program (“the Program”).¹ This fledgling Program harkens back to an era from the 1950s through the 1970s when the federal government funded regional planning and coordination.² As Professor Alexander notes, however, the Program is novel in the sophistication of its goals—particularly around sustainability and regional equity—and in the explicitly bottom-up experimentalist frame it adopts.³ Indeed, the Program’s promise can be found largely in what Professor Alexander identifies as its “new governance” elements—namely, its broadly collaborative, devolutionary design.⁴

Professor Alexander’s primary concern—the peril she highlights—is the risk that power imbalances may undermine distributive justice as the Pro-

* Associate Professor, University of Colorado Law School. The author worked at the U.S. Department of Housing and Urban Development (HUD) during the period in which HUD developed the Sustainable Communities Regional Planning Grant Program. This Comment represents the views of the author solely and not of HUD.

1. Lisa T. Alexander, *The Promise and Perils of “New Regionalist” Approaches to Sustainable Communities*, 38 *FORDHAM URB. L.J.* 629 (2011).

2. The Housing Act of 1954, Pub. L. No. 560, 68 Stat. 590 (repealed 1981), for example, authorized HUD’s Section 701 Comprehensive Planning Assistance program. The program built local planning capacity and supported regional collaboration until it was repealed in the Omnibus Budget Reconciliation Act of 1981. See *The Housing and Community Development Amendments (Omnibus Budget Reconciliation Act) of 1981*, Pub. L. No. 97-35, 95 Stat. 357. Similarly, Office of Management and Budget Circular A-95 established a clearinghouse system for coordinating certain federal grants. The circular and its accompanying coordination process were revoked under Executive Order No. 12,372, 24 C.F.R. 92.357 (1982).

3. See Alexander, *supra* note 1, at 631-35.

4. See *id.* at 635-48.

gram unfolds.⁵ Alexander argues that failures of demographic representation, opportunism, and acquiescence challenge the fundamentally collaborative premise of new governance.⁶ These failures can cause seemingly promising broad-scale partnerships to privilege traditionally dominant interests. In essence, Alexander identifies a tension between the Program's new governance process and its new regionalist normative goals. In addition, her close, contextual examination of the Madison, WI and Dane County Regional Area consortium demonstrates this tension in practice.⁷

This is an important tension to surface, although inherent in the Program's new governance approach is an appropriate degree of caution about being overly prescriptive in setting federal mandates. For many implementation choices, however compelling, there are likely to be competing imperatives. As it develops, the Program will have to balance the benefits of deferring to local initiative, knowledge, and institutional resources against the need to ensure a measure of meaningful inclusion.

Professor Alexander's analysis, however, points to a larger conceptual point about the distinctive role that the federal government can play in incentivizing new regionalism.⁸ One reason the kind of metropolitan collaboration the Program encourages has not been more widely embraced is that a kind of pervasive political and legal stasis can hold fast the state and local institutions that might otherwise recognize transcendent interests. When the federal government approaches regionalism, however, it is functionally less beholden to that institutional framework and can accordingly foster regionalism with an outsider's detachment. This brief Comment will suggest, then, that although the ability to approach regionalism from a national perspective does not ensure that local power dynamics will not be replicated, the distance and independence that the federal perspective provides—a kind of remove so often derided—may in fact be a cause for optimism, particularly for those traditionally marginalized at the local level.

ORTHOGONAL INTERVENTION—A FEDERAL ROLE IN NEW REGIONALISM

The kind of local power dynamics underlying Professor Alexander's cautionary tale highlights an underappreciated aspect of what the Program may accomplish. One of the great dilemmas in regionalism is that for all of the manifest logic that a multi-jurisdictional, metropolitan approach holds for responding to a myriad of policy challenges, the power of localism re-

5. *See id.* at 645-48, 659-60.

6. *See id.* at 645-48.

7. *See id.* at 661-62.

8. *See id.* at 630-32.

mains deeply embedded. There are many reasons for this path dependency, many of which are entirely legitimate. But resistance to meaningful regional collaboration can often seem to be as much about the equilibrium reached in an entrenched state and local political economy. As Gerald E. Frug and David J. Barron have noted, local government structure is shaped by interaction with the states,⁹ and it can be in the mutual interests of states and their localities not to distribute political power in any meaningful way to intermediate institutions.

A number of concerns shape this entrenchment, but three in particular are relevant to assessing the role that the Program might play. First, there is the inherent inertia that comes from state ordering of local prerogatives. Next, there is perennial myopia about spillover effects from local decision-making, with the costs of much local governance obscured. Finally, there is the question of the appropriate scale of democratic accountability for issues that cross jurisdictional lines. For all of these concerns, the federal government is well suited to taking on a kind of orthogonal approach to entrenched localism.

To begin, the federal government is not bound in acting by the local lines that states draw and the attendant political geography that those lines carry. If the appropriate scale of an issue—whether in housing markets, economic development, employment, water or air quality, or any number of other policy arenas—is metropolitan, the federal government can act at that scale, at least within federal statutory constraints.¹⁰

Indeed, there are many ways in which federal agencies already do act trans-jurisdictionally. A portion of the recent Neighborhood Stabilization Program, for example, was funded through a need formula that created an alternative geography that did not strictly map on to local jurisdictional lines.¹¹ The freedom to set appropriate boundaries, albeit at a much larger scale, is also evident in the geography of federal administrative structure. Thus agencies that have significant field presence—such as HUD and the U.S. Department of Agriculture—tend to be organized into functional regions, rather than strictly along state or local lines.¹²

9. See generally GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008).

10. Indeed, in some contexts, courts have validated a regional lens for federal action and at least one court has suggested that the federal government should have explicitly regional obligations. See *Thompson v. U.S. Dep't of HUD*, 348 F. Supp. 2d 398, 408-09 (D. Md. 2005).

11. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654, 2850-51.

12. See *HUD's Local Office Directory*, U.S. DEP'T OF HOUS. & URBAN DEV., <http://portal.hud.gov:80/hudportal/HUD?src=/localoffices> (last visited Mar. 7, 2011); see

Moreover, while certainly not upending in any wholesale way entrenched local structures, a federal perspective can add variables that have been lacking in the state-local discourse on regionalism. Conceptually, this federal role shifts traditional devolutionary arguments in some interesting ways. For example, the federal perspective provides a different, and in some contexts arguably better, perspective on local spillover effects than those of states or localities. Federal support for regional airports, for example, recognizes the national interest in interlinked transportation networks.¹³

Democratic-accountability concerns likewise present collective action problems that can create mismatches between the scale of a problem and the democratic mechanisms to respond, underscoring the value of the federal perspective. When a local government acts in ways that impact others in the region—and that can be quite often—there are relatively few political mechanisms for internalizing that impact. Here, again, the kind of distance in approach that a federal program can maintain can provide a platform for recognizing alternative political majorities at a regional level in the face of metropolitan fragmentation.

In short, where a federal effort to fund and highlight sustainable regional planning intersects with this entrenchment in regionalism, the result is somewhat akin to the creative alternative paradigms of participation and dissent that Heather K. Gerken has examined.¹⁴ Gerken notes that dissenting voices in the democratic process are traditionally understood to have two choices—to act officially but moderately or to “speak radically” but forego the chance to be a meaningful part of governance.¹⁵

Gerken, however, argues that a variety of institutions provide forums for a third possibility, that of dissenting voices taking on the imprimatur of official action.¹⁶ A compelling insight in Gerken’s framing is her identification of the way official channels not generally associated with alternative views can provide opportunities for officially contesting some majoritarian perspectives.¹⁷ Thus, for example, when San Francisco started marrying

also U.S. DEP’T OF AGRICULTURE, <http://www.usda.gov/wps/portal/usda/usdahome> (last visited Mar. 7, 2011).

13. Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 671.

14. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1746-47 (2005).

15. *Id.*

16. See *id.* at 1747.

17. See *id.* at 1747-49.

gay and lesbian couples, the city acted in the face of a contrary state-level majoritarian view, and altered the valence of the issue for the entire state.¹⁸

While it may be counter-intuitive, the federal government's role in fostering regionalism can be thought of in similar terms. When the federal government funds regional collaboration, it is approaching one set of majoritarian commitments—local majoritarianism in the regional context—and officially recognizing the concerns of a different political geography. The scale of federal involvement thus widens the range of official interests and provides a platform for alternative political majorities. This is not to say that the Program will—or should—ignore state and local political institutions and the democratic communities they represent. It is, rather, to recognize that in asserting a national interest in meaningful regional collaboration, the federal government has much greater latitude to act notwithstanding any parochial political economy.

Ideally, the Program will do exactly what it was designed to do, supporting innovative regional plans that directly spur creative collaborations. For all of new governance's promise, there is still value in strong institutions that create connective tissue, evaluating and replicating success, and bolstering capacity where there are unequal resources—a kind of refereed experimentalism. The Program can provide this by directly funding collaboration, validating the importance of regionalism, and providing a national metric for evaluating successful models. Through the Program, the federal government is essentially providing seed funding with something of a venture capitalist's eye for potential value—and not with any traditional top-down mandate. Not all of these bets will pay off, but there is tremendous opportunity to advance metropolitan policy approaches.

The Program's greatest impact, however, may be less direct, but no less important in the alternative platform it may provide. To return, then, to the power imbalances that Professor Alexander appropriately highlights, the question with respect to regional equity is ultimately whether the risk of exclusion for those traditionally marginalized at the local level is magnified or mitigated by a federal presence. The latitude that the federal government has in the Program to acknowledge, but not be bound by, state and local institutions may provide openings to elevate concerns and constituencies otherwise excluded in the state-local relationship. As Professor Alexander notes, it is too early to know whether that promise will outweigh the potential perils of a deferential administrative structure,¹⁹ but I believe that the ability of the federal government to foster regionalism without being bound by that state and local dynamic is a source of optimism.

18. *See id.* at 1748.

19. *See* Alexander, *supra* note 1, at 673-74.

CONCLUSION

It is fitting that Professor Alexander's article appears as part of a colloquium on the subprime mortgage crisis. It is important to answer the crisis not just in terms of consumer protection, as crucial as that is, but also in terms of place-based responses. Thus, it is imperative to think about the impact of the crisis in specific communities and metropolitan areas, as well as racial and ethnic variations in who was caught in the undertow of the crisis. An essential component of sustainability, reflected in the goals of the Sustainable Communities Regional Planning Grant Program, is a place-based approach to reducing volatility in many of the determinants of the crisis. Alexander's focus on the power dynamics that inevitably shape such approaches will help improve the Program as it unfolds, reinforcing the hope that regional sustainability can be an essential component in staving off the next housing crisis. In this, the federal government has a unique role to play, and only time will tell whether the promise outweighs the perils.